

Ecocide – a new crime against peace?

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Introduction

The International Criminal Court (ICC) was set up in 2002 to try cases alleging crimes against peace: genocide, war crimes, crimes of aggression and crimes against humanity. There are compelling arguments for a fifth crime against peace: the crime of ecocide. Generations to come will scarcely believe that we acted with such myopic self-interest at the cost of all life on earth. The ‘war’ that we have waged against the planet is an attack on the peaceful enjoyment of the habitats of all species. A small but important part of the change in international policy would be the creation of ecocide as a new crime against world peace. Broadly defined, ecocide is the significant damage to or destruction of an ecosystem to such an extent that peaceful enjoyment of a part of the planet will be substantially diminished.¹ Decision-makers in companies, organisations or states that cause ecocide would be held accountable in the ICC. Accountability for the ecocide crime is not just the desire of a small number of environmental crusaders. It is a view that is gaining widespread international support from ordinary citizens, politicians and academics. As environmental lawyers, we are morally obliged to add our knowledge and voice to the debate.

The race against time

Humanity is facing an existential crossroads. Such a view would have been roundly condemned and derided by vested interests until relatively recently. A growing body of reliable scientific evidence suggests that the earth has reached a ‘tipping point’² and we are approaching ‘planetary boundaries’.³ As the oceans become warmer and ice caps melt, as carbon pollution continues to rise, more species of plants and animals are being lost than ever before. Indigenous peoples in many parts of the world are disappearing, victims of the majority’s need to exploit their ancestral lands. Population growth, widespread destruction of natural ecosystems and climate change are driving the planet towards irreversible

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1. There is no consensus on the exact definition of ecocide and the meaning of peaceful enjoyment and size of the damage and territory, but this is the authors’ working definition.
 2. University of California – Berkeley, ‘Evidence of Impending Tipping Point for Earth’ (2012) *Science Daily* 6 June. Available at: www.sciencedaily.com/releases/2012/06/120606132308.htm. Last accessed 1 April 2014.
 3. Stockholm Resilience Centre, ‘Planetary Boundaries’ (2009). Available at: www.stockholmresilience.org/21/research/research-programmes/planetary-boundaries.html. Last accessed 1 April 2014.

changes. These changes are likely to be catastrophic not only for mankind, but also for much of life on earth. If we are lucky, there may still be time to halt the decline before we reach the precipice, but the time available is ticking away. A range of drastic measures is necessary to slow down and reverse a process which began with the industrial revolution but which has gathered pace exponentially in the last 50 years. These measures will require international co-operation on a scale and with a vision that our leaders may not possess. An important part of the suite of necessary measures is the creation of the crime of ecocide. This would send the strongest possible signal to those who wield power within states and corporations, that unless they are willing to be a part of the international solution, they will be dealt with as a cause of the problem.

This is not a new idea

During the 1970s, 1980s and 1990s, the idea of expanding the 1948 Genocide Convention led to extensive studies and consultation within the United Nations (UN). Three options were discussed to incorporate ecocide into the draft Code of Offences against the Peace and Security of Mankind, precursor to the Rome Statute establishing the ICC, as a stand-alone crime, included under Crimes against Humanity or under War Crimes.⁴ Eventually, a decision was taken to remove the environmental crime from the draft Rome Statute and the only remainder was the inclusion of a war crime (Art 8.2.b.iv),⁵ making it so weak that no one has ever been prosecuted under this Article. Christian Tomuschat, Rapporteur of the UN working group on environmental crime, has shed some light on potential reasons for the removal of this crime: ‘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 . . .’.⁶ Whatever the true reasons for the earlier exclusion of ecocide as a crime against peace, were the matter to be debated again, the political and scientific arguments in favour of inclusion are stronger than ever before.

