

To: ICC Bar Association Executive Council:

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Through: Dominic Kennedy – *ICC Bar Association Executive Director*

From: ICC Bar Association Working Group on Ecocide (**EWG**):

Regina Weiss - *Chair*; Javier Ruiz; Drazen Plavec; Juan Carlos Manríquez; Kimberly Motley; Thomas Hannis - *Members*.

Date: 24 September 2024

Re: Paper on Ecocide for presentation at the ICCBA General Assembly (27 September 2024)

1. Executive Summary

On 9 September 2024, ICC Member States Vanuatu, Fiji and Samoa formally introduced the crime of ecocide for consideration by ICC State Parties to the UN Secretary-General and the Working Group on Amendments of the Assembly of States Parties (**ASP**). The definition of Ecocide as proposed is “*unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts*” which emanates from the 2021 Independent Expert Panel (**Expert Panel**)¹ convened by Stop Ecocide International. This significant and timely step triggers a process which may result in the inclusion of Ecocide as a fifth category of crime in the Rome Statute. This paper is designed to brief the ICCBA Executive Council on the salient points and live issues likely to be raised and debated in the discussions which underpin any future adoption of Ecocide. Submissions will no doubt be sought from interested parties and organisations as the process progresses, including the ICCBA. Discussions will be led through the ASP Working Group on Amendments. To assist the ICCBA in crafting meaningful and necessary submissions, the ICCBA Ecocide Working Group (**EWG**) can continue to engage with the Executive Council to provide guidance and advice.

This paper provides (1) the contextual background which led to the ultimate 9 September introduction; (2) various proposed definitions of Ecocide; (3) whether the definition of ‘victim’ in the Rome Statute is applicable to ecocide and other environmental crimes; (4) the current framework for environmental crimes; (5) Ecocide as a fifth crime in the Rome Statute and (6) recommendations.

2. Background

The term ‘ecocide’ was initially conceived and introduced for discussion in 1970 by revered American plant physiologist and bioethicist Arthur Galston. In coining the concept, he was deliberately drawing on Raphael Lemkin’s term ‘genocide’. Galston’s definition stemmed from

¹ <https://www.stopecocide.earth/legal-definition>

his observations of the resulting damage to the environment caused by the US military's defoliation and crop-destroying practices in Vietnam including the use of Agent Orange, and eventually assisted in halting its use. He adapted the terminology used in the *Convention on the Prevention and Punishment of the Crime of Genocide* to propose a new crime comprising the 'wilful destruction of the environment'.

In June 1972, representatives of 113 nations came together at the United Nations Conference on the Human Environment ("Stockholm Conference"). The then-Prime Minister of Sweden, Olaf Palme, in his opening speech followed Galston's lead and used the term "ecocide" to describe the effects of the Vietnam War. Several other leaders, including India's then-Prime Minister, Indira Gandhi, denounced reckless environmental impairment.

The Stockholm Conference consequently released essential principles of International Environmental Law. Principle 1 focuses on a human's fundamental right to adequate conditions of life and equality in an environment of quality conducive to dignity and well-being. Principle 6 stipulates that toxic discharge must not inflict irreversible damage on the ecosystem. Stockholm Conference delegates formed a Working Group on Crimes Against the Environment who submitted a draft text of an Ecocide Convention to the United Nations in 1973. The proposed text was considered by the United Nations International Law Commission (ILC) for inclusion in the precursor to the Rome Statute - the Code of Crimes Against the Peace and Security of Mankind. Although there was support for the inclusion of 'wilful and severe damage to the environment' in the Code as a stand-alone crime, disagreements about the *mens rea* ultimately led to its removal in 1996 from the proposed text of the impending Rome Statute. It seems, that inclusion of ecocide as a crime in the Rome Statute was once close, but didn't eventuate.²

Galston's proposal was embraced by the contemporary legal academic, Richard Falk, and Falk embarked on constructing a legal framework around 'ecocide'. Falk's work was used as a basis by other legal scholars in modern times, such as Mark Gray and Polly Higgins – who's work eventually led to the proposed modern definitions of 'ecocide'.

