

THE PREAMBLE TO THE ROME STATUTE AND THE PROPOSAL TO ADD THE CRIME OF ECOCIDE TO THE STATUTE: A TRIBUTE TO DON

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INTRODUCTION: SOME REMINISCENCES OF DON

The two authors of this tribute were both students in Don Paterson's Administrative Law class at Victoria University of Wellington in the 1960s, although in different years. We are both strong admirers of his life's work and are delighted to participate in this collection in his memory. We are probably emblematic of the continuing influence, friendship, and occasional contacts that so many of his students have had with him in his later years. There is a catchy phrase in the Preamble to the Rome Statute of the International Criminal Court (ICC)¹ which we shall discuss later in its original context. We believe, however, that it is also apt to characterize Don's long and dedicated career as a teacher. The phrase is "for the sake of present and future generations." These words capture his approach to teaching and scholarship do they not? He wanted to reach the current generation with his courses (generations really, given how long he toiled on the job), but he was also, in setting up programmes and collecting distinctively Pacific teaching and other legal materials, looking presciently to the future.

After graduation, Neroni Slade's path took him back to Apia, as a government lawyer, and then to a stint as Attorney-General. He then moved to London to work as a legal officer at the Commonwealth Secretariat, later to New York as the Samoan Ambassador to the United Nations (and to the United States and Canada). He subsequently became one of the first judges on the International Criminal Court and then Secretary-General of the Pacific Islands Forum.

After graduate study at Columbia University in New York, Roger Clark's career took him from teaching back at Victoria to a long, forty-nine-year, tenure at Rutgers Law School in New Jersey.

A few years after taking Don's course, when he, in turn, became a member of the Victoria Law Faculty, Roger Clark was assigned to teach Administrative Law. He made extensive use of Don's 1967 book, *An Introduction to Administrative Law in New Zealand*, which was based on his doctoral dissertation at Yale. Roger visited him in Port Vila in 1990 when he was attending a United Nations Decolonization Committee meeting there. They had a long talk about USP's distance learning programme in law. Don was thrilled to be involved in this innovative teaching and learning experience.

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¹ Rome Statute of the International Criminal Court, Rome, 17 July 1998.

Neroni Slade records formal dealings with Don post-Victoria from the first Pacific Islands Law Officers Meeting (or PILOM) held in Vanuatu in 1981, at a time when Don had moved to Fiji as a faculty member and then Deputy Vice-Chancellor of the University of the South Pacific (USP). The idea for such a meeting had been canvassed for some time and this first gathering was initiated by Vanuatu with the full backing and funding from USP and active support by the Commonwealth Secretariat in London.

Initially a pioneering effort enabling legal cooperation and functioning as a region, especially in essential education and training, PILOM has continued to develop and strengthen over the passing years to what it is today, an invaluable networking facility for Pacific Islands Law Officers or PILON as it is now known. From USP administrator in Suva, Don later moved on to Vanuatu to head the development of the Pacific Law Unit (PLU), now the School of Law - and in the process to engage some of the region's senior law officers. This group included Neroni who had travelled to Vanuatu from London to chair a small group working with Don, on the syllabus of PLU courses and programmes.

Neroni notes that Don was fully engaged with all Pacific Law Officers. Throughout the PILOM experience, Pacific Law Officers in their agenda-considerations have also been consistent in their concerns for the region's environment, with their call for regular updates on the work of the Forum Fisheries Agency, established in 1979² by Pacific countries in accordance with what they considered to be the principles of international law, well before adoption of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982.³ Also included were presentations by Pacific specialists on international environmental law principles for the preservation and protection of the marine environment (resulting in the regional Noumea Convention of 1986⁴ in particular) including the legal implications of the greenhouse effect and projected global climate change impacts. Don was directly involved in all this work and, given his long tenure and closeness to so many in the region, we have no doubt of the importance of his personal influence and inspiration.

