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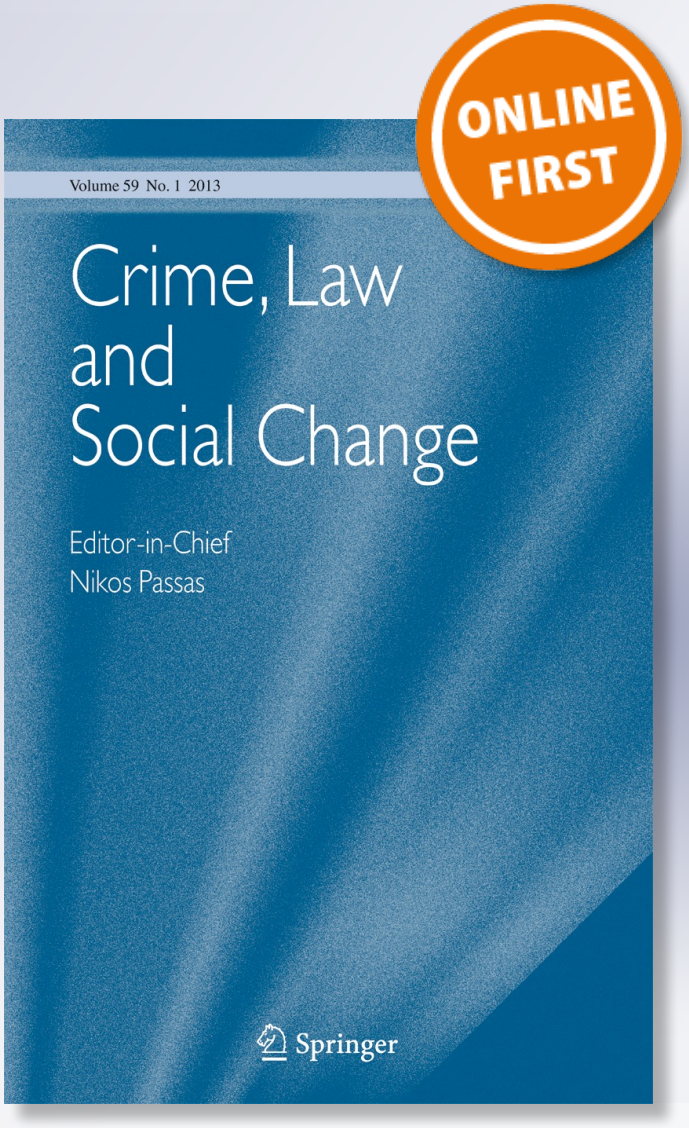

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Protecting the planet: a proposal for a law of ecocide

Polly Higgins · Damien Short · Nigel South

Abstract A wide range of actions imperil the planet and threaten the future of humanity and other species. This essay notes some examples of crimes and harms damaging to the environment and human and non-human species as well as various forms of response that have called for more effective and appropriate models of justice and law than currently prevail. This leads to a discussion of several suggestions regarding the development and expression of an earth jurisprudence and to the history of a proposal that "ecocide" be recognised internationally as a crime. Analysis of documentary sources traces this idea from debates about the concept of genocide to consideration by United Nations officials as to how crimes against the environment might be defined, and shows how near such a proposal has previously come to acceptance and enactment. The article concludes with an argument for supporting a law of ecocide as the 5th Crime against Peace.

Introduction

The development of a green perspective in criminology has drawn attention to crimes and harms affecting the environment, human and non-human life and the planet itself [3, 19, 29, 33, 37, 38, 41, 50, 51]. Examples of such crimes and harms include: industrial pollution; corporate criminality and its impact on the environment; health and safety in the workplace where breaches have environmentally damaging consequences; involvement of organised crime and official corruption in the illegal disposal of toxic waste; and the impact and legacy of military operations on landscapes, water supply, air quality and living organisms populating these areas. Despite this breadth of impact, the plundering of the earth's resources and degradation of the environment have only relatively recently been thought of as activities that might be considered criminal or at least seriously harmful with intergenerational consequences and transnational impacts [39, 52, 54].

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The distinction drawn here between "crime" and "harm" reflects a longstanding challenge for criminology: whether to concern itself only with legally defined crimes or also embrace study of those activities that lie within lawful practice but evidently, at least to some and by some measures of evidence, have harmful consequences that might merit legal proscription and response. Criminologists have therefore tended to adopt either a *legal-procedural approach* to environmental issues, retaining a traditional focus on violations of enacted environmental law (including civil and regulatory violations), or a more *critical* or *socio-legal approach* examining environmental harms that are not statutorily prohibited but regarded as equally or more damaging than some actions that are legal offences. In the orbit of both – but perhaps particularly the latter – can be found discussion and assertion of principles of rights and justice – environmental, species-related and human-specific [11]. Whichever position is taken, in the furtherance of ensuring law is appropriate to its time and that entitlement to rights and justice is fair and comprehensive, criminology has routinely questioned the "taken for granted" nature of definitions and classifications of crime, harm and deviance and offered alternative proposals about where concern and regulation should be directed [32].

