

Modern Proposals for Regulating Ecocide: pragmatic, ideological or diplomatic.

Towards a legal concept befitting the ecological challenges of our time

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1 Introduction

Since the launch of the ecocide proposal of the Independent Expert Panel under auspices of jurists and legal scholars Dior Fall Sow and Philippe Sands (hereinafter: the Panel) in June 2021, ecocide has been front and centre in public and academic debate.¹ Although ecocide is still in the throes of development, it always entails the most flagrant wrongdoing to the environment. Well-known examples that could possibly qualify as such are the Deepwater Horizon Oil Spill, large-scale pollution and deforestation.² The Panel's proposal aims to add the crime of ecocide to the Rome Statute as a fifth crime against peace to combat this gross environmental destruction.

It is a step forwards compared to previous attempts to criminalise ecocide – like the proposals of Richard Falk (1972) and Polly Higgins (2010) – for it tries to formulate a practical legal tool to address modern day challenges of human-caused environmental degradation. However, the proposal surely also has its shortcomings. Academic debate on ecocide focuses mainly on the validity of different elements of

- 1 See for example Marc Santora, 'As Dead Dolphins Wash Ashore, Ukraine Builds a Case of Ecocide Against Russia,' *New York Times*, 17 August 2023, <https://www.nytimes.com/2023/08/17/world/europe/russia-war-dolphin-deaths-ukraine.html>; Ernesto Londoño, 'Imagine Jair Bolsonaro Standing Trial for Ecocide at The Hague', 21 September 2019, <https://www.nytimes.com/2019/09/21/sunday-review/bolsonaro-amazon-fire.html>; Jack Losh, 'Historic moment': Legal experts unveil new definition of ecocide', *Al Jazeera*, 22 June 2021, <https://www.aljazeera.com/news/2021/6/22/legal-experts-unveil-new-definition-ecocide>.
- 2 Polly Higgins et al., 'Protecting the planet: a proposal for a law of ecocide', *Crime Law Soc Change* 59 (2013): 253, doi 10.1007/s10611-013-9413-6 (last accessed 22 November 2023).

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the Panel's proposal.³ Some question the problematic *mens rea* element,⁴ the balancing provision,⁵ or wantonness requirement.⁶ Others criticise the questionable political support,⁷ or the Rome Statute as the most apt vehicle to criminalise ecocide.⁸

Because it seems impossible to mitigate the complexity of modern ecological problems⁹ in the legal proposal, academic debate remains stuck at the level of minor adjustments, or overall rejection of the Panel's proposal. The central tenet of this article is that a more fundamental problem lies at the heart of the apparently flawed proposal. The problem, or so will be argued, is the incongruence between the (environmental) challenges the Panel sees itself confronted with, the objectives it consequently formulates, and finally the legal solution it proposes. This problem cannot be overcome by minor adjustments, and is, in my view, a cause for rejection of the proposal.

The incongruence is not merely practical; it also exposes a vastly more fundamental problem concerning the feasibility of political theories. This fundamental problem regards the opposition between ideal theory and non-ideal theory as a methodological concern in political thinking.

- 3 However, NGOs such as Global Witness mostly welcomed the proposal. See Global Witness, 'Company Executives Could Now be Tried for Land Grabs and Environmental Destruction', Press release, 15 September 2016, <https://www.globalwitness.org/en/press-releases/company-executives-could-now-be-tried-land-grabbing-and-environmental-destruction-historic-move-international-criminal-court-prosecutor/> (last accessed 22 August 2024).
- 4 Anastacia Greene, 'Mens Rea and the Proposed Legal Definition of Ecocide', *Völkerrechtsblog*, 7 July 2021, doi 10.17176/20210707-135726-0 (last accessed 21 August 2024); Kevin Jon Heller, 'Skeptical Thoughts on the Crime of Ecocide – That Isn't', *Opinio Juris*, 23 June 2021, <http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt> (last accessed 21 August 2024); Danuta Palarczyk, 'Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment', *Crim Law Forum* 34 (2023): 164-170, doi 10.1007/s10609-023-09453-z (last accessed 17 September 2023).
- 5 Liana Georgieva Minkova, 'The Fifth International Crime: Reflections on the Definition of "Ecocide"', *Journal of Genocide Research* 24 (2023): 1, 62-83, doi:10.1080/14623528.2021.1964688; Kevin Jon Heller, 'Ecocide and Anthropocentric Cost-Benefit Analysis', *Opinio Juris*, 26 June 2021, <http://opiniojuris.org/2021/06/26/ecocide-and-anthropocentric-cost-benefit-analysis/> (last accessed August 2024); Kai Ambos, 'Protecting the Environment through International Criminal Law?', *EJIL:Talk!*, 29 June 2021, <https://www.ejiltalk.org/protecting-the-environment-through-international-criminal-law/>.
- 6 Elliot Winter, 'Stop Ecocide International's Blueprint for Ecocide Is Compromised by Anthropocentrism: A New Architect Must Be Found' *Israel Law Review* 57 (2024): 175-209, <https://doi.org/10.1017/S0021223722000218>; Kevin Jon Heller, 'The Crime of Ecocide in Action', *Opinio Juris*, 28 June 2021, <http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action> (last accessed 22 August 2024).
- 7 Palarczyk, 'Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment', 174-176.
- 8 Michael Faure, 'De strafrechtelijke bescherming van duurzaamheid: vergezichten en uitdagingen', *Delikt en Delinkwent* 50 (2021) 648.
- 9 Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court*, (Cambridge: Cambridge University Press & Assessment, 2022), 56-61; Harmen van der Wilt, 'Grootschalige milieuvuilers voor het Internationale Strafhof: (g)een schijn van kans?', *Delikt en Delinkwent* (2021): 272-273.

Although different gradients exist within the two opposite extremes, the main distinction is rooted in the question to what extent (real-world) facts that can be relevant for the realisation of a certain normative ideal should play a role or else be assumed away in political thinking.¹⁰ Examples of such real-world facts are natural processes, human view on nature, and the working of (international) bodies of law. On the one hand of the spectrum, Amartya Sen argues that non-ideal theory should provide guidance on how to advance justice in the real-world, compared to the injustices of the status quo. No ideal situation is needed to strive towards, for every improvement of a current injustice is good.¹¹ On the other hand of the spectrum, Gerald Cohen holds that our beliefs about normative principles should in no way respond to real-world facts. Ideal theory should thus be free of all matters of (non-normative) fact. For Cohen, a truly ideal theory is concerned mainly with identifying normative truths.¹²

The incongruence as portrayed within the Panel's proposal on a juridical level corresponds to an incongruence on this more fundamental methodological level. The challenges, objectives and legal solutions of the (or in fact, of any) proposal, should be grounded in either an ideal *or* a non-ideal point of departure. If the starting points of these three elements do not align, then one of these indispensable components falls outside the chosen or preferred theory. For both methodologies are fundamentally mutually exclusive, this renders the proposal flawed from the start. I will demonstrate that the Panel makes use of both an ideological and non-ideological methodology at the same time. I hold that the discovered methodological incongruence should not be understood as an excusable translation error from concept or ideology to law. Instead, the incorporation into positive law is a fundamental part of thinking about ecocide. For that reason, the incongruence is problematic. Because the challenges and objectives that form the starting point of the Panel's endeavour to eradicate ecocide are of a non-ideal nature, any proposed legal solution should be developed within this same (non-ideal) vein.