In that wider perspective, we thought it might be appropriate to discuss, in some way, the ICC and the Pacific. Accordingly, we asked Dr Morsen Mosses, the Editor of this tribute issue, whether he had talked to Don in recent years about the ICC and especially about Pacific Islands involvement with it. He vividly remembered talking with Don in 2019 about a push for Pacific states to become parties to the Rome Statute, and the sponsorship of Vanuatu of a move to include the crime of ecocide in the Statute of the Court. He referenced a report of a meeting in Port Vila to encourage Pacific support for the Court⁵ and another report on Vanuatu's supportive efforts on

² See South Pacific Forum Fisheries Agency Convention, Honiara, 10 July 1979, available at <https://www.ecolex.org/details/treaty/south-pacific-forum-fisheries-agency-convention-tre-000735/>.

³ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 UNTS 3.

⁴ See Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Noumea, 24 November 1986, available at <https://www.sprep.org/attachments/NoumeConventiontextATS.pdf>.

⁵⁵ 'Pacific Islands States Commit to Advancing International Criminal Justice', *Daily Post Digital*, 11 June 2019, available at https://www.dailypost.vu/news/pacific-islands-states-commit-to-advancing-international-criminal-justice/article_51cf5309-22c5-5180-80a7-9bda0982cff8.html.

ecocide.⁶ That convinced us that we could evoke Don's spirit, his love for things Pacific, and his continuing intellectual curiosity to the end of his life, by discussing some aspects of the ICC with which we are familiar. Regrettably, only about half of the Pacific Island states are parties to the Rome Statute: Cook Islands, Fiji, Kiribati (the most recent to join, in 2019) Marshall Islands, Nauru, Samoa and Vanuatu. Samoa, alone of them, is one of 43 of the 123 states parties to the Statute to have accepted the 2010 Kampala (aggression) Amendments to the Statute. Those Amendments made it possible since 2018 for the Court to exercise its nascent jurisdiction over the crime of aggression.

In the context of a meeting of Pacific Forum Leaders held in Apia in 2017 there was a visit by the ICC President at the time (Judge Silvia Fernández de Gurmendi). She was welcomed by the then Samoan Prime Minister⁷ and addressed Pacific Leaders in a side event on the work of the ICC and made an appeal for more Pacific membership. Neroni Slade was present and spoke in support at the side-event⁸ which was chaired by the now current Prime Minister of Samoa, then Deputy PM. The President of Kiribati was present and quite vocal at the side-event and seemed impressed enough to pledge right there for Kiribati to join as soon as he got back home. And he did!

The rule of law is sometimes all that a small country can rely on to protect its interests and it is a matter of regret that the other Pacific Island states have not yet become parties to the Rome Statute.

Indeed, by addressing the influential readers of this Journal, we seek to encourage more interest in the ICC in the Pacific region. To narrow the task, we have chosen to write, firstly, about the Preamble to the Court's constituent instrument, the Rome Statute, which captures the flavour of the whole instrument, and, secondly, the ecocide proposal, a new development. Neroni Slade has been deeply involved in each of these endeavours; Roger Clark worked closely with him on the first but is merely a committed observer of the ecocide initiative. The Preamble symbolizes the original vision of Rome; the proposals on ecocide treat the Rome Statute as a living instrument, open to development as the needs of the international community evolve.

NEGOTIATING THE PREAMBLE TO THE ROME STATUTE

We note, by way of background, that in 1995 we had both appeared to represent Samoa before the International Court of Justice in the Advisory Proceedings on the *Legality of the Threat or Use of Nuclear Weapons*,⁹ as did Marshall Islands and the Solomon Islands (one of whose representatives was Ambassador Rex Horoi, another was Professor Philippe Sands, who both reappear later in this

⁶ 'Vanuatu calls for International Criminal Court to seriously consider recognizing crime of ecocide', *Daily Post Digital*, 5 December 2019, available at https://www.dailypost.vu/news/vanuatu-calls-for-international-criminal-court-to-seriously-consider-recognizing-crime-of-ecocide/article_7530f548-16e2-11ea-a143-970c8bf787bc.html.

⁷ See <https://www.looppng.com/global-news/icc-president-address-pacific-islands-forum-65965>.

⁸ Id.

⁹ 1996 ICJ Rep 226.

tribute).¹⁰ Given the important related issues involved – peace, war, the environment – it was natural that we became involved in the negotiations to create an International Criminal Court, and late in 1995, Neroni asked Roger to assist him, *pro bono*. Our instructions from the Prime Minister started with the proposition that such a body could be a useful addition to the architecture of global cooperation so critical to a small country, and our task was to help figure out the best treaty that we could get. Don, we think, would have regarded what we were up to as, at least in part, an exercise on (International) Administrative Law, creating a new institution. It also took us into many areas of Public International Law and Criminal Law that were learning experiences for us both.