A brief history

Ecocide (from Greek ‘oikos’ = house, home and Latin ‘caedere’ = destroy, kill) in the broadest sense describes the destruction of the natural environment. The term became known after World War II and, in particular, after the Vietnam War. Professor Arthur Galston, the scientist whose research led to the invention of Agent Orange, played an instrumental role in calling for a new international agreement to ban ecocide⁷ and Prime Minister Olaf Palme of Sweden called the Vietnam War an ‘outrage sometimes described as ecocide’.⁸ Parallel to the 1972 UN Conference on the Environment, a public demonstration in favour of recognising ecocide attracted over 7000 participants.⁹ A draft Ecocide Convention was published in 1973, calling for ecocide to be recognised as an intentional war and peace crime.¹⁰

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4. A. Gauger, M.P. Rabatel-Fernel, L. Kulbicki, D. Short and P. Higgins (2012) ‘Ecocide is the Missing Fifth Crime Against Peace, Human Rights Consortium’, School of Advanced Study, University of London . Available at: <http://sas-space.sas.ac.uk/4686/>. Last accessed 6 April 2014.
 5. For more information on the history of ecocide and the positions of individual countries, see Gauger et al. above, n. 4; C. Tomuschat, Document on Crimes Against the Environment. ILC(XLVIII)/DC/CRD.3. Extract from the *Yearbook of the International Law Commission*: 1996, vol. II(1). See also Art 8.2.b.iv of the Rome Statute of the International Criminal Court T.S. 35 (2002) Cmnd 5590; 2187 UNTS 3.
 6. C. Tomuschat, ‘Crimes Against the Environment’ (1996) 26(6) *Environmental Policy and Law* 243.
 7. D. Zierler, *The Invention of Ecocide* (University of Georgia Press: Athens, 2011).
 8. B. Tord ‘The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972’ (1996). Available at: <http://folkrorelser.org/johannesburg/stockholm72.pdf>. Last accessed 28 March 2014.
 9. See Tord above, n. 8.
 10. R.A. Falk, ‘Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals’ (1973) 4 *Security Dialogue* 80–96.

In 2010, Polly Higgins,¹¹ a British barrister, revived the idea of ecocide. In 2013, the citizens' movement End Ecocide organised a European Citizens' Initiative to demand that the European Union (EU) adapt legislation to outlaw ecocide. To date, over 175,000 EU citizens have supported this proposal with their signature.¹²

Polly Higgins defines ecocide as the 'extensive damage to, destruction of or loss of ecosystem(s) of a given territory [...] to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished'.¹³ It is argued that liability arises even if environmental damage was not intended but is rather the side effect of industrial activity. The law of ecocide prevention shifts the focus from assessing risks and probabilities towards assessing potential consequences. An activity with potentially devastating consequences, even if the risk that these materialise is small, would thus be caught. Some suggest that the net is cast too wide, but its proponents argue that the planet's precarious state requires such measures.

Some countries already recognise the need for a crime

Notwithstanding the withdrawal of ecocide from the ICC's mandate, some countries implemented it in national legislation, for example Vietnam (1990),¹⁴ the Russian Federation (1996)¹⁵ and other former Soviet countries.¹⁶

In addition, some states have started to recognise the rights of nature, ecosystems and animals. Human rights have become increasingly linked to the environment, and the movement for the recognition of the rights of future generations is growing. Group rights, such as those of indigenous peoples, are often compromised by ecocide, therefore the law inherently protects the rights of indigenous peoples. Efforts to use litigation to force governments to act on climate change are underway in the Netherlands¹⁷ and the United States.¹⁸

Ecuador dedicated an entire chapter (number 7) to the Rights of Mother Earth (Pachamama) in its 2008 constitution. Bolivia adopted the Law of the Rights of Mother Earth in 2010, granting nature the right to life, biodiversity, water, clean air, equilibrium, restoration, and freedom from pollution.¹⁹ A state in the United States passed an Ordinance in 2013 establishing a local Bill of Rights – including the Rights of Nature – and prohibiting activities which would interfere with those rights, including oil drilling and hydraulic fracturing,

11. P. Higgins, *Eradicating Ecocide* (Shepherd-Walwyn Publishers: London, 2010).

12. Full text of the draft Ecocide Directive is available at www.endecocide.eu/wp-content/uploads/2012/11/Draft-Ecocide-Directive.pdf. Last accessed 15 November 2014.

13. P. Higgins, 'Eradicating Ecocide Global Initiative: What is Ecocide?' (2014). Available at: <http://eradicatingecocide.com/overview/what-is-ecocide/>. Last accessed 6 April 2014.