A wide range of actions imperil the planet and threaten the future of humanity and other species. These crimes and harms need to be responded to through both informal and formal means of resolution and restoration, underpinned by an internationally applicable legal framework. The history of a proposal for instituting such a framework in the form of international recognition of a crime of "ecocide" is presented, drawing on research that reveals how close this has previously come to acceptance and enactment. The paper concludes with support for a contemporary restatement of this proposal.

Environmental crime, harm and (in) justice

Examples of environmental harm and crime can be organized into, for example, primary and secondary forms, classified as either resulting directly from the destruction and degradation of the earth's resources (primary) or as being symbiotic with or dependent upon such destruction, and efforts made to regulate or prevent it (secondary). We can suggest four main 'primary' clusters of green crimes/harms negatively affecting the environment and species other than humans brought about as a result of human actions, and examples are given below. 'Secondary' or symbiotic green harms and crimes can arise from the exploitation of conditions that follow environmental damage or crisis (e.g., illegal markets for food, medicine, water) and/or from the violation of rules that attempt to regulate environmental harm and to respond to disaster. These can include numerous major and minor practices whereby states violate their own regulations (either by commission or omission) and in so doing contribute to environmental harms. For the purpose of illustration and to emphasise the breadth and scale of primary crimes/harms, consider the following examples.

Crimes/harms of water pollution

During the span of one century the global population tripled, water consumption multiplied sixfold and "half the world's rivers and lakes have become polluted by

waste water" [22, p.12, 53]. Some 58 % of the world's reefs and 34 % of all fish may be at risk due to over-fishing, poaching and non-sustainable fishing techniques, as well as pollution [2]. Freshwater and marine pollution is an everyday occurrence but was highlighted as a global news story in April 2010 by the explosion of the BP Deepwater Horizon oil well, which had the immediate effect of killing 11 people and injuring 17 others but also turning into an ecological disaster on an enormous scale. This was however, only the latest in a line of incidents in which the oceans of the world and coastal eco-systems and economies have been ravaged and damaged by oil spills (see e.g. www.telegraph.co.uk/earth/environment/7654043/Major-oil-spills-the-worst-ecological-disasters.html).

Crimes/harms of air pollution

Air pollution crosses national boundaries and can affect all who live and work in cities or centres of high industrial concentration although it cannot be said that pollution is egalitarian in impact insofar as those who are more able than others to live in low pollution areas can avoid the worst excesses that are suffered by those living in high density locations. All populations will however be subject to the effects of climate change and ozone depletion, which are predominantly driven by air pollution. As Walters [47] reports 'The World Health Organisation estimates that air pollution causes the annual premature death of two million people worldwide through respiratory infections, heart disease and lung cancer—all accelerated by, or the direct result of, poor air quality .... Not only are humans placed at risk, but wildlife, water, agriculture, buildings and natural heritage are also damaged by air pollutants at great financial, cultural and environmental expense. In addition, air pollution is a major contributor to climate change and the increase in so called 'natural disasters'.'

Crimes/harms of deforestation and spoiling of the land

Across the world the impact of illegal logging is depleting forestry resources and this has worrying implications for global warming but the activities, actors and motives involved are complex and it is important to recognise that illegal logging is pursued for need as well as for greed. [7, 45] Even so, the impact of giant industrial logging companies on areas like the Amazon basin is devastating not only for the rainforest but also for the survival chances of the few remaining nomadic hunter gatherer tribes such as the Awá. As their land is taken over by illegal settlements and new cattle ranches, the Awá are being murdered by *pistoleros*, hired gun men described by tribe members as responsible for wiping out their families, a situation so grave that a Brazilian judge has called it "a real genocide" [9, 13]. Meanwhile, both criminal enterprises and legitimate businesses continue to engage in toxic dumping and unsafe waste disposal, frequently with a discriminatory impact on communities of the poor and powerless [12, 20, pp. 94–101, 34].

Crimes/harms against animals/non-human species

Abuse, mistreatment or death of animals and birds may be visible and stark as in cases of destruction of habitats by war, catastrophe, oil spills, deforestation, or be less

visible and indeed socially accepted when related to farming, medical experiments, clearance of land for building, or where damage results from activities that cause air or water pollution, soil erosion or climate change. Illegal wildlife trafficking is now a global business rivalling the drugs and arms trades [42] but whether licit or illicit, the smuggling of live animals or trading of animal parts is poorly and inadequately regulated. Matters of ethics and justice related to species diversity are now facing a new horizon, of a future where "synthetic biology provides the technology to create life that has not and could not naturally have existed" [35, p. 33]. Organisations led by Friends of the Earth have already called for a "moratorium on the release and commercial use of synthetic organisms until proper regulation is in place."

