

# Ending Ecocide - the next necessary step in international law

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## Executive Summary

A healthy environment is not only key to the achievement of human rights such as the most fundamental of all, the right to life, but also increasingly recognised as a human right in itself. This healthy environment, in fact the entire earth ecosystem, is threatened by the increasing depletion of resources, biodiversity loss and climate change. Dangerous industrial activity is responsible for a large proportion of this - but the corporations and individuals causing wide-spread damage and destruction often remain unpunished. For over 40 years, different formulations of an international environmental crime, called 'ecocide', have been discussed to halt this destruction through criminal liability of decision-makers. This article presents the proposed crime of ecocide, explores its history, and links it with recent developments in law recognising the human right to a healthy environment, but also the rights of nature, future generations, and indigenous peoples. It concludes that the law of ecocide prevention as well as a supranational court to enforce it are necessary to ensure these rights.

## Introduction

Humanity is facing a crossroads. Evidence shows that earth has reached a 'tipping point'<sup>1</sup> and we are approaching 'planetary boundaries'<sup>2</sup>; population growth, widespread destruction of natural ecosystems, and climate change are driving the planet, our home, towards an irreversible change of its biosphere, implicating consequences for which we lack adequate preparation, mitigation, and adaptation options. Our current legal framework does not possess the necessary tools to stop the widespread degradation of ecosystems caused by dangerous industrial activity. New tools are needed to safeguard not only our and in particular future generations' rights, but also the rights of nature itself. One such tool would be the inclusion of a crime of ecocide as an International Crime against Peace. Research has shown that such a crime has indeed been discussed at the United Nations for decades<sup>3</sup>. The increasing recognition of the precautionary and the polluter pays principles, as well as the human right to a healthy environment and indigenous peoples' rights, combined recent efforts to infer rights to ecosystems, animals and future generations all are steps in the right direction. Recognising the destruction of ecosystems as a crime and establishing a court to enforce it would be the next necessary step.

## The human right to a healthy environment

Links between human rights and the environment have increasingly been recognised and culminated in the proposal of the recognition of a healthy environment as a human right itself. The 1972 Stockholm Conference set up the first rights-based approach to the environment<sup>4</sup>. According to its Principle 1 *"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being"*.

20 years later, Principle 1 of the 1992 Rio Declaration reinforced that human beings are *"entitled to a healthy and productive life in harmony with nature"*. The 1993 Vienna Declaration on Human Rights

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<sup>1</sup> University of California - Berkeley (2012). Evidence of impending tipping point for Earth. *ScienceDaily*. 6 June. Available at <http://www.sciencedaily.com/-/releases/2012/06/120606132308.htm> [Accessed 01.04.2014]

<sup>2</sup> Stockholm Resilience Centre (2009): *Planetary Boundaries*. Available at <http://www.stockholmresilience.org/21/research/research-programmes/planetary-boundaries.html> [Accessed 01.04.2014]

<sup>3</sup> Gauger, A., Rabatel-Fernel, M. P., Kulbicki, L., Short, D and Higgins, P. (2012): *Ecocide is the Missing 5th Crime Against Peace*, Human Rights Consortium, School of Advanced Study, University of London. Available at <http://sas-space.sas.ac.uk/4686/> [Accessed 06.04.2014]

<sup>4</sup> Shelton, Dinah (2007): *Human Rights, Health and Environmental protection : linkages in law and practice*. A background paper for the WHO. Available at: [http://cdrwww.who.int/hhr/Series\\_1%20%20Sheltonpaper\\_rev1.pdf](http://cdrwww.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf) [Accessed 30.03.2014]

included in Article 11 a reference not only to the rights of future generations but also to the right to life and health of everyone which would be endangered by toxic and dangerous substances and waste<sup>5</sup>. The UN Assembly further recognised "*that all individuals are entitled to live in an environment adequate for their health and well-being*"<sup>6</sup> and that "[t]he rights to food and clean water are fundamental human rights"<sup>7</sup>.

Since the 1990s, many treaties<sup>8</sup> have been developed in relation with environmental obligations and national constitutions and laws increasingly recognize the right to a healthy environment, due to the obligation of states to adopt the principles reflected in the Stockholm and Rio declarations. Some domestic courts have also referred to principles enshrined in these declarations. Currently, over 75 constitutions explicitly recognize the right to a clean and healthy environment<sup>9</sup> and 92 constitutions impose a duty on the government to prevent harm to the environment<sup>10</sup>.

Furthermore, steps have been taken towards the recognition of the right to a safe and healthy environment as independent and fundamental human right by the UN system. Regional human rights systems have shown the way. The 2006 UN Declaration of the Rights of Indigenous Peoples clearly recognised the "*right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources*" of indigenous peoples (Article 29).

