
**EVALUATING ECOCIDE: INVALUABLE OR
INVALID?**

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LIST OF ABBREVIATIONS

ICC	International Criminal Court
ICRC	International Committee of the Red Cross
MAF	Ministry of Agriculture and Forestry
OAG	Office of the Auditor-General
RMA	Resource Management Act

TABLE OF LEGISLATION

Australia

Protection of the Environment Operations Act 1997 (NSW)

Canada

Canadian Environmental Protection Act 1999

New Zealand

Resource Management Act 1991

South Africa

National Environmental Management Act 1998

United Kingdom

Water Act 1989

Water Resources Act 1991

International

Rome Statute 1998

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Sandstone Dairy Limited v Southland Regional Council HC Invercargill CRI 2007-425-000001, 15 May 2007

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R v Larsonneur (1933) 24 Cr App R 74

Sweet v Parsley [1969] 1 All ER 347 (HL)

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INTRODUCTION

*Arrogance, ignorance and greed, combined with overpopulation and powered by technology, are responsible for such severe resource exploitation and environmental degradation as to menace the integrity of the very biosphere, that thin layer of earth, water and air upon which all life depends.*¹

The last 30 years has seen a significant impetus to criminalise activities with adverse environmental effects. One such proposal is to amend the Rome Statute to include within the jurisdiction of the International Criminal Court (ICC) a fifth crime: “Ecocide”. This is an ambitious suggestion for which the author, United Kingdom (UK) lawyer Polly Higgins, and her organisation Eradicating Ecocide have been labelled “radical”. This is, however, *precisely* their aim: to pull up the status quo by the roots through a shift from protecting private interests to protecting the interests of *all* members of the community, including plants and animals.² Higgins is arguably “only radical in the sense that a group of lawyers agitating for a law against genocide would have been seen as radical in 1935”³; both are examples of a “new law (and new language) that has had to be invented to prohibit destructive practices”.⁴

This paper does not aim to assess the justification for an international crime against the environment, the appropriate forum in which to locate such a crime, or the interface between the hypothetical Ecocide Act⁵ and the existing Rome Statute.⁶ Its

¹ Mark Allan Gray "The International Crime of Ecocide" (1995-1996) 26 Cal W Int'l LJ 215 at 215.

² Polly Higgins *Eradicating Ecocide* (Shepherd-Walwyn (Publishers) Ltd, London, 2010) at XI-XIII. Linguistically, “eradicate” and “radical” mean “to pull up by the roots, to eliminate at the source”.

³ G Dyer "'Ecocide' law waits on severe damage" *Otago Daily Times* (Dunedin, 26 June 2012) at 9.

⁴ Higgins, above n2 at 62. She points out that “before laws were made prohibiting both genocide and slavery, neither were illegal: in fact both generated profit for many parties [...] what was once the norm, became overnight the exception” (Polly Higgins *Earth is Our Business: Changing the Rules of the Game* (Shepherd-Walwyn (Publishers) Ltd, London, 2011) at XII).

⁵ See Appendix I.

⁶ Implementing the proposal in the Rome Statute as intended would be problematic. The draft Ecocide Act comprises full definition, offence, liability, and penalty sections, among others; almost all of which differ – some significantly – from their Rome Statute counterparts. It is unclear whether, and if so how, the campaign anticipates the Rome Statute to accommodate such inconsistent provisions (identified where relevant throughout this paper). This paper therefore assesses the proposal in isolation, and only refers to the Rome Statute in relation to its general history and character or where its provisions are specifically relevant to the proposal (e.g., where a provision is based on a Rome Statute provision).

ambit is simply to evaluate Ecocide:⁷ it undertakes a critical examination of the drafting and substantive content of the proposal, to determine whether it is justifiable in principle and how it would function in the event it were adopted at international law. Such an inquiry is important both *internally*, as critical analysis identifies weaknesses that can then be remedied, and *externally*, as it encourages and stimulates public awareness and discourse about environmental issues.

It is also valuable to address whether, and if so how, this crime could be used in New Zealand (NZ), where a reasonably sound environmental regime is in place. A NZ example of environmental harm that strikes a particular chord with the public is “dirty dairying”, the practice of discharging dairy effluent into NZ’s freshwater ecosystems. In a country that prides – and markets – itself on a ‘green’ image, ongoing problems with freshwater quality are a serious concern; yet the existing regulatory regime, in both its monitoring and enforcement functions, has not fully addressed the problem, and some recidivist offenders continue to pollute in spite of huge financial penalties. Insofar as the *application* of the regime is responsible, the crime of Ecocide may produce a different result; demonstrating both its value to competent domestic regimes, and its application to a type of environmental degradation that, while harmful, is less extreme than the examples referenced by the campaign (see page 5).

The first part of this paper outlines the context for the proposal and then analyses the elements of the draft UK Ecocide Act. It goes on to analyse two of the key features of the proposal: its application to individuals and its imposition of strict liability, proposing amendments where appropriate. The paper then turns to the case study of dirty dairying, discussing the application of NZ’s Resource Management Act (RMA) before exploring the result under Ecocide as currently drafted and *per* the amendments proposed. The fourth chapter comments on the realistic benefits of a crime of Ecocide, if amended in the manner proposed in the previous chapters. This paper concludes that significant amendments would need to be made to render Ecocide consistent with existing legal principle, which would radically alter the proposal’s likely utility.

⁷ This paper capitalizes “Ecocide” when referring to the crime in the Ecocide Act, and but retains the lowercase style when referring to the concept of ecocide generally.

CHAPTER ONE – A Proposed Crime of Ecocide

I. Context of the Proposal

Environmental harm is as old as recorded history.⁸ Even primitive societies were “quite capable of methodically and heedlessly misusing their resources, generation after generation, until the bruised and battered environment would no longer support them”.⁹ However, industrial and civil progress during the last century has seen a significant increase in the global community’s needs and its ability to meet them by exploiting natural resources.¹⁰ The Organisation for Economic Co-operation and Development noted this year that “over the past decades, human endeavour has unleashed unprecedented economic growth in the pursuit of higher living standards... natural assets have been and continue to be depleted, with the services they deliver already compromised by environmental pollution”.¹¹

Awareness of this degradation grew during the twentieth century, although international responses were “slow, gradual and not very effective”.¹² Initial suggestions to create a “general offence of environmental degradation, ecocide or [geocide]”¹³ were coined largely in response to environmental destruction during times of armed conflict,¹⁴ such as the use of defoliants (Agent Orange) during the Vietnam War and the Kuwaiti oil fires in 1991.¹⁵ This wartime-specific stance has

⁸ Christopher H. Lytton "Environmental Human Rights: Emerging Trends in International Law and Ecocide" (2000) 13(1) Environmental Claims Journal 73, at 81. He gives as an example the Scythians' scorched-earth policy.

⁹ Ludwik A. Teclaff "Beyond Restoration - The Case of Ecocide" (1994) 34 Nat Resources J 933, at 934.

¹⁰ In the view of one commentator, the planet has come to be treated as a commodity, whose sole use is 'to provide human beings with unlimited resources for survival and economic expansion'. See Regina Rauxloh "Corporate Environmental Crimes in International Law - The Role of International Criminal Law in Environmental Protection" in Francis Botchway (ed) *Natural Resource Investment and Africa's Development* (Edward Elgar, Cheltenham, 2011).

¹¹ OECD *OECD Environmental Outlook to 2050* (OECD Publishing, 2012), at 19.

¹² Teclaff, above n9 at 939. Also, see Higgins, above n2 at 93-97 for a discussion of the flaws of Principle 6 of the Stockholm Declaration 1972 and the Rio Earth Summit 1992.

¹³ Frédéric Mégret "The Case for a General International Crime Against the Environment" (3 April 2010) Social Science Research Network <
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1583968 >#1 at 2. For examples of such proposals, see Grey, above n1; Lytton, above n8; and Richard A. Falk "Environmental Warfare and Ecocide - Facts, Appraisal, and Proposals" (1973) 4 Security Dialogue .

¹⁴ Teclaff, above n9 at 933.

¹⁵ For more, see Marcos A. Orellana "Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad" (2004-2005) 17 Geo Int'l Envtl L Rev 673 at 675.

persisted both in municipal penal codes,¹⁶ and the related “patchwork of international law”.¹⁷ Even Falk’s draft Ecocide Convention, much lauded in Eradicating Ecocide’s research paper for its specific application to peacetime activities, was nonetheless drafted with *military* destruction in mind.¹⁸

In the mid-1980s, the International Law Commission began working on the Draft Code of Crimes Against the Peace and Security of Mankind, among which the inclusion of “acts causing serious damage to the environment” was mooted.¹⁹ The 1991 draft, adopted by the Commission on first reading at the 43rd session, contained an individual crime of “wilful and severe damage to the environment”.²⁰ However, debate emerged over the inclusion of the element of intent; and notwithstanding the specific endorsement of some countries²¹ and recommendations of a Working Group,²² the provision was removed in 1996.²³

¹⁶ Georgia, Armenia, Belarus, Kazakhstan, Kyrgyzstan, the Republic of Moldova, the Russian Federation, Tajikistan, Ukraine and Vietnam all criminalise “ecocide” in varying forms in their domestic law. However, the provisions *all* appear within or alongside sections on Crimes against Peace or Humanity or International Humanitarian Law.

¹⁷ Orellana, above n15 at 673. For instance, Art 1(1) of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques prohibits the ‘hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage, or injury to any other State Party’. The same wording is mirrored in the 1977 Protocol I to the 1949 Geneva Conventions; Art 35 para 3 and Art 55 para 1.

¹⁸ Falk, above n13 at 93. Art II criminalises the use of weapons of mass destruction, defoliants, bombs and artillery, bulldozing where for military purposes, weather modification as a weapon of war, and forceful removal of persons or animals to expedite the pursuit of military objectives.

¹⁹ Mai Pouye Rabatel-Fernel Anja Gauger, Louise Kulbicki, Damien Short and Polly Higgins “Ecocide is the missing 5th Crime Against Peace” (2012) <<http://www.sas.ac.uk/hrc/projects/ecocide-project>>paper at 10.

²⁰ Art 26: “an individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [...]”.

²¹ From 1993 to 1996, 19 countries spoke out in the Legal Committee in favour of retaining ecocide in the draft Code, while only three called for its exclusion. See discussions in the Sixth Committee (Legal) of the General Assembly addressing the draft Code: 12th-15th meeting, summary records: A/C.6/50/SR.12 to A/C.6/50.SR.25 (in Anja Gauger, above n19 at 2).

²² This group was established at the 2404th meeting, to consider the issue of “wilful damage to the environment” (2404th meeting – multiple topics [1995] vol 1 YILC at 172) and subsequently issued a report: *Document on draft crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission* [1996] vol 2, pt 1. The group recommended on the basis of the report that crimes against the environment should be incorporated into the draft Code either as a war crime (Art 22) and a crime against humanity (Art 21), or as an autonomous offence in Art 26 (2430th meeting – multiple topics [1996] vol 1 YILC 7-13).

²³ In the 2431st meeting, the then Chairman, Mr. Ahmed Mahiou, invited members to vote on referring environmental crimes to the Drafting Committee *only* in the context of Arts 21 and 22. Despite the objection of Mr. Alberto Szekely that members should be afforded the opportunity to vote on all three proposals from the working group, the vote went ahead only in relation to Arts 21 and 22, without justification for the omission of Art 26 (2431st meeting – Draft code of crimes against the peace and security of mankind (Part II) – including the draft statute for an international criminal court [1996] vol 1 YILC 13-14).

In effect, the only provision relating to environmental damage included in the final Rome Statute is Art 8(2)(b)(iv), a war crime. It criminalises:

[i]ntentionally 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.

Essentially, no provision at international law criminalises environmental degradation during peacetime. The effect of this is to ignore “the broad private side of global violence against the environment by individual economic actors”,²⁴ permitting such violations to go “largely unsanctioned”.²⁵ Yet private extractive industry arguably accounts for some of the *worst* modern environmental harm:²⁶ the campaign lists as examples Amazonian deforestation; Athabasca tar sands (crude oil deposits) in Alberta, Canada; the 2010 Deepwater Horizon oil spill; and bauxite mining in the Niyamgiri mountains of India.²⁷ It is against this backdrop that the most recent proposal to criminalise ecocide was made.

II. The Proposed Crime of Ecocide

*We tried the small steps – now we need to take the leap.*²⁸

Polly Higgins

In April 2010, Polly Higgins submitted a proposal to the United Nations to criminalise ecocide under the Rome Statute, rendering it the fifth “crime against

²⁴ Frédéric Mégret "The Problem of an International Criminal Law of the Environment" (2011) 36(2) Colum J Envtl L 195, at 211.

²⁵ Rauxloh, above n10.

²⁶ Teclaff, above n9 argues at 933-934 that if the *scale* of damage done to the environment is the distinguishing feature of ecocide, the term should also apply to modern peacetime activities that destroy or damage ecosystems on a massive scale.

²⁷ Higgins, above n2 notes at 63 that the first two examples in conjunction with polluted water in many parts of the world account for the death of more people than all forms of violence, including war.

²⁸ Higgins, above n4 at 7.

peace” within the jurisdiction of the ICC.²⁹ As of October 2012, the exact terms of the amendment proposed are not publicly available; it appears to have comprised only the definition of Ecocide (presumably the causing of which would be a crime, although the campaign literature does not make this clear) and principles to govern the creation of the crime.³⁰

However, on 30 September 2011 Eradicating Ecocide staged a mock trial in London’s Supreme Court to demonstrate how Ecocide could work in domestic prosecutions. Fictional perpetrators of crimes based on real life events were tried and convicted on charges laid under a draft UK Ecocide Act, which has been published as an appendix to the second of Higgins’ two books. While this is only an *example* of a domestic incorporation – provided it remains consistent with the Rome Statute, ICC member States opting in to a new crime³¹ are free to incorporate it on their own terms – this Act is the only document comprehensively illustrating the proposal and the way in which it is intended to function as a legal mechanism. As the focus of the campaign is now entirely on this Act and the mock trial judgment interpreting it, this paper uses both as the basis for its discussion of Ecocide.

This chapter outlines and critically examines the Act’s objectives and its definition, offence, liability and penalty provisions, while the more substantive issues of its application and standard of liability are discussed in more depth in Chapter Two.

²⁹ It should be noted that the ICC is “complementary to national criminal jurisdictions” (Art 1 Rome Statute). This is reinforced in the Preamble, which states that “effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”, and that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. Therefore, jurisdiction arises only where national courts are unwilling or unable genuinely to investigate or prosecute (Art 17 Rome Statute).

³⁰ Polly Higgins "Closing the door to dangerous industrial activity : A concept paper for governments to implement emergency measures" (2012) <<http://www.eradicatingecocide.com/the-law-of-ecocide/attachment/ecocide-concept-paper/>>paper, at 15.

³¹ Articles 5-8 of the Rome Statute, the crimes over which the ICC has jurisdiction, are subject to a special process under Article 121(5) whereby any amendment can effectively be accepted if and when individual States choose. It is therefore likely that any additional crimes incorporated into the Statute would be subject to the same opt-in procedure.

a. Objective and Principles

The Act's objective is "to stop the extensive damage to, destruction of or loss of ecosystems which is preventing peaceful enjoyment of all beings of the earth and to prevent such extensive damage to, destruction of or loss of ecosystems from ever happening again."³² According to clause 2 of the Preamble, the consequences of Ecocide include loss of (human and non-human) life, heightened risk of conflict and adverse impact on future generations and cultural heritage; and the crime therefore aims to prevent war, loss or injury to life, pollution and loss of traditional cultures.³³

b. Definition

Higgins defines Ecocide in the following terms:

1. Ecocide

Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that:-

- (1) peaceful enjoyment by the inhabitants has been severely diminished; and or
- (2) peaceful enjoyment by the inhabitants of another territory has been severely diminished.³⁴

2. Risk of Ecocide³⁵

Ecocide is where there is a potential consequence to any activity whereby extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, may occur to such an extent that:-

- (1) peaceful enjoyment by the inhabitants of that territory or any other territory will be severely diminished; and or
- (2) peaceful enjoyment by the inhabitants of that territory or any other territory may be severely diminished; and or

³² Ecocide Act (EA) 2010, see Appendix I. Preamble, clause 1.

³³ EA Preamble, clause 3.

³⁴ EA s1.

³⁵ This is consonant with the precautionary principle, "the requirement that environmental harm/pollution be prevented in advance rather than remedied after the event and, as such, is simply an embodiment of the almost universally accepted adage that "prevention is better than cure" (Patrick Bishop "Criminal law as a preventative tool of environmental regulation: compliance versus deterrence" (2009) 60(3) N Ir Legal Q 279 at 280). See William Howarth "Crimes against the Aquatic Environment" (1991) 18 J L & Soc'y 95 at 99 and 106 for more. This is arguably the case for inchoate environmental offences where actual *harm* is not a condition precedent of liability. These offences include s85(1) Water Resources Act 1991 (UK) (causing poisonous, noxious or polluting matter to enter controlled waters), and s15(1) Resource Management Act 1991 (NZ) (discharging contaminants into water).