1.2 Methodology

The current ecocide proposal by the Panel is often mentioned in the same breath with the earlier ecocide proposal that British barrister and activist Polly Higgins elaborates on in her book *Eradicating Ecocide*, and the ecocide proposal of Richard Falk, who published an article in 1972 in which he proposes to introduce a crime of ecocide in answer to the atrocities of the Vietnam War. These are the most influential fully developed ecocide proposals that have received corresponding academic attention. Analogising the three proposals, however, means comparing apples and oranges. The challenges to which each of the proposals respond, the formulated objectives and the proposed legal solutions differ too significantly.

10 C. Thompson, 'Ideal and Nonideal Theory in Political Philosophy', *Oxford Research Encyclopedia of Politics* (2020), 1. Retrieved 23 May 2024, from <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1383>.

11 Amartya Sen, 'What do we want from a theory of justice?', *Journal of Philosophy*, 103 (2006): 215-238.

12 Gerald A. Cohen, 'Facts and Principles', *Philosophy & Public Affairs*, 31, No. 3 (2003): 244-245.

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Yet each proposal portrays a certain internal congruence or incongruence between the challenges, objectives and legal solutions, that might teach us more about why the Panel's proposal does not seem to be the final answer to ecocide. Each proposal is being scrutinised in order to unravel the aspects that are relevant to the enhancement of the Panel's proposal. These incongruities seem to spring from the different pragmatic, ideological or diplomatic approaches that the initiators of the proposals take. Analysing the (in)congruences between challenges, objectives and legal solutions of each ecocide proposal makes clear why the stalemate in the ecocide debate occurs, and at the same time shows where possible solutions could be found.

This present contribution aims to demonstrate that the current debate on ecocide law is gridlocked, and that the Panel's proposal to eradicate ecocide does not adequately answer to modern day ecological challenges (as identified by the Panel), mainly due to its one-dimensional character. Considering that ecocide is still a major global problem that urgently needs resolution, it is imperative to understand what causes the stalemate, so that a new route towards possible solutions can be plotted. Clarifying the underlying motivations behind the juridical instruments employed in the different proposals could enable us to revive the debate on the correct contours of ecocide law, bringing us closer to a better solution. Moving beyond the impasse first requires an investigation of the challenges, objectives and legal solutions of the earlier proposals, broadening the notion of what ecocide law can encompass.

Challenges of environmental protection differ significantly over time, and may differ due to a certain focus. In order to make a fair comparison between the proposals, it is imperative to establish to what challenges the initiators react with their proposal. In each of the proposals attention has been paid to the (ecological) challenges that the initiators of the proposals wish to address, and so the challenges will be distilled from the core text and the accompanying explanations by the authors of the proposals. In reaction to these challenges, each of the initiators have implicitly or more explicitly formulated several objectives by which they seek to address the challenges. The objectives will be discerned from the proposals' commentaries and core texts by means of inductive reasoning. This endeavour requires a certain degree of interpretation, as not everything is explicitly specified in each of the proposals. Close reading will provide the insights for this article.

Finally, the objectives are translated into a legal proposal for the criminalization of ecocide. By looking at the plain text and the juridical implications of the ecocide proposals the aim is to discover if the underlying motives that speak from those proposals are congruent to the earlier identified challenges and objectives. Thereto, the commentary and core text of the three proposals will be successively analysed to the extent that congruence or incongruence can be sufficiently demonstrated. The culmination of this descriptive and interpretative examination will be an analysis of the (in)congruence between the challenges identified, the formulated objectives and the legal proposals.

After a brief historical introduction to ecocide in section 2, the following three sections (section 3, 4 and 5) will shed light on these challenges, objectives and legal solutions of the ecocide proposals of respectively Falk, Higgins and the Panel, and provide an analysis of the (in)congruences between these aspects. Section 6 contains preliminary findings regarding the comparison of the congruence between the challenges, objectives and legal solutions of the three ecocide proposals, as well as an integration of these findings in the political theory of (non-)idealism, before providing in section 7 the conclusion.

2 A brief historical introduction to ecocide

When tracing the roots of the development of ecocide, it appears that the blueprints of Falk's definition in 1973 will prove relevant for the present day discussion about the criminalisation of ecocide. As mentioned in the introduction, Falk's proposal forms the starting point of the ecocide proposal as formulated by Higgins in 2010, which in turn serves as the basis for the Panel's proposal. For Falk's ecocide proposal did not sprout out of thin air, before turning to the environmental challenges he aims to address, this section will provide some essential background information concerning the early history of the development of ecocide.

Ecocide has a longer history than often assumed. The political and academic debate about ecocide was prompted by the study of the question of the prevention and punishment of the crime of genocide and is to be seen in the broader light of the development of the Genocide Convention and the wish to expand its scope through adding ethnocide and ecocide.¹³ Although we now know genocide as (somewhat over-simplified) mass destruction of a people fuelled by racial, ethnical or religious motives,¹⁴ Raphaël Lemkin, founding father of the well-known term *genocide*, was more concerned about 'the destruction of people by means other than direct physical extermination'.¹⁵ The destruction, or significant alteration of the environment, such as deforestation or drying marshlands as occurred in the case of the Southern Iraqi Marsh Arabs, can be such a means.¹⁶ This intention-centred idea of genocide, namely *cultural genocide* is much easier connected to ecocide as genocide than the popular (mis)conception of genocide as mass destruction of a

13 Anja Gauger et al., 'Ecocide is the missing 5th crime against peace,' Human Rights Consortium, London (2013): 6, 7.; U.N. Human Rights Comm., Sub-comm. On Prevention of Discrimination and Protection of Minorities, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/416 (4 July 1978).

14 Art. 6 of the Rome Statute states that genocide is 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group'.

15 Gauger et al., 'Ecocide is the missing 5th crime against peace', 6.

16 Aaron Schwabach, 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts,' *Colo. J. Int'l Envtl. L. & Pol'y* 15 (2004): 1.

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people is.¹⁷ Ecocide threatens people's lives and specific ways of living or culture, thereby, although lacking the specific intent of destroying a people, nevertheless bringing about ecocidal consequences.¹⁸

From the 1970s onwards, discussions to include ecocide in the Rome Statute or its precursor, The Draft Code of Offences against the Peace and Security of Mankind, have dealt with three options: to include the crime of ecocide under the heading of either War Crimes or Crimes against Humanity, or as a stand-alone crime. For unclear, or at least undocumented reasons, ecocide was eventually removed from the 1995 draft Code.¹⁹ Currently, only three articles exist in international law that protect the natural environment in wordings that could easily fit under the definition of ecocide, and they do so for *in bello* situations.²⁰ Under the Rome Statute, Article 8.2.b.iv, a war crime, protects the environment from 'widespread, long-term and severe damage' when caused by an 'intentionally launched attack' that is 'clearly excessive' in relation to the military advantage.²¹ Jessica C. Lawrence and Kevin Jon Heller have made a clear analysis of the provision's shortcomings,²² and with Lawrence and Heller I agree that the proportionality standard of the provision is 'weighted far too heavily against finding an attack disproportionate'.