We were aware that Trinidad and Tobago had been one of the leading lights in getting the ICC idea back on the General Assembly Agenda, and that other members of the Alliance of Small Island States (AOSIS), of which Ambassador Slade was then the Chair (the Ambassador of Vanuatu having been the first AOSIS chairman) were interested in the project. We also knew that several West European and Other States (including Samoa's former colonial powers, New Zealand, and Germany) were sympathetic. Like Samoa and Solomon Islands, New Zealand and Germany became early members of the 'Like-Minded Group' in the negotiation, the coalition of states most enthusiastic in seeing the negotiation to its end. Samoa is a member of the Asia/Pacific Group for voting purposes in the UN, which sponsored the negotiations. Early in 1998 we managed to insinuate ourselves through that Group as one of the Vice-Presidents of the Rome Diplomatic Conference which was to complete the negotiations to create the Court. To our surprise, when we arrived in Rome in June 1998, Ambassador Slade was appointed as Coordinator of the negotiations on the Preamble and the Final Clauses of the Statute of the Court.¹¹ Like most delegates, we had not given much thought to what should go into a preamble. There had been no significant discussion in New York's Preparatory Committee (PrepCom) for the Diplomatic Conference which met between 1996 and early 1998. Is there a great work out there somewhere on the philosophical theory of preambles? If there is, we have not found it. At all events, we concluded (seemingly with general agreement) that the preamble should probably be a mixture of explanations of why the treaty was a good thing and a summary of some of the treaty's basic principles. In making this operational, we had significant assistance from the representatives of Solomon Islands, led by Ambassador Rex Horoi and the Attorney-General Primo Afeau, the only other Pacific Island state represented in Rome. They had expert help from Professors Philippe Sands and Andrew Clapham. (Solomons signed the Statute soon after Rome but has not yet ratified

¹⁰ See generally Roger S. Clark and Madeleine Sann, *The Case Against the Bomb: Marshall Islands, Samoa and Solomon Islands Before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons* (1996).

¹¹ We have previously recounted some of that experience in Tuiloma Neroni Slade and Roger S. Clark, 'Preamble and Final Clauses', in Roy Lee (ed), *The Rome Statute of the International Criminal Court: Issues, Negotiations, Results* (1999) 421.

it.) Solomons also laboured hard, along with France, to include corporate criminal responsibility in the Statute but was unsuccessful in forging a consensus for this.¹²

The International Law Commission (ILC) had provided what became a first draft for a Statute, but it was much amended in the negotiations in the PrepCom in New York prior to Rome. The Commission had drafted three rather prosaic, but important, preambular paragraphs. These three paragraphs recorded: the desirability of furthering international cooperation to enhance the suppression of crimes of international concern and of establishing a court for that purpose; an emphasis that the Court was to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;¹³ and that the Court was intended to be complementary to national criminal justice in cases where such trial procedures may not be available or may be ineffective. (That is to say, states would have the first opportunity to prosecute; if a state is unwilling or unable, then the Court can enter the fray.) The second and third of these were basic statements of the limited nature of the Court's jurisdiction. All three of the ILC's statements found their way, in essence, into the ninth and tenth preambular paragraphs of the final product. But the remainder of the Preamble emerged from whole cloth in Rome, based largely on formal proposals made by Andorra, the Dominican Republic and Spain, with some informal language by others, including particularly Liechtenstein and the nongovernmental organization (NGO) grouping named 'The Faith-Based Caucus'. The latter, like Andorra, was eager for some ethical standards to appear in the final product.

There were a couple of side issues, essentially placeholders, introduced by Singapore and the Holy See as proposed language for the Preamble, which dropped off along the way. Singapore wanted to preserve the right of States Parties to engage in capital punishment and even to include it in the Statute. This was anathema to most delegates. The Holy See wanted to protect 'human beings', a shot in the abortion war, aimed at the women's groups advocating (successfully) for the inclusion of 'forced pregnancy' as a crime in the Statute (an issue all-too-close to home in East Timor). Both these proposals failed to generate a consensus and finally fell by the wayside towards the end of our work.