- (3) injury to life will be cause; and or
- (4) injury to life may be caused.

These definition sections are problematic. First, s1 is internally inconsistent: subsection (2) refers to “peaceful enjoyment by the inhabitants **of another territory**”, while (1) does not explicitly refer to “inhabitants of **that** territory”.³⁶ Second, s1 is inconsistent with s2: the s1 distinction between “[**that**]” and “**another** territory” is absent in s2, where both limbs are included in *each* of (1) and (2). While these inconsistencies would not unduly hinder interpretation, it would be more appropriate to employ consistent drafting.

Further, ss1 and 2 are not complementary in terms of consequences qualifying as Ecocide. Both sections refer to “severely diminished peaceful enjoyment”,³⁷ yet s2 is alternatively met where injury to life will or may be caused.³⁸ This separate inclusion of “injury to life” suggests it does not come within the concept of “severely diminished peaceful enjoyment”, in turn suggesting it is only relevant to establishing Risk of Ecocide, not existing Ecocide.³⁹ However, “peaceful enjoyment” is statutorily defined to include the right to health and wellbeing, diminution of which likely encompasses the concept of “injury to life”. This interpretation is supported by the mock trial interpretation of “peaceful enjoyment”: “plainly, if [...] living organisms die, or are seriously injured, or their lives seriously disrupted, then you will see that comes within peaceful enjoyment”.⁴⁰ This conclusion, that diminished “peaceful enjoyment” encompasses injury to life, effectively renders ss2(3) and (4) unnecessary.

³⁶ This wording was used in earlier versions of Higgins’ proposal. For instance, the draft definition from the Concept Paper (above n30) applies where “peaceful enjoyment of inhabitants of **that** territory has been severely diminished”. It is unclear why the second limb, referring to inhabitants of “another territory”, has since been added; and why the phrase “of that territory” was removed.

³⁷ They differ only in tense, reflecting the fact that s1 applies to existing ecocide whereas s2 applies to the *risk* of ecocide.

³⁸ Sections 2(3) and (4). “Life” for the purposes of s2 must refer to both human and non-human life, as neither subcategory is specified, as they are in ss3 and 4.

³⁹ This is unlikely to be critical; a Crime Against Nature is committed where there is ecocide + “breach of non-human right to life”; which in turn constitutes the Crime of Ecocide.

⁴⁰ *R v Bannerman & Tench* [30 September 2011] Transcript of Mock Ecocide Trial, available at www.wildlawuk.org/uploads/6/5/3/1/.../300911supremecourt.pdf trial judgment, at page 18.

i. 'Damage, destruction or loss'

While Higgins anticipates destruction and loss would be easy to ascertain by way of data,⁴¹ *damage* is harder to determine. Section 10 of the Act is critical:

10. Size, Duration, Impact of Ecocide

The test for determining whether Ecocide is established is determined on either one or more of the following factors, which have impact on the severity of diminution of peaceful enjoyment by the inhabitants, namely:-

- (a) size of the extensive damage to, destruction of or loss of ecosystem(s);
- (b) duration of the extensive damage to, destruction of or loss of ecosystem(s);
- (c) impact of the extensive damage to, destruction of or loss of ecosystem(s)

These terms are intended to be interpreted as follows:⁴²

- Widespread: “encompassing an area of several hundred square kilometres”
- Long-term: “lasting for a period of months, or approximately a season”
- Severe: “involving serious or significant disruption or harm to human life, natural and economic resources or other assets”.

These criteria deliberately draw on Art 8(2)(b)(iv), ostensibly deriving legitimacy from the connection to an existing Rome Statute crime.⁴³ Two problems arise with this. First, Art 8(2)(b)(iv) criminalises *intentionally* attacking *in the knowledge* it will have the above effects. Liability therefore arises not just from the effect caused, but the *state of mind* of the accused. However, as currently drafted, the state of mind of the accused is irrelevant for Ecocide (discussed further in Chapter 2). A vital component of the source provision has therefore been omitted.

In addition, Art 8(2)(b)(iv) further limits liability in requiring that damage be “clearly excessive in relation to the concrete and direct overall **military** advantage anticipated”. Higgins appears to have considered this, and even suggested replacing

⁴¹ Higgins, above n2 at 63.

⁴² These definitions come from Understandings drawn up for the purposes of the ENMOD Convention (see ICRC Advisory Service on International Humanitarian Law). Polly Higgins "Ecocide Powerpoint Presentation" <<http://www.eradicatingecocide.com/ecocide-presentation/>>.

⁴³ For instance, in the concept paper, above n30 at 4 and Louise Kulbicki and Jess Brightwell *Youth Matter: Your Guide To Making Ecocide A Crime* (London, 2012). Available at <<http://eradicatingecocide.com/get-involved/toolkit/>> at 19, it is stated that “in war-time, it is already an international crime to destroy the environment. During peace time, no such crime exists.” This is misleading: it suggests that their proposal is the exact corollary of the war-time equivalent without acknowledging that only the criteria have been transplanted to Ecocide.

“military” with “community”;⁴⁴ however, this phrase was never adopted into the Act. Evidently military advantage *per se* is irrelevant to a peacetime crime; but balancing harm against the advantage gained is an important limitation on liability for Art 8(2)(b)(iv) that has been omitted.

Effectively, the Ecocide Act borrows the criteria for when damage will cross the threshold to attract liability, but omits the limits critical to Art 8(2)(b)(iv), undermining any ostensible legitimacy derived from this connection.

i. “*Whether by human agency or other causes*”

This formulation creates two categories of Ecocide: ascertainable and non-ascertainable. The latter is the outcome of “naturally occurring events such as but not limited to; tsunamis, earthquakes, acts of God, floods, hurricanes and volcanoes”.⁴⁵ Higgins’ primary focus, however, is on *ascertainable* Ecocide: human-made degradation, where liability of a legal person can be determined.⁴⁶

ii. *Other elements of the definition of Ecocide*

The remaining elements of the definition of Ecocide are defined in section 37:⁴⁷

33. Interpretation

In this Act:-

...

‘*ecosystem*’ means a biological community of interdependent living organisms and their physical environment.

‘*inhabitants*’ means any living species dwelling in a particular place.

‘*peaceful enjoyment*’ means the right to peace, health and well-being of life.

‘*territory*’ means any domain, community or area of land, including the people, water and/or air that is affected by or at risk or possible risk of Ecocide.

⁴⁴ Higgins, above n42.

⁴⁵ EA, s37.

⁴⁶ Higgins, above n2 at 63.

⁴⁷ This is the final section of the Act, following s36 (Short Title, Application and Extent). However, it is labelled in the Act as s33. As it was cited as s33 during the 2011 mock trial, it is possible that it has simply been transposed from an earlier draft of the Act without having been reformatted.

c. Offence provisions

Several sections in the Act give rise to liability:

3. Crime Against Humanity

A person, company, organisation, partnership, or any other legal entity who causes Ecocide under section 1 of this Act and has breached a human right to life is guilty of a crime against humanity.

4. Crime Against Nature

A person, company, organisation, partnership, or any other legal entity who causes Ecocide under section 1 of this Act and has breached a non-human right to life is guilty of a crime against nature.

5. Crime Against Future Generations

A person, company, organisation, partnership, or any other legal entity who causes a risk or probability of Ecocide under sections 1 or 2 of this Act is guilty of a crime against future generations.

6. Crime of Ecocide

The right to life is a universal right and where a person, company, organisation, partnership, or any other legal entity causes extensive damage to, destruction of or loss of human or non-human life of the inhabitants of a territory under sections 1-5 of this Act is guilty of the crime of Ecocide.

7. Crime of Cultural Ecocide

Where the right to cultural life by indigenous communities has been severely diminished by the acts of a person, company, organisation, partnership, or any other legal entity that causes extensive damage to, destruction of or loss of cultural heritage or life of the inhabitants of a territory under sections 1-6 of this Act, is guilty of the crime of cultural Ecocide.

8. Offence of Ecocide

It will be an offence of Ecocide where a person, company, organisation, partnership, or any other legal entity is found to be in breach of section 1 and 7 of this Act.

Numerous problems arise with the drafting of these provisions. Sections 3 and 4 in isolation are clear and complementary: liability arises thereunder where a) the definition of Ecocide is met, and b) either a human or non-human right to life is

breached. However, the drafting of s6 – arguably a more serious crime – effectively renders ss3 and 4 redundant.⁴⁸ Section 5 contains another drafting difficulty: liability arises where “a risk or probability of Ecocide” is caused under “sections 1 or 2”. It is unclear why s1 is referred to: it contains no reference to “risk or probability”, and to read such a nuance into it would be to read down what s2 is drafted to do.⁴⁹ Section 5 can function solely through s2, and should be drafted accordingly to avoid confusion.

Section 6 is yet more problematic. First, the opening phrase is an emotive assertion, inappropriate in an offence provision, which should remain squarely in the Preamble. Second, the section as drafted is grammatically incoherent.⁵⁰ Third, it renders ss3 and 4 redundant, as outlined above. Fourth, s6 provides that Ecocide is established where “**extensive damage to, destruction of or loss of human or non-human life of the inhabitants of a territory under sections 1-5**” is caused. It is difficult to understand how the above phrase could “arise under sections 1-5”, as it does not appear in the drafting of these sections. Further, the bolded phrase is employed in the definition (ss1-2) in reference to *ecosystems*, yet is used here in reference to *life*. This repetition is confusing, yet is included without apparent justification. Perhaps the phrasing is used to distinguish s6 from the lesser Crimes, in that *extensive* loss of life must be established to satisfy this section in addition to extensive damage to destruction of or loss of ecosystems; however this is unlikely given that the campaign is based on the “Crime of Ecocide”, without reference to such an additional layer.

Numerous issues arise with s7. It contains the same internal grammatical error as s6, and the same ill-fitting utilisation of the phrase “extensive damage to, destruction of or loss of”. In addition, the Act defines “cultural Ecocide” under s37⁵¹ as “damage to, destruction to or loss of a community’s way of life including a community’s spiritual

⁴⁸ While s6 requires “*extensive* damage to, destruction of or loss of human or non human life”, a phrasing which appears to set a higher threshold than ss3 and 4’s “breach of a right to life”; s6 goes on to use the phrase “under sections 1-5”, suggesting behaviour qualifying under ss3 and 4 is intended to qualify under s6. There is no need to criminalise the same behaviour twice, given that the Crime of Ecocide arguably carries more weight.

⁴⁹ Section 2 is drafted specifically to deal with *future* possible consequences, rather than existing effects. This is evident in the language used: all qualifying effects are phrased using terminology of “will or may” (s2).

⁵⁰ The substantive phrase begins with “where...”, suggesting a precondition that must be established, yet ends with “is guilty of the crime of Ecocide” where it should be phrased “, they are guilty...” to be consistent with the beginning of the phrase.

⁵¹ It is unclear why s5 relates to “risk of ecocide” defined under s2, and s6 relates to “ecocide” defined under s1, yet s7 relates to “cultural ecocide” which is defined under s37.

practices”. It is nonsensical to draft an offence where the causing of X renders Y guilty of cultural ecocide, then *separately* define cultural Ecocide in different terms. Further, loss to cultural heritage or life must occur “under sections 1-5”; yet as above, this phrase does not feature in any of the preceding offences so cannot logically “arise” under them. It would be a strained interpretation to hold that s7 imposes liability where regular Ecocide is established (under ss1-5), *and* there is loss to cultural heritage. More broadly, the concept of cultural Ecocide is at odds with the wider campaign aimed at environmental degradation, and the literature provides no explanation as to why this has been included.

Finally, it is entirely unclear why an “Offence” of Ecocide is included alongside “Crimes” of Ecocide, unless it is intended to be of lesser seriousness. However, as s6 effectively amounts to a breach of s1, the offence under s8 equates to the crime under s6 + the crime under s7. There is no explanation for such an odd and ostensibly redundant provision.

d. Penalties

The two principal penalties under the Ecocide Act are imprisonment⁵² and restorative justice.⁵³ The outcome of the mock trial demonstrates that, although the prospect of imprisonment is considered the key to the “pre-emptive duty”, the restorative justice process is also considered valuable in the long-term.⁵⁴

⁵² Section 9. The campaign makes it clear that the entry point is 3-4 years (Higgins, above n42).

⁵³ Section 9. In addition, s19 provides that the Court *must* remand the case to offer the victim(s) the opportunity to participate in a restorative justice process, unless it considers the offence to be so serious that this would be inappropriate (s19(2)). Section 37 defines ‘*restorative justice*’ as:-

a process applied as an alternative to conventional sentencing. Where guilt has been accepted or a defendant has been found guilty, he/she may choose to enter into a restorative justice process where he/she shall engage with representatives of parties injured to agree terms of restoration.

⁵⁴ Subsequent to the mock trial, the convicted perpetrators took part in a restorative justice conference on 31 March. One of the perpetrators engaged in the restorative justice process and signed an action plan (including, for instance, setting up working groups to look into funding for alternative energy sources). His sentence was suspended for 6 months, at the end of which, if he ‘complies’ with his action plan, he will receive a suspended sentence or a supervision order. The other refused to accept the verdict and declined to enter the restorative justice conference with the victims, a position seen as an aggravating factor. He was sentenced to four years imprisonment.

III. Proposed Amendments

The above discussion demonstrates the problematic drafting of the operative provisions of the Act. Four amendments are needed to rectify the grammatical errors and streamline and harmonise the provisions. The first is to redraft ss1 and 2 into a single definition section, comprising existing *and* possible effects. The second is to redraft ss5 and 6 to eliminate confusion and render them consistent. The third is to remove ss3, 4, and 8, as they are redundant in light of what can be achieved through (the new) ss1 and 2. Finally, s7 could either be deleted entirely (given there is no apparent justification for its inclusion), or if justifiable, the s37 definition of “peaceful enjoyment” could be redrafted to extend to the concept of cultural heritage.

1. Definition of Ecocide

Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory or another:

- 1) has been severely diminished; or
- 2) will be or may be severely diminished.

2. Crime of Ecocide

A person, company, organisation, partnership or any other legal entity who causes Ecocide under s1(1) is guilty of the Crime of Ecocide.

3. Crime against Future Generations

A person, company, organisation, partnership or other legal entity who causes a risk of Ecocide under s1(2) is guilty of the Crime against Future Generations.

However, the more problematic aspects of the crime of Ecocide are the strict standard of liability imposed under the Act and its intended application to individual directors of offending corporations. This paper moves now into a discussion of these issues followed by proposed amendments.

CHAPTER TWO – Critical Evaluation

Two key but controversial features of the proposal are the standard of liability imposed and its application to individuals. This chapter critically examines each position to determine whether they are justifiable in light of general principles of law.

I. Standard of Liability

The standard of liability is a crucial dimension to criminal responsibility, as it dictates whether a mental element must be proved, on whom the burden of proof lies, and whether any defences are available. This section outlines a rudimentary three-tier categorisation of standards of criminal liability, then uses this framework to critically assess the standard is adopted under the Act.

a. Standards of liability: principles

The traditional criminal standard of liability is **fault-based**: there is a common law presumption that the prosecution must prove a mental element, or *mens rea*,⁵⁵ before an individual can be held guilty of a “truly criminal” offence.⁵⁶ There are several justifications for requiring proof of *mens rea*: that liability should arise only where there is moral guilt,⁵⁷ that there is a high stigma – or “disgrace of criminality”⁵⁸ – associated with criminal convictions, and that severe penalties arise upon conviction.⁵⁹

⁵⁵ The traditional forms of *mens rea* are intent, knowledge and recklessness.

⁵⁶ This is encapsulated in the Latin maxim *actus non facit reum nisi mens sit rea* (an act is not culpable unless the mind is guilty). This is affirmed in Lord Scarman’s first principle in *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1969] 2 All ER 503 (PC) at 508f-g.

⁵⁷ Hawthorne discusses this retributive principle (Ryan Hawthorne "Strict Criminal Liability: A Principled Approach" (2010) 6 Cambridge Student L Rev 33 at 45). He cites Kant that a defendant “must first be found deserving of punishment before any consideration is given to the utility of his punishment” (E. Kant, *The Metaphysical Elements of Justice*, (J. Ladd trans. 1965) at 100. Strantz notes the “generally held repulsion against punishment of the morally innocent” (NJ Strantz "Beyond *R. v. Sault Ste. Marie*: The Creation and Expansion of Strict Liability and the "Due Diligence" Defence" (1992) 30 Alta L Rev 1233 at 1236).

⁵⁸ *Warner v Metropolitan Police Comr* [1969] 2 AC 256 at 272, in Michael Kidd "The use of strict liability in the prosecution of environmental crimes" (2002) 15 S Afr J Crim Just 23 at 26. Also see Hawthorne, above n57 at 45-46.