3 Falk's pragmatic proposal

In 1973 Richard Falk published his influential article 'Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals'. Although the article seems to be largely in line with the warfare take on ecocide, it also shows some important differences.

3.1 Challenges

Falk was strongly aware of the potential military advantages environmental destruction can bring about. The war in Vietnam had been the impetus for the suggested draft ecocide articles by Falk, focusing on the ecological damage that had

17 Gauger et al., 'Ecocide is the missing 5th crime against peace', 6.

18 See also: Damien Short, *Redefining Ecocide. Settler Colonialism, Social Death and Ecocide*, (London: Zed books, 2016), 7-17, 194.

19 Sailesh Mehta and Prisca Merz, 'Ecocide – a new crime against peace?', *Environmental Law Review*, (2015) 17: 1: 4; See Anja Gauger et al., 'Ecocide is the missing 5th crime against peace', 9; Merle Kooijman, 'From Anthropos to Oikos in International Criminal Law: A Critical-Theoretical Exploration of Ecocide as an "Ecocentric" Amendment to the Rome Statute', in *Netherlands Yearbook of Int'l Law*, eds. Daniëlla Dam-de Jong and Fabian Amténbrink (The Hague: TMC Asser press, 2022), 115.

20 See Art. 35(3) and Art. 55(1) of Protocol I to the Geneva Conventions; Art. 1(1) of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD).

21 Art. 8.2.b.iv Rome Statute reads as follows: 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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.'

22 Kevin Jon Heller and Jessica C. Lawrence, 'The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime', *Georgetown International Environmental Law Review*, 20 (2007): 17-20.

occurred during the war. He identified several challenges that are new for his time, prompted by the new methods of warfare such as the use of Rome Plows,²³ weather modification techniques and, more notoriously, the large scale and frequent use of different types of defoliants of which 'Agent Orange' is the most well-known.²⁴ While aware of the unfolding 'process of discovering the extent to which man's *normal* activities are destroying the ecological basis of life on the planet"²⁵ and on the other hand acknowledging that 'all forms of warfare are detrimental to man and his artifacts, and in this sense all warfare could be conceived to be environmental (or ecological) warfare',²⁶ Falk emphasised the different nature of 'the distinctive feature of US warfare in Indochina and the specific dangers of ecosystem destruction that are posed by high-technology counterinsurgency warfare'.²⁷

Falk was not concerned about ecocide more or less coincidentally happening as a result of 'normal' warfare, though as a deliberate *means* of warfare,²⁸ and deems an 'orientation toward the subject based on a conception of *human ecology*' appropriate.²⁹ Falk notably took into account the deliberate destruction of crops caused by the various defoliants, and in addition thereto includes the detrimental effects on the people, mentioning starvation as a direct result, and even teratogenic effects in unborn children. Assessing the injustice of this type of warfare under international law, Falk identified several other practical issues, mainly malfunctions of international criminal law such as its dependency on states' self-interest.³⁰

3.2 Objectives

These problems lead Falk to describe three distinct clear-cut, non-ideal objectives (that can be broken down into six separate objectives) he aims to serve with his proposal. The first objective is twofold and entails strengthening and clarifying international law regarding the ban on weapons and strategies causing harm to the environment on the one hand, and, on the other hand, the designation of a distinct crime that addresses the cumulative effects of war that substantially or even irreversibly destroy ecosystems.³¹ The second objective is threefold, focussing firstly on putting an end to the ecological atrocities in Vietnam, secondly on repair of the environment, and thirdly on (US) responsibility. For the realisation of ecological repair Falk suggests a thorough assessment of the detrimental effects of the war on the environment, and to require the US to bear a minimal responsibility in providing abundant resources for ecological restoration, aiming for the quickest

23 A Rome Plow is 'a heavily armored caterpillar bulldozer with a 2.5 ton blade. The Rome Plow can cut a swath through the heaviest forest. It has been used to clear several hundred yards on each side of all main roads in South Vietnam'. See Richard A. Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', *Security Dialogue* 4 (1973): 87.

24 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 85.

25 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 80.

26 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 84.

27 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 84.

28 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 84.

29 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 85.

30 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 92.

31 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 90-91.

and most humane rehabilitation possible.³² Finally Falk states, in passing, as a third objective ‘to secure equity for all people on earth’.³³

3.3 Legal solutions

Falk translates the aforementioned objectives as follows into a legal proposal for the criminalisation of ecocide that consists of a Proposed International Convention on the Crime of Ecocide (hereinafter: the Proposed Convention), a Draft Protocol on Environmental Warfare (hereinafter: the Draft Protocol). In addition thereto, he proposes two other documents: a Draft Petition, to be signed by individuals and non-governmental organisations, addressed to the Secretary General of the United Nations (hereinafter: the Draft Petition), and a Draft Peoples Petition of Redress on Ecocide and Environmental Warfare, addressed to governments and to the United Nations (hereinafter: the Draft Peoples Petition).³⁴

The Proposed Convention defines ecocide as acts committed ‘with intent to disrupt or destroy, in whole or in part, a human ecosystem’. The *mens rea* element of intent is identical to the wordings of the crime of genocide as included in the Genocide Convention,³⁵ reflecting its gravity according to Falk. Secondly, Falk’s choice to protect only human ecosystems, and not all ecosystems is noteworthy. The Proposed Convention subsequently contains a limitative enumeration of acts that are considered ‘ecocide’ that mentions only the methods of warfare that were (problematically) used during the Vietnam War. Considering Falk’s aim to criminalise ecocide in times of war as well as in times of peace, it is remarkable that the second article of the Proposed Convention is so preoccupied with the methods of warfare.

The Draft Protocol prohibits comparable acts, this time expressly focused on ecological warfare. This Draft Protocol notably does not require the *mens rea* element of the Proposed Convention, requiring only ecocidal effects to manifest themselves. The ecocidal effects are again caused by certain tactics and methods of warfare that bring about ‘harm to the environment or disrupt fundamental ecological relationships’, which would, contrary to the Proposed Convention, leaves space for environmental protection per se, instead of protection of the human environment only. The Proposed Convention and the Draft Protocol strongly depend on the UN’s commitment to its success.

32 Falk, ‘Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals’, 90-91.

33 Falk, ‘Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals’, 92.

34 Falk, ‘Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals’, 91. The Proposed Convention, Draft Protocol, Draft Petition and Draft Peoples Petition can be found as appendices I-IV to Falk’s article ‘Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals’, 93-96.

35 Art. II of the Genocide Convention states that genocide means ‘any of the following acts committed with intent to destroy, in whole or in part, (...)’. Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948. The phrase is copied exactly in Art. 6 of the Rome Statute, stating that genocide means ‘any of the following acts committed with intent to destroy, in whole or in part, (...)’.

As a practical objection, Falk observes that the US is powerful enough to thwart initiatives to end ecocide within the UN framework that run counter to the state's perceived self-interest. For international law continues to reflect individual state interests, according to Falk the very nature of the state system renders it unable to effectively coordinate the protection of the planet against ecological harm.³⁶ In addition to the Proposed International Convention on the Crime of Ecocide (Appendix I), Appendix III and IV are therefore added to bypass the (im)possibilities of the UN framework: NGOs and individuals have a role to play, pressuring where the UN is failing its duties.