14. Article 342 of the Vietnam Penal Code: Crimes against mankind states that 'Those who, in peace time or war time, commit acts of annihilating en-masse population in an area, destroying the source of their livelihood, undermining the cultural and spiritual life of a country, upsetting the foundation of a society with a view to undermining such society, as well as other acts of genocide or acts of ecocide or destroying the natural environment, shall be sentenced to between ten years and twenty years of imprisonment, life imprisonment or capital punishment.'

15. Criminal Code of the Russian Federation 1996, Art. 358. Ecocide: Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable by deprivation of liberty for a term of 12 to 20 years.

16. Criminal Code of the Republic of Armenia 2003, Art. 394; Criminal Code Belarus 1999, Art. 131; Penal Code Republic of Moldova 2002, Art. 136; Criminal Code of Ukraine 2001, Art. 441; Criminal Code of Georgia 1999, Art. 409; Penal Code Kazakhstan 1997, Art.161; Criminal Code Kyrgyzstan 1997, Art. 374; Criminal Code Tajikistan 1998, Art. 400.

17. R. Cox, 'Revolution Justified' (The Planet Prosperity Foundation: Maastricht, 2012).

18. 'Our Children's Trust' (2014). Available at: <http://ourchildrenstrust.org/>. Last accessed 5 November 2014.

19. Bolivia 'Ley de Derechos de La Madre Tierra' (2010) Available at: www.ine.gob.bo/indicadoresddhh/archivos/alimentacion/nal/Ley%20N%C2%BA%200071.pdf. Last accessed 5 April 2014.

or ‘fracking’, for shale gas.²⁰ Many countries recognise *locus standi* (standing for the public) to issue legal proceedings in the public interest (e.g. the Aarhus Convention)²¹ – which could be done directly on behalf of nature. There are an increasing number of court judgments which attribute rights to nature, ecosystems or animals.²² Several countries have recognised the rights or ‘holiness’ of certain natural sites belonging to indigenous communities.²³ New Zealand extended personhood rights to great apes in 1999; Spain followed suit in 2008.²⁴ Dolphins have recently been given ‘personhood’ in India.²⁵ In 2008, the Criminal Court of Paris criticised the world’s fourth largest oil group Total SA and imposed a fine of €375,000 – the maximum allowable penalty for maritime pollution – claiming ‘ecological prejudice’ caused by the sinking of the Erika. This is the first time that a French court has convicted a company for environmental damage, and the landmark ruling could establish a legal precedent for suing companies or persons over ecological disasters.

The need to protect future generations – a recognised right

Our children and grandchildren will be those suffering most from today’s actions and inaction, without having contributed to the problem. Several international declarations recognise the principle of protecting future generations.²⁶ A further step could be the recognition of a High Commissioner for Future Generations at the UN, as requested at Rio+20.²⁷ At least six countries have included provisions in their constitutions²⁸ and five different countries and one region either have or have had offices for future generations.²⁹ France held a Council for Future Generations in 1993 and Germany established a Parliamentary Advisory Council on Sustainable Development in 2009. Some US states also recognise the place of future generations.³⁰ The Philippines’ case *Opposa v Factoran 1993*³¹ is an historic example of the judiciary reasoning to prevent irreversible ecological damage (deforestation) in the name of present children and that of future generations.

20. State of New Mexico, County of Mora Ordinance 2013-01 (2013). Available at: www.celdf.org/downloads/Mora_Co_Community_Rights_Ordinance_042913.pdf. Last accessed 5 April 2014.

21. The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters TS 24 (2005) Cmnd 6586; 2161 UNTS 447.

22. See www.gaiafoundation.org/earth-law-precedents. Last accessed 15 November 2014.

23. Including Kenya, South Africa, Ethiopia, Uganda, Benin, India. See Gaia Foundation ‘Earth Law Precedents’ (2014). Available at www.gaiafoundation.org/earth-law-precedents. Last accessed: 5 April 2014.