As noted above, on 9 September 2024, the proposal to include Ecocide was officially introduced for consideration by Member States.

3. Proposed definitions of Ecocide

There are various definitions of Ecocide put forward by key leaders in the drive to criminalise ecocide internationally and domestically. The leading – or at least the most discussed – definition is that proposed by the Expert Panel:

Ecocide means the unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.

"Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;

² <https://www.un-ilibrary.org/content/books/9789213621660c007/read> See generally about the process which led to the 1996 removal of the draft text in 'The Ecocide Project 'Ecocide is the missing 5th Crime Against Peace' - A report by Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short and Polly Higgins', available at: https://sas-space.sas.ac.uk/4830/1/Ecocide_research_report_19_July_13.pdf

“Severe” means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;

“Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;

“Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;

“Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.³

This definition is the basis for the work of the EWG and the one proposed for inclusion on 9 September. As a starting point, it is a definition widely accepted by the international community, although not one which has avoided criticism in academia. The key criticism is that the definition reads as anthropocentric, in the sense that it focuses on damage only and that the consequences of that damage apply to humankind. That is, damage solely to ecosystems is not enough to satisfy the definition proposed by the Expert Panel.

Further criticisms of this definition include that its approach to ecocide as an endangerment crime rather than a result crime and that use of the term ‘wanton’ concerns excessive damage *vis-a-vis* anticipated socio-economic benefits. However, in essence, the EWG is supportive of the Expert Panel’s definition.

Another definition that is circulating is the ‘Polly Higgins definition’:

Ecocide is the extensive loss or damage or destruction 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.

Mathew Gillet has also proposed a definition which includes an enumerated act format:

Ecocide means wilfully committing any of the following acts and thereby causing severe damage to the natural environment that is also widespread or long-term:

- a) killing, harming, or removing protected flora or fauna;*
- b) destroying or damaging ecosystems or wild animal habitats;*
- c) destroying or damaging natural heritage;*
- d) trafficking or dumping hazardous substances;*
- e) releasing, emitting, or introducing harmful quantities of substances or energy into the air, water, or soil.⁴*

³ See:

<https://www.stopecocide.earth/s/SE-Foundation-Commentary-and-core-text-rev-6.pdf;>
<https://opiniojuris.org/2023/06/20/a-tale-of-two-definitions-fortifying-four-key-elements-of-the-proposed-crime-of-ecocide-part-i/>

⁴ See “Prosecuting Environmental Harm before the International Criminal Court”, 2022, Matthew Gillet, -Studies on International Courts and Tribunals- (Cambridge University Press & Assessment, 978-1-316-51269-2), Ch.2: “Environmental Harm as a Crime Under the Rome Statute”.

Domestic jurisdictions are embarking on introducing ecocide as a crime in their domestic laws. For example, Belgium's definition⁵ – which is different to the proposed Expert Panel definition – is much narrower:

deliberately committing, by act or omission, an unlawful action causing serious, widespread and long-term damage to the environment in the knowledge that this act causes such damage, provided that this act constitutes an infringement of federal legislation or an international instrument that is binding on the federal authority or if the act cannot be located in Belgium.

Belgium's definition only includes 'unlawful' acts under either Belgian federal law or applicable international law – it doesn't include wanton or reckless acts. So that means that the conduct does not significantly expand the scope of conduct already unlawful under Belgian domestic law.

In the EWG's view, the narrower definition of Ecocide isn't ideal. If a person is acting within the law – for example, logging trees in a manner that isn't against domestic law – then the first element of ecocide falls away, even if that logging causes serious, widespread and long-term damage to the environment.