3.4 Analysis of any (in)congruities within the proposal

In short, it can be said that Falk's legal solutions correspond well to the challenges he identifies and to the objectives he formulates. The challenges Falk identifies are typical for the Indochina war. Preoccupied with new methods of warfare, Falk is mainly concerned about the intentional substantive disruption and irreparable destruction of the human environment in Vietnam. Although the negative effects on humans are also acknowledged, this is not his primary focus. The objectives – strengthening and clarifying international law regarding the ban on weapons and strategies causing harm to the environment; designating a distinct crime that addresses the cumulative ecocidal effects of war; eradicating ecocidal activities in Vietnam; repair of the environment affected by the Vietnam War; and ensuring the US will be held responsible for the restoration – are perfectly congruent with the challenges he wishes to address.

Falk breaks down the three objectives he commits himself to into six separate objectives, thereby deconstructing the identified challenges into more manageable sub-objectives. In order to meet the objectives, Falk's legal proposal too can be broken down into several separate partial solutions to the problem(s), addressing each of the objectives in its own distinct manner. His proposal, for example, contains the Proposed International Convention on the Crime of Ecocide, to meet the objective of designating a distinct crime that addresses the cumulative ecocidal effects of war. In addition thereto, it contains a Protocol directed at ecological warfare that, together with the Petitions, meets the objective of ending ecocidal activities in Vietnam. By means of the Proposed Convention and the Protocol, Falk appeals to the body of the UN. Aware of its vulnerabilities, he suggests a Petition and a Peoples Petition to tackle the problems from various quarters.

Although it might appear obvious, it is noteworthy to add that it is impossible to appeal to NGOs and individuals in the same (Proposed) Convention on the Crime of Ecocide. For, to Falk, the role of the NGOs and individuals is of major importance for the proposals to be successful, it is inevitable to invoke more than one body of law in order to coherently address the issue of environmental destruction by means of warfare methods. He convincingly demonstrates that the relatively simple

36 Falk, 'Environmental Warfare and Ecocide — Facts, Appraisal, and Proposals', 92.

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challenges and correspondingly the objectives he identifies imperatively require a complex legal response in order to be congruent.

In the 1970s, conventions that address environmental warfare such as the ENMOD and the Additional Protocols to the Geneva Conventions were adopted. Although these are not a direct result of Falk's efforts to criminalise ecocide, various corresponding aspects of the conventions show that Falk's line of thinking was feasible: Falk's proposal entails challenges, objectives and legal solutions that are all of a non-ideal nature, showing no abstractions or neglect of any real-world facts that could be of importance to his ecocide proposal. Therefore, the proposal does not suffer from any problematic methodological incongruence. The proposal is pragmatic in this sense, taking into account the relevant real-world facts in every juncture of his proposal.

4 Higgins' Idealistic proposal

Of the three ecocide proposals studied here, Higgins' proposal is accompanied by the most extensive elaboration on the reasons behind aims and scope of the initiative. A large part of her book *Eradicating Ecocide* is dedicated to a description of modern ecological challenges.³⁷

4.1 Challenges

The challenges of today, according to Higgins, include, but are certainly not limited to, the emission of greenhouse gasses, cumulatively contributing to dangerous climate change, large-scale deforestation and plastic pollution of land and water.³⁸ She devotes attention to the causes of these challenges, and seems to be specifically interested in everyday conduct that silently contributes to the aforementioned issues. Higgins points to our very economic system, the 'commercial takeover of the world',³⁹ at the roots of our behaviour as the culprit responsible for the unbridled destruction of nature.

Multinationals play an important role in her inquiry, as she correctly states that '[t]he global reach of international corporations is such that they surpass many states' economic or territorial stature'.⁴⁰ Peter Stoett refers to this idea of corporate irresponsibility as directly linked to the concept of ecocide as a *maximalist approach* of ecocide, which includes 'everything from driving automobiles, flying to academic conferences, and eating dubiously farmed salmon'.⁴¹ Lastly, Higgins denotes that

37 Polly Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*. (London: Shephard-Walwyn (publishers) Ltd., 2nd ed., 2015), 1-54.

38 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 6-20; Higgins et al., 'Protecting the planet: a proposal for a law of ecocide', 253.

39 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 1.

40 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 67, 104.

41 Peter Stoett, *The evolution of and future prospects for transnational environmental crime prevention* (The Hague Institute for Global Justice and the Stimson Center, 2015), 4, https://www.stimson.org/wp-content/files/Commission_BP_Stoett.pdf (last accessed 20 October 2023).

often the poor and the powerless are affected disproportionately by the consequences of pollution and climate change.⁴² Although this is primarily an *effect* of environmental destruction, at the same time social and economic injustice is a problem she wishes to mitigate as well.

The ecological challenges and their alleged causes bring about new difficulties when it comes to the objectives. If one wants to eradicate ecocide, it is a prerequisite to investigate who is responsible for the environmental destruction, and exactly this is virtually impossible to identify for the challenges Higgins describes. Is it, as she seems to suggest, mainly the big corporations? Is it unwilling politics? Is it individual persons that each collectively contribute to the accumulation of pollution? Observing many intertwined problems, Higgins' objectives prove to be very extensive. The ultimate objective is nonetheless unambiguously eradicating ecocide. The next paragraph makes an attempt to unravel the amalgamation of objectives that can be discerned from Higgins' texts.

4.2 Objectives

Most importantly, as a first objective, Higgins envisions a major change of consciousness, leading to an attitude towards nature of collective responsibility,⁴³ which in turn results in legislation reflecting this very shift of consciousness. A second objective is war prevention.⁴⁴ A third objective is preventing environmental harm from the outset, rather than focusing 'on the blame of the accused'.⁴⁵ Furthermore, because Higgins is so concerned about economic stimulus for destructive practices, the regulation of the economy is an important focus when it comes to the objectives. Mindful of the possibility of *naturally* occurring ecocide, Higgins additionally aims to assure a *shared* responsibility of governments when it comes to the consequences of ecocide, whether naturally occurring or caused by human conduct.⁴⁶

Human-caused ecocide, on the other hand, should become a responsibility of governments and businesses alike. Moreover, it is rather 'policy makers, directors or who are responsible for funding or investment', than the corporations as legal entities that should become legally bound 'to ensure that any business practice that causes mass damage, destruction or loss of ecosystems is brought to an end'.⁴⁷ The aforementioned responsibilities lean towards the notion of restorative justice. Lastly, restoration is thus required to ensure that the environment is effectively protected, forcing 'those who have successfully evaded their responsibilities to remedy the harm that has been caused'.⁴⁸

42 Higgins et al., 'Protecting the planet: a proposal for a law of ecocide', 253.

43 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, xviii.

44 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*

45 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 68.

46 Higgins et al., 'Protecting the planet: a proposal for a law of ecocide', 257.

47 Higgins et al., 'Protecting the planet: a proposal for a law of ecocide', 257.

48 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 69 and 143.