Andorra came to Rome with the task of finding something poetic and philosophical as a first paragraph to the treaty. Its basic idea was that international crime shatters the bonds of the international communion and that an international court may be able to help put things back together again. The Faith-Based Caucus, very supportive of Andorra, saw this as something along the lines of restorative justice. Andorra first presented the thought in a draft with an image of a 'tapestry' (a metaphor for the international community) which might be 'torn and rent asunder'. We were approached by several non-native-English speakers who enquired what sort of English that was. We replied that it was a little archaic, but we remembered that it had a home in the *King James Bible*. Do you think we could find a King James Bible in Rome? Later we found it on-line,

¹² See Andrew Clapham, 'The question of jurisdiction under international criminal law over legal persons: lessons from the Rome Conference on an international criminal court', in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law* (2001) 139.

¹³ Ultimately the Court's subject-matter jurisdiction was limited to genocide, crimes against humanity, war crimes and the crime of aggression, jurisdiction over the last of these not being available until 2018.

and ‘rent asunder’ appears in both the Old and New Testaments. One of the Faith-Based representatives also found it in S.T Coleridge’s unfinished 1797 Gothic masterpiece, *Christobel*, so we hung tight for a while, dropping the word ‘torn’ as repetitive. ‘Tapestry’, however, was felt by some, including Japan and France, to be culturally inappropriate. This led to much discussion about the nature of the spectacular French ‘Bayeux Tapestry’ (the French version of William the Conqueror’s defeat of the English) which, it seems, is embroidered not woven, and thus not a tapestry as normally understood. We confess to being bemused by this whole lengthy discussion over a couple of weeks. It led eventually to a reference which we suggested to a ‘mosaic’ rather than a ‘tapestry’. A mosaic had general cultural resonance. The Drafting Committee rejected the whole paragraph, as being a little too sentimental. It was disinterred triumphally in the Committee of the Whole after a difficult conversation with the late Professor Cherif Bassiouni, Chair of the Drafting Committee. Since it was hard to rend a mosaic asunder, the felicitous verb ‘shattered’, suggested by a US delegate, carried the day. The paragraph, rather elegant we think, ultimately read:

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.

The second preambular paragraph, based on Spanish and Dominican drafts, reads:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.

That we were working on behalf of ‘the victims’ was a common refrain during the negotiations; this paragraph captures that thought and the characterization of the twentieth century as the bloodiest on record. The emphasis on victims led, in the substantive articles of the Statute, to significant rights of participation by victims and to the reparation article therein. As one of the drafters of the 1985 General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,¹⁴ Roger was delighted to see language from that instrument included in article 68 of the Statute. It guarantees the right of victims to participate in the proceedings. And article 75 of the Statute exhorts the Court to ‘establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation,’ language which we supported. We were, nevertheless, acutely aware at the time of the limitations of the criminal process as a vehicle for victim reparation. We therefore tried not to oversell the chances of obtaining redress. Most accused do not have funds that can be reached, and the ever-present possibility of acquittal at trial or on appeal, as in the *Bemba Gombo* case,¹⁵ means that victims’ hopes for justice will sometimes (perhaps often) be raised only to be dashed. This is so,

¹⁴ GA Res 40/34 (29 November 1985).

¹⁵ Appeals Chamber, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute,” ICC-01/05-01/08-3636-Red, June 8, 2018. The Appeals Chamber, in a 3-2 vote, reversed a conviction against a wealthy defendant who could potentially pay reparation, essentially on the basis of a failure of proof of elements of the crimes charged (war crimes and crimes against humanity). Reparation based on criminal convictions is always subject to the vagaries of the criminal process.

notwithstanding the valiant begging efforts of the Trust Fund for Victims set up pursuant to the Statute. The Trust Fund relies on less-than-generous voluntary contributions from states.

The third preambular paragraph makes explicit the perceived connection between grave crimes and international peace and security. Grave crimes inevitably have transnational effect. The paragraph is a reinforcement of the first paragraph, and an acknowledgement of the way in which the Security Council may find the Court a useful tool for its efforts in exercising its primary, but not exclusive, role in the maintenance of peace and security. It has the adherents to the Statute 'Recognizing that such grave crimes threaten the peace, security and well-being of the world.' The Court may develop as a useful secondary tool in enforcing the norms against aggression.