Another approach to domestic inclusion of environmental crimes, for example, is the recently adopted double criminal liability attribution system in Chile, under the *Economic and Environmental Crimes Act*, 21. 595 (which commenced 1 September 2024). The rationale behind this is that traditionally, domestic law has considered environmental crimes as economic crimes, under a high level penal responsibility when they are committed by natural person or legal entities for corporate benefit. Criminalising serious damage of one or multiple ecosystem components affecting a large territorial extension zone with little or no rehabilitation prospects or the serious impact on species under critic risk or vulnerable to extinction will result in Chile in punishment to the maximum legal degree.⁶

As a side note, reflecting on many current domestic structures which focus on corporate responsibility for environmental damage leading to pecuniary sanctions or punishment, the issue of individual vs corporate responsibility for Ecocide may be a point of discussion at future ASP Amendments Working Group meetings. Although the ICC's jurisdiction is over individuals rather than corporations, and focuses not on economics, discussions about the inclusion of Ecocide in the Rome Statute moving forward may also include whether criminal responsibility under the Rome Statute should remain limited to individuals or whether they may extend further, to corporations. The intention of the original drafters of the Rome Statute was to hold *persons* responsible for those crimes of most serious concern to mankind. Noting that hiding behind a corporate structure can be an avenue to facilitate impunity for key decision makers who could be responsible for Ecocide, it is understandable that discussions within the ASP Amendments Working Group may ensue. In particular, acts and omissions by legal entities result in environmental crimes today, which could be classed as Ecocide under the proposed definition. Of course, including corporate responsibility would mean significant changes to the Rome Statute, and particularly to Article 25, which may not be feasible.

⁵ See Oxford Human Rights Hub, [Belgium Recognises the Crime of Ecocide: A \(Lukewarm\) European First | OHRH \(ox.ac.uk\)](#) by Catherine Savard.

⁶ Act 21. 594, article 310 bis.

4. Key issue: who is the ‘victim’ of ecocide and how does this impact on the reparations regime in the Rome Statute?

The important role of the victims before the ICC is a significant element of the Court’s design and means a major development in international criminal law. The recognition of victim status has implications for intervention in proceedings and the scope of liability for reparations.⁷

The OTP 2016 Case Selection Guidelines⁸ increase focus on the vulnerability of victims, and the social, economic and environmental damage inflicted on their affected communities. This indicates a change towards providing reparation for environmental harm, but is unclear how the rules and practices governing victims would apply in the case of damage to the environment, despite the fact that the environment can be ‘victimized’ as a result of crimes within the Rome Statute. It follows that the environment – nature – should also benefit from those reparations. The question remains, how can the current regime for victims’ participation and reparations apply to environmental harm cases, and potentially, Ecocide?

The Preamble of the Rome Statute refers to “*millions of children, women and men*” as having been “*victims of unimaginable atrocities*” which is indicative of the intention to address victimisation as a central motivation for the ICC’s inception, in anthropocentric terms. It refers also to “*present and future generations*”, which could be read to include the environment.

The Rules of Procedure and Evidence define victims as being “*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*”. The harm can be a direct or indirect result of the crime but must be suffered personally by the victim. Rule 85(b) expands the parameters of “*potential victims*” in that victims may also include organizations or institutions that have sustained direct harm to their property.⁹

Is this definition wide enough to include the environment as a stand-alone victim? Granting ‘victim status’ to the environment, or even some environmental features is highly unlikely under the current framework.

The view of the EWG is that the definition of ‘victim’ will require expanding if Ecocide is included as a fifth crime¹⁰ in the Rome Statute.

Article 75 of the Rome Statute provides that the Court may order reparations for victims to direct and indirect individual victims, provided that the harm they suffered is personal, and to legal entities who are direct victims of the crime. The ICC’s reparations regime serves two key purposes: (1) it obliges those responsible for serious crimes to repair the harm they caused to the victims and (2) it enables the Court to ensure that offenders are held to account for their acts. Transposing this compensatory obligation to individuals, as is the case under the ICC reparations scheme, is a relatively under-developed area of international criminal law, although it is changing rapidly.

⁷ Christine Van den Wyngaert, “Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge”(2011), Case Western Reserve Journal of International Law (2011) p. 490.