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4.3 Legal solutions

Ecocide is defined by Higgins as ‘the extensive destruction, 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 severely diminished’.⁴⁹ Higgins thereby proposes a remarkably singular provision. Many of Higgins’ objectives are to be mitigated rather by the very ICC framework and the Rome Statute, or even through economic impulses and political steering, than by the proposal itself. Proposing to add the crime of ecocide as a stand-alone crime to the four existing core crimes of the Rome Statute,⁵⁰ Higgins appeals to the Statute’s complementarity principle, according to which individual states are endowed with the responsibility to investigate and punish crimes that fall under the jurisdiction of the ICC, encouraging states to implement national legislation that criminalises ecocide.⁵¹ This way, she trusts in the law to ‘trigger a green economy and put in place a powerful global governance mechanism’,⁵² inducing or encouraging the envisaged change of consciousness. ‘In legal terms’, Higgins argues, ‘this means the journey of moving away from laws premised, either deliberately or accidentally, on compromise’.⁵³

Higgins leaves no doubt about the uncompromised *mens rea* element of ecocide. ‘A law of Ecocide should recognise human-caused environmental damage and degradation (...) as a crime of strict liability (in other words, without intent)’.⁵⁴ This significantly lower *mens rea* requirement is unusual in the Rome Statute, and has therefore received the critique that Higgins’ proposal is unfit for the Rome statute.⁵⁵ In *Eradicating Ecocide*, Higgins lays out four reasons to lower the *mens rea* requirement: ‘Firstly, ecocide is a crime of consequence’.⁵⁶ As ‘most corporate ecocide is not intended’, and ecocidal consequences of business are often perceived as ‘collateral damage or an accident’,⁵⁷ it is the consequences of the conduct that are in question rather than the conduct itself.⁵⁸ As a second reason, Higgins suggests that the gravity and consequences of ecocide ‘justify conviction without proof of any criminality of mind’.⁵⁹

The third, more practical reason to include absolute liability is the belief that ‘the legislation would be rendered largely ineffective’ without absolute liability being part of the provision.⁶⁰ Based on the belief that the environment is worthy of

49 Higgins, *Eradicating ecocide*, 63.

50 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 61–63; Polly Higgins et al., ‘Protecting the planet: a proposal for a law of ecocide’.

51 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 70.

52 Higgins et al., ‘Protecting the planet: a proposal for a law of ecocide’, 257.

53 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, xv.

54 Higgins et al., ‘Protecting the planet: a proposal for a law of ecocide’, 262.

55 Heller, ‘Skeptical Thoughts on the Crime of Ecocide – That Isn’t’.

56 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 68.

57 Higgins et al., ‘Protecting the planet: a proposal for a law of ecocide’, 262.

58 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 68.

59 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 68.

60 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 68.

protection whether destruction of it is intended or not, and provided that most (corporate) ecocide is not intended, any higher *mens rea* requirement would indeed make the ecocide law largely ineffective for the purposes Higgins strives to pursue. The fourth and final reason for recognising a crime of strict liability rests on Higgins conviction that ‘strict liability places the focus on the onus of first preventing the harm, not on the blame of the accused’.⁶¹

4.4 Analysis of any (in)congruities within the proposal

Higgins thus identifies a vastly more complex set of challenges than Falk does. Other authors acknowledge these modern ecological difficulties such as uncertainty of materialisation of consequences, cumulative causes, and thus challenges regarding responsibility and liability.⁶² But the challenges Higgins is concerned about are even broader: social injustice for example is a topic high on her agenda. This maximalist approach is strongly criticised by Stoett, stating that although it ‘has interesting ramifications for the study of the nexus between environment and society’, it does not serve well as a legal conceptualisation for it is too idealistic.⁶³

The objectives she subsequently formulates, such as inducing a shift of consciousness and making ecological protection a responsibility of states as well as of corporations, correspond with this very elaborate documentation of challenges, again marked by ideology. Her legal reply to these comprehensive problems is nevertheless strikingly minimal.

Substantive juridical critique on the proposal that has been formulated in current debate on ecocide, regards for example the *mens rea* element.⁶⁴ Higgins’ reasoning that the gravity and consequences of ecocide justify conviction without proof of any criminality of mind seems incorrect, for it would be easy to argue the opposite: crimes with a high *mens rea* threshold are (to be) perceived as crimes of greater gravity, taking genocide, the crime of crimes as an illustrating example. Kevin Jon Heller points out that ‘the drafters of the Rome Statute were overwhelmingly opposed to including recklessness in the Rome Statute, deeming the crimes too serious to justify such an easily satisfied *mens rea*’.⁶⁵ It is in fact the mental element that aggravates the crime.

Although these (and other) criticisms on Higgins’ proposal might be justified, it is generally overlooked that it is not so much the content of her quite underdeveloped, singular article, but rather the omission to account for the language and limitations of the law to achieve broad normative objectives. Higgins’ unrealistically high expectations of the power of one provision in the Rome Statute makes the proposal

61 Higgins, *Eradicating ecocide: laws and governance to prevent the destruction of our planet*, 68.

62 Van der Wilt, ‘Grootschalige milieuvuilers voor het Internationale Strafhof: (g)een schijn van kans?’, 272-273.

63 Peter Stoett, *Human and Global Security: An Exploration of Terms*. University of Toronto Press, (1999): 3-4. JSTOR, <https://doi.org/10.3138/9781442675919>.

64 Minkova, ‘The Fifth International Crime: Reflections on the Definition of “Ecocide”’; Heller, ‘Ecocide and Anthropocentric Cost-Benefit Analysis’; Heller, ‘The Crime of Ecocide in Action’.

65 Heller, ‘Skeptical Thoughts on the Crime of Ecocide – That Isn’t’.

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unfit for the job, lacking Falk's pragmatism and extensive coverage of diverse difficulties. By expecting too much from this singular provision, it seems as though Higgins' legal solution matches the objectives she identified, whereas in practice this ideal image will not thrive well in reality, for to mitigate the complex ecological challenges she identifies require a more complex legal answer. It can be argued that it was not Higgins' aim to mitigate all challenges by this one ecocide proposal. The proposal can be seen as just one of many means strive towards the achievement of her idealistic objectives. To conclude, Higgins' proposal can be classified as an ideal theory, abstracting from real-world facts in order to formulate a normative ideal of justice concerning ecocide, or the human relation with nature.

5 The Panel's diplomatic proposal

The most recent ecocide proposal comes from the aforementioned Independent Expert Panel. The published commentary and core text are conspicuously minimal concerning the turmoil it has caused in public and academic debate.

5.1 Challenges

Ongoing emission of greenhouse gasses and the destruction of ecosystems that will have 'catastrophic consequences for our common environment'⁶⁶ is the foremost concern of the Panel and the impetus for the definition of a crime of ecocide. The Panel's elaboration on the ecological challenges it wishes to address is very minimal. Nevertheless, it is clear that they identify, like Higgins, besides incidental excesses such as the Deepwater Horizon Oil Spill,⁶⁷ the cumulative effects of everyday conduct to be a challenge that is to be mitigated by their ecocide proposal.⁶⁸ The difficulty, again, is that a fair deal of the consequences of such cumulative effect remains unknown until they manifest themselves, creating an epistemic uncertainty that poses a significant problem for legal mitigation.