Responses – from weak compliance to restorative justice

Of course, in response to these various issues and challenges, legal and criminological tools have been developed and applied, cases of environmental crime have been reported and prosecuted, and matters of responsibility and reparation have been analysed and debated. For example, Walters [47] notes that in response to the damaging as well as differentially unequal impacts of air pollution, Vanderheiden has called for "atmospheric justice": "Drawing on Rawlsian concepts of liberal egalitarian justice, as well as cosmopolitan justice and political realism", Vanderheiden proposes "an international climate change regulatory regime based on equity, responsibility and compensation". Similarly, various proposals outlining principles and action in support of "Climate Justice" have emerged in the last decade from international networks, activist groups and human rights-oriented organisations such as the Mary Robinson Foundation (http://www.mrfcj.org/).

However the current system of governance is weak and dependent on models of deregulation and voluntary compliance (based on the belief that the market will provide effective and efficient remedies) and legislative-balancing-acts (where agencies who are tasked with encouragement of compliance in the course of doing business are also charged with prosecuting and penalising in cases of offending) [40]. In addition, systemic problems of regulatory capture (where regulators are largely representatives of the regulated) and "trivialisation" of injurious actions [16] (following lengthy legal debate about mitigation) occur at levels from transnational crime to local offending. Hence, as Huisman [27, p. 56] shows, those "soft law" instruments that do exist and operate can "contribute to creating generally accepted social norms" underpinning protection of human rights or the environment by corporations - however "the worst offenders are not compelled to take part" and "increasing numbers of corporations affiliated to the UN Global Compact initiative do not comply with their reporting obligations". Huisman [27, p. 59] rightly draws attention to the "ambiguity and ambivalence" underlying the system as it operates.

Stewart [44, pp. 11–14] and the Open Society Justice Initiative argue that a more rigorous approach can be developed and aim to apply this to the post-Cold-War plunder of minerals, metals, timber and other natural resources which could be seen as "pillage", a concept with a long history of application as describing an offence under the laws of war and an element of various war crime statutes. Stewart argues that the so-called "resource curse" affecting nations rich in terms of resource endowment but poor in terms of social development and most prone to violent upheaval can

be addressed by curtailing corruption, regulating the resource industries domestically and enhancing judicial capacity in countries recovering from war. But the liability of foreign businesses for trading in illicit commodities (whether conflict minerals or wildlife) must also be recognised and this requires an effective legal tool. As the argument of pillage [1] has been used against former politicians and in post-WWII prosecutions of Nazi business leaders for theft of property from occupied countries but rarely against modern corporations or their officials, the proposal is that on the basis of similarities between these earlier crimes and corporate practices in the resource wars affecting countries today it is time to put these ideas to the test.

One further important perspective and tool already applied in various cases of contestation and conflict is the idea of restorative justice. This is now seen to hold considerable promise as a means to resolve responsibility and agree recompense for crimes against the environment and the human and non-human beings affected. The idea of restorative justice is in one sense quite simple and has a long history but as Braithwaite [10, pp. 7–8] notes, the important point for his purposes – and indeed for ours - is that we have witnessed "a late modern revival of restorative justice that has its deepest roots in a shift from most regulatory activities having individuals and their bodies as their objects to a world where more of the wrongdoing is done by organizations that are regulated in a mostly restorative fashion." As Higgins [25, p.143] puts it, "Restorative justice is built on an understanding of our relationship with nature and the duty to remedy the harm caused" – addressing "the needs of the beleaguered party to restore that which has been harmed rather than simply fixating on the punishment of the perpetrator." This kind of approach to the administration of environmental justice, invoking methods and principles of mutual engagement and shared learning, is both practical as well as consonant with green ideals.

Rights and justice on an endangered planet

There have been several previous calls for forms or expressions of law and justice that relate to crimes and harms against the planet and the species that share it. Cullinan [14, p.144], for example, notes that "A few prescient commentators have for several decades drawn attention to the need for legal systems to take an evolutionary leap forward by recognizing legally enforceable rights for nature and other-than-human-beings." Cullinan refers to this body of work as "the evolution of earth jurisprudence" and cites, among others, the work of Stone [43] who questioned whether the widening of protection and rights to the formerly disempowered should be extended to natural objects such as trees, and Berry [6, p.161] who argued that: "we need a jurisprudence that would provide for the legal rights of geological and biological as well as human components of the Earth community. A legal system exclusively for humans is not realistic." According to this view, both pragmatic reforms of law and governance, as well as radical revisions, should build on recognition of, and respect for, the interdependence of eco-systems and the principle of intergenerational equity.