⁸ See [20160915_OTP-Policy_Case-Selection_Eng.pdf \(icc-cpi.int\)](#).

⁹ See Prosecutor v. Al-Mahdi, ICC-01/12-01/15, Reparations Order, 17 August 2017 (‘Al Mahdi Reparations Order’), paras. 40–1. : [Judgment and Sentence | International Criminal Court \(icc-cpi.int\)](#)

¹⁰ See “[The Fifth International Crime: Reflections on the Definition of “Ecocide” \(tandfonline.com\)](#)” by Liana Georgieva Minkova (Cambridge, 2023).

In relation to environmental harm, the likely orientation of any reparation award would extend to restoring the environment to its state prior to the harmful act and, to the extent there were human victims, individual compensation to natural persons. This is consonant with the approach taken in the UN Victims' Declaration (*UN Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985*)¹¹ which recognises restitution of the environment to its pre-damaged state in the event of criminal conduct resulting in serious environmental harm.

Elements for consideration *vis-à-vis* the victim and reparations scheme include

- whether the environment can qualify as a victim, or whether the victims' regime would only be relevant insofar as human beings and human organizations were impacted by environmental harm.
- The need to show causation between the environmental harm and the injury to individuals
- the means and mechanisms available to quantify environmental harm for the purpose of reparations through compensation.

It is the view of the EWG that the provisions relating to reparations will require amending to incorporate the environment as a beneficiary of reparations, in that monies paid to compensate for harm suffered as a result of ecocide must be used for the benefit of the environment. This would be a novel approach to reparations before the ICC and will require careful consideration and consultation, particularly with indigenous populations.¹²

5. Current Rome Statute framework for environmental crimes

Currently, the Rome Statute only criminalises environmental crimes in the context of an international armed conflict at Article 8(2)(b)(iv):¹³

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

As is evident, this crime is only prosecutable if it occurred in the context of war. **In the view of the EWG**, acts which would constitute the crime of Ecocide as proposed often happen outside the context of war – perhaps even more so in countries not at war. For example, destruction of Amazonian rainforests is not happening in the context of war, but in peace time nor are reckless oil spills are not occurring in the context of war. Yet the ensuing damage on the environment is often devastating and, in some cases, results in irreparable harm.

To date, no public charges of environmental crimes against any suspect before the ICC have been laid, although it seems they could have been. Former President of the Sudan Omar Al Bashir¹⁴ ordered a 'scorched earth' campaign to be carried out by Sudanese forces and Janjaweed in Darfur in from 2003 to 2005, which resulted in an estimated 200,000 deaths and displacement of 2 million civilians. Janjaweed razed villages and crops and contaminated water

¹¹ See 1985 Victims' Declaration of Basic Principles in : [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power | OHCHR](#)

¹² "Case of the Indigenous Communities (Our Land) Association v. Argentina, Inter-American Court of Human Rights (IACHR) , Judgment of 6 February 2020: [seriec_420_ing.pdf \(corteidh.or.cr\)](#)

¹³ See Kai Ambos "Protecting the Environment through International Criminal Law? – EJIL: Talk! ([ejiltalk.org](#))".

¹⁴ See "Comment on the Future Environmental Crimes Policy at the International Criminal Court", International Nuremberg Principles Academy: [Comment-on-OTP- Environmental- Crimes-Policy.pdf \(nurembergacademy.org\)](#) by Maud Sarlieve, Pauline Martini and Pablo Gavira Diaz.

supplies and food sources. The ‘scorched earth campaign’ was used as evidence to underpin the genocide charge but environmental crimes were not charged as war crimes.

Article 8(2)(b)(iv) could be charged against suspects in the Palestine situation for mass destruction of the natural environment in Gaza or with respect to the bombing of the Karkhova Dam in the Ukraine situation, given that the Prosecutor announced that his office will be drafting a policy paper on Environmental Crimes, “*aiming to ensure that it takes a systematic approach to dealing with crimes within the Court’s jurisdiction committed by means of, or that result in, environmental damage.*”¹⁵

The EWG supports the application of Article 8(2)(b)(iv) more readily, however this is not enough. The following section will provide the arguments for and against the inclusion of Ecocide as a fifth crime in the Rome Statute.