5.2 Objectives

The objectives of the Panel to criminalise ecocide via the Rome Statute are threefold. Firstly, the Panel hopes that the proposal will contribute to a 'change of consciousness'. The desired change should be 'in support of a new direction, one that enhances the protection of the environment',⁶⁹ and encompass the transformation of 'our relationship with the natural world, shifting that relationship from one of harm to one of harmony'.⁷⁰

Secondly, the proposal should offer a new legal framework for the protection of the environment. The legal framework being 'collaborative and effective (...) for our

66 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text* (2021) 2.

67 Gauger et al., 'Ecocide is the missing 5th crime against peace', 6; Polly Higgins et al., 'Protecting the planet: a proposal for a law of ecocide', 253.

68 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 10.

69 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 3.

70 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 2.

common future on a shared planet'.⁷¹ The proposal ought to offer a 'practical legal tool' to combat ecocide. Thirdly, and this is not expressly argued by the Panel, the proposal seems to be strongly preoccupied with politics, or the international acceptance of the proposal. The Panel is eager for the proposal to acquire a solid and respectable place in the core crimes of the Rome Statute, and further stimulate political commitment to the criminalisation of ecocidal activities.⁷²

5.3 Legal solutions

The Panel intends, like Higgins, to add the crime of ecocide as a fifth crime against peace to the Rome Statute, defining ecocide as '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'.⁷³ The proposal was perceived as groundbreaking by some,⁷⁴ and as simply not fitting in the Rome Statute by others.⁷⁵

Although the Panel's proposal builds on the already existing crime of ecocide during armed conflict (Arts, 35(3) and 55(1) API), it is designed to extend the protection of the environment to ecocide occurring during peace time, this way 'reflecting the fact that today, most severe environmental damage occurs during times of peace, a situation that currently falls outside the jurisdiction of the ICC'.⁷⁶ The current text of the proposal hinges heavily on the wartime provisions. The proportionality test, for example, is copied directly from Article 8(2)(b)(iv) of the Rome Statute, merely replacing 'military advantages' by 'social and economic advantages'.⁷⁷

Intent, subsequently, is a tricky matter in the Panel's proposal. Within the proposal, different *mens rea* elements seem to be relevant to different aspects of the proposed crime. About the discrepancy of the prerequisite elements of 'wanton', which is described as 'reckless disregard', and, in the same sentence, 'knowledge that there

71 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 3.

72 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 2. Note that Elliot Winter successfully argued that this preoccupation is futile. Winter, 'Stop Ecocide International's Blueprint for Ecocide Is Compromised by Anthropocentrism: A New Architect Must Be Found', 204-9.

73 Winter, 'Stop Ecocide International's Blueprint for Ecocide Is Compromised by Anthropocentrism: A New Architect Must Be Found', 5.

74 Mostly by activist organisations such as the Stop Ecocide Foundation/Stop Ecocide International; Global Witness, 'Company Executives Could Now be Tried for Land Grabs and Environmental Destruction'; see also Rachel Killean, 'Prosecuting Environmental Crimes at the International Criminal Court – Is a Crime of Ecocide Necessary?', *Intlwgrrls*, 30 June 2021, <https://ilg2.org/2021/06/30/prosecuting-environmental-crimes-at-the-internationalcriminal-court-is-a-crime-of-ecocide-necessary/>.

75 Goran Sluiter and Barbara van Straaten, 'Ecocide als internationaal misdrijf: Perspectieven op vervolging en berechting in Nederland', *Boom Strafblad* 3 (2020): 134.

76 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 3.

77 Art. 8(2)(b)(iv) of the Rome Statute reads as follows: 'Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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' [emphasis added].

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is a substantial likelihood' of damaging consequences occurring as a result from the acts, has been written extensively by other authors.⁷⁸ Here, I will confine myself to firstly accept that the Panel apparently aimed to propose a *mens rea* of knowledge, recklessness or *dolus eventualis*,⁷⁹ which is significantly lower than that of virtually all other articles of the Rome Statute,⁸⁰ or at least 'in fact pose very different requirements'.⁸¹

The proposal, however, befuddles and confounds by attributing significantly deviant meanings to concepts well-known in ICL, such as 'knowledge', which in Article 30(3) of the Rome Statute is defined as 'awareness that a... consequence will occur in the ordinary course of events'. Heller correctly notices that, provided that 'the ICC's judges have interpreted Art. 30(3) to require the perpetrator to be aware that his or her actions are "virtually certain" to bring about the prohibited consequence(s)', this is 'a much higher standard of subjective awareness' than the Panel's 'substantial likelihood', which is more loosely related to recklessness.⁸² In addition to this 'knowledge' (that is in fact meant as recklessness) of the facts that acts will cause 'severe and either widespread or long-term damage to the environment', the conduct should be wantonly, requiring a perpetrator to also be conscious that the damage will be 'clearly excessive in relation to the social and economic benefits anticipated'. Ecocide thus carries components of a *mens rea* element of *dolus eventualis* and of *dolus indirectus*, being internally incompatible.⁸³

5.4 Analysis of any (in)congruities within the proposal

The Panel adopts the severe and complicated ecological challenges from Higgins. The objectives, however, are of a slightly more realistic nature than those of Higgins: The Panel is very much occupied with embedment in the currently existing ICC framework, political willingness, and legal feasibility. So far, the objectives could be deemed rather consistent with the identified challenges, although already risking an oversimplification of the subject matter. The alleged congruence perishes, however, regarding the concrete legal solution they propose. First of all, considering the wish to offer a new legal framework, the Panel's choice to incorporate ecocide in an already existing framework, namely that of the Rome Statute, is interesting. It raises the question what this new framework consists of. Neither the commentary and core text nor secondary literature provides an answer, as both seem not to be concerned with the discrepancy as identified in this article.

78 Greene, 'Mens Rea and the Proposed Legal Definition of Ecocide'; Heller, 'Skeptical Thoughts on the Crime of Ecocide – That Isn't'.

79 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 11; Ambos, 'Protecting the Environment through International Criminal Law?'.
80 Greene, 'Mens Rea and the Proposed Legal Definition of Ecocide'.

81 Minkova, 'The Fifth International Crime: Reflections on the Definition of "Ecocide"'.
82 Heller, 'Skeptical Thoughts on the Crime of Ecocide – That Isn't'.

83 For further explanation of this point, please see Heller, 'Skeptical Thoughts on the Crime of Ecocide – That Isn't'; Greene, 'Mens Rea and the Proposed Legal Definition of Ecocide'.

Secondly, despite the aims of fitting the ecocide proposal into the Rome Statute, there have been myriad criticisms pointing out the failure of exactly that.⁸⁴ This is also true for the wish to constitute a shift of consciousness: the balancing provision has been met with disappointment and scepticism, for it said to enhance the current *modus operandi* when it comes to submitting nature to often short-term economic gain, thereby accepting its degradation.⁸⁵

The important aspect of the *mens rea* element, finally, remains highly opaque, and considering the commentary and core text, it remains unclear altogether what level of intent we are dealing with. In addition to the above-mentioned internally conflicting *mens rea* requirements, critique has been put forward about the inclusion of any *mens rea* element, for some authors argue that ecocide should be a crime of strict liability.⁸⁶ This critique is however gratuitous, for it is easy to criticise the predominantly politically oriented Panel's proposal from an ideological stance, as, for example, Higgins'.