[1] Although the terms pillage, plunder, spoliation and looting are all commonly used in legal discussion with more or less the same meaning, pillage is the only one that features in treaties governing the laws of war [44, p.15].

However, as Benton [4, p.10] cautioned "giving weight to considerations of justice in the context of sustainability poses a significant challenge to established ways of thinking in several respects" and this applies to the idea of 'sustainable development' and even more so to the more challenging aspiration of 'ecological sustainability'.[2] As Benton continues, in the current global context those agencies charged with developing strategies for securing sustainability (of whatever variety) "generally lack either the will or the resources to do so. The current dominance of neo-liberal ideology and its associated institutional framework for regulating international trade and investment runs directly counter to the imposition of normative restraints on economic activity."

Yet in the face of climate change, carbon emission and potentially irreversible harms to the planet such restraint is required. The argument here is that this could be expressed through radical additions to and revision of human legal systems that would recognize, as Cullinan [14, p.144] puts it, "that a primary cause of environmental destruction is the fact that current legal systems are designed to perpetuate human domination of nature instead of fostering mutually beneficial relationships between humans and other members of the earth community."

The proposal for a law of ecocide

Ecocide as a concept has a longer history than some of the proposals and approaches discussed so far although the term has perhaps not made the degree of impact that might have been expected given its pertinence and usefulness. One set of reasons for this is discussed in detail below. As to its history, it is recorded as being used as early as 1970 at the "Conference on War and National Responsibility" in Washington, where Professor Arthur W. Galston "proposed a new international agreement to ban 'ecocide'".[3]

Gray [24] used the term to describe the "causing or permitting [of] harm to the natural environment on a massive scale", reflecting a "breach of duty of care owed to humanity in general". Berat [5] used the term Geocide in a similar way, to provide a means in international law to preserve the right to a healthy environment. In the green criminology literature, Boekhout van Solinge [8, p. 26] referred to the idea of ecocide as a "delict" (an offence or transgression) citing Gray, while South [39, p.239] suggested that support for Gray's proposal that ecocide be written into international law might be premised on the threat, or breach of rights, to health and to life. This argument draws on Hulme [26] who refers to the importance of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment which observes that "Both aspects of man's environment, the natural and the manmade, are essential to his well-being and to the enjoyment of basic human rights, the right to life itself", and also to the Report on Human Rights and the Environment,[4] in which section 248 argues that environmental damage has

[2] The authors are grateful to Rob White for this and several other points.
[3] In Gauger et al. [22] citing The New York Times, 26 February 1970 as quoted in Weisberg [48].
[4] U.N. Commission on Human Rights, 1994, Rapporteur Ksentini, Sub-commission Report.

direct effects on the enjoyment of a series of human rights, such as the right to life and to health.

Ecocide as the missing 5th crime against peace

In April 2010 a proposal for an international law of Ecocide was submitted to the United Nations Law Commission by U.K.-based lawyer, Polly Higgins [25]. Higgins proposed the following as an amendment to the Rome Statute: "*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 severely diminished"*. Within this definition, Higgins identifies two types of ecocide; human caused and naturally occurring ecocide. In so doing, a legal framework is created for pre-empting, preventing and prohibiting ecocide. As part of the proposal the principle of superior responsibility applies to not only big business but also nations. By creating a legal duty of care which pre-empts, nations will be legally bound to act before mass damage, destruction or ecosystem collapse occurs and the law will impute a legal duty of care on all nations to provide assistance to those countries that are at risk of or are suffering from ecosystem collapse as a result of rising sea-levels or catastrophic events such as tsunamis and floods. Naturally occurring ecocide, whether related to climate change or not, becomes a responsibility of governments. Human-caused ecocide becomes a responsibility of governments as well as businesses – those who are policy makers, directors or who are responsible for funding or investment, become legally bound to ensure that any business practice that causes mass damage, destruction or loss of ecosystems is brought to an end. To put such an international law in place requires an amendment to the Rome Statute. Once a Signatory country calls for an amendment, a conference can be held to open the process whereby the crime of Ecocide can be included. In so doing, an international law that imposes duties and responsibilities on heads of State as well as heads of business will create a framework that has enormous implications, both economically and governmentally. Such a law will trigger a green economy and put in place a powerful global governance mechanism.