⁵⁹ A failure to require proof of *mens rea* is said to “amount to a violation of fundamental justice and constitutional rights” (Strantz, above n57 at 1246). See also AD Reid "*R v Sault Ste. Marie*: A Comment" (1979) 28 UNBLJ 205 at 206. Kidd, above n58 at 39, observes that the possible imposition of severe penalties would “almost certainly present constitutional impediments to the use of strict criminal liability”.

However, this presumption in favour of *mens rea* can be displaced, if it is “clearly or by necessary implication the effect of the statute”,⁶⁰ in “quasi criminal”, public welfare regulatory offences⁶¹ directed at conduct having a tendency to endanger the public.⁶² This flexibility recognises that harm is caused not just by intentional or negligent wrongdoing, but also by “a failure to meet an active and affirmative duty to protect public interests”.⁶³ Determining whether the presumption is displaced is likely to depend on “the nature of the crime, the punishment, the absence of social obloquy, the particular mischief and the field of activity in which it occurs”.⁶⁴

Traditionally, the alternative standard in “quasi-criminal” offences is **absolute**, where liability arises on proof of only the *actus reus* and no defences are available.⁶⁵ Several justifications are given for imposing absolute liability: that it contributes to efficient administration by “eliminat[ing] the difficult task of proving intent on the part of a corporate offender”,⁶⁶ and encourages compliance through deterrence by shifting the risks of dangerous activity to “those best able to prevent a mishap”.⁶⁷ However, Hall argues that deterrence is irrelevant to an absolute liability harm-doer, “since they have not in the least thought of their duty, their dangerous behaviour or any sanction”.⁶⁸ Further, imposing absolute liability risks “the unfair result that the merely negligent offender could be found as culpable as those guilty of flagrant or intentional

⁶⁰ Lord Scarman’s third principle in *Gammon*, and Kiron Reid “Strict Liability: Some Principles for Parliament” (2008) 29(3) *Statute Law Review* 173 at 193. This is consonant with the “substantive force” of *Sherras v De Rutzen*: that “mens rea is the default position and is rebuttable where its implication is clearly outweighed by other factors” (Hawthorne, above n57 at 38).

⁶¹ This new type of legislation emerged in response to the “economic social and sanitary evils” of the early nineteenth century (RJ Asher “Mens Rea” or a Duty of Care? The Development of Strict Liability” (1967-1971) 1 *Auckland U L Rev* 80 at 80).

⁶² *Millar v Ministry of Transport* [1977] 1 NZLR 429 at 225, in KA Fraser “Strict Liability Revisited: *Millar v Ministry of Transport*” (1988) 6(4) *Otago Law Review* 664 at 675. See also Asher, above n61 at 83. Strantz gives as examples pollution, environmental, and occupational health and safety legislation (Strantz, above n57 at 1245).

⁶³ S. Harring, “Liability without Fault: Logic and Potential of a Developing Concept” [1970] *Wis. L. Rev.* 1201 at 1206, in Hawthorne, above n57 at 41.

⁶⁴ Lord Pearce in *Sweet v Parsley* [1969] 1 All ER 347 (HL) at 256. See Reid, above n60 at 193, Strantz, above n57 at 1244 and 1247, Lord Scarman’s fourth principle in *Gammon*. Also see Reid at 185 (who claims *mens rea* should always be a requisite element if imprisonment is a possible penalty).

⁶⁵ Sometimes this term is used interchangeably with the phrase “strict liability”. However, as will become apparent, this can be confusing; this paper classes these offences as “absolute liability”.

⁶⁶ Strantz, above n57 at 1235. See also Kidd, above n58 at 24.

⁶⁷ Hawthorne, above n57 at 42.

⁶⁸ J Hall “Negligent Behaviour Should be Excluded from Penal Liability” (1963) 63 *Col L Rev* 632 at 641.

violation”,⁶⁹ which “would not [further] the enforcement of the regulations in the slightest”.⁷⁰

These considerations led to the development in *Sault Ste. Marie* of the common law **strict liability** standard, a “half-way house”⁷¹ between fault-based and absolute liability in relation to public welfare regulatory offences. Strict liability offences similarly do not require proof of *mens rea*, but once the *actus reus* is proved and a case is prima facie made out, the onus of proof shifts to the defendant to rebut it and avoid liability, precluding a “violation of fundamental justice and constitutional rights”.⁷² The defences available vary according to the statute and jurisdiction, but tend to involve the taking of all reasonable care or all reasonable precautions.

The categorisation of negligence, comprising a breach of a duty of care, is somewhat fluid. While classic tortious negligence resembles strict liability, in that a defence of reasonable care is tantamount to establishing a duty of care was met, “criminal negligence” is considered a form of fault-based liability where the onus is on the prosecution to prove the breach as an element of the crime.

The attitude towards strict and absolute liability offences differs across jurisdictions.⁷³ However, the key factors in determining the applicable standard of liability are generally the presumption of *mens rea*, whether the legislation has a regulatory flavour, the penalty imposed and the precision of the statutory language used.⁷⁴

⁶⁹ Strantz, above n57 at 1236, citing the “generally held repulsion” of punishing the “morally innocent”.

⁷⁰ Asher, above n61 at 83. This was perhaps the case in *R v Larssonneur* (1933) 24 Cr App R 74.

⁷¹ Strantz, above n57 at 1235. It offers “sanctuary from the harshness and potential inequity of the doctrine of absolute liability” (Reid, above n59 at 211), while encouraging statutory compliance: the deterrent factor incentivises voluntary compliance and encourages establishment of industry standards, and responsiveness after innocent violations minimises cost to the corporation, while ensuring better systems are developed to prevent future violations (Strantz, above n57 at 1249-1250).

⁷² At 1246.

⁷³ For instance, Canada is characterised by a decisive condemnation of absolute liability (Webb at 306), with courts “reading down” absolute liability provisions to offences of strict liability to remain constitutional (Strantz, above n57 at 1247); while the English position is far less decisive. Courts regularly approve of absolute liability offences, despite indicating distaste for them, and do not seem to endorse the strict liability category favoured in Canada and NZ, refusing to supply a common law due diligence defence (although some regulatory regimes incorporate such a defence) out of concern it may violate the presumption of innocence (Webb at 316).

⁷⁴ *R v Sault Ste. Marie* 1978 2 SCR 1299 at 1326.

b. Standard of Liability for a Crime of Ecocide

i. At present

Section 12 of the Ecocide Act provides that Ecocide is a crime of “strict liability”. In the UK, where the Act and proposal originate, this label describes the rubric termed “absolute liability” above. Further, s14 provides that superior responsibility creates liability “regardless of [...] knowledge or intent”. This is confirmed in the draft Sentencing Guidelines drawn up for the mock trial. Principle 4 states that:

Ecocide is a crime of [absolute] liability precisely because Parliament regards the causing of damage, destruction to or loss of ecosystems on an extensive scale to be so undesirable as to merit the imposition of criminal punishment irrespective of an individual’s and/or the company’s knowledge, state of mind, belief or intention.⁷⁵

In the 2011 mock trial, defence counsel objected that it was contrary to the principles of English law that an individual CEO, who “could not and did not have any hand at all in the act which caused the damage and... could not possibly have prevented it”, could be strictly liable and subject to imprisonment. Counsel submitted therefore that some personal liability must be proved.⁷⁶ The judge responded that the impact of the ruling was not for him to determine, but that he interpreted the Act such that “it’s an absolute requirement of the steps being taken by those under the authority of CEOs”. He went on to state that the scope of the trial was simply to consider whether Ecocide has been committed and whether it was caused by the operations at issue.⁷⁷

The legislation – supported by the Guidelines and the judgment in the mock trial – is therefore clear that liability for the crime of Ecocide is absolute. Provided an accused is in a position of superior responsibility (the intended basis for liability, discussed in more depth below), liability arises once the prosecution has proved that Ecocide has been caused. As such, no mental element must be established in relation to the defendant, and no defences are available to rebut liability.⁷⁸

⁷⁵ The Sentencing Guidelines can be found on the Eradicating Ecocide website: <http://eradicatingecocide.com/get-involved/toolkit/> accessed 12/07/2012.

⁷⁶ *R v Bannerman & Tench* at 28-30.

⁷⁷ *R v Bannerman & Tench* at 30.

⁷⁸ This is illustrative of the practical difficulties of combining Ecocide with the existing Rome Statute, which permits the operation of some defences (see Arts 31-33).

ii. Discussion

This result is problematic.⁷⁹ At first glance, the environmental character of the proposal supports displacing the *mens rea* presumption; such legislation falls classically within the rubric of public welfare regulatory offences, particularly as it envisages applying to instances of particularly serious public harm. In addition, the possibility of imprisonment is not necessarily fatal.⁸⁰

However, it must not be overlooked that this proposal is at its heart the addition of a crime to an international criminal regime. Not only does Rome Statute liability connote serious stigma and moral guilt – indeed a large part of its legitimacy and deterrent force is derived from this status as a “truly punitive sanction”⁸¹ – but it is decidedly non-regulatory in character.⁸² Further, Art 30(1) of the Rome Statute explicitly states that “unless otherwise provided” liability arises for a crime only if “the material elements are committed with intent and knowledge”; and all existing Rome Statute crimes have a *mens rea* component. While not determinative, as a new crime could “provide otherwise”, this is a strong indication that new Rome Statute crimes should similarly adopt a fault-based standard of liability.

Further still, it is generally accepted that the principle of command responsibility upon which liability for Ecocide is based (discussed in more depth below) does not impose strict liability, a position confirmed in the *Čelebići* case: liability arises only where the superior has either actual or constructive knowledge.⁸³ Ironically, Higgins claims that absolute liability is justifiable because a person in a position of superior responsibility “knows, or should know, of the consequences arising out of any

⁷⁹ Not least due to the justification given by Higgins for absolute liability: the “directing mind and will” doctrine. She infers it is used to attribute knowledge of the corporation to its directors. In fact, the reverse is true: this doctrine is employed where a *director’s* knowledge is attributed to the *company* who is then vicariously liable for its agent’s actions. Here, the company’s liability is not at issue.

⁸⁰ This has not precluded strict liability in some domestic jurisdictions, for instance s341 RMA and *Alphacell v Woodward* [1972] AC 824. However, it is questionable whether absolute liability imprisonment would ever be appropriate for an imprisonable offence.

⁸¹ Higgins, above n2 at 112.

⁸² Because domestic implementation of an ICC crime must be consistent with its international counterpart, it is not possible to introduce Ecocide with *mens rea* in the ICC, then domestically implement it with a lesser standard of liability. This would be critically inconsistent, as it would lessen or remove a key element of liability.

⁸³ See Eugenia Levine “Command Responsibility: The Mens Rea Requirement” (2005) <<http://www.globalpolicy.org/component/content/article/163/28306.html>> for more. Art 28 Rome Statute, in which this principle is enshrined, imposes an even higher *mens rea* standard in the case of non-military superiors (discussed further below).

business activity”.⁸⁴ Far from *supporting* an absolute liability position, this statement is entirely consistent with Art 28, and envisages a legitimate fault-based standard.

Further, imposing fault-based liability is in line with both domestic instances of corporate officer liability⁸⁵ and other proposals to criminalise ecocide. Gray, who argues for an international crime of ecocide, considers that it would have limited scope in relation to individuals due to his “absolute foreseeability” requirements:⁸⁶ “knowledge or unreasonable failure to realize that the general scientific consensus is that the act or omission causes or contributes significantly to global environmental impairment”.⁸⁷ Falk’s draft Ecocide Convention provides that ecocide means any one of the specified acts *committed with intent to disrupt or destroy, in whole or in part, a human ecosystem*.⁸⁸ Rauxloh similarly proposes an addition to the Rome Statute of “grave crimes against the environment”, committed by multinational corporations, with a *mens rea* threshold of objective recklessness.⁸⁹

Insofar as the proposal constitutes an amendment to the ICC, there are evidently strong justifications for a fault-based standard of liability that places the burden of proof on the prosecution. Interestingly, this would not be inconsistent with the wider campaign, which makes it clear that Ecocide is intended to impose a pre-emptive legal obligation by way of a duty of care.⁹⁰ This is equivalent to a negligence standard, which could be reinterpreted as *fault-based* negligence so as to place the onus of proof on the prosecution. Such a standard would therefore still achieve the goals of the campaign, but would be justifiable in principle by placing the onus of proof on the prosecution, and ultimately grounding liability in the fault of the accused

⁸⁴ Higgins, above n2 at 109-110.

⁸⁵ The harshness of vicarious liability is usually tempered by the incorporation of a mental element. In NZ, under s340(3) it must be proved that the director knew or could reasonably be expected to have known the offence was to be or was being committed. In the UK, s177(1) the offence must be committed with the consent or connivance, or attributable to the neglect of, the officer for liability to arise. However, in Canada, s280(1) CEPA vicarious liability is imposed on any director or officer “who is in a position to direct or influence the corporation’s policies”.

⁸⁶ Gray, above n1 at 221.

⁸⁷ At 219.

⁸⁸ Falk, above n13 at 93. This is reminiscent of the *dolus specialis* of genocide.

⁸⁹ Rauxloh, above n10.

⁹⁰ EA Preamble, clause 6. Further, clause 4 states that Ecocide “creates an international and transboundary duty of care”, clause 5 refers to the “explicit responsibility” imposed over all “...CEOs, Directors and any person(s) who exercise rights, implicit or explicit, over a given territory”; clause 8(i) lists as one of the regime’s primary purposes as “hold[ing] persons to public account”; and clause 11 states that “this Act creates a legal duty of accountability and restorative justice obligations”.

rather than automatically attributing liability. Imposing negligence as a variant of fault-based liability is not only consistent with domestic environmental law,⁹¹ but commentators argue that “the fact that international environmental law has made so much of the precautionary principle would seem to be conducive to a greater recognition of liability by negligence”.⁹² In addition, Mégret argues that a failure to properly monitor is “akin to negligence in cases where the superior ‘should have known’ that they were committing certain crimes”.⁹³ The constructive knowledge requirement under the command responsibility principle, on which liability for Ecocide is based, is therefore equated to negligence.

iii. *Conclusions*

There are two possible ways to accommodate a change to a fault-based standard of liability. The first is to amend the drafting of the Act to explicitly introduce a *mens rea* element. Logically, this could take the form of a knowledge or constructive knowledge requirement. The other is to remove the explicit ban on strict liability in s12, and interpret s13 to impose a criminal negligence standard, with the onus on the prosecution. Either option would be consonant with general principle, and consistent with the command responsibility principle on which liability is based.

A final observation must be made. Imposing a standard of liability inconsistent with both general principle and the sources for the provisions is deliberate, and does not belie a failure to understand the general principles of criminal categorisations outlined above. It is a policy choice as part of a campaign aiming to engender a “shift in conscience” to break down a “system that pushes profit above all other considerations”⁹⁴ and, if necessary, prohibit destructive practice rather than simply minimising it.⁹⁵

⁹¹ Howarth, above n35 at 104 discusses the possibility of convicting corporate officers on the basis of negligence in the UK context, and refers to US authority suggesting that “‘being a Director of a company which harms the environment is not a position to take up lightly. Personal liability is the norm” (PA Smith "Criminal and Civil Liability of Company Directors and Senior Managers" (Paper presented at the Environmental Law and Practice, London, 7 November 1990)).

⁹² Frédéric Mégret "The Case for a General International Crime Against the Environment" (3 April 2010) Social Science Research Network <
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1583968 > at 14-15.

⁹³ At 14.

⁹⁴ Higgins, above n2 at 173. The bottom line for many when considering legislation aimed at environmental protection is to limit its scope where it intersects with individuals’ rights to pursue profit-making activities: a major argument against the imposition of a high degree of liability is that

II. Application of the Act

The focus of the Ecocide Act⁹⁶ – and the campaign in general – is on the culpability of *individuals*, not fictional corporations. This is consonant with both the Rome Statute, which has jurisdiction only over natural persons,⁹⁷ and the general principle of individual criminal responsibility expounded in the judgment from the Nürnberg Tribunal.⁹⁸

Section 13(1) provides the major basis for liability under the Act:

13. Superior Responsibility

(1) Any director, partner, leader and or other person in a position of superior responsibility is responsible for offences committed by members of staff under his authority, and is responsible as a result of his authority over such staff, where he fails to take all necessary measures within his power to prevent or stop all steps that lead to the commission of the crime of Ecocide.

Section 13 is specifically based on the military principle of indirect command responsibility⁹⁹ that holds commanders personally responsible for war crimes committed by members of their forces,¹⁰⁰ “because the latter, being his subordinate, is under his control”.¹⁰¹ This principle is also known as the *Yamashita* standard, after the

“well-qualified business people may be reluctant to take up directorships”, which “could be detrimental to the achievement of the company's profit and wealth maximisation objectives (Michelle Welsh and Helen Anderson "Directors' Personal Liability for Corporate Fault: An Alternative Model" (2005) 26 *Adel L Rev* at 305 and 308).

⁹⁵ See Higgins, above n2 at XVI-XVII

⁹⁶ Notwithstanding that it is drafted to apply to natural and fictional persons, widening the international ambit for the domestic context. See s12, which seems to cover a “company, organisation, partnership or other legal entity”, a phrase drafted into the Act numerous times (see ss3-8).