Despite the Panel's undoubtedly sincere and courageous attempt, it has not been able to envelop nowadays problems in its proposal. The Panel inevitably sells short the ecological problems of today by oversimplifying the proposed legal solution. The legal solution lacks Falk's pragmatism, and Higgins' ideology is not reflected in the proposal anymore. In short, the wordings of the Panel's proposal do not correspond to the explicitly stated objectives, yet characterised by multiple concessions, does reflect its preoccupation with political willingness. The Panel needs to manoeuvre oneself between the ideals that drive them, and with 'pragmatism', 'realism' and 'legal effectiveness'⁸⁷ that are needed for a feasible juridical answer to ecocide. As Elliot Winter already argues, this leads to insurmountable compromises that weaken the proposal.⁸⁸ The compromises, however, go beyond these observations, and need to be sought at a more fundamental level, namely the discrepancy between ideal and non-ideal theory.

The incongruence between the challenges, objectives and legal solutions is reflected, and possibly has its roots in methodological discrepancies. The panel starts off by taking challenges from reality and real-world facts as the starting point for further theoretical reasoning. Despite the Panel's occupation with legal feasibility of the proposal, its main objective is highly idealistic. The objective that humans ought to have a harmonious relationship with the natural world can be seen as a moral

84 Heller, 'Skeptical Thoughts on the Crime of Ecocide – That Isn't'; Palarczyk, 'Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment', 174-176; Faure, 'De strafrechtelijke bescherming van duurzaamheid: vergezichten en uitdagingen', 648.

85 Heller, 'Ecocide and Anthropocentric Cost-Benefit Analysis'; Minkova, 'The Fifth International Crime: Reflections on the Definition of "Ecocide"'.

86 Greene, 'Mens Rea and the Proposed Legal Definition of Ecocide'.

87 Winter, 'Stop Ecocide International's Blueprint for Ecocide Is Compromised by Anthropocentrism: A New Architect Must Be Found', 178.

88 Winter, 'Stop Ecocide International's Blueprint for Ecocide Is Compromised by Anthropocentrism: A New Architect Must Be Found', 178.

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principle of full social justice.⁸⁹ Finally, when the Panel is mainly concerned about the practical feasibility of the proposal, and no assumptions or abstractions are made for the sake of normative reasoning, the ideal nature of the theory perishes again.

6 Comparing the challenges, objectives and legal solutions of the three proposals

The previous investigation of the challenges, objectives and proposed legal solutions, reveals remarkable differences in the approaches of Falk, Higgins and the Panel towards the problem of ecocide. The differences become apparent when the challenges, objectives and proposed legal solutions of the three proposals are compared. Falk is concerned about the ecological destruction of the Vietnam War, demonstrating a rather minimalist approach. Confining himself to the period and impact of the war, he identifies a relatively simple, singular problem.

Higgins, on the other hand, sees herself confronted with a much more complex set of ecological challenges. Taking a maximalist approach on ecocide, this includes the cumulative emission of greenhouse gasses, cumulative pollution, consumerist overconsumption and resource depletion. She also notes social and economic injustice, whether or not as a consequence of ecocide, as a challenge. The Panel adopts Higgins' idea of modern ecological challenges, yet at the same time it seems to understand the need for a limitation of the challenges it wishes to address, and considers the ecological problems only, although these are already vastly more complex than the issues Falk identified at the time.

In the third section of this article, Falk's objectives have been broken down into five more manageable sub-objectives. These seem perfectly congruent with the challenges he identifies. Higgins, on the contrary, envisions a 'shift of consciousness' to be an important objective in her quest to eradicate ecocide, notwithstanding other demands as shared responsibility and individual liability. In addition to strictly ecological problems, she also vouches for improvement of economic structures and social issues. Her rather broad objectives appear to be congruent with the equally broad challenges she identifies.

The Panel, however, seems to take a more political, or at least diplomatic stance towards the subject matter. It does not expressly formulate objectives, other than offering an 'effective legal framework' and a 'practical legal tool'.⁹⁰ The commentary and core text reveal that the Panel envisions, like Higgins, to bring about 'a change of consciousness'. Although the challenges of Higgins and the Panel are virtually identical, for they are both concerned with the ecological challenges of our time, the objectives of the Panel's proposal and Higgins' proposal differ significantly.

89 David Estlund, 'Overview', in *Utopophobia: On the Limits (If Any) of Political Philosophy* (Princeton University Press, 2020), 25-39, <https://doi.org/10.2307/j.ctvhrd1gx.5>.

90 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 3.

The legal solutions they propose differ even more. Considering the underdeveloped, singular proposal by which Higgins aims to address all challenges and objectives she identifies, she evinces a very strong confidence in the power of the Rome Statute and the ICC. The Panel has copied some of Higgins' ideas about ecocide in its proposal. Other elements are altered (slightly) to fit the Panel's considerations, mostly concessions on the balancing provision and the *mens rea* element that would have been unacceptable for Higgins' uncompromising idealistic approach. Nevertheless, the Panel's proposal, too, is strikingly simple, in the sense that it puts its trust in only one article. On the other hand, the legal solutions Falk suggests to mitigate the much simpler challenges of his time are fourfold; each of the legal bodies mitigating a (sub)problem that Falk foresees concerning his objectives.

Falk has convincingly demonstrated that the challenges, and correspondingly the objectives he identifies, imperatively require a multitude of legal responses. The main strength of his proposal as compared to the other two, is that it is internally congruent. For this purpose we can, even in spite of the fundamental differences with the two 'modern' ecocide proposals of Higgins and the Panel, draw this important lesson from Falk's proposal that a legal response to the even more complex present day ecological challenges is necessarily juridically complex, and that an ecocide proposal should entail multiple diverse laws and regulations that each individually deal with a separate subproblem of the intricate challenges of today.

6.1 *Evaluating incongruence*

The Panel's endeavour to criminalise ecocide is a form of political thinking containing normative principles, such as having a 'relationship of harmony' with nature, as well as a practical proposal to add the crime of ecocide to the Rome Statute. The qualification of this political thinking as either ideal or non-ideal has major implications for the use and purpose of the proposal, and for the judgement of its quality. A non-ideal theory cannot be judged on its feasibility, and a non-ideal theory cannot be assessed on its achieving full social justice. At stake is the thus the question if the Panel should include real-world facts into their reasoning, or if it would be permissible to abstract or idealise certain factors for the sake of its theory.