During war-time, it is already a crime to cause damage where the spatial size affected exceeds 200 km in length or where impact on ecosystems exceeds 3 months, causing severity of impact to human, natural or economic resources [25, p. 64]. Yet, during peace-time such damage occurs daily to our soils and seas, whether as a consequence of the business of agrochemical companies or heavy extractive industry. By creating a crime of Ecocide, no longer will it be lawful to commit daily damage, destruction or loss of ecosystems of the kind already criminalised during time of war. But is the prospect of realising a law of Ecocide simply too fanciful and naive? The answer would seem to be "no" because enactment of such a proposal has been under serious consideration on several past occasions and the laws and constitutions of several nations now incorporate expressions of what has been called 'Earth Law' [14, 15] .

Documents examined in the report *Ecocide is the Missing Crime against Peace* [23] demonstrate that the idea of Ecocide as an international crime to stand alongside Genocide was very much at the forefront of various discussions underway between 1972 and 1996. For over a decade, in work undertaken by the United Nations, debates and drafting exercises *included* Ecocide until it was finally removed from the text that became known as the Rome Statute, which codifies the four Crimes against Peace.

The institutional history of the concept of ecocide

The institutional history of ecocide is inextricably bound up with that of its more famous relation: genocide. In 1933, Raphael Lemkin, a Polish Jurist, spoke at the International Conference for Unification of Criminal Law in Madrid and urged the international community to converge on the necessity to ban the destruction, both physical and cultural, of human groups, invoking the linked concepts of "barbarity" and "vandalism". In his subsequent seminal text, Lemkin [28] combined his prior formulations, barbarity and vandalism, to form a new, more comprehensive concept – *genocide*, combining the Greek word *genos* meaning tribe or race and the Latin *cide* meaning destruction.[5] Lemkin envisaged a law consisting of the deliberate destruction of a nation or ethnic group in the following ways: a) by killing its individual members, i.e. physical genocide (derived from Lemkin's notion of "barbarity"); b) by undermining its way of life, i.e. cultural genocide (derived from "vandalism"). His original definition crucially identified the destruction of a people by other factors not directly involved in killing. Ecocide can and often does lead to cultural damage and destruction. Like genocide, ecocide can be direct and indirect; it can be the destruction of a territory and it can also be the undermining of a way of life - ecological as well as cultural.

For Lemkin, it was culture that animated the *genos* in genocide - a social group existed by virtue of its common culture. Thus, during the construction of the draft United Nations Convention on Prevention and Punishment of the Crime of Genocide, Lemkin argued that "Cultural Genocide is the most important part of the Convention" [30, pp.12–13]. In his 1958 autobiography [18, p.82], Lemkin subsequently wrote: "I defended it (cultural genocide) successfully through two drafts. It meant the destruction of the cultural pattern of a group, such as the language, the traditions, the monuments, archives, libraries, churches. In brief: the shrines of the soul of a nation. But there was not enough support for this idea in the Committee…So with a heavy heart I decided not to press for it". [17] Lemkin was forced to drop an idea that, in his words, "was very dear to me". [6]

[5] [29, p.79 – 95]. For further discussion, see Moses [31].

[6] In fact one out of five acts of *cultural* genocide did remain in the Convention, this is "(a) forcible transfer of children to another human group"; the excluded other categories being: "(b) forced and systematic exile of individuals representing the culture of a group; (c) prohibition of the use of the national language even in private intercourse; (d) systematic destruction of books printed in the national language or of religious works or prohibition of new publications; (e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship." [http://www.preventgenocide.org/law/ convention/drafts/]. Cases of the forcible removal of indigenous children – the 'stolen generations' – in Australia and Canada have produced enormous controversy and invoked the notion of cultural genocide but none has produced a prosecution let alone conviction at the international level.

The Genocide Convention had lost its coherence and conceptual integrity, moreover, a major *method* of genocide was not criminalised. The removal of this method led to a preoccupation, in legal and scholarly realms, with establishing perpetrator *intention* rather than genocidal effects and to the popular (mis)understanding of the crime of genocide as simply racially motivated mass killing [36]. Eventually, it also led to reviews within the U.N. system of the Convention's effectiveness since it was not being used and seemed to offer little to those groups it was designed to protect. It was in just such a review that we find the first attempt to criminalise in international law, environmental destruction.[7]