⁹⁷ See Art 25(1). In 2011, Regina Rauxloh suggested amending the Rome Statute on similar criteria to Higgins, but proposed extending jurisdiction to legal persons (including corporations) rather than finding individuals within the corporation (see Rauxloh, above n10).

⁹⁸ The most well-known passage of the judgment reads: “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced” (International Military Tribunal at Nuremberg, Judgment of 1 October 1946 in *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany* Part 22 (22nd August, 1946 to 1st October, 1946). This principle is strongly visible in the campaign literature, for instance Higgins’ view that ‘only a human can evade a responsibility, duty or obligation’ (Higgins, above n2 at 107).

⁹⁹ Higgins, above n2 at 108-110

¹⁰⁰ Levine, above n83 at 1.

¹⁰¹ *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 (Commentary), ICRC/Martinus Nijhoff Publishers, Leiden, 1987, p. 1013 in Jamie Williamson "Some Considerations

first international trial against a commander for “failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes”.¹⁰² While the result of this case is considered controversial, the general principle of indirect command responsibility remains good law, and was subsequently codified in several international criminal instruments¹⁰³ including Art 28 of the Rome Statute. Art 28 materially provides that liability arises where a superior has effective command or control over a subordinate, they know or should know from the circumstances of the commission (or imminent commission) of criminal acts,¹⁰⁴ and they fail to take the necessary and reasonable measures to prevent or punish commission of the acts.¹⁰⁵

However, several aspects of s13 deviate significantly from the principle of command responsibility. Leaving aside the problematic question of how s13 could be incorporated within or alongside Art 28,¹⁰⁶ the following analysis discusses the general and substantive issues with s13.

a. Corporate context

A preliminary issue is that the individuals targeted by Ecocide are those in private industry: the proposal aims to look beyond fictional corporations to impose an “overriding duty of care to the territory within which they are working”¹⁰⁷ on high-ranked officers in control¹⁰⁸ – a sort of Corporate [*Officer*] Social Responsibility.¹⁰⁹

on Command Responsibility and Criminal Liability" 30-06-2008 Article International Review of the Red Cross No. 870 (available at <www.icrc.org/eng/assets/files/other/irrc-870_williamson.pdf> at 306.

¹⁰² *In Re Yamashita* 327 US 1 (1946) at 13-14 (in Levine, above n83 at 3).

¹⁰³ It was codified in Art 86(2) of the 1977 Additional Protocol I to the Geneva Convention 1949. In addition, express formulations can also be found in Art 6 of the ILC Draft Code of Crimes Against the Peace and Security of Mankind, Art 7(3) of the ICTY Statute, Art 6(3) of the ICTR statute.

¹⁰⁴ Art 28 Rome Statute is unique from the other incarnations of command responsibility at international law in that it provides a slightly different test for non-military superiors: they must either know or consciously disregard information, considered a higher test than for military superiors in that it necessitates an element of *certainty* rather than mere *possibility* in relation to the commission of the crimes (Williamson, above n101 at 308). It would be an awkward fit to introduce s13 alongside Art 28, as it precisely envisages a type of non-military superior yet imposes a different test to Art 28(b).

¹⁰⁵ At 306-307.

¹⁰⁶ Section 13 liability, based as it is on Art 28, represents a further instance where the Act's incorporation into the Rome Statute would be problematic.

¹⁰⁷ Higgins, above n4 at 8.

¹⁰⁸ This term is hereby used to refer to directors, partners, leaders or others involved in a position of responsibility within a company, organisation, partnership or other legal entity.

However, Ecocide is intended to sit alongside genocide, crimes against humanity, war crimes and the crime of aggression as a Rome Statute crime. The ICC is a forum borne out of the “unimaginable atrocities” of the 20th century and “limited to the most serious crimes of concern to the international community as a whole”.¹¹⁰ While Art 28 technically applies to non-military superiors, this application is intended to be restricted to “civilian superiors [who] clearly played a substantial role in overseeing and directing violations of IHL [international humanitarian law], crimes against humanity and genocide”, such as ministers, mayors and heads of state.¹¹¹ Evidently, there is a strong IHL character to its application.

Consequently, it is immediately apparent that Ecocide is at odds with Art 28. Higgins makes two arguments for locating Ecocide in the Rome Statute. The first is that “the capacity of ecocide to be trans-boundary and multi-jurisdictional necessitates legislation of international scope”.¹¹² While this may be true, other international mechanisms than the ICC are available to address international environmental damage.¹¹³ Her second argument is that “ecocide leads to resource depletion, and where there is escalation of resource depletion, war comes chasing close behind”.¹¹⁴ However, a link is missing: warfare is an international issue relating to state activity, not a domestic issue relating to private citizen activity. It is entirely inappropriate to hold individuals criminally liable at international law on the basis that states *may* ultimately go to war as a result of their activities.

There is no compelling argument to extend ICC individual responsibility to the *corporate* context. The proposal inexpediently marries two ill-fitting branches of the law, in order to achieve the effect available at domestic law but with the gloss of ICC legitimacy.

¹⁰⁹ This doctrine is described in the following way: “as a result of mounting public pressure, consumer awareness, and other forces, the multinational enterprise is forced to self-regulate in the sphere of human rights (broadly understood) and the environment” (Ilias Bantekas “Corporate Social Responsibility in International Law” (2004) 22 B U Int’l L J 309).

¹¹⁰ Preamble and Art 5 Rome Statute.

¹¹¹ Williamson, above n101 at 307-309.

¹¹² Higgins, above n4 at 9.

¹¹³ See Gray, above n1.

¹¹⁴ Higgins, above n4 at 9.

b. Elements of s13

i. "Authority"

Under Art 28, the nexus between the subordinate's criminal act and the superior's liability is the "effective control" of the superior. Provided this is met, "one is duty-bound as a commander to intervene when acts of subordinates constitute or would constitute violations of IHL, and to prevent or repress these".¹¹⁵ However, the Court in *Čelebići* held that "international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures within his powers [...or] within his material possibility".¹¹⁶ A superior's control, and consequent responsibility, is fact-dependant; and liability should be imposed only where the superior *could* actually have prevented the crimes, consonant with its classification as imposing a fault-based standard of liability.

The equivalent phrase under s13 is "authority". Two problems arise with this element in relation to Ecocide. The first is abstract: any concept of "authority" assumes a direct *vertical* relationship between the director and members of staff. This is ostensibly justifiable on the basis of domestic corporate officer liability,¹¹⁷ a common means of deterring corporate activity,¹¹⁸ given that corporations themselves are accountable only through fines which become "quite literally, a cost of doing business".¹¹⁹ However, such liability arises on a *horizontal* basis, due to the superior's

¹¹⁵ Williamson, above n101 at 306.

¹¹⁶ *Prosecutor v Delalić et al. (Čelebići)*, Judgment, Case No. it-96-21-T, 16 November 1998 at 311.

¹¹⁷ VS Khanna "Corporate Criminal Liability: What Purpose Does it Serve?" (1996) 109 Harvard Law Review at 1477-1478 [emphasis added]. Bishop neatly summarises the rationale for corporate officers' liability in the following way: "if the upper echelons of a company are aware that if the organisation for which they are responsible engages in activities which constitute environmental crime, which in turn creates a significant possibility of imprisonment, then a real incentive is provided to put in place mechanisms to ensure full regulatory compliance" (Bishop, above n35 at 291).

Strantz cites Dickson J's observation in *R v Sault Ste. Marie* at 1322 that "The element of control, particularly by those in charge of businesses [sic] activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger" (Strantz, above n57 at 1240).

¹¹⁸ For instance, in environmental jurisdictions alone: NZ's (s340(3) Resource Management Act 1992), the UK's (s177(1) Water Act 1989) and South Africa's (s34(7) National Environmental Management Act 1998). This liability also features in Canadian federal legislation (s280(1) Canadian Environmental Protection Act 1999) and in legislation from some Australian jurisdictions (s169(1) Protection of the Environment Operations Act 1997 in NSW).

¹¹⁹ Norm Keith "Evolution of Corporate Accountability: From Moral Panic to Corporate Social Responsibility" (2010) 11(3) Business Law International 247 at 256. Corporations are said to prefer fines, which can be passed on to consumers and end users (Keith, at 248-249). This dynamic is captured in the witticism that "when the corporation catches a cold, someone else sneezes" (J Coffee "No soul to damn: no body to kick: an unscandalized inquiry into the problem of corporate

position or functions within the corporate structure; and does *not* arise directly in relation to the responsible employee. The vertical relationship envisaged here is artificial in the corporate context, as it effectively ignores the corporation: employee A is the agent of *company B*, not director C: any relationship between A and C is necessarily filtered *through B*, the *only* source of rights or duties for either.

The second issue is more substantive. While at first instance the concept of “authority” equates to Art 28’s “effective control”, this term was interpreted by all parties in the mock trial as a necessary implication of holding a position of superior responsibility within a corporation, rather than an element of liability.¹²⁰ It does not therefore appear open to a defendant to argue that he lacked authority or control over the perpetrator and could not *in fact* have prevented the offence. While this interpretation is in harmony with the Act’s current strict liability standard, it would undermine the proposed reinterpretation of the Act as imposing a fault-based standard of liability. As such, the requirement of “authority” should similarly be reinterpreted, as a substantive element in line with Art 28.

ii. “All necessary measures”

Art 28 requires that “all necessary **and reasonable** measures” be taken to prevent or repress commission of the crime. However, s13 requires only that “all necessary measures” be taken, and no justification is given in the campaign literature as to why “reasonable” has been omitted. A compound test requiring both limbs is preferable, as “reasonable” encompasses a wider range of measures, thus requiring more of the individuals the proposal intends to target. Amending the proposal to include this second limb would not only further the Act’s purpose but would be in line with Art 28, its ostensible source provision.

punishment” (1980) 79 Michigan Law Review at 287). For more on corporate accountability generally, which is beyond the scope of this paper, see Keith, above n119 and Jem Bendell “Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement” United Nations Technology, Business and Science Programme Paper Number 13, June 2004.

¹²⁰ The indictments of both defendants use the phrasing “in his role as chief executive officer [the defendant] had authority over and responsibility for [the operation(s) which caused the alleged ecocide]. Further, Bannerman was asked whether, in his capacity as CEO, he had “authority and responsibility over [the corporation’s] operations”, to which he replied that he did not dispute it (at 107-108). Further, the judge refers to the ecocidal act being “caused by [crew members] who were under Mr Bannerman’s authority as chief executive officer of [the corporation]” (at 183), and to the operations being carried out under his authority (*R v Bannerman & Tench* at 187).

What would *constitute* all necessary and reasonable measures under the Ecocide Act is unknown, given that there is no discussion of this element in campaign literature, and there is obviously no jurisprudence yet which could help to establish parameters of an issue that would in any event be highly fact-dependant. However, IHL jurisprudence on the command responsibility principle suggests that the issue of what measures to take is closely related to the issue of effective control (or, here, “authority”): the Appeals Chamber in *Blaškić* held that “necessary and reasonable measures are such that can be taken within the competence of a commander as evidenced by the degree of effective control he wielded over his subordinates”.¹²¹ It is appropriate to similarly conclude in relation to Ecocide that the “applicable test is more means-based than results-oriented, and that the measures to be taken must be within the power of the accused”.¹²² The result would be fact-dependent, although in the corporate context it could loosely turn on the ability to supervise, inspect and improve business methods,¹²³ it would be open to the accused to argue that their authority was such that no reasonable or necessary measures could have been taken.

ii. “His” failure to take measures

A final problematic aspect to the operation of s13 arises in relation to the mock trial interpretation of the “failure to take all necessary measures”.¹²⁴ The judge ruled that the Act imposed an absolute requirement that all necessary measures should be taken to prevent Ecocide, and “if **those measures are not taken by employees** under [...] the authority of the chief executive charged in the particular case, then the offence is attributable to that chief executive”.¹²⁵ This interprets the phrase “**he** fails to take all necessary measures within **his** power” as referring to the member of staff, not the superior. This effectively reads down s13 as imposing vicarious liability, where *anyone’s* failure to take measures is attributed up the chain of command, rather than the indirect personal liability found in the control provisions of international law.

¹²¹ *Prosecutor v. Tihomir Blaškić*, Appeals Judgment, 29 July 2004, Case No. IT-95-14-A 29 July 2004, at 72.

¹²² Williamson, above n101 at 311.

¹²³ As was the case in *R v Sault Ste. Marie*.

¹²⁴ An interesting departure from Art 28, which requires that all necessary *and reasonable* measures be taken – arguably a higher standard than that imposed here. A further departure is that Art 28 requires that, in the event the crime has been committed, the superior “submit the matter to the competent authorities for investigation and prosecution”. No such requirement is imposed under s13.

¹²⁵ *R v Bannerman & Tench* at 29 [emphasis added].

There are four reasons this interpretation is not justifiable. First, it demonstrates an inconsistent interpretation of the Act as a whole, which already contains a derivative liability provision.¹²⁶ Section 13 should therefore be read to constitute a different basis of liability.

Second, it is a linguistically strained interpretation of the section: “his authority” refers to the individual accused while “members of staff” refers collectively to the subordinates committing the actual offences.¹²⁷ The final reference to “*his* failure to take measures within *his* power” is linguistically consistent with the previous references to the individual accused; to suddenly interpret this to refer to a single staff member within the previously collective class is illogical. The logical interpretation is that X is liable for Y’s offence that leads to Ecocide where X fails to take all necessary measures *within X’s power* to prevent or stop that offence.

Third, and crucially, this interpretation significantly reduces the threshold for liability. Under the logical interpretation emphasised above, liability arises only after an inquiry into the individual accused’s actions *in relation to* the actions of a subordinate, a two-step process. Under the judge’s interpretation, liability is *automatically* attributed after establishing the subordinate’s offending. Not only does this remove the second stage of the process, but it directs the inquiry *away* from the accused – contrary to principles of criminal law, and ironically in contrast to the campaign’s ostensible focus on individual responsibility.

Finally, this interpretation is a complete departure from the operation of the principle of command responsibility: it reinforces the Act’s current strict standard, rather than grounding liability in fault or personal responsibility. This interpretation is the proverbial nail in the coffin for any connection with command responsibility.

¹²⁶ **17. Culpability of a company, organisation, partnership, or any other legal entity**

(1) Where an offence under any provision of this Act committed by a company, organisation, partnership or any other legal entity is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or a person who was purporting to act in any such capacity, he as well as the company, organisation, partnership or any other legal entity shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

¹²⁷ Moreover, under the judge’s interpretation, the subordinate’s “offence” must be the failure to “prevent or stop” steps leading to Ecocide. This creates an awkward tiered system of liability where A is automatically liable for B who failed to prevent C’s offending. The correct interpretation would eliminate the top layer, rendering A responsible where they failed to prevent B’s offending.

c. Conclusions

Aside altogether from the conceptual problems of extending command responsibility to the corporate context, s13 deviates significantly from the principle, encapsulated in Art 28; undermining any purported legitimacy. To continue to ground s13 in this principle, its nexus to international criminal law, s13 must be interpreted in a consistent manner, as proposed below.

III. Proposed Amendments

The most justifiable approach in light of traditional categorisations of offences and existing law is to interpret s13 as an objective fault-based standard of liability. The adoption of a fault-based standard would be consonant with the general principles of criminal law outlined above, while still imposing a deterrent and corresponding pre-emptive duty on individuals in corporate positions of superior responsibility.

This position must be carried through to the interpretation of the substantive elements of s13. The element of “authority” should be considered a substantive element of the provision, the “necessary measures” test should be expanded to include the limb of “reasonable measures”, and the s13 inquiry should be into the failures of the *accused*, a higher threshold than the trial interpretation.

Having discussed both the drafting of the Act and its substantive provisions, this paper now turns to a case study to explore the likely application and utility of such a statute in NZ, both as currently drafted and under the amended terms as outlined above.

CHAPTER THREE – Case Study: Dirty Dairying in New Zealand

This part of the paper moves from theory to application, by examining the possible value of a crime of Ecocide in the NZ context, using the case study of ‘dirty dairying’. This chapter first considers how dirty dairying is dealt with under the RMA, and then predicts the likely operation of Ecocide as drafted and *per* the amendments proposed above.

I. Dairying in New Zealand

NZ has long been known for its “high environmental standards and clean green image”.¹²⁸ Freshwater ecosystems (such as rivers and lakes) are “an integral part of our national identity”, linked as they are to our tourism and cultural activities.¹²⁹ However, water quality is steadily declining due to discharges of effluent from dairy farms into these waterways, a problem compounded by intensification of the industry.¹³⁰ Fish & Game’s 2001 “dirty dairying” media campaign has raised consumer awareness of industry environmental practices;¹³¹ however this ecocentric view faces the challenge that dairying is crucial to our economic sector.¹³² These interests are inconsistent: as the OAG Report puts it, “one of the most notable challenges to managing freshwater quality is balancing the rural sector’s economic contribution with everyone’s desire for clean lakes and rivers.”¹³³

¹²⁸ Fonterra Co-Operative Group Limited *Annual Review 2008* (Auckland, 2008b) in Douglas Dibley *‘Dirty Dairying’: What are the processes responsible for eutrophication within the Lake Rotorua Catchment and what strategies can be implemented to alleviate these?* (University of Canterbury, 2009) at 6.