Let us first see what the Panel's approach seems to be, before judging its methodological tenability. The challenges as identified by the Panel, seem to ground in non-ideal theory: these are real-world challenges, as we currently face them, without any abstractions nor idealisations. However, the Panel seems to proceed with a development of the first objective in an *ideal* manner. The goal that we (humans) ought to have a harmonious relationship with the natural world, can be seen as a moral principle of full social justice.⁹¹ This goal sets such a high standard that it is likely that it will never be met in the real world. This does not need to be

91 Estlund, *Utopophobia: On the Limits (If Any) of Political Philosophy*, 26

problematic following the reasoning of ideal theory, for I endorse David Estlund's statement that '[i]rrrealism (the property of being unrealistic) is a vice of proposals but not a vice of principles'.⁹² Although ideal theory has the merit of carefully identifying values and principles that are prerequisite for reaching a just society without the 'risk' of distraction by everyday facts about compliance and fortuitous circumstances,⁹³ ideal theory is subject to an important critique that is relevant for this case. It is impossible to theorise about reality without taking into account a minimal set of facts about that very reality. Here a problem arises, especially for those who wish to formulate a *realistic* proposal to implement a far-reaching normative ideal in the real world, such as the Panel's.

Hence, it *does* become problematic when the aim is to formulate not an ideal normative theory, but a *practical* legal tool, that the Panel wishes to achieve at the same time by the other formulated objectives. Those two objectives are supportive to the first objective in a practical manner, and are of a non-ideal nature: wishing to offer a practical legal tool, and the concern about political willingness (in our world, as it is) to accept the proposal, require taking into account non-normative facts that cause these very objectives to be. (For if one would *assume* political willingness, and one would *assume* the practical feasibility of the article, then these objectives would become void and superfluous).

In order to achieve the objective to bring about a change of consciousness that should shift our relationship with the natural world to a harmonious relationship, thereby enhancing the protection of the environment,⁹⁴ in the legal solutions (the practical legal tool, that is) the Panel makes use of at least two abstractions or idealisations. First, epistemic uncertainty seems to be ignored. This ignorance specifies a circumstance under which the theory holds: the legal proposal is only applicable in the cases where a certain threshold of epistemic certainty is met, as is required in tort law in general. According to Musgrave's categorisation of abstractions of real-world facts that are made for the purpose of ideal theorising, this kind of ignorance can be interpreted as a *domain* assumption.⁹⁵ Secondly, the Panel's belief that criminalisation of ecocide (as proposed by the Panel) will lead to a change of consciousness, seems to be fuelled by the idealising assumption that law (always) brings about a corresponding moral attitude. According to Onora O'Neill, idealisations of this sort can easily lead to falsehoods.⁹⁶ Because this assumption is not necessarily true, it remains questionable if law in general, and more specifically the ICC, is the most apt vehicle to bring about the desired change of consciousness. Although these aspects of the legal solutions seem to be a part of an ideal theory, the legal solutions are at the same time of a non-ideal nature, as

92 Estlund, *Utopophobia: On the Limits (If Any) of Political Philosophy*, 26.

93 John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 216.

94 Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, 2-3.

95 'Domain assumptions assume that a factor is absent in the sense that a theory only applies if that factor is absent; domain assumptions specify the circumstances in which a theory holds.' Thompson, 'Ideal and Nonideal Theory in Political Philosophy', 4.

96 Onora O'Neill, *Towards justice and virtue* (Cambridge, UK: Cambridge University Press, 1996), 41.

the Panel takes into account the actual functioning of the Rome Statute, and seeks to align the wording of the proposed article with already existing articles and practice. (The fact that the Panel's proposal contains several juridical errors is not relevant for the qualification of an ideal or non-ideal theory.)

Because the Panel's overall approach seems to be obviously non-ideal, the juridical facts – and errors – matter even more. This has compelling consequences for the role of normative principles: the political and juridical considerations of a solution for ecocide should, for that very reason, be sought in the same vein of a non-ideal theory, that is, taking real-world matters of fact not only into account, but making them leading in this proposal. Especially because it is the Panel's explicit aim to offer a practical legal tool, from a methodological perspective it is amiss that the Panel fails to achieve precisely that point.

The discovered incongruence between challenges, objectives and legal solutions has its origins in the methodological sphere. The Panel simultaneously departs from (mutually exclusive) idealistic and non-idealistic methodologies, which causes any practical elaboration of the theory to be flawed from the start. The proposal, therefore, misses an ideological point, as well as feasibility in legal practice.

7 Conclusions

Both Higgins and the Panel make use of a simple onset to mitigate a tremendously intricate problem. The fact that both Higgins and the Panel find the basis for their proposal in Falk's proposal is in itself not problematic. The fact that they both have not considered that Falk a) aims to solve a much less complex problem, and b) that he does so in a vastly more (legally) complex manner, is. The complex environmental challenges of today are widely recognised in academic debate on ecocide. Although the problem is acknowledged, the Panel *and* its critics have not left the idea of mitigating ecocide in one singular ecocide provision. Instead, they keep adding or slightly altering elements of the proposed provision.

Moreover, what is generally overlooked is that the three proposals seem to address the challenges from a different angle. Falk shows a *pragmatic* approach to the issue, whereas Higgins chooses an *ideological* stance, and the Panel in turn seems to have a more *diplomatic* agenda. The ideological and diplomatic approach are not as such problematic, yet they are not always easily reconcilable with the necessity to seek a workable legal solution.

On a more fundamental level, the discrepancies shown may originate from a methodological error. Because the challenges, objectives and legal solutions of Falk's proposal are congruent in the sense that they are all nonideal, and those of Higgins are congruent in the sense that they are all ideal in nature, this error occurs only in the Panel's proposal. Higgins' ideal theory has its value, albeit in the sphere of an ideal theory. Its practical feasibility should therefore not be assessed nor judged. The strongest juridically feasible contribution comes from Falk, for he has

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a strongly nonideal oriented theory of ecocide, taking real-world facts and feasibility into account from the start as an important feature for his proposal(s). It is easy to criticise an ideological manifesto from a nonideal pragmatic or political stance and vice versa. For they all have a different take on the matter, critique back and forth is gratuitous and does not contribute meaningfully to the debate on ecocide. This practice has resulted in the gridlocked debate of today.

The only critique that continues to hold, is that on the Panel's attempt to formulate an ecocide proposal. Because the Panel seems to simultaneously depart from mutually exclusive idealistic and non-idealistic methodologies, the proposal misses an ideological point, as well as feasibility in legal practice. This causes any practical elaboration of the theory to be flawed from the start.

A more purposeful endeavour would thus be to deliberately choose an approach and formulate objectives and legal responses accordingly, fitting all three completely within either ideal theory, or in non-ideal theory. It should be acknowledged that the legal solutions, taken by itself, cannot alleviate all problems. In case one truly expects effect in a strictly juridical sense from the legal provision(s) proposed, then it would be feasible to follow Falk's non-ideal pragmatic approach and formulate a juridically complex system containing a multitude of laws and regulations that each address their own (sub)objectives that are often incompatible in one singular article. A fruitful way forward in the legal battle against ecocide would be for future research to investigate the ecological challenges of our time and place closely, as well as the wide variety of legal answers that are necessary to mitigate them, while bearing in mind the underlying motivations with which the juridical instruments are put to work. Another valuable option is to develop an ideal theory with principles of full social justice concerning the human-nature relationship, and the related problems of ecocide. Such a theory might not provide feasible legal solutions for our present day challenges, but instead it has the potential of ideal theories in general, to guide us towards a more just society.