The fourth paragraph reads:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

The 'fight against impunity' was another constant theme in the negotiations. This expression of it, again emphasizing the national and the international, was a composite of a number of formulations that had been expressed; it emerged in this form largely from the Coordinator's bilateral contacts.

The fifth preambular paragraph uses the word 'impunity' itself. It was added at the suggestion of Liechtenstein during the informal consultations. It reads:

Determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.

This reflects both a determination to end impunity (retributive justice) and the belief that punishment of those guilty of international crimes will lead to deterrence of others (general deterrence). There are some deep questions of penological theory that are, of necessity in a brief paragraph or two, never fully explored in the Statute. How significant is general deterrence based on the punishment of a relatively small number of miscreants? Beyond restorative and reparative justice, does the Court have a role in rehabilitation (or incapacitation) of those convicted? Is specific deterrence relevant here? Can génocidaires and aggressors be deterred for the future? Can they be rehabilitated? Do they age out of criminal impulses like most domestic criminals? Is the expressive function of the law (implied rather than expressed in the preamble) a large part of the explanation for the enterprise? What an evocative paragraph!

The next paragraph came from the Dominican Republic's proposals. It is studiously ambiguous: 'Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.' Is it referring to jurisdiction over crimes occurring within the territorial or nationality jurisdiction of the State? Or is it referring to a much broader jurisdiction of the universal kind, as some of the NGOS such as Amnesty International believed, regardless of where the events occurred? In this respect, it reflected the ambivalence of some negotiators about whether the Court should derive its jurisdiction on a theory of universal jurisdiction or whether it should be narrower, based on the consent of the territorial state or the

state of nationality. The narrower concept is contained in the Statute, but this paragraph leaves open the possibilities for a broader jurisdiction at the national level, as for example, Samoa exercises.¹⁶

The seventh paragraph had a checkered career. It reads:

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

It began with a widely expressed insistence that some reaffirmation of the UN Charter was appropriate in a task of the magnitude of the creation of the Court, a creation seen by many as the culmination of the joint legacy of Nuremberg and of the finalization of the Charter in San Francisco in mid-1945. Spain proposed a general reference to the Charter, accompanied by references also to the maintenance of international peace and security, to respect for human rights and to the promotion of international law. Objections were made that these three items represented only part of what should be reaffirmed and that the drafting left something to be desired. The result was that in the Coordinator's last text on 14 July the reaffirmation was merely of the Purposes and Principles of the United Nations (to be found in articles 1 and 2 of the UN Charter). So it remained in the report of the Drafting Committee on 16 July, but the Bureau (the small overall steering group for the details of drafting) evidently found it necessary to the needs of one of the major players (China, we believe) to reinstate the selective reference to the use of force at the very last minute.

A similar note is struck in the next (eighth), closely related paragraph, also the last-minute work of the Bureau. Underscoring the sensitivity of some of the negotiators to including non-international armed conflicts within article 8 of the Statute, it reads:

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State.

The ninth and tenth paragraphs, as we have noted, reflect the ILC's original thoughts, with some additional flourishes. They read:

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national jurisdictions.

¹⁶ (Samoa) International Criminal Court Act 2007, as amended, sections 5-7 and 7A (creating universal jurisdiction for Rome offences, including aggression).

The ninth paragraph also took aboard the idea that the Court would be, as mentioned earlier, ‘for the sake of present and future generations’ and that, in fulfilment of the implied promise of the Nuremberg project, that it should be ‘permanent’.

The last preambular paragraph, with its very significant reference to justice came from the Dominican Republic’s proposals. It reads:

‘Resolved to guarantee lasting respect for the enforcement of international justice.’

If one had to state the essence of the Statute in one word, is this it: justice? Or is it victims?