24. The UK, Sweden, Austria, Belgium and the Netherlands have also banned research on apes for ethical reasons.

25. The Indian Ministry of Forests and Environment has prohibited the establishment of any dolphinarium in the country because ‘cetaceans in general are highly intelligent and sensitive, and various scientists [...] suggested that the unusually high intelligence as compared to other animals means that dolphin should be seen as “non-human persons” and as such should have their own specific rights’; see Circular F.No. 20-1/2010-CZA(M)/2840 Government of India – Ministry of Environment and Forests. Available at: http://cza.nic.in/ban_on_dolphinariums.pdf. Last accessed 15 November 2014.

26. See, for example, the Declaration of the United Nations Conference on the Human Environment UN Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972) (Stockholm Declaration); The United Nations Conference on Environment and Development A/CONF.151/26 (vol.1) (1992) (Rio Declaration); United Nations Framework Convention on Climate Change (1992); TS 28 (1995) Cmnd 2833; 1771 UNTS 107.

27. See UN Report of the Secretary-General, ‘Intergenerational solidarity and the needs of future generations’ (2013). Available at: <http://sustainabledevelopment.un.org/content/documents/2006future.pdf>. Last accessed 6 April 2014.

28. Bolivia, Ecuador, Germany, Kenya, Norway and South Africa; see UN Report of the Secretary-General above, n. 27.

29. Canada, Finland, Hungary, Israel, New Zealand and Wales; see UN Report of the Secretary-General above, n. 27.

30. Indiana underlines the purpose of environmental policy being ‘to preserve, protect, and enhance the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment’. Hawaii and Montana refer to future generations in their constitutions; see UN Report of the Secretary-General above, n. 27.

31. S.C. Philippines, *Oposa v Factoran [1993]* in T. Allen, ‘The Philippine Children’s Case: Recognizing Legal Standing for Future Generations’ (1994) 6 *Georgetown International Law Review* 713–741.

Recognising the crime of ecocide would allow both for the inclusion of trans-generational legal provisions in environmental and criminal law and for the juridical defence of future generations. Public health and environmental and nuclear disasters all demonstrate the need to act and implement legal provisions to safeguard the rights of future generations. What is at stake here is the survival of humanity itself.

Ecocide and indigenous peoples

A group particularly vulnerable to ecocide are indigenous peoples whose ways of life and future survival often depend on their environment. Where a culture depending on a local ecosystem collapses due to the destruction of the ecosystem, we can speak of 'cultural ecocide'.³² The 2007 Declaration on the Rights of Indigenous Peoples³³ establishes the rights of indigenous peoples and individuals, among others, to 'the conservation and protection of the environment and productive capacity of their lands or territories and resources'. The 2007 Declaration reinforces their right to be engaged in free, prior and informed consent in any project which might affect their lands or territories, as stated since 1989 in the binding International Labour Organization's Convention No. 169.³⁴ These rights are severely infringed in many cases of ecocide.

Conclusion

We have a right to live on this planet peacefully: to breathe clean air, to drink clean water, to enjoy the climate, the land and the seas our forebears enjoyed. It is not a right exclusively enjoyed by our species. It is a right closely interlinked to the right to life. The over-exploitation of our limited resources has led us to a precipice – the very survival of our species, and much of life on earth, is at stake. We have the means to slow down and possibly reverse the unprecedented harm caused by the activities of individuals, states and corporations. This will require selfless international cooperation to curtail and change every aspect of our energy-hungry existence. These changes will have to be underpinned by law. Primary amongst these laws should be the recognition that those who continue to assault our peaceful enjoyment of the planet will be stopped. There is a compelling case for the introduction of a fifth Crime against Peace – the crime of Ecocide.

Note

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Declaration of conflicting interest

The author declares that there are no conflicts of interest.

32. P. Higgins, *Earth is our Business. Changing the Rules of the Game* (Shepherd-Walwyn: London, 2010) 160.

33. United Nations Declaration on the Rights of Indigenous Peoples A/61/L.67/Annex Adopted 7 September 2007 (UN: 2008) No. 07-58681. Available at: www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. Last accessed 27 November 2014.

34. The International Labour Organization's Convention No. 169 is a legally binding international instrument open to ratification, which deals specifically with the rights of indigenous and tribal peoples. To date, it has been ratified by 20 countries.