A draft *International Convention on the Crime of Ecocide* was prepared by Richard A. Falk and was introduced as part of a review process which sought to evaluate the effectiveness of the Genocide Convention. The proposal to include, in an amended Convention, a law against ecocide that could address both direct ecological crimes and ancillary cultural ecocide was explored at length. There was concern in the U.N. that the Convention on Genocide was deficient and that there were other destructive phenomena that needed to be criminalised. Falk drew up the proposed Convention for a journal article he published in 1973, [21] which was then included in a study conducted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities regarding evaluation of the effectiveness of the 1948 Genocide Convention. Falk argued that it was necessary to recognise "that we are living in a period of increasing danger of ecological collapse" […] and "that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace" [21, p.93]. In spite of the recognition that environmental damage can be caused consciously and unconsciously, the majority of the draft Ecocide Convention primarily focused on ecocide as a war-crime with intent and did not set out similar peacetime provisions. Another commentator, Westing, argued at the time that: "Intent may be not only impossible to establish without admission but, I believe, it is essentially irrelevant." [49]. Within the Sub-Commission Mr. Bouhdiba voiced support for criminalising ecocide: "any interference with the natural surroundings or environment in which ethnic groups lived was, in effect, a kind of ethnic genocide because such interference could prevent the people involved from following their own traditional way of life." [8] By this time a sizeable majority of parties to the United Nations were in favour of ecocide as a crime during peacetime. However, the draft International Convention on the Crime of Ecocide was shelved very late in the day without being put to the vote and for no apparent recorded reason [23].

In 1947 the General Assembly of the United Nations had assigned the International Law Commission (ILC) to formulate "the principles of international law recognized in the charter of the Nuremberg Tribunal and in the judgment of the Tribunal" and to "prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the [aforementioned] principles". [9] Between the years 1984 – 1996 there was extensive engagement in the ILC about the inclusion of environmental damage and Ecocide into the list of Crimes against Peace. The Special Rapporteur on the draft Code of Offences against the

[7] Sub-Commission on The Prevention of Discrimination and Protection of Minorities. Study of the Question of the Prevention and Punishment of the Crime of Genocide. Prepared by Mr. Nicodème Ruhashyankiko. 4 July 1978. E/CN.4/Sub.2/416.

[8] E/CN.4/Sub.2/SR.658, p. 53.

[9] General Assembly resolution 177 (II) of 21 November 1947.

Peace and Security of Mankind, Doudou Thiam, had included the crime based on precedence in international law.[10] Furthermore, in the draft Articles on State Responsibility legislation that the ILC was working on concurrent to the Code, Crimes against the Environment had been included in Article 19 of Part 1 which referred to "wilful and severe damage to the environment" [23].[11]

The consideration, since 1984, of whether to include "acts causing serious damage to the environment" as a Crime against Peace led some members to re-open the debate on whether this was a crime of *intent*. By 1991 discussions were focussing on the inclusion of the element of intent and the final drafting of Article 26. For the purposes of the Code previous drafts were removed and Article 26 was reduced to "wilful and severe damage to the environment". After the element of intent had been added, the governments of Australia, Belgium, Austria and Uruguay went on record criticising the re-drafting, in recognition that ecocide during peacetime is often a crime without intent [23]. Belgium argued "[t]his difference between articles 22 [war crimes][12] and 26 ["wilful and severe damage to the environment"] does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive." Australia objected on the grounds that "the requisite *mens rea* in Article 26 should be lowered so as to be consistent with article 22", and Austria went on record stating that "since perpetrators of this crime are usually acting out of a profit motive, intent should not be a condition for liability to punishment."[13] Even so, the ILC, instead of removing the element of intent, determined to remove Article 26 altogether.

Reactions within the ILC and Legal Committee to the announcement of the withdrawal of Article 26 were only partially recorded but it is clear that the decision was not based on agreement between the parties [23]. Subsequent off-the-record debates between Commission members failed to further the law of ecocide: the Chairman in 1995 decided twice to hold informal meetings "to facilitate the consultations and ensure a truly frank exchange of views".[14] Thus, in true U.N. fashion, in 1995 it was decided to establish a further Working Group but one restricted to consideration of "the issue of wilful damage to the environment." In 1996, at the start

[10] The Special Rapporteur refers to the following international instruments: the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; the Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water; the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies; and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques; see A/CN.4/377 and Corr.1, para. 44 and 51, p.94-96.

[11] A/CN.4/377 and Corr.1, para. 46, p.95.

[12] One provision of Art.22 on war crimes covers damage caused to the environment in times of war. "Article 22. Exceptionally serious war crimes: 2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts: […] (d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment; […]". See: Yearbook of the ILC 1995, Vol.II, Pt.2, p.97.

[13] A/CN.4/448 and Add.1, contained in Yearbook of the ILC 1993, Vol.II, Pt.1, p.66, para.50 (Australia), and p.68, para.30 (Austria)

[14] A/CN.4/448 and Add.1, contained in Yearbook of the ILC 1995, Vol.I, 2386th m., pp. 52; and 2387th m., p. 52–53

of the ILC's 48th session, the Working Group convened to consider this far more limited inclusion of crimes of environmental damage in the Code.[15] The members included Mr. Thiam, Mr. Tomuschat, Mr. Kusuma-Atmadja, Mr. Szekely and Mr. Yamada.[16] As the group was not listed with the other working groups at the beginning of the 1996 Yearbook of the ILC, it has not been possible to detect exactly which members took part in its discussions [23]. Nevertheless, a Working Group report on the topic was published titled "Document on crimes against the environment"[17] by Mr. Tomuschat. In his recommendations he suggests either a) retaining environmental crimes as a distinct and separate provision; or b) including environmental crimes as an act of crimes against humanity; or c) adding the ecocide part to the provision on war crimes.