¹²⁹ Dibley, at 6.

¹³⁰ Office of the Auditor-General *Managing freshwater quality: Challenges for regional councils* (September 2011) at 2.46.

¹³¹ In addition, world markets are becoming increasingly interested in the cleanliness of dairy farms and the practices that are carried out there (1.4). This means that “it is vital that industry is seen to be proactive (55) in addressing environmental concerns arising from dairying practices” (Dibley, above n128 at 54-55).

¹³² Fonterra Co-Operative Group Limited is NZ’s largest company (co-operatively owned by 10,500 dairy farmers, representing 95% of NZ’s dairy farmers) and “only true global business” (Dairy Environment Review Group *Dairy Industry Strategy for Sustainable Environmental Management* (2006)). It posted revenue of \$19.9 billion in the 2011 financial year (Fonterra Co-operative Group Limited *Fonterra Annual Report 2011* (2011)), and is responsible for over a third of international dairy trade.

¹³³ OAG Report, above n130 at 5.

Pollution from the dairying industry occurs in two major ways: “overland surface water flow and leaching through to groundwater flow”.¹³⁴ In addition, discharges of pollutants can originate from point sources (from a single facility at a known location)¹³⁵ or non-point sources (that “do not have a single point of origin, and may include pollutants that have run off wide areas of disturbed or developed land after rainfall”).¹³⁶ Currently, the main threat to freshwater quality is non-point source “contamination of nitrogen and phosphorus, which is lost either as leachate to groundwater or via overland flow to surface water”.¹³⁷

As highlighted in the recent OAG Report on freshwater quality in NZ, “central government, district and city councils, iwi, the primary production sector, environmental groups, and recreational water users all have an interest and a role to play in managing freshwater quality”.¹³⁸ In terms of farmers’ responsibility to take action, implementation of measures known to be effective have been lacking: “there’s a bit of fiddling while Rome burns... unless we take action, we’re going to see continued water degradation and be in a worse position in five or ten years time” observes Fish & Game’s Neil Deans.¹³⁹ There have been several industry responses to the problem thus far that may have been “instrumental in changing attitudes and actions amongst the majority of dairy farmers”¹⁴⁰ but have produced far from satisfactory results. A significant early response was the signing in May 2003 of the “cross disciplinary”¹⁴¹ Dairying and Clean Streams Accord, a voluntary agreement between Fonterra, the Minister of Agriculture, the Minister for the Environment and regional councils to improve the environmental performance of dairying. The Accord

¹³⁴ Environment Bay of Plenty *The Rotorua Lakes Protection and Restoration Programme: outline of project structure and timeline* (EBOP 2004/08) in Dibley, above n128 at 24.

¹³⁵ Ministry for the Environment "Main Sources of Pollution in New Zealand's fresh water" (December 2007) < <http://www.mfe.govt.nz/environmental-reporting/freshwater/river/nutrients/sources.html> >. This goes on to say that until the 1970s, this was the main source of water pollution (directly into water systems). However, since the Water and Soil Conservation Act and the RMA (as well as upgrades to wastewater treatment systems), the trend now is to apply effluent into land rather than directly into waterways.

¹³⁶ Ibid.

¹³⁷ Dibley, above n128 at 6-7.

¹³⁸ OAG Report, above n130 at 2.9.

¹³⁹ Fiona Proffitt "How clean are our rivers?" (1 July 2010) NIWA <<http://www.niwa.co.nz/publications/wa/water-atmosphere-1-july-2010/how-clean-are-our-rivers>>.

¹⁴⁰ Neil Deans & Kevin Hackwell *Dairying and Declining Water Quality: Why has the Dairying and Clean Streams Accord not delivered cleaner streams?* (October 2008) at 32.

¹⁴¹ Dibley, above n128 at 11.

comprises five objectives;¹⁴² however, in the nine years since the Accord was signed, only one has been met.¹⁴³ Further, the Accord has been criticized both in a 2008 report commissioned by Fish & Game and Forest & Bird,¹⁴⁴ and by scientific writers.¹⁴⁵ Supporting measures and initiatives to improve compliance have also been put in place, such as Fonterra's Effluent Improvement System and subsequent 'Every Farm Every Year' program. However, the former faced problems with fair and consistent implementation,¹⁴⁶ and the latter has patently not met its goals, with all 10,5000 farms having each been visited only once in two years, not each year as the name suggests.

Notwithstanding various measures and initiatives, industry players are failing to adequately respond to the serious issue of dirty dairying. However, responsibility also lies with State regulatory bodies. Crucially, Fish and Game's report found that the Accord is "no substitute for enforcement of rigorous compliance by farmers and sound monitoring by regional councils",¹⁴⁷ pointing out that without the Accord, stronger measures may have been introduced and enforced by regional councils. The following part of the paper outlines the current legislative regime applicable to respond to the issue.

¹⁴² Exclusion of cattle from streams, rivers, lakes and their banks; creation of bridges or culverts at regular crossing points; appropriate treatment and discharge of farm dairy effluent; effective management of nutrients to minimize losses to ground and surface water and fencing of regionally significant or important wetlands (and protection of their natural water regimes).

¹⁴³ Less than 1% of regular stock crossing points remain to be fenced. However, cattle are excluded from waterways on only 84% of Fonterra-supplying farms (compared to the target of 90% by 2012); only 69% of farms are fully compliant (compared to the expectation that all would be immediately fully compliant), and this varies across regions from 40% to 95%; only 46% of farms have a nutrient management plan in place (compared to the target of 100% by 2007); and only one region, Taranaki, has met the 2007 target of fencing 90% of its regionally significant wetlands (Ministry of Agriculture and Forestry *The Dairying and Clean Streams Accord: Snapshot of Progress 2010/2011* (December 2011)).

¹⁴⁴ A failure to focus on actual measurable improvements in water quality; a lack of independent auditing of farmers' self-reporting (the source of Accord statistics); and, chiefly, the fact that as a voluntary "soft" mechanism it is 'unable to deal with the significant minority of dairy farmers who have failed to comply with its requirements' (Hackwell, above n140 at 32).

¹⁴⁵ To come within the Accord, 'waterway' must be 'deeper than a red-band gumboot, wider than a stride and permanently flowing' (MAF *Snapshot*, above n143 at 13). This excludes small streams (which provide important breeding and nursery habitat for fisheries and wildlife and, if left unprotected, still contribute to the dairy pollution entering the main water body (NSF Newsletter Jan 2012 at 16)), 'where the greatest effects of dairying are seen' (Proffitt, above n139).

¹⁴⁶ MAF *Snapshot*, above n143 at 10.

¹⁴⁷ Hackwell, above n140 at 5.

II. Dirty Dairying: under the Resource Management Act

The RMA is the principal organ in NZ for regulating land use. While s9 provides that land use is presumed to be permissible, certain activities, including dairy effluent discharges, must be carried out in accordance with Regional Plans and permits granted by regional councils. Councils therefore exercise an ongoing monitoring and compliance function in relation to these activities, and “have the main responsibility for managing freshwater quality”.¹⁴⁸ However, they have been criticized for variously failing to implement policy in the first place,¹⁴⁹ failing to adequately measure and report on compliance,¹⁵⁰ or failing to address non-compliance.¹⁵¹ The OAG Report made six recommendations applicable to all regional and unitary councils¹⁵² in order to improve monitoring of freshwater quality, co-ordination with appropriate stakeholders, and impartial prosecutions.¹⁵³ While inadequate council management is therefore a major factor in the dirty dairying problem, the scope of this paper is confined to councils’ *enforcement* function, and the role of the RMA as a legal mechanism to respond to instances of dirty dairying. Although prosecutions have increased in recent years,¹⁵⁴ water quality continues to decline.¹⁵⁵

One explanation for the disappointing status quo is the imposition of inadequate sentences (where prosecutions are taken). When the RMA was introduced, the Court in *Machinery Movers* observed that the increased possible sanctions (separate criminal liability for directors and managers and the possibility of imprisonment)

¹⁴⁸ OAG report, above n130 at 2.9.

¹⁴⁹ Dibley, above n128 at 56.

¹⁵⁰ The OAG report found this was true of Horizons Regional Council and Environment Southland (above n130 at 3.72). It also found that Waikato Regional Council did not have adequate systems for recording performance or consistency in categorising findings (at 5.22).

¹⁵¹ The report found that Waikato Regional Council did not have consistent strategies for addressing non-compliance (above n130 at 5.22), and recommended it needed to improve its processes for resolving non-compliance (at 5.4). It also found that Environment Southland could be slow to take enforcement action when non-compliance was ongoing (at 5.5). In contrast, Horizons Regional Council had “taken a strong approach to using formal enforcement tools... and reports low non-compliance rates” (at 5.3).

¹⁵² OAG report, above n130 at 7. It also made two recommendations to the Ministry for the Environment.

¹⁵³ For more, see Appendix 1 to the OAG report, above n130 at 73-74.

¹⁵⁴ There have been 151 prosecutions since 1 June 2008, involving over 300 charges against 198 individuals or companies (plus 1698 abatement notices and 1564 infringement notices for lesser offences). These have generated over \$3 million in fines from 1 July 2008-1 July 2012 (Marty Sharpe "Fonterra director takes dirty dairy rap" (20 June 2012) Stuff NZ <<http://www.stuff.co.nz/business/farming/7133725/Fonterra-director-takes-dirty-dairy-rap> >).

¹⁵⁵ Proffitt, above n139.

“constitute clear legislative direction to the Courts to ensure that higher penalties are imposed that will have a significant deterrent quality”,¹⁵⁶ which placed a greater emphasis on environmental protection.¹⁵⁷ However, case law since then is concerning, notwithstanding the substantial increases to the maximum fines under s338(1) ushered in during 2009.¹⁵⁸ Imprisonment has not yet been imposed in dairy effluent cases, and courts appear to barely consider it an option. *Waikato Regional Council v GA & BG Chick Ltd* employed a three-tier classification for dairy effluent sentencing purposes according to levels of seriousness, with the third class – “more than moderately serious” – indicating a starting point of \$30,000 or more should be adopted.¹⁵⁹ This suggests even the worst dirty dairying will attract a fine rather than imprisonment. This attitude pervades the case law, even where recidivist offenders are involved. The defendant in *Taranaki Regional Council v Yates* was given a financial penalty and effectively let off with a warning: “as a person who now has five convictions for dairy effluent offending, you need to be aware that offences under the Resource Management Act carry a potential penalty of up to two years’ imprisonment”¹⁶⁰.

However, a more worrying possible explanation concerns the application of liability under the RMA. Prosecutions are not taken against those offsite dairy industry players who are at the top of the chain of command but removed from day-to-day management of the farms. Not all farming structures have such an individual, but prosecuting authorities are yet to take action against this class, preferring to charge the company itself or individuals closer to the offending. Neatly, Ecocide intends to capture precisely such individuals: if the definition could be met in dairy effluent discharge cases, Ecocide may impose liability on those not at present caught by the RMA, which may effect long-sought change. This paper first explores the position of dirty dairy prosecutions under the RMA.

¹⁵⁶ *Machinery Movers v Auckland Regional Council* [1993] 1 NZLR 492 at 668. The court went on to say that “if fines are too low, they will be regarded a minor license fee for offending and convey the idea that the law may be broken with relative impunity” (at 668).

¹⁵⁷ John R Billington "Recent New Zealand Efforts to Combat Environmental Crime" (1995) 6(2) Criminal Law Forum 389 at 401 and 404.

¹⁵⁸ Under the Resource Management (Simplifying and Streamlining) Amendment Act 2009, individuals are liable to a fine of up to \$200,000 or 2 years imprisonment, while corporate offenders are liable to a penalty of up to \$600,000.

¹⁵⁹ *Waikato Regional Council v G A & B G Chick Ltd* (2007) 14 ELRNZ 291 at [23]- [26]. Although this case was in 2007, prior to the amendments increasing the penalties, subsequent cases have continued to rely on it as a guide (such as *Crafar v Waikato Regional Council* HC HAM CRI-2009-419-000067, 13 September 2010).

¹⁶⁰ *Taranaki Regional Council v Yates* EC NWP CRI-2009-043-004643, 11 February 2010 at [35].

a. Offence

The relevant offence provision is s338(1)(a), which provides that “every person commits an offence against this Act who contravenes, or permits a contravention of [...] section 15”. Section 15(1) provides that:

No person may discharge any –

- (a) Contaminant... into water; or
- (b) Contaminant onto or into land in circumstances which may result in that contaminant (or any other contaminant emanating as a result of natural process from that contaminant) entering water.

...

unless the discharge is expressly allowed by a ... resource consent.

Dairy effluent plainly comes within the definition of a contaminant.¹⁶¹ When it is discharged outside the terms of a resource consent, s15 is contravened.

b. Application

The issue is then who may be prosecuted for the fact of the discharge. The discussion below is structured in reference to dairy industry players and their proximity to the offending, rather than the RMA’s “cascade” of criminal liability that overlaps in its application. However, the classification submitted by counsel in *Crafar* is a helpful reference: persons (both natural and fictional)¹⁶² are liable under the RMA who –

- a. Act or omit to act;
- b. Permit another to breach;
- c. Have an agent who contravenes the Act, creating vicarious liability;
- d. Is a director of a company which breaches the Act when that director has given authority, permission, or consent and knew or could reasonably have known that the breach was to occur, but failed to intervene to prevent it.¹⁶³

¹⁶¹ Section 2 RMA defines ‘contaminant’ as including:

[a]ny substance [...] that either by itself or in combination with the same, similar, or other substances [...] -

(a) when discharged into water, changes or is likely to change the physical, chemical, or biological condition of water.

¹⁶² Section 2 defines “person” to include “a body of persons, whether corporate or unincorporate”.

¹⁶³ *Crafar* at [249]. See *Northland Regional Council v Pinney* DC Whangarei CRN-09027500764, 18 March 2011 at [40]-[41] for a similar “stepped” approach.

i. *Primary: responsible individuals*

Personal acts or omissions resulting in effluent discharge constitute a “contravention” of s15.¹⁶⁴ Onsite individuals directly responsible for deliberate or negligent discharges are clearly caught under (a) of the above classification.

ii. *Secondary: companies, managers and directors*

Direct liability

An individual or company can also be liable as a primary offender, “notwithstanding that the particular actions giving rise to an offence were carried out by an agent, employee or delegate of that individual or company”.¹⁶⁵ The Act defines “discharge” to include “allow to escape”. This was held in *McKnight v Biogas* to be satisfied where there is “awareness of facts from which a reasonable person would recognise that escape could occur. In that case, failure to investigate and take appropriate preventive steps would amount to allowing an escape should it subsequently occur.¹⁶⁶ This test was applied in *Southland Regional Council v Sandstone*,¹⁶⁷ where the Court held that the owner company, despite having contracted out the management of the farm, was faced with an effluent discharge operation that contained inherent risks. It also held that the company took no subsequent precautions to minimise the risk of discharge, despite the fact it had happened previously and the company was aware of circumstances that would allow escape of effluent.¹⁶⁸

¹⁶⁴ For instance *Canterbury Regional Council v White Gold Limited* DC Christchurch CRI-2011-009-004949, 18 June 2012.

¹⁶⁵ This was established in *Sandstone Dairy Limited v Southland Regional Council* HC Invercargill CRI 2007-425-000001, 15 May 2007; as noted in *Otago Regional Council v Lawrence* EC Dunedin CRI-2008-005-000136, 3 February 2009 at [34].

¹⁶⁶ *McKnight v New Zealand Biogas Industries Ltd* [1994] 2 NZLR 664, at p14. The Act therefore “encompasses the consequences of activities carried out by a person” provided there is a causal connection between the person and the discharge.

¹⁶⁷ *Sandstone Dairy Limited v Southland Regional Council*; *Southland Regional Council v Sandstone Dairy Limited* DC Invercargill CRN 0601 7500043, 14 December 2006 at [27]-[28], approved on appeal in *Sandstone Dairy Limited v Southland Regional Council* at [22].

¹⁶⁸ *Sandstone Dairy Limited v Southland Regional Council* at [33].