America, Africa, and Europe have regional provisions safeguarding the human right to a healthy environment. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988)<sup>11</sup> enshrines the Right to a Healthy Environment and Article 10 the Right to Health. The African Charter on Human and Peoples' Rights (1981) contains both, a Right to Health (Article 16) and a Right to a general satisfactory environment favourable to

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<sup>5</sup> Art 11: The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone.

<sup>6</sup> United Nations General Assembly (1990): *Need to ensure a healthy environment for the well-being of individuals*. A/RES/45/94. Available at: <http://www.un.org/documents/ga/res/45/a45r094.htm> [Accessed 06.04.2014]

<sup>7</sup> United Nations General Assembly (2000): *The Right to Development*. A/RES/54/175. Available at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/91d74f473455a7d8802568a80059bae1?Opendocument> [Accessed 06.04.2014]

<sup>8</sup> The 1972 World Heritage Convention, The 1985 Vienna Convention, The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (UNEP), The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (UNEP), The 1992 Framework Convention on Climate Change (UNEP), The 1992 Convention on Biological Diversity (UNEP)

<sup>9</sup> ANNEX II List of constitutional provisions on environmental rights and duties, Dutch Section of the International Commission of Jurists (NJCM) in response to the 2011 OHCHR study on Human Rights and Environment.

<sup>10</sup> Shelton (2007).

<sup>11</sup> Art 11: 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.

their development (Article 24). The Council of Europe stated in its 1990 Dublin Declaration that the objective of the community action for the protection of the environment "*must be to guarantee citizens the right to a clean and healthy environment*" but never went further and did not amend the European Convention on Human Rights (1950) accordingly. The Charter of Fundamental Rights of the European Union, however, does recognise both, environmental protection (Article 37) and consumer protection (Article 38) as principles by which the European Union should be guided. It is complemented by the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters ensuring procedural rights to enforce such rights.

Notwithstanding these regional successes, the right to a healthy environment has not yet been recognised as a fundamental human right - a *jus cogens* right - and is still a non-binding principle. Lynn Berat appealed already in 1993 to the international community "*that the right to a healthy environment is more than merely a rule of customary international law. Rather, because the survival of the planet depends on it, it should be regarded as jus cogens*"<sup>12</sup>. Her appeal is still valid today. As emphasised by a recent report on human rights and climate change: "*While the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the UN human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.*"<sup>13</sup>

The 2012 appointment of a new Special Rapporteur on Human Rights and the Environment<sup>14</sup> gives hope that the UN might be taking up the issue of the human right to a healthy environment again. Mr John Knox is mandated to investigate human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promote best practices relating to the use of human rights in environmental policy-making. It remains to be seen whether this appointment will lead to discussions about an official recognition of the human right to a healthy environment as *jus cogens*.

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<sup>12</sup> Berat, Lynn (1993): Defending the right to a healthy environment : Toward a crime of Geocide in international Law. *Boston University International Law Journal*. 11. pp. 327-348. p. 339.

<sup>13</sup> OHCHR (2009): *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, U.N. Doc. A/HRC/10/61 (Jan. 15), p. 18.

<sup>14</sup> The first Special Rapporteur on Human Rights and the Environment for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Fatma Zohra Ksentini had drafted a declaration on the human right to a healthy environment in 1994, recognising all persons' universal, independent and indivisible right to a secure, healthy and ecologically sound environment (Art 2), the right to freedom from pollution and environmental degradation (Art 5), and a right to save and healthy food and water (Art 8). However, this declaration was never adopted by the United Nations.

## Ecocide

Since *jus cogens* is universally applicable, a violation of the right to a healthy environment, if recognized by the international community as a fundamental human right, should be considered as international crime. International crimes may refer to crimes against international customary, humanitarian, or criminal law or the established Crimes Against Peace, namely Genocide, Crimes Against Humanity, War Crimes, and Crimes of Aggression, established by the Rome Statute in 1998 and enforced by the International Criminal Court (ICC), established in 2002. Principle 22 of the Stockholm Declaration already called on states to "*cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage*". The introduction of an international environmental crime can be the tool to do so. The question is how this environmental crime should be defined. Should it be included in the qualifications of the Crime against Humanity or should it be defined more broadly, as Higgins' ecocide definition does, incorporating a new generation of rights of future generations, nature, and indigenous peoples?

Ecocide in the broadest sense describes the destruction of the natural environment. The term became known after World War II and in particular 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 ecocide<sup>15</sup>. Only two years later, then Prime Minister Olaf Palme of Sweden called the Vietnam War an "*outrage sometimes described as ecocide*"<sup>16</sup> at the opening of the 1972 UN Conference on the Environment. In parallel, a public demonstration in favour of recognising ecocide attracted over 7,000 participants<sup>17</sup> and a draft Ecocide Convention was published in 1973, calling for ecocide to be recognised as intentional war and peace crime<sup>18</sup>.