A defining moment came in 1996 at a meeting of the ILC, when the then Chairman, Mr. Ahmed Mahiou, unilaterally chose to remove the crime of ecocide completely as a separate provision *without putting it to a vote*. This singular act was not just a procedural irregularity but also contrary to the remit of the Working Group which was "to work on crimes against the environment". Hence, it was not surprising that at least one member, Mr. Szekely, strongly objected – albeit to no avail.[18] As a placatory measure, it seems, a far narrower remit was finally put to a vote but with ecocide gone the only decision left to take was whether to include environmental damage solely in the context of a war crime or to include it as a crime against humanity. [19] The final result of the Working Group process was that the Drafting Committee was instructed to draft with the far narrower remit of "environmental damage in the context of war crimes" and not in the context of "crimes against humanity".

Thus, Article 26 was removed in 1996 and the final Article adopted by the ILC, which was further amended by the Drafting Committee, refers to intentionally causing "widespread, long-term and severe damage to the natural environment" within a war context.[20] This was the final reference to a crime against the environment which made it into the Rome Statute. And so, contrary to the prevailing mood at the time, 1996 saw the crime of ecocide suddenly removed from all draft documents. A full picture of exactly how and why this happened is not available from the U.N. documentation but the research conducted [23] has discovered two important pointers. First, a comment by the Special Rapporteur on the *Draft Code of Offence*

[15] Working group was established at the 2404th meeting. See: Vol.I and Vol. II, Pt.2 of the Yearbook of the ILC, 1995.

[16] Yearbook of the ILC, 1996, Vol. I, 2428th meeting, p.5, para.5.

[17] ILC(XLVIII)/DC/CRD.3 (included in Yearbook of the ILC, 1996, Vol. II, Pt. 1).

[18] Yearbook of the ILC, 1996, Vol. I, 2431th meeting, Tuesday, 21 May 1996.

[19] Ibid. Including environmental damage in the context of war crimes: 12 votes in favour to 1, 4 abstentions; in the context of crimes against humanity: 9 votes to 9, 2 abstentions.

[20] Article 8. War crimes:

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: […]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: […] (iv) Intentionally launching an attack in the knowledge that such attack will cause […] 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; […]

against the Peace and Security of Mankind, Mr. Thiam of Senegal, who stated in his 13th report that the removal was due to the comments of a few governments who were largely opposed to any form of inclusion of Article 26 ("wilful and severe damage to the environment").[21] Second, Christian Tomuschat, who was a long-term member of the ILC from 1985 to 1996–11 years in total - and a member of the Working Group on the issue of wilful damage to the environment, published a brief article in 1996 where he reflected on the development of the provisions regarding crimes against the environment during the drafting and codification process of the draft Code. In a telling passage he writes:

> One cannot escape the impression that nuclear arms played a decisive role in the minds of many of those who opted for the final text which now has been emasculated to such an extent that its conditions of applicability will almost never be met even after humankind would have gone through disasters of the most atrocious kind as a consequence of conscious action by persons who were completely aware of the fatal consequences their decisions would entail. [46]

A law of ecocide

A law of Ecocide should recognise human-caused environmental damage and degradation (whether committed during or outside of war-time), as a crime of strict liability (in other words, without intent). Of the ten countries that have already included Ecocide in their criminal penal codes, not one of them sets out a test of intent. An international law of Ecocide where intent was a necessary component of the crime opens up the legal loophole of sidestepping responsibility on the basis that mass damage or destruction was not intended. Most corporate ecocide is not intended; often it is deemed collateral damage or an accident. Where intent or knowledge is required, many corporations would hide behind the defence that they did not know what was happening or what could happen. Thus the defence "I did not know" would be robustly put forward by virtually every company. What is recognized by this proposal is that very rarely do corporations *intend* to cause mass damage and destruction; rather it is a consequence. To impute strict liability is to impute accountability. Under current legislation there is very little onus on business to be accountable.