Direct liability also arises under s338 for persons who “permit” discharges. In *Hillside*¹⁶⁹, the fifth dairy effluent discharge prosecution of brothers Allan and Frank Crafar,¹⁷⁰ Judge Newhook held that “permits” itself encompasses:

- a) Providing or affording opportunity for acts or omissions;
- b) Allowing acts or omissions to be done or occur;
- c) Acquiescence to acts or omissions;
- d) Abstinance from prevention of acts or omissions;
- e) Tolerating acts or omissions.¹⁷¹

Andrews J on appeal considered this demonstrated a conclusion that “some degree of knowledge on the part of the Crafars had to be proved beyond reasonable doubt”, a test that the trial judge concluded was met.¹⁷² Andrews J agreed that the contraventions were ultimately the responsibility of the Crafars, and upheld their convictions for “permitting” them to occur. The judge in *Wakapua Farms* held that this confirmed that proof of knowledge of the actual discharge or overflow was not necessary, as “allowing, acquiescence, toleration or failure to prevent, can suffice”.¹⁷³

Vicarious liability

As an alternative to direct liability, companies or individuals may be vicariously liable under s340(1) for the actions of their agents or employees. However, this is subject to a defence in s340(2) which constitutes a two-step inquiry: (a) whether there is an awareness of facts from which a reasonable person should recognise that a discharge could occur, and (b) whether there is a failure to investigate and take proper steps, which “effectively mirrors the statutory defences in s341”.¹⁷⁴

¹⁶⁹ *Waikato Regional Council v Hillside Limited And Ors* DC TEA CRI-2008-019-500880, 20 July 2009.

¹⁷⁰ The Crafars have been described as “poster boys of dirty dairying” by Ian Balme, then-chair of Environment Waikato’s regulatory committee (Ian Balme “Dirty dairying has no place here in NZ” (19 August 2008) Stuff NZ < <http://www.stuff.co.nz/business/farming/587941/1-Dirty-dairying-has-no-place-here-in-NZ-i> >).

¹⁷¹ *Waikato Regional Council v Hillside Limited And Ors* at [262].

¹⁷² He held that the Crafar brothers had “extensive knowledge of the concerns of the council about actual and further potential breaches” (*Crafar v Waikato Regional Council* at [52] – [54]).

¹⁷³ *Manawatu-Wanganui Regional Council v Wakapua Farms Limited And Ors* DC Levin CRI-2011-031-000643, 22 February 2012 at [25].

¹⁷⁴ *Northland Regional Council v Pinney* at [76].

There is clearly a “considerable overlap between discharging, permitting, and vicarious liability”¹⁷⁵. The vicarious liability provisions have therefore been used to prosecute in similar situations to those outlined above. In *Otago Regional Council v Lawrence*, the defendant entered a share-milking agreement and put management of the operation in the hands of an employee¹⁷⁶, yet was found liable under s340(1).¹⁷⁷

Derivative Liability

Finally, s340(3) provides a quite distinct ground of derivative liability for directors and managers of companies convicted under the Act, arising purely on the basis of their position in relation to the company. However, certain stringent criteria must be met: the act constituting the offence must take place within their authority, permission or consent; they must know or reasonably be expected to know of the commission of the offence; and they must fail to take all reasonable steps to prevent or stop it.

At first glance, this seems aimed precisely at high level directors not caught under other provisions, to impose a deterrent measure other than fining the corporation (not always effective, as mentioned above). Thus far, however, s340(3) has only been used in the prosecution of individuals *also* charged directly under s338(1).¹⁷⁸ A possible explanation for this is strategic: liability for s338(1) offences is strict (s341),¹⁷⁹ while s340(3) contains knowledge requirements incumbent on the *prosecution* to prove. A more pragmatic explanation is that a director with constructive knowledge sufficient to satisfy s340(3) could likely also be considered to “permit” it under s338.

¹⁷⁵ At [77].

¹⁷⁶ *Otago Regional Council v Lawrence* at [3].

¹⁷⁷ This was never actually made explicit; but the defence was raised under s340(2), and the judge found that this did not apply. He went on to hold at [35] that having reached those conclusions, it was not necessary to make a finding under the alternative ground of primary liability, because the same outcome would be reached under s340(1) or s338(1), as had been the case in *Sandstone Dairy Limited v Southland Regional Council* at [38].

¹⁷⁸ For instance, in *Southland Regional Council v MacPherson*, in addition to individual and company charges, three defendants were found liable under both s338(1) and s340(3) for having permitted discharges when they could reasonably have been expected to know that the discharge was taking place and did not take all reasonable steps to stop it (at [2]).

¹⁷⁹ This is more specific than the common law strict liability position outlined above: the Court in *Waikato Regional Council v Hillside Limited And Ors* held at [248] that the characterization of strict liability under the RMA requires proof that “a defendant knew what was going to occur”. S341(2) provides two statutory defences: the first is effectively an enhanced “due diligence” defence (Derek Nolan (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at 20.43), while the other can be invoked when the discharge was due to an unforeseeable event beyond the defendant’s control, and the defendant remedied or mitigated any adverse environmental effects.

It is evident that the RMA casts a wide, often overlapping, net with respect to dairy effluent discharge offences. It will catch any individuals directly responsible, and will extend direct or vicarious liability to managers, directors and companies provided they have at least some knowledge (to meet the requirements for “permitting” or vicarious liability), or constructive knowledge (s340(3)).

iii. *Tertiary: offsite, high-level directors*

However, one class of individuals does not come easily within the RMA regime: offsite directors removed from the day-to-day running of the farm. While such individuals are not present in every case – far from it – they nonetheless represent a sector of the industry yet to be prosecuted, notwithstanding s340(3) in particular. Consider Colin Armer: a farmer of 30 years’ experience who is now a director of about 90 farming companies,¹⁸⁰ including Fonterra. His company, Armer Farms Ltd, was convicted of effluent discharge after a pipe split in 2010, and fined \$72,000, yet Armer was not personally charged. It is unclear whether the failure to prosecute such individuals is because a prosecution would not succeed (as the requisite actual or constructive knowledge for direct, vicarious, or derivative liability could not be factually established) or whether a prosecution against onsite actors or the company itself is simply considered easier to prove and thus more likely to succeed.

However, the real reason for such offending is usually inadequate processes in place to monitor and manage the onsite systems:¹⁸¹ the offending in *Armer Farms* was characterised as a “systemic” failure that could have been prevented by better monitoring,¹⁸² and the offending in *Southland Regional Council v Antara AG Limited* was characterised as “systemic carelessness”.¹⁸³

This clearly acknowledges that the putting in place and monitoring of appropriate systems is a crucial factor in preventing offending. Arguably, this is precisely the

¹⁸⁰ In addition, he has 450 staff in total across the group (Sharpe, above n154).

¹⁸¹ *Manawatu-Wanganui Regional Council v Wakapua Farms Limited And Ors* at [27].

¹⁸² *Bay of Plenty Regional Council v Armer Farms (N.I.) Limited* DC Tauranga CRI-2011-070-000805, 25 June 2012 at [65] and [106].

¹⁸³ *Southland Regional Council v Antara AG Limited* DC Invercargill CRI-2008-025-001316, 22 May 2008. The judge at [10] refers to the inadequate attention or emphasis on proper management controls.

justification for derivative liability under s340(3): it is *directors* who are in a position to control the systems and infrastructure in place, and the prospect of personal liability would serve a vital deterrent effect in a way that fining the company cannot (see above). Judges have indicated a recent emphasis on the importance of deterrence,¹⁸⁴ and (admittedly in cases of secondary level players) have recognised that ultimate responsibility lies in the higher ranks: “the owner is the person who has the ability to change or implement the new infrastructure. The owner makes the decisions as to how much stock should be on the property.”¹⁸⁵

A total failure to prosecute offsite directors – because success is impossible or simply unlikely – sends a message that this (admittedly rare) class is exempt from the Act. Not only does this fail to directly deter those best placed to make changes, but it in effect creates a perverse incentive on such directors to know as little as possible about the workings of the farm so as to protect themselves from personal liability. Whether such individuals *would* be brought within the Act would be highly fact-dependent, but cannot be predicted with any certainty as no such prosecutions have yet been taken.

Regardless of whether the RMA applies, this limited class of individuals arguably comes squarely within the focus of Ecocide: high-level individuals, with the power to control infrastructure and decision making yet who can turn a blind eye to environmentally degrading consequences of their activity because the profit exceeds the likely fines. In theory, then, Ecocide is a perfect fit: the following part of the paper assesses whether Ecocide would hold value in practice.

¹⁸⁴ For instance, *Canterbury Regional Council v White Gold Limited* at [14]; a case where a total fine of \$90,000 was imposed. In addition, council environment regulation director Kim Drummond stated that the fine shows farmers will be facing harsher penalties for non-compliance (“White Gold fined \$90,000 for dirty dairying” (20 July 2012) Radio New Zealand <[http://www.radionz.co.nz/news/rural/111257/white-gold-fined-\\$90,000-for-dirty-dairying](http://www.radionz.co.nz/news/rural/111257/white-gold-fined-$90,000-for-dirty-dairying) >).

¹⁸⁵ *Northland Regional Council v Pinny & Bolton* DC Whangarei CRI-2009-027-003265, 27 April 2011 at [36].

III. Dirty Dairying under Ecocide

This paper turns now to the application of the proposed crime of Ecocide to the issue of dirty dairying. It assesses first whether the definition is met, then whether liability would arise under either the current drafting, or *per* the amendments proposed above.

a. Definition of Ecocide

i. *Ecosystem*

“A biological community of interdependent living organisms and their physical environment” is a broad definition and would plainly be met by any stream, river, lake or other waterway polluted by dairy effluent discharge.

ii. *Extensive damage, destruction or loss*

While *components* of an ecosystem may be “destroyed” or “lost” as a result of dirty dairying – members of a fish species, for instance, or aspects of the habitat itself – it is unlikely that either test could as yet be established. However, it is likely one or more of the criteria in s10 could be proved, thereby establishing “extensive damage” sufficient to satisfy the definition of Ecocide.¹⁸⁶ It must be noted, however, that each of the following inquiries is highly fact-dependant and this general assessment is necessarily speculative.

Impact of damage, based on the ICRC test for “severity” applicable to Art 8(2)(b)(iv), requires “serious or significant disruption or harm to human life, natural and economic resources or other assets”. Dairy effluent pollution affects water in several ways. First, nutrient enrichment¹⁸⁷ (predominantly of nitrogen and

¹⁸⁶ This discussion is concerned only with discharges falling *outside* the scope of resource consents, as discharges permitted by permit (for instance, the application of effluent to land, although under conditions specific to each permit) are necessary for the dairying context and, imposed as they are by the Government, are in compliance with the law. This can be distinguished from instances where defendants hold necessary permits in the ordinary course of business but the facts in issue are outside the scope of what is permitted (as was the case in the mock trial: *R v Bannerman & Tench* at 137).

¹⁸⁷ Also known as eutrophication. According to NIWA, “regional council monitoring published by the Minister for the Environment in 2006 tells us that many of our lakes are in bad shape: of 134 lakes monitored, 56 per cent are ‘eutrophic’ or worse“ (Proffitt, above n139). NZ’s aquatic systems are particularly sensitive to this and as such even small increases can have marked effects.

phosphorus) promotes algal blooms, including toxic cyanobacteria¹⁸⁸, which both reduce water clarity (thereby decreasing the aesthetic value),¹⁸⁹ and deplete oxygen levels leading to ‘large scale habitat destruction and anoxia within fish species which can ultimately decimate populations’.¹⁹⁰ Second, the BOD (or “bio-chemical oxygen demand”) of organic matter such as ammonia-N requires oxygen to be broken down which could otherwise be used by aquatic life.¹⁹¹ Third, the presence of ammonia can occur in concentrations which may lead to the degradation of flora and fauna.¹⁹² Finally, faecal contaminants can be transmitted which can transmit infectious diseases.¹⁹³ Such effects, if they arose on the facts, would clearly meet the test of “serious or significant disruption or harm” to natural resources.

Further, our economic and cultural (or “other”) assets are arguably affected. Estimates suggest tourism associated with Lake Rotorua could be affected by up to 20% or \$58 million ‘because of declining lake associated activities’¹⁹⁴ as a result of degraded water quality. Further, in the recent *White Gold* case, pollution of Lake Ellesmere, which itself “supported a range of aquatic values, including fisheries, native fishing, etc”,¹⁹⁵ damaged the property interests of the Ngai Tahu iwi who owned the lake bed under a Treaty of Waitangi settlement.

Duration is the second criterion in assessing damage. “Long-term” is defined by the ICRC as “lasting for a period of months, or approximately a season”. Once contaminants from effluent enter water supplies, they are taken up by plants (including macrophytes, or water weeds, and algae) which cause localised effects such as large swings in daily dissolved oxygen, blockage of the passage of water causing river levels to rise and possibly flood low-lying areas, and block irrigation intakes. These effects usually last for a period of several months or two seasons. Further, sediments and faecal microbes (viz. pathogens like *Campylobacter jejuni*)

¹⁸⁸ Proffitt, above n139.

¹⁸⁹ Dibley, above n128 at 19.

¹⁹⁰ Ibid.

¹⁹¹ Dairying and the Environment Committee *Managing Dairy Farm Effluent* (3rd ed, 2006) at 1.4.2.

¹⁹² *Canterbury Regional Council v White Gold Limited*, at [7].

¹⁹³ Ibid.

¹⁹⁴ Dibley, above n128 at 19.

¹⁹⁵ *Canterbury Regional Council v White Gold Limited* at [8].

settle onto streambeds and endure for weeks to months.¹⁹⁶ It is therefore likely that this criterion would be met.

Finally, the **size** of the damage is relevant, with “widespread” defined as “encompassing an area of several hundred square kilometres”. Physical damage is unlikely to meet this criterion: ponding of effluent on land can be significant, and undoubtedly harmful,¹⁹⁷ but is only likely to cause in the tens of kilometres of actual physical damage. Similarly, while pollution into waterways by its nature disperses contaminants across a large geographic area,¹⁹⁸ the total area of affected waterway per average single instance of discharge (based on the measurable effect of effluent) would only be around 2-3 square kilometres.¹⁹⁹

It could be argued that a different definition should be adopted for “size”, beyond the geographical range of the physical damage. In the present case, intensification of farming practices is a major nationwide issue, and respondents to an opinion poll taken in 2008 by consultants EOS Ecology “rated water pollution and water-related issues as the number one environmental issue facing NZ”.²⁰⁰ In addition, the run-off, so to speak, from the debate may affect the industry’s image in the eyes of international investors, affecting our reputation and business interests.

However, as only *one* of the three criteria needs to be met for the test of Ecocide to be established, a failure to establish that damage is physically widespread is unlikely to be fatal in proving Ecocide. In light of this, it is perhaps appropriate to retain the stringent tests: the tests are so high to ensure behaviour is sufficiently grave in order to qualify, rather than unjustifiably lowering the threshold.

¹⁹⁶ Letter from Dr. Bob Wilcock (NIWA Principal Scientist) to Meg Nicholson regarding the effects of dairy effluent discharges on New Zealand waterways (6 September 2012).

¹⁹⁷ For instance, in *White Gold*, 45,000 litres of effluent was discharged to form a pond of almost 29,000 square metres, including up to 100 millimetres of solids on the ground (*Canterbury Regional Council v White Gold Limited* at [3]).

¹⁹⁸ It is evident from NIWA research that pollution into waterways will have a flow-on effect to downstream waterways and ecosystems, ultimately ending at the sea (Proffitt, above n139).

¹⁹⁹ Water must be 250 times stronger than the rate of effluent production for the effluent to cease to have a measurable effect. Assuming a herd size of 300 cows, each producing around 50L of effluent per day, the total herd production would be 0.174L per second; the receiving water rate would need to be around 50L per second. Assuming an average stream width of 10 metres, this rate would take several hundred metres of river distance for the effluent to be fully mixed (Letter from Dr. Bob Wilcock, above n196).

²⁰⁰ Proffitt, above n139.

Diffuse pollution?

This particular case study raises a final salient point that does not arise where the destructive practice is unique in its context; for instance, a single company engaged in an extractive industry in a given area. Dirty dairying is by its nature a collective issue arising out of the conduct of many actors: the recognised harmful effects are the cumulative sum of discharges from different farms. As Clive Howard-Williams, National Institute of Water and Atmospheric Research Chief Scientist for Freshwater & Estuaries, points out: “the real impact of diffuse pollution on ecosystems downstream is multiple stressors: one stressor almost never works on its own.”²⁰¹

This poses two related problems. The first is the evidential problem of tracing the diffuse effects of pollution to a single source. Contrary to the RMA (where only the fact of a discharge is at issue), the extent of harm is crucial to Ecocide; and where one discharge mingles with existing pollution in areas of particularly high intensity farming (particularly when mingled with non-point source pollution, creating uncertainty as to the ratio of contributions), it may be difficult to prove that X amount of eutrophication or faecal contaminants came from the particular farm in question.

This leads to the second, related, issue: in cases where it can be established that the defendant was responsible for certain discharges, the acute effects of that particular discharge may be minor, with the additional contaminants simply contributing to an existing problem. Under RMA regulatory jurisprudence, “the cumulative effect will likely be significant and was certainly contributed to”.²⁰² It is arguably contrary to principle to hold an accused criminally liable based on a collective problem caused for the most part by the actions of others, where their actions would not suffice independently. However, this would permit a “death by a thousand cuts” approach to prevail, where Ecocide is caused but each party could hide behind a diffusion of responsibility among all responsible parties. Higgins specifically aims to target environmental degradation causing death by a thousand cuts,²⁰³ and claims that her law of Ecocide intends to impose a legal duty on corporate superiors to “prohibit

²⁰¹ Proffitt, above n139.