6. Ecocide as a fifth crime in the Rome Statute

The EWG heard opinions and arguments from leading academics and experts in the last six months or so about the pros and cons of the inclusion of Ecocide as a fifth crime in the Rome Statute. **The EWG is of the view** that the pros outweigh the cons and are supportive of Ecocide being included as a fifth crime. That process was triggered while the EWG were in the midst of drafting this Paper, when on 9 September 2024, Vanuatu, Samoa and Fiji officially commenced the process in New York. But now – what next?

The process of introducing a new crime into the Rome Statute is long and arduous. Academics told the EWG at the April EWG Workshop in The Hague that any quick adoption of the crime of Ecocide is low. Other experts told the EWG that the OTP and ICC in their current state does not have the capacity, capability or expertise to take on the work required to properly investigate and prosecute the crime of Ecocide. However, one academic presented a view endorsed by the EWG, being:

*the potential for the crime of ecocide to send a clear expressive message about the relationship humans have with our environment could nonetheless make the effort worthwhile. To say that humans are inseparable from the natural world is obvious, and is something that most people need to be reminded of.*¹⁶

Despite the pushback and arguments against the inclusion of the crime of Ecocide as a fifth crime, it will eventually make its way into the Rome Statute. The process would not be quick. A legal definition will likely be agreed on, but the State-based conversation will likely slow things down significantly, including the resistance of States who have a vested interest in keeping Ecocide away from their jurisdiction.

The ICC’s mandate is to address the greatest threats to humanity and end impunity for those acts. To not have a crime related to environmental destruction in peace time goes against its intention and future generations will not accept otherwise. Indeed, international criminal law sends the expressive message that the international community does not accept conduct and inclusion in the Rome Statute is indicative of international legitimacy. It follows, then that acts constituting Ecocide are serious enough to be an international crime.

¹⁵ <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0>

¹⁶ Rebecca J Hamilton, ‘Criminalizing Ecocide’ (forthcoming Harv. Hum. Rts J., 2025)

Amendments to the Rome Statute must be proposed, adopted, and ratified in accordance with Articles 121 and 122 of the Statute. Any State Party to the Statute can propose an amendment and adoption of the proposed amendment is by a two-thirds majority vote. An amendment comes into force for all States Parties one year after it is ratified by seven-eighths of the States Parties. Any amendment to articles 5, 6, 7, or 8 of the Statute (the crimes) only enters into force for States Parties that have ratified the amendment. A State Party which ratifies an amendment to Articles 5, 6, 7, or 8 is subject to that amendment one year after ratifying it, regardless of how many other States Parties have also ratified it. (Article 121(5)) For an Article 5, 6, 7, or 8 amendment, the Statute itself is amended after the amendment comes into force for the first State Party to ratify it (Article 122(2)).

The effect of the inclusion of Ecocide will carry over to domestic jurisdictions, under the principle of complementarity¹⁷. The flow on effect will mean that States will need to criminalise Ecocide domestically. **The EWG welcomes** this positive change on domestic legislative structures, providing accountability at State level. It will also alleviate the burden carried by the ICC to investigate acts which could constitute ecocide, if State Parties follow their obligations to investigate those acts, at the first instance, themselves, noting that the ICC is a court of last resort.¹⁸

The EWG endorses the commentary of Professor Phillippe Sands KC, Co-Chair of the Independent Panel of Experts:

There is a manifest gap in the Statute of the ICC, and Ecocide is now firmly on the agenda, a vital and necessary moment for an effective international law. This development reflects a growing recognition that severe environmental destruction deserves the same legal accountability as other grave international crimes that focus on the human. I urge member states to support this initiative, to recognise that the Rome Statute as drafted cannot adequately address environmental harms, and that this is a moment of generational change, one that is needed to safeguard our environment and signal to coming generations that the world is truly serious about doing so."