The Rome Statute is a collaborative product. In one rueful moment Ambassador Scheffer, the leader of the US delegation in Rome, claimed to us that Samoa’s two-person delegation got more of its words in the Statute than his forty-eight-member delegation. We don’t know that the Preamble proves the point. His delegation got the word ‘shattered’ while we can claim ownership of ‘mosaic’. Andorra got its poetry (with a little help from its friends); Liechtenstein got a paragraph and Spain and the Dominican Republic several. Some good friends suggested that ‘for the sake of present and future generations’, which we happily apply here to Don Paterson, were our words. Alas, it was Spain who introduced them in Rome, and they go back at least to the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment¹⁷ and they appear again in the 1992 UN Framework Convention on Climate Change.¹⁸ Much international drafting cannibalizes what came before does it not? The Rome Statute is typical in this respect.

ADDING ECOCIDE TO THE CRIMES IN THE STATUTE

Vanuatu has become closely associated with the current international effort to add ecocide to the international crimes in the Rome Statute. At the ICC Assembly of States Parties in 2019, Vanuatu,¹⁹ together with The Maldives,²⁰ had proposed that the Rome Statute might be amended to criminalise acts that amount to ecocide. Both are mid-ocean small island countries whose communities and natural systems are uniquely sensitive to and vulnerable to global forces of widespread environmental degradation and extreme climate-driven impacts like sea-level rise.

There is an abundance of widely acknowledged scientific evidence which underscores the environmental concerns of countries like Vanuatu and The Maldives. They are concerns shared by many other countries and which have helped galvanise the work of the international independent expert panel sponsored by Stop Ecocide International²¹ which released its draft of a legal definition of ecocide in June 2021.²²

¹⁷ UN Doc A/CONF 48/14/Rev 1 (1972).

¹⁸ Available at

https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

¹⁹ See https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.VAN.2.12.pdf.

²⁰ See https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/GD.MDV.3.12.pdf.

²¹ See <https://www.stopecocide.earth/>.

²² Definition of ecocide, <https://www.stopecocide.earth/legal-definition>. For enthusiastic support by one of the Experts, see Christina Voigt, “‘Ecocide’ as an international crime: Personal reflections on options and choices”, in *EJIL Talk!* 22 June 2021, available at <https://www.ejiltalk.org/author/cvoigt/>. Less enthusiastic is Kevin Jon Heller,

The panel recommends that a new crime of ecocide be adopted as Article 8 *ter* of the Rome Statute, the provision to read:

For the purpose of this Statute, “ecocide” means 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.

The structure of the proposed definition is drawn from Article 7 of the Rome Statute (dealing with crimes against humanity): the first paragraph setting out the crime, and the second paragraph defining its core elements, including the terms “wanton”, “severe”, “widespread”, “long-term” and “environment”. Several of the core elements are drawn from the existing provision under Article 8 (2)(b)(iv) of the Rome Statute (dealing with war crimes) including the use of the terms “widespread”, “long-term” and “severe”; a proportionality test; and the use of endangerment liability. In that sense the new crime proposed draws its essential elements from language that is already familiar, having been included in existing international law agreements.

The panel’s draft legal definition, together with a supporting commentary note, have been widely circulated and now publicly featured and will have to be judged on its own terms. It is not our purpose in this tribute necessarily to promote or advocate for the panel’s work, although we would note that our colleague from The Hague and Rome, Philippe Sands (see above) was co-chairman of the panel, and that Neroni was a panel member.

As explained in the panel’s commentary note accompanying the definition,²³ we would draw attention to the fact that the panel’s work has been inspired and informed by earlier efforts, in the 1940s, to forge definitions of new international crimes, including genocide and crimes against humanity. Ecocide draws from both terms, in form and substance. Taken together with these two crimes, and with war crimes and the crime of aggression, it is the expressed hope of the panel that ecocide might take its place as the fifth ICC crime under its Rome Statute.

From what we know of Don Paterson we believe he would share completely the viewpoint that the moment is right to harness the power of international criminal law to protect our global environment, and on the basis that the law will act as a powerful deterrent. After all, the Rome Statute is a statute of deterrence, for the prevention of ICC crimes and to putting an end to impunity for the perpetrators of such crimes. As it is said, nothing concentrates the mind more than the exposure to personal criminal responsibility.