²⁰² CJ Doherty in *Canterbury Regional Council v White Gold Limited* at [10].

²⁰³ Higgins, above n4 at 4.

profit, investment and policy which causes or supports ecocide”.²⁰⁴ As such, it is likely that an environmentally destructive activity that contributes to an existing problem amounting to Ecocide in its totality would be enough.

Based on the above discussion, it is highly likely that while size may be problematic, instances of dairy effluent discharge – depending on the facts of the case – would be of a requisite impact and duration, thereby satisfying the definition of Ecocide.

iii. *By human agency or other causes*

Dairy effluent discharge is clearly caused by human agency, and as such falls within the class of “ascertainable ecocide”.

iv. *Severely diminished peaceful enjoyment*

As outlined above, “peaceful enjoyment” is defined as “the right to peace, health and well-being of all life”. The right to peace and health of non-human inhabitants of the affected ecosystems²⁰⁵ is arguably severely diminished when the habitat is damaged in the manner set out above. It is also clear that peaceful enjoyment of human inhabitants of the territories affected is severely diminished: degraded water quality affects human enjoyment of areas, as microorganisms transmitted may make the water unsafe for drinking or recreational use.²⁰⁶ Further, degraded water quality compromises Maori cultural and spiritual values. A recent example of this is in the *White Gold* case, where Ngai Tahu gave evidence that pollution of Lake Ellesmere would not only affect its property interests, but also, as it was considered a taonga, its “cultural values and... historical and contemporary mahina kai practices”.²⁰⁷

It is therefore likely that the definition of Ecocide may be met by a sufficiently large instance of effluent discharge.

²⁰⁴ At 4.

²⁰⁵ Coming within the definition of “territory” given in s37 of the Act.

²⁰⁶ Managing Dairy Farm Effluent, above n191 at 1.4.2. NIWA published a league table of the suitability of 77 NZ rivers for contact recreation (such as swimming, kayaking, water skiing); a pilot application over a four year period (2005-2008) of their 2001 water quality index.

²⁰⁷ *Canterbury Regional Council v White Gold Limited* at [9]. Subsequent to the sentencing, David Perenara-O’Connell stated that the lake held “a treasured position within our tribal area. It is of great historical and contemporary significance to us. This behaviour is not acceptable” (Howard Keene “\$90,000 fine for effluent discharge” *The Dairyman* (online ed, Auckland, August 2012) at 14).

b. Liability

i. The current position

The players likely to be charged under Ecocide are those in a position of superior responsibility.²⁰⁸ In the context of dirty dairying discharges, this class would not only comprise onsite managers or directors,²⁰⁹ but also, significantly, offsite directors. The position suggested by the mock trial judgment is that only two inquiries are relevant: a) whether the definition of Ecocide is objectively met, and b) whether it was caused by a failure to take necessary measures by anyone within the wider operation or activity – thereby coming within the accused’s “authority”.²¹⁰ No inquiry into the accused’s state of mind is permissible.²¹¹ Upon answering these questions in the affirmative, individuals with superior responsibility would be absolutely liable, and subject to imprisonment and/or a restorative justice process.

Therein lies the difference between the RMA and Ecocide as it stands: liability is directed to those at the top *purely* on the basis of the corporate structure, and intentionally disregards their degree of knowledge. This distinction serves to deliberately, and as it stands automatically, capture those rare few individuals who would fall outside the net of the RMA. However, this result – neatly consistent though it is with the campaign’s principles and literature – is flawed, as it was reached through the application of insupportable provisions.

ii. Per the proposed amendments

This paper has above proposed amendments to Ecocide that introduce at least a constructive knowledge requirement, put the onus of proof on the prosecution, and revert to a higher standard of superior responsibility, consonant with the command

²⁰⁸ In fact, the mock trial judgment suggests that a previous version of the Ecocide Act contained a provision stating “prosecution is first and foremost against natural persons who are in a position of superior responsibility” (*R v Bannerman & Tench* at 27). It is unclear why this was removed, and whether this means subordinates can now also be charged for causing Ecocide.

²⁰⁹ These individuals would likely be liable under the RMA anyway, depending on their knowledge; but Ecocide may provide a different penalty. This is discussed below.

²¹⁰ The concept of “authority” as an equivalent to “effective control” would likely serve to limit liability to those *within* a single corporate structure, and would not extend to directors or managers of external, representative bodies such as Fonterra Co-operative Group Ltd.

²¹¹ EA, s14.

responsibility principle. These changes are likely to significantly reduce Ecocide's utility.

As amended, Ecocide in fact closely resembles s340(3) of the RMA. Liability arises where the prosecution proves that:

- i. the offence occurred within the superior's authority;
- ii. the superior had actual or constructive knowledge; and
- iii. the superior – not their subordinate – failed to take all necessary and reasonable measures to prevent or stop the offence.²¹²

This amended test would still be likely to catch the recidivist, profit-orientated onsite actors²¹³ already caught under Ecocide (1) and the RMA. While nonetheless valuable for the reasons discussed in Chapter Four, this application would not break new ground.

As for the high-level, offsite directors, if it could be established on the facts that a director knew (or should have known) about instances of dirty dairying on the farms they were involved in the management of, but they failed to do everything within their control from their high-level position – such as the implementation of monitoring or managing systems – Ecocide would likely operate to impose liability on them.

However, it is likely that the amended Ecocide would face the same difficulties as s340(3) in its application to this class, although the result would ultimately depend on the facts of the case and the evidence adduced.²¹⁴ In the case of generally compliant companies, it would be open to such directors to argue that they were so removed that they had neither actual nor constructive knowledge of the offending. Even in the event of recidivist or problematic farming companies where at least the directors' constructive knowledge may be established, it would be arguable that their

²¹² Therein lies the only real distinction with s340(3), which requires a failure to take “all *reasonable* steps”.

²¹³ For instance, in *Southland Regional Council v Talisker Farms Company Limited And Anor* DC Invercargill CRI-2010-025-002498, 17 December 2010, the defendant company was convicted of continuing offences for dumping sludge from its storage pond onto land on 13 January 2010, discharges that were found to be continuing on 26 February and 22 April. It faced another charge for the overflowing storage pond (again, found to be continuing upon re-inspection in February and April).

²¹⁴ A difficulty compounded by the lack of NZ jurisprudence on “reasonable measures”, which could have served as a starting point.

“authority” was of such a remote and high-level character that they *had* taken all steps within their power to prevent such offending, but that unrelated individuals had nonetheless breached those systems and caused the offence. To require *more* of such directors would be to require either their onsite involvement, undermining the efficiency of such an industry, or a decision to end the business practice in question entirely. While the campaign may agitate for this exact result in such a stark situation, this is not persuasive, as it unrealistically demands that extreme precaution trump pragmatism.

IV. Conclusion

This case study demonstrates that the definition of Ecocide would likely apply to a new type of environmental harm with a rather more domestic scope than the examples given by the campaign. It further illustrates that, as drafted, Ecocide would indeed hold liable certain key players currently escaping liability under the Resource Management Act.

However, if the Act were amended in the manner proposed above, the class of individuals to whom it would extend is likely to correspond to that under the current regime. As such, Ecocide if amended would be sounder in principle but would no longer have the characteristically radical application so prized by the campaign.

Nonetheless, even a reigned-in crime of Ecocide would hold key benefits, insofar as the *application* of the RMA is responsible for the status quo. This paper now proceeds to discuss the realistic value of a pared-down version of Ecocide.

CHAPTER FOUR – Likely Benefits

This part of the paper aims to briefly outline the realistic value of a crime of Ecocide, *if* it were adopted at international law, and *if* on the amended terms suggested above. It is useful to draw parallels with the utility of the crime of genocide,²¹⁵ as Ecocide is intended to be its environmental corollary, both linguistically – “Ecocide” is considered a contraction of “ecological genocide”²¹⁶ – and theoretically.²¹⁷ Both are examples of “radical” law introduced in response to modern instances of a problem that is in fact “as old as humanity”.²¹⁸

I. Symbolism

The first major benefit is the significance in elevating ecocide to the level of a Crime against Peace in the Rome Statute, regardless of the practical problems with its application. Including a peacetime environmental protection provision in the few crimes within the jurisdiction of an international criminal court sends the message that environmental protection is fundamentally relevant to all citizens of the international community. Although genocide, “singled out” by the international community for “special condemnation and opprobrium”²¹⁹ when it was created in 1948, has been rarely used in the 60-odd years since its inception, the few domestic prosecutions that have been taken for genocide have been to “make a point about the magnitude of the offense, even though other more easily proved offenses could have been charged”.²²⁰

²¹⁵ Genocide, a term coined in 1944 by Raphael Lemkin, was first criminalized in the UN Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously on December 9, 1948, under which it can be pursued against other state parties in the International Court of Justice (Art 9). Further, it has been incorporated in the same terms in the Rome Statute Art VI, and can therefore also be pursued to the ICC.

²¹⁶ Higgins, above n2 at 62.

²¹⁷ Although the proposal is ostensibly ecocentric, Higgins sees human wellbeing as dependent on the wellbeing of the ecology of the planet (Higgins, above n2 at XII). However, this premise has been met with skepticism from many who believe that “[e]cocide, as terrible as it could be, has little in common with genocide... and it would belittle the victims of genocide if they were to be compared with victims of ecological pollution” (Vesselin Popovski & Kieran G. Mundy "Defining climate-change victims" (2012) 7 Sustain Sci 5 at 13).

²¹⁸ Jean-Paul Sartre "On Genocide" in Richard Falk/Gabriel Kolko/Robert Jay (eds) *Crimes of War* (Random House, New York, 1971) at 534.

²¹⁹ *Prosecutor v Krstić*, Appeal Judgment, Case No. IT-98-33-A, 19 April 2004 at [36].

²²⁰ John Quigley "Genocide : A Useful Legal Category?" (2009) 19(2) *International Criminal Justice Review* 115 at 117.

A corollary to this is the simple deterrent factor associated with *any* international crime, even if its components do not function in the deterrent manner Higgins initially envisaged. It has been said that the simple fact a crime of genocide *exists* is likely to lead to a reduction in genocidal acts that would otherwise have occurred: similarly, the simple fact of having recognised Ecocide as a crime against peace would likely lead to a reduction in environmentally degrading activities as industry realises that environmentally harm is no longer an acceptable consequence of the pursuit of profit.

Further, Quigley notes that a finding of genocide “may influence other states and international organizations in their dealings with the state at fault”.²²¹ Similarly, a finding of Ecocide would be likely to significantly affect a company’s business relations with clients or other businesses; an additional factor lending deterrent weight. Therefore the mere act of criminalizing Ecocide would send a powerful message that would in turn *practically* reduce the prevalence of environmental degradation.

II. Suit to the ICC

The other major practical benefit is the simple fact that, when instances of Ecocide do occur, ICC member states (who have agreed to the new crime of Ecocide) are under an international obligation to take action domestically, even if through an alternative regime.²²² Should they fail to do so, through unwillingness or inability as noted in Chapter 1, the Prosecutor can step in to bring the case under the ICC’s complementary jurisdiction. This not only places a duty on states to prosecute, but would shore up the likelihood of prosecution with the addition of a second interested party.

However, even this benefit is tempered by the possibility of several complications that have plagued the short history of genocide as an international crime – despite the hundreds of genocidal acts that have been committed since the Convention came into

²²¹ John B. Quigley *The Genocide Convention: An International Law Analysis* (Ashgate Publishing Limited, Aldershot, 2006) at 268.

²²² Quigley suggests, in the context of genocide, that it may not matter what offense is charged domestically when meeting the international obligation to prosecute (See Quigley, above n221 at 129).

operation in 1951,²²³ it is only in the closing years of the 20th century that prosecutions were commenced in any numbers.²²⁴

First, the principle of *ne bis in idem* may limit the utility of the ICC. Enshrined in Art 20 of the Rome Statute, it states that:

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct.

Neither of the two exceptions applies to cases where the court has dealt with the matter as an “ordinary crime”: “it is the underlying facts, not the legal characterisation, that are decisive”.²²⁵ Any domestic prosecution – even if under the RMA, or if the accused is acquitted, or if an unsatisfactory sentence is imposed – would therefore preclude a prosecution at international law.

Second, a technical issue may arise in relation to universal jurisdiction. The ICC’s jurisdiction to prosecute is limited to instances where the crime was committed in the territory of a member State or by a national of a member State:²²⁶ thus a prosecution for Ecocide could not take place if neither of those conditions can be satisfied.²²⁷ As it is, only 121 States are party to the Rome Statute, while 32 have signed but not ratified and a further 41 have never signed.²²⁸ The majority of the non-member states are developing countries located in Asia and Africa, who are precisely the countries with natural resources left to deplete, and therefore represent the locations of many classic instances of Ecocide. ICC member states with a strong economic interest in continuing extractive practices in such non-member State countries could simply choose not to opt in to a new crime of Ecocide, safe in the knowledge that neither

²²³ Andrew D. Mitchell "Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: *Nulyarimma v Thompson*" (2000) 24 Melb U L Rev 15 at 20.

²²⁴ Quigley, above n221 at 129.

²²⁵ Håkan Friman Robert Cryer, Darryl Robinson, Elizabeth Wilmshurst *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2010) at 82.

²²⁶ Art 12(2) Rome Statute.

²²⁷ There are two limited exceptions to this. The first is that the UN Security Council can “refer” a situation to the ICC (Art 13(b)), but this can be vetoed by any of the five permanent UNSC members, and as such has only been used twice. The second is that a non-State party can make a declaration accepting the jurisdiction of the ICC (Art 12(3)). However, this has only been invoked once.

²²⁸ ICC Website "The States Parties to the Rome Statute" <<http://www.icc-cpi.int/Menus/ASP/states+parties/>>.

condition could then be met and a prosecution to the ICC would be effectively precluded. A further dimension to this is that developing countries may not have a developed domestic mechanism for prosecuting for environmental harm, and those states who do may be unwilling or unable to prosecute a “multinational corporation which brings employment, revenue and growth”;²²⁹ a situation that the corporations themselves may deliberately exploit by putting economic pressure on governments, such as offering bribes to settle prosecutions.²³⁰ Therefore the countries at a real risk of hosting ecocide within their borders are unlikely to have a domestic method of response, or may be unwilling to do so due to political concerns; yet the ICC could likely not step in.

Therefore, while the fallback availability of an ICC prosecution is a practical benefit to a crime of Ecocide, it should not be overlooked that this is subject to its own weaknesses.

²²⁹ Rauxloh, above n10.

²³⁰ Mégret, above n24 at 213.

CONCLUSION

This paper has aimed to outline and analyse Ecocide, a recent example of a wider movement gaining traction that aims to respond to the issue of environmental degradation.

As drafted, not only does Ecocide theoretically break ground in its application, but it appears to achieve precisely the intended results in practice, as demonstrated by the mock trial and the (first) application to dirty dairying. However, this is a flawed conclusion, as it is the product of a flawed proposal.

While Ecocide may be rooted in an admirable attempt to respond to the fact of environmental degradation, and while the definition of Ecocide is sound, the proposal as it stands derives legitimacy from several sources, such as Falk's Ecocide Convention, Art 8(2)(b)(iv) and Art 28, yet takes drastic liberties with them. The result is a piecemeal set of provisions, representing the collision of several worlds: wartime and peacetime; public and private; international criminal and domestic regulatory. Crucially, s13 deviates significantly from Art 28, automatically attracting liability *per* the mock trial, and absolute liability is employed when only a fault-based is justifiable. Aside altogether from the questionable logistics of accommodating such inconsistent provisions within the existing Rome Statute, it is difficult to imagine that such an apparently hasty and at times unjustifiable proposal would even be adopted.

However, assuming Ecocide is to remain an international criminal proposal,²³¹ amendments could be made as suggested throughout this paper to address these concerns. *Per* these amendments, Ecocide would in fact operate in a similar manner to NZ's relatively comprehensive regime. As such, it would likely not achieve the radical results intended by the campaign, reducing the scope of its benefits significantly.

²³¹ Alternatively, the campaign could reconsider the forum it advocates for its proposal. The definition of Ecocide, arguably the core component of the campaign, is sound; and could easily be transplanted to a different context. For instance, if 'Ecocide' were to be administered by an independent tribunal, the crime could retain the radical flavour that characterises it without attempting to fit it within traditional international criminal law. A full discussion of this possibility is beyond the scope of this paper.

In the author's opinion, Polly Higgins and Eradicating Ecocide have reached a crossroads: they can fully commit to Ecocide as an international legal mechanism, and seriously pare down and redraft the proposal so that it is both justifiable in principle and workable in practice. Alternatively, they can retain the bold flavour of the provisions, accept that such a formula may not be adopted at the ICC, and concentrate on the more realistic benefits arising out of the campaign's increasing profile.