Moreover, implementation of the crime of Ecocide stops the flow of destruction at source and creates a pre-emptive duty on corporate activity to prohibit mass damage and destruction to ecosystems from the outset. This has huge implications for climate change - by stopping the major polluters from continuing to produce escalating levels of carbon dioxide, instability in the atmosphere is abated. In so doing, the crime of Ecocide becomes a powerful preventative measure that would render those in a superior position of responsibility at-risk of prosecution where they are responsible for taking decisions that lead to, support or finance mass damage and destruction (whether or not it contributes to climate instability: measurement of carbon dioxide emissions being only one way of measuring Ecocide). By levying responsibility on

[21] A/CN.4/466, included in the Yearbook of the ILC 1995, Vol.II, Pt.1, p.35

persons, not legal entities (the corporate body), the cycle of destruction and accrual of silent rights to destroy is halted. Thus, instead of "the polluter pays" (if caught), the new governing principle becomes "the polluter does not pollute" and the protection of interests shifts from those few who have ownership to the many who are at risk of suffering.

The matter of implementation and operationalisation of such a law would be one that connects well to parallel proposals for the extension of environmental courts and the establishment of an International Environmental Court. The value of such courts lies in the focus and expertise that can be brought to bear on complex and technical matters that are often unfamiliar when introduced and processed through the traditional courts (see Walters and Westerhuis, and White, this volume).

Conclusion

One aspect of the climate change debate that is often overlooked is the rule of law. Who owes whom a duty of care to help in times of need? Who will step in and assist before sea levels rise to disastrous levels? The problem is, no-one has a legal duty of care to throw a life-line. A law of Ecocide will be more than a lifeline – it will impose a legal duty of care upon all nations to pre-emptively help. The implication of such a law for many Small Island States is huge: not only does such a law abate the threat of climate-driven ecocide it puts in place a legal duty of care to assist. The power of law to act as a mechanism to encourage transformation to a green economy is also underestimated. Using law to prioritise the adoption of technologies that are benign and renewable on a world-wide basis and to prohibit dangerous industrial activity while imposing a legal duty of care, will all redirect investment into clean technologies and a green economy.

As well as looking to the future, there are lessons to be learned from the past. Two hundred years ago, in response to calls for the abolition of slavery, the slave industry responded by asserting that any restriction on their trade would be uneconomic, lead to loss of jobs, and remove a public necessity from society. Slavers argued for the right to self-regulate and to voluntarily limit the number of slaves traded (a precursor to cap and trade), as well as suggesting restrictions on the usage of slaves and improvement of conditions. The market mechanisms proposed were based on compliance, the use of tradable permits and payment of fines if limits were exceeded. All these proposals were ultimately rejected but today these very same principles and methods are what we rely on to address a problem with a fundamental economic similarity - slaves were in effect a form of energy replaced by the machine age and dependence on fossil fuel.

Today ten countries have a law of Ecocide although it is of interest (and should be immediately acknowledged) that adoption of the wording and objectives of a progressive law does not necessarily imply that the adopting state is a progressive democracy. For example, Viet Nam, no doubt as a consequence of its experiences during the long Viet Nam war, was the first country to adopt a law of ecocide, followed by the Soviet Union in 1996, just prior to its collapse. Although Ecocide had been taken off the table at the United Nations during the same year, the crime itself was adopted by States who preferred to include all the Crimes against Peace that were

in the draft document. In the aftermath of the collapse of the USSR, over a period of seven years, the new States that were formed drew up their own Criminal Penal Codes. Some have included Ecocide as a named Crime against Peace in their Penal Codes - Armenia, Belarus, Moldova, Ukraine, Georgia, Kazahkstan, Kyrgyztsan and Tajikistan. What is striking is that none of these newly formed states became signatories of the Rome Statute (they could not have been signatories at the time of the creation of the Statute in 1996 because they were only established following secession from the Soviet Union after 1998). These states adopted Ecocide as part of the draft Code of Crimes against the Peace and Security of Mankind (the precursor to the Rome Statute). Elsewhere (e.g. Ecuador, see White, this volume), other countries have adopted new constitutions which may not explicitly reference the crime of ecocide as outlined above but which do place emphasis on recognition of the rights of ecosystems and nature.

There was a moment in recent years when a law to prevent mass damage or destruction affecting the environment had a name and was very nearly adopted at an international level to be embraced both in peace-time and war-time. The paper trail that has been followed has raised questions about why ecocide as a peace-time crime against the environment was suddenly removed. In the next few years, the concept and its application might be expected to receive increasing attention from policy makers as they take notice of experiments with mock trials that prosecute under a 'law of ecocide' and of the emerging evidence of the value of specialist environmental courts.

For now, in law outside of wartime, it is not a crime to cause mass destruction or loss of ecosystems. Our world has normalized the daily ecocide caused by the practices that drive economies as they currently function [1, 39]. Two rules to change these practices and the world we live in are proposed under one law: first, prohibit mass damage, destruction or loss of ecosystems, and second, impose a legal duty of care upon persons in positions of superior responsibility. The proposal is for a law of Ecocide.

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