However, there cannot be any illusion about the difficulties, for there are likely to be real and significant challenges to the proposed definition, in legal and policy terms and, we would expect, in the political considerations of at least some ICC member countries. Moreover, because of the complex amending provisions in Article 121 of the Rome Statute, it can probably be made

‘Skeptical Thoughts on the Proposed Crime of “Ecocide” (That Isn’t)’ in *Opinio Juris* 23 June 2021, available at <http://opiniojuris.org/2021/06/23/skeptical-thoughts-on-the-proposed-crime-of-ecocide-that-isnt/>. For an earlier negative assessment of the concept, see Christopher Tavao, ‘Critical Evaluation on Ecocide as to whether or not it should be a Serious Crime under the Rome Statute of the International Criminal Court’, (2020) 22 JSPL.

²³ Above note 22.

applicable only to those states parties who chose to be bound (comparable with the ultimate result with the crime of aggression). At the same time, we can be equally clear that humanity now stands at the crossroads with the awful reality of continuing and worsening environmental destruction worldwide, serious and irremediable loss of biodiversity and the immediacy and existential dangers of global climate change.

Serious international concerns about the deteriorating state of the global environment, and the impact of weapons of mass destruction in particular, were extensively debated at the Rome conference. The deliberate and intentional attack on the natural environment was agreed to in Rome as a criminal act and so criminalised, albeit with the specificity and high-level thresholds prescribed for a war crime under Article 8(2)(b)(iv) of the Rome Statute. The creation of the crime of ecocide, in every respect, is part of that process of Rome and in that sense is part of its unfinished business.

Indeed, it could be said that having ecocide as an ICC crime will contribute substantively to the moral authority of the Court and its true purpose and spirit – those as proclaimed in the preamble of the Rome Statute: to serve as deterrence against ‘grave crimes [which] threaten the peace, security and well-being of the world’ (3rd and 5th paragraphs) and with resolve of the international community to ‘guarantee lasting respect for and the enforcement of international justice’ (11th paragraph).

We believe that the Don Paterson we remember would agree that the binding ‘hard law’ provisions of the Rome Statute need to co-exist with the more aspirational ‘soft law’ of the Paris Agreement and other international agreements for safeguarding the global environment, for they all share the ‘common concern of humanity’ and essential humanitarian underpinnings. The destruction of the environment starts with people and ends with people.

As the law teacher without boundaries, we think Don would insist on climate change being the global challenge that it is, not a small islands problem; and would see the Paris Agreement as the international acknowledgement of the magnitude and immediacy of climate change and standing for this very purpose – the assertion of international responsibility. Humanity needs to come together to make the Paris Agreement a reality. Never before has the need to secure the core principle of the UN Climate Change Convention been more imperative – the need, that is, to protect the planetary climate system for the benefit of present and future generations of humanity on the basis of equity. As we have noted above, it is precisely for those present and future generations of humanity for which the International Criminal Court was created.

At the ICC Assembly of States Parties meetings in December 2021, Vanuatu and Samoa were among the countries co-sponsoring a side-event for the presentation of the panel’s proposed legal definition of ecocide.²⁴ It was an occasion for re-asserting unwavering faith and commitment to the purpose and principles of the Rome Statute, and Pacific country-support of the essential role the Court plays as part of the international rules-based order. For small vulnerable countries, there is little other option but to rely on the system of global order and the rule of law to provide the most effective measure of protection.

²⁴ See <https://www.stopecocide.earth/asp-summary> (2021).

At the same time, as the Prime Minister of Samoa had said, it was a necessary opportunity to consider how the Court's mandate can be brought to bear on one of the world's most pressing problems: that of ecological destruction and climate breakdown; and giving careful consideration to the possibility of employing the power of the international criminal law system of the ICC for the purpose.

CONCLUSION

This then is our tribute to Professor Don Paterson, our law teacher, colleague, and friend. A man trained in the age-old halls of established academia in the United States and New Zealand and who for much of his later years chose the Pacific as the centre of his personal dedication and professional work in building and establishing law-teaching systems. This was pioneering work of exceptional proportion at a formative era and in a region so large and diverse that for almost every aspect, there were, and there are, constant and substantial challenges to overcome. Don was a teacher who reached beyond borders and his long tenure and close association with so many around the Pacific would have provided him special facility to set in place in the region an expansive sense of the law and role of lawyers. Lawyers and teachers of the law need to be concerned with principles and values, with the law as it should be, as well as with the law as it is.