For Ecocide is no longer merely a proposal to the UN: it is a campaign that has garnered international attention and support. Subsequent to the mock trial Higgins released a second book, representatives of Eradicating Ecocide attended Rio+20, the campaign released a research paper in conjunction with the Human Rights Consortium, and most recently the UK Green Party voted at its annual conference in favour of a motion that "the Green Party of England and Wales gives its wholehearted support for an international law of Ecocide – a crime against nature, humanity and future generations – to be established and recognised as an International Crime Against Peace". These developments may just be the start of a global movement capable itself of achieving Higgins' goal of "going upstream and turning off the tap".²³²

²³² Olly Zanetti "Polly Higgins : Natural Fighter" (May 29, 2012)
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ECOCIDE ACT

PREAMBLE

Ecocide as the 5th international Crime Against Peace

Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished.

The objective and principles governing the creation of the offence of Ecocide as the 5th international Crime Against Peace:

1. To stop the extensive damage to, destruction of or loss of ecosystems which is preventing peaceful enjoyment of all beings of the earth and to prevent such extensive damage to, destruction of or loss of ecosystems from ever happening again.
2. Ecocide is a crime against peace because the potential consequences arising from the actual and/or future extensive damage to, destruction of or loss of ecosystem(s) can lead to:
 - i. loss of life, injury to life and severe diminution of enjoyment of life to human and non-human beings;
 - ii. the heightened risk of conflict arising from impact upon human and non-human life which has occurred as a result of the above;
 - iii. adverse impact upon future generations and their ability to survive;
 - iv. the diminution of health and well-being of inhabitants of a given territory and those who live further afield;
 - v. loss of cultural heritage or life.

3. The aim of establishing the crime of Ecocide is to:-
 - i. prevent war;
 - ii. prevent loss and injury to life;
 - iii. prevent dangerous industrial activity;
 - iv. prevent pollution to all beings;
 - v. prevent loss of traditional cultures, hunting grounds and food.
4. The crime of Ecocide creates an international and trans-boundary duty of care to prevent the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s).
5. All Heads of State, Ministers, CEOs, Directors and any person(s) who exercise rights, implicit or explicit, over a given territory have an explicit responsibility under the principle of superior responsibility that applies to the whole of this Act.
6. This Act places upon all Heads of State, Ministers, CEOs, Directors and/or any person who exercises jurisdiction over a given territory a pre-emptive legal obligation to ensure their actions do not give rise to the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s).
7. The burden of responsibility to prevent the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s) rests jointly with any person or persons, government or government department, corporation or organisation exercising a position of superior responsibility in respect of any activity which poses the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s).
8. The primary purpose of imposing an international and trans-boundary duty of care is to:-
 - i. hold persons to public account for the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s);
 - ii. enforce the prevention of risk of or actual extensive damage to or destruction of or loss of ecosystem(s);
 - iii. evaluate consequence of risk of or actual extensive damage to or destruction of or loss of ecosystem(s).

9. The offences created under this Act are strict liability; sentence will be determined by the culpability of the person(s) and organisation found guilty as per the provisions of this Act.
10. This Act shifts the primary focus away from evaluation of risk to evaluation of the consequences whereby risk of Ecocide gives rise to the potential for and/or actual extensive damage to or destruction of or loss of ecosystem(s).
11. This Act creates a legal duty of accountability and restorative justice obligations for a given territory upon persons as well as governments, corporations and or any other agency found to have caused the Ecocide.

PART I

Definition of Ecocide

1. Ecocide

Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that:-

- (1) peaceful enjoyment by the inhabitants has been severely diminished; and or
- (2) peaceful enjoyment by the inhabitants of another territory has been severely diminished.

2. Risk of Ecocide

Ecocide is where there is a potential consequence to any activity whereby extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, may occur to such an extent that:-

- (1) peaceful enjoyment by the inhabitants of that territory or any other territory will be severely diminished; and or
- (2) peaceful enjoyment by the inhabitants of that territory or any other territory may be severely diminished; and or
- (3) injury to life will be caused; and or
- (4) injury to life may be caused.

*Breaches of Rights***3. Crime against Humanity**

A person, company, organisation, partnership, or any other legal entity who causes Ecocide under section 1 of this Act and has breached a human right to life is guilty of a crime against humanity.

4. Crime against Nature

A person, company, organisation, partnership, or any other legal entity who causes Ecocide under section 1 of this Act and has breached a non-human right to life is guilty of a crime against nature.

5. Crime against Future Generations

A person, company, organisation, partnership, or any other legal entity who causes a risk or probability of Ecocide under sections 1 or 2 of this Act is guilty of a crime against future generations.

6. Crime of Ecocide

The right to life is a universal right and where a person, company, organisation, partnership, or any other legal entity causes extensive damage to, destruction of or loss of human and or non-human life of the inhabitants of a territory under sections 1–5 of this Act is guilty of the crime of Ecocide.

7. Crime of Cultural Ecocide

Where the right to cultural life by indigenous communities has been severely diminished by the acts of a person, company, organisation, partnership, or any other legal entity that causes extensive damage to, destruction of or loss of cultural heritage or life of the inhabitants of a territory under sections 1–6 of this Act, is guilty of the crime of cultural Ecocide.

8. Offence of Ecocide

It will be an offence of Ecocide where a person, company, organisation, partnership, or any other legal entity is found to be in breach of section 1 and 7 of this Act.

9. Liability

- (a) Any person who pleads guilty or is found guilty of Ecocide under any sections of this Act; or
- (b) any person who pleads guilty or is found guilty of aiding and abetting, counselling or procuring the offence of Ecocide, under any sections of this Act shall be liable to be sentenced to a term of imprisonment. Either in addition to or substitution of imprisonment any person convicted of Ecocide can exercise the option of entering into a restorative justice process.

10. Size, Duration, Impact of Ecocide

The test for determining whether Ecocide is established is determined on either one or more of the following factors, which have impact on the severity of diminution of peaceful enjoyment by the inhabitants, namely:-

- (a) size of the extensive damage to, destruction of or loss of ecosystem(s);
- (b) duration of the extensive damage to, destruction of or loss of ecosystem(s);
- (c) impact of the extensive damage to, destruction of or loss of ecosystem(s)

PART II**11. Proceeds of Crime**

The provisions of the Proceeds of Crimes Act 2002 will apply in the event of conviction for any offence pursuant to this Act.

*Extent***12. Strict Liability**

Ecocide is a crime of strict liability committed by natural and fictional persons.

13. Superior Responsibility

- (1) Any director, partner, leader and or any other person in a position of superior responsibility is responsible for offences committed by members of staff under his authority, and is

- responsible as a result of his authority over such staff, where he fails to take all necessary measures within his power to prevent or to stop all steps that lead to the commission of the crime of Ecocide.
- (2) Any member of government, prime minister or minister in a position of superior responsibility is responsible for offences committed by members of staff under his authority, and is responsible as a result of his authority over such staff, where he fails to take all necessary measures within his power to prevent or to stop all steps that lead to the commission of the crime of Ecocide.
 - (3) With respect to superior and subordinate relationships not described in subsection (1) and (2), a superior is responsible for offences committed by staff under his effective authority, as a result of his failure to exercise authority properly over such staff where he failed to take all necessary measures within his power to prevent or repress their commission or to submit the matter to the competent authorities for investigation.
 - (4) Any agency purporting to lobby on behalf of (1), (2) or (3) where steps lead to the commission of Ecocide shall be regarded as aiding, abetting, counselling or procuring the commission of the offence.
 - (5) A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence.
 - (6) In interpreting and applying the provisions of this section the court shall take into account any relevant judgment or decision of the International Criminal Court.
 - (7) Nothing in this section shall be read as restricting or excluding:-
 - (a) the liability of any superior, or
 - (b) the liability of persons other than the superior.

14. Knowledge

- (1) Any director, partner or any other person in a position of superior responsibility is responsible for offences committed

by him where his actions result in Ecocide, regardless of his knowledge or intent;

- (2) Any member of government, president, prime minister or minister in a position of superior responsibility is responsible for offences committed by him where his actions result in Ecocide, regardless of his knowledge or intent.

15. Withdrawal of immunity of government officials and other superiors

Where any government official and other superior or their members of staff are in breach of Article 2 of the Universal Declaration of Human Rights, after the commencement of this Act, the prosecution may be enforced as of right by proceedings taken for that purpose in accordance with the provisions of this Act.

16. Unlawful use of land

Where any land has been destroyed, damaged or depleted as a result of Ecocide or any offences in this Act, any person who exercises authority over and/or responsibility for the land shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

17. Culpability of a company, organisation, partnership, or any other legal entity

- (1) Where an offence under any provision of this Act committed by a company, organisation, partnership, or any other legal entity is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or a person who was purporting to act in any such capacity, he as well as the company, organisation, partnership, or any other legal entity shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
- (2) Where a person of superior responsibility is convicted of an offence under this Act by reason of his position as CEO, director, manager, secretary or a person who was purporting

to act in any such capacity for a company, organisation, partnership, or any other legal entity, as a consequence of the conviction the company shall be held jointly responsible for the actions of its servant.

PART III

Orders

18. Power to order Restoration and Costs

Where any person, company, organisation, partnership, or any other legal entity has committed an offence under this Act:-

- (1) a Restoration Order shall be made; and
- (2) a Costs Order shall be made; and
- (3) the named person, company, organisation, partnership, or any other legal entity that had business in the given territory shall be deemed responsible for the clean-up operations to the extent that the territory be restored to the level it was before the Ecocide occurred.

19. Restorative Justice

- (1) Subject to subsection (2), where a defendant pleads or is found guilty, the court must remand the case in order that the victim(s) shall be offered the opportunity to participate in a process of restorative justice involving contact between the offender and any representatives of those affected by the offence.
- (2) The court need not remand the case for the purpose specified in subsection (1) where it is of the opinion that the offence was so serious that this would be inappropriate.
- (3) The court has the power to order heads of agreement.
- (4) Heads of agreement pursuant to a Restorative Justice process can include the following:-
 - (i) Restoration Order
 - (ii) Cost Order
 - (iii) Environmental Protection Order
 - (iv) Suspension of Operations Order
 - (v) Environment Investigation Agency Order

- (vi) Publicity Order
- (vii) Enforcement Notice
- (viii) Earth Health and Well-being Report

20. Environmental Protection Order (EPO)

Where any person, company, organisation, partnership, or any other legal entity has on the balance of probabilities caused or is likely to cause extensive destruction, damage to or loss of ecosystems of a given territory an EPO shall be made for the duration of any related proceedings and shall only be extinguished by either an acquittal or by an imposition of a Restoration Order.

21. Suspension of Operations Order

Any person, company, organisation, partnership, or any other legal entity identified under a restoration order shall be suspended from operating until the territory has been restored to a level that is acceptable to an independent audit, undertaken by the Environmental Investigation Agency.

22. Determination by the Environmental Investigation Agency

The Environmental Investigation Agency shall determine whether appropriate remediation has been undertaken within the timescale set by the court, and/or whether additional steps (such as the imposition or discharge of an EPO) are necessary, and/or shall identify the nature of remediation outstanding and how best to implement.

23. Publicity Order

Where any person, company, organisation, partnership, or any other legal entity has committed an offence under this Act a Publicity Order may be ordered by the Court setting out:-

- (a) the fact of the conviction;
- (b) the terms of any restorative justice, remedial and/or commercial prohibition order(s) or any other order the court has made and deems fit for public announcement;
- (c) the amount of any financial order;

- (d) specified particulars of the offence.

A publicity order can be renewed at any review hearing following a plea of guilty or conviction.

24. Prohibition Notice

- (1) Where a person, organisation or government agency can demonstrate on the balance of probabilities that activities that fall within the definition of Ecocide within this Act are at risk of commencing, or have commenced, or are continuing and involve an imminent risk of Ecocide, the court shall issue a Prohibition Notice on the person(s) and/or the company(s) carrying on the process.
- (2) Where a person, organisation or government agency can demonstrate on the balance of probabilities that a failure to take steps by any company, organisation, partnership, government department or any other legal entity can lead to an imminent risk of Ecocide, the court shall issue a notice (a 'prohibition notice') on the person(s) and the company(s) carrying on the process.
- (3) A Prohibition Notice shall direct that the authorisation shall, until the notice is withdrawn, wholly or to the extent specified in the notice cease to have effect to authorise the carrying on of the process; and where the direction applies to part only of the process it may impose conditions to be observed in carrying on the part which is so authorised.

25. Enforcement Notice

- (1) Any person, company, organisation, partnership, or any other legal entity or government agency that is at risk of being prosecuted for Ecocide may be issued with an Enforcement Notice giving an order made by the court to cease all activities that may give rise to Ecocide.
- (2) Any person, company, organisation, partnership, or any other legal entity or government agency that has been found guilty of Ecocide shall be issued with an Enforcement Notice giving

an order made by the court to cease all activities that may give rise to Ecocide and pay any consequential losses.

- (3) Where an Enforcement Notice has been ordered by a court, an enforcement Notice shall be issued by the Environment Investigation Agency setting out the steps to be taken and specify the period within which those steps must be taken.

26. Earth Health and Well-being Report

Where a territory has been identified as an area at risk of Ecocide or has been named as a territory for the purposes of section 24, an Earth Health and Well-being Report shall be ordered by the court.

27. False written statements tendered in evidence

Where any person tenders a written statement in any proceedings under this Act which he knows to be false or does not believe to be true, he shall be liable to be sentenced to a term of imprisonment.

28. False oral statements tendered in evidence

Where any person tenders evidence in any proceedings under this Act which he knows to be false or does not believe to be true, he shall be liable to be sentenced to a term of imprisonment.

29. Committing Perjury

The Perjury Act 1911 shall have effect as if this Part were contained in that Act.

30. Disclosure of Finances

Any person, company, organisation, partnership, or any other legal entity who is charged with an offence under this Act must provide full disclosure of their finances to the court and failure to disclose by any person ordered by the court for the purposes of this Part shall be liable to be sentenced to a term of imprisonment.

31. Jurisdiction

- (1) Where a person commits Ecocide in a different jurisdiction then, notwithstanding that he does so outside England and

Wales, he shall be guilty of committing or attempting to commit the offence against this Act as if he had done so in England or Wales, and he shall accordingly be liable to be prosecuted, tried and punished in England and Wales without proof that the offence was committed there.

- (2) Where a person of UK residence is in a different jurisdiction and who is charged with, or found guilty of in absentia, any sections under this Act, a warrant for his arrest shall be issued.
- (3) Where there is more than one person, in different jurisdictions and who are charged with, or found guilty of in absentia, any sections under this Act, multiple warrants may be issued at the same time.

Restoration and Consequential Loss Costs

32. Restoration and Consequential Loss Costs

Where any person, company, organisation, partnership, or any other legal entity has been convicted of Ecocide, he and/or it shall be held responsible for any restoration costs that have arisen from causing Ecocide and any consequential losses arising from injury, loss of life, diminution of health or well-being of the inhabitants of the given territory.

33. Balance of Probabilities

No costs shall accrue to any person, organisation or government agency when seeking an order, interim order or prosecution pursuant to the provisions of this Act; costs shall only apply when the person, organisation or government agency fails to establish on the balance of probabilities that there exists a prima facie case pursuant to the provisions of this Act.

34. Costs Assessment

Where Ecocide has occurred, the health and well-being of the community shall be restored as far as possible to the condition as it existed before the Ecocide occurred; and

- (1) such costs of cultural Ecocide shall be accorded equal priority with restoration of any ecological Ecocide; and

- (2) any costs shall be assessed at a separate cost hearing and shall be enforceable under an Enforcement Notice.

Extent

35. International Criminal Court Act 2001

Section 51 of the International Criminal Court Act 2001, as amended, shall now read:

- (1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity and nature, a crime of aggression, a war crime or Ecocide.
- (2) This section applies to acts committed:-
- (a) in England or Wales, or
 - (b) outside the United Kingdom

by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.

36. Short Title, Application and Extent

This Act:-

- (1) may be cited as the Ecocide Act 2010;
- (2) extends to the whole of the United Kingdom;
- (3) may be subject to additions and shall prevail over all other legislation;

No exemptions shall be made subsequent to this Act being enacted.

33. Interpretation

In this Act:-

'Cultural Ecocide' means the damage, destruction to or loss of a community's way of life including a community's spiritual practices.

'Earth Health and Well-being Report' means a report which shall include an assessment of human, cultural and non-human health and well-being impact from damage, destruction to or loss of ecosystem(s) of the immediate and/or any other territories affected or at risk of being affected.

'ecosystem' means a biological community of interdependent living organisms and their physical environment.

'inhabitants' means any living species dwelling in a particular place.

'other causes' means naturally occurring events such as but not limited to; tsunamis, earthquakes, acts of God, floods, hurricanes and volcanoes.

'peaceful enjoyment' means the right to peace, health and well-being of all life.

'restorative justice' means a process applied as an alternative to conventional sentencing. Where guilt has been accepted or a defendant has been found guilty, he/she may choose to enter into a restorative justice process where he/she shall engage with representatives of parties injured to agree terms of restoration.

'territory' means any domain, community or area of land, including the people, water and/or air that is affected by or at risk or possible risk of Ecocide.