Although there will no doubt be opposition to the inclusion of Ecocide as a fifth crime from stakeholders, organisations and States (member or otherwise) who may have economic interests adversely affected by the criminalisation of ecocide at international law, **the EWG is of the view** that this should not deter the ICCBA from supporting it. Notable support for the extension of international criminal law for accountability for environmental harm came this year from Deputy Prosecutor Nazhat Khan, in her keynote address at a conference in Amsterdam.

The Rome Statute and international criminal law now face a challenge to their own relevance if they do not accept the need for such adaptation and flexibility in relation to the reality of the planet. The future negotiations around the Rome Statute and the creation of new offences, rest of course in the hands of State Parties. But in my view, if the small island states want to participate in such negotiations, they too will need to step up to involve themselves in the work of the Court, and in the Assembly of State Parties. That journey must begin with more

¹⁷ See our previous note (12) "Comment on the Future Environmental Crimes Policy at the International Criminal Court", International Nuremberg Principles Academy, pag 42: "Implementation of the Principle of Complementarity".

¹⁸ P. Higgins "Protecting the Planet: A Proposal for a Law of Ecocide", Crime, Law and Social Change (2013) and P. Higgins, Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet (2nd Ed. Shephard-Walwyn, 2016).

ratification. If such states want to have their voices heard, they must give themselves a seat at the table.

It seems that since the speech, the small island states took the Deputy Prosecutor's counsel and did indeed step up by triggering the process, which will garner momentum and no doubt be a key topic at the upcoming 23rd session of the Assembly of States Parties in The Hague. **The EWG encourages** the ICCBA Executive to take part in any discussions it is invited to attend, with a view to supporting the inclusion of Ecocide as a fifth crime in the Rome Statute.

7. Recommendations

The EWG recommends that Ecocide be included as a fifth crime in the Rome Statute.¹⁹ The current framework for environmental crimes under international law are not sufficient, because Article 8 does not apply to conduct outside the context of an international armed conflict.²⁰

The EWG recommends avoiding the anthropocentric vs. eco-centric conundrum. It is important for the arguments to be fleshed out but not to prove as a stumbling block or stalemate *vis-à-vis* the inclusion of Ecocide as a fifth crime. Humans are inseparable from nature and the environment, which means protecting nature and the environment is long term protection of human benefits.

The EWG recommends advocating for the incorporation of indigenous groups in further discussions on the inclusion of Ecocide as a fifth crime in the Rome Statute.

The EWG recommends the discussion relating to the establishment of principles underpinning the ICC's reparations regime. Indigenous populations form a large portion of the victim-base of ecocide and their views should be incorporated into the definition of 'victim' for the purposes of reparations.

¹⁹ See "Ecocide — Puzzles and Possibilities", by Darryl Robinson (2022) [Microsoft Word - Ecocide Puzzles and Possibilities 2022 03 13 SSRN .docx \(elsevier-ssrn-document-store-prod.s3.amazonaws.com\)](#) . Journal of International Criminal Justice 20 (2022), 313–347.

²⁰ See "The Challenge of an International Environmental Criminal Law", by Frederick Megret (2010): [Microsoft Word - Challenge of an international environmental criminal law.doc \(elsevier-ssrn-document-store-prod.s3.amazonaws.com\)](#)

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5. Kevin Jon Heller, "The Crime of Ecocide in Action", OpinioJuris [The Crime of Ecocide in Action - Opinio Juris](#) (2021) ;
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10. "Vers un écosystème de formation et de recherche sur la justice pénale internationale", Vivianne Dittrich et Natacha Bracq, Pag 183, en "La clé d'un système global de lutte contre l'impunité des crimes internationaux", Editions Pedone, Mai 2024;
11. "Les débats relatifs à l'incrimination de l'Écocide", Juliette Bagary-Latchimy , pag 95, en "Idealisme et Pragmatisme de la Justice Penale Internationale" (2024), Julian Fernandez-Olivier De Frouville.