During the 1970s and 1980s, the idea of expanding the 1948 Genocide Convention led to extensive studies and consultation within the United Nations. Three options were discussed how to include ecocide into the draft Code of Offences Against the Peace and Security of Mankind (the 'Code),

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<sup>15</sup> Zierler, David (2011): *The Invention of Ecocide*. Athens: University of Georgia Press

<sup>16</sup> Tord, Björk (1996): *The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972*, Available at <http://folkrorelser.org/johannesburg/stockholm72.pdf> [Accessed 28.03.2014]

<sup>17</sup> Tord (1996).

<sup>18</sup> Falk, Richard A. (1973): *Environmental Warfare and Ecocide –Facts, Appraisal, and Proposals*. *Security Dialogue*. 4. pp. 80-96.

precursor to the Rome Statute establishing the ICC: as stand-alone crime, included under Crimes against Humanity, or under War Crimes<sup>19</sup>.

The 1991 version of the Code included draft Article 26: "*An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced ...*". As the environmental crime was a highly contested one, a working group was established inside the International Law Commission (ILC) to look into the issue of 'wilful and severe damage to the environment', led by Christian Tomuschat. He clearly demonstrated why the destruction of the environment would fit in the context of the Code<sup>20</sup> and thus also in today's Rome Statute. The commentary to draft Article 26 clarified that the scope of the crime should apply to both, times of peace and war<sup>21</sup>. Nevertheless, eventually Article 26 was withdrawn from the draft Code based on a unilateral decision by the ILC Chairman and a vote was held only between ecocide in the context of war crimes or in the context of crimes against humanity, resulting in the inclusion of environmental damage as war crime<sup>22</sup>.

Notwithstanding the withdrawal of ecocide from the Crimes against Peace, some countries implemented it in national legislation. Vietnam (1990<sup>23</sup>), the Russian Federation (1996<sup>24</sup>), and other former Soviet countries<sup>25</sup> decided to include ecocide in their national legislation.

The only remainder in the Rome Statute was Article 8.2.b.iv under the war crimes "*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*". This very watered-down provision of the Rome Statute

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<sup>19</sup> Gauger et al (2012).

<sup>20</sup> Three conditions must be fulfilled for the Crimes against Peace: seriousness, harm to humans (which can be indirect via affects on health of environment), moral gravity (see Tomaschut). All of them are fulfilled for the environmental crime.

<sup>21</sup> Tomuschat, Christian (1996): *Document on crimes against the environment*. ILC(XLVIII)/DC/CRD.3. Extract from the Yearbook of the International Law Commission: 1996, vol. II(1).

<sup>22</sup> For more information the history of ecocide, and individual countries' positions, please refer to Gauger et al (2012) and Tomuschat (1996).

<sup>23</sup> Article 342 Vietnam Penal Code: Crimes against mankind: Those who, in peace time or war time, commit acts of annihilating en-mass 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.

<sup>24</sup> Criminal Code Of The Russian Federation 1996, Article 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.

<sup>25</sup> 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, Article 374; Criminal Code Tajikistan 1998, Art 400.

triggers various concerns, as outlined by Drumbl, namely unclear definitions of 'widespread, long-term and severe', only liability with full intention, and damage must be 'clearly excessive' in relation to the concrete and direct overall military advantage. Without sanctions nor liability for negligence or carelessness, the Rome Statute constituted a significant step backwards from the 1977 Geneva Protocol where a 'reasonable expectation that environmental damage would occur' sufficed<sup>26</sup>. To date no single party has been convicted of the environmental war crime.

Academic work on the crime of ecocide has been championed by Gray, Berat, and Higgins. Berat published a paper in 1993 which laid the basis for the proposed crime of 'geocide'. Envisioned as the environmental counterpart of genocide, geocide should be defined as "*intentional destruction, in whole or in part, of any portion of the global ecosystem, via killing members of a species; causing serious bodily or mental harm to members of the species; inflicting on the species conditions of life that bring about its physical destruction in whole or in part; and imposing measures that prevent births within the group or lead to birth defects*"<sup>27</sup>. Intentional in this case should be broadened to not only include *mens rea* from criminal law but also the tort law standard, i.e. desire or knowledge with substantial certainty. Liability for geocide would extend not only to those actually committing geocide but also to conspiracy, attempt, and complicity. Constitutionally responsible rulers, public officials, and private individuals, including corporations would be liable. The geocide law would take a holistic perspective of the global ecosystem and reparations should be applied. She also advocates for an international standing tribunal next to national enforcement<sup>28</sup>.

In 1995, Gray outlined his definition of a crime of ecocide. To classify as ecocide, three conditions would have to be fulfilled: The act must have caused serious and extensive or long-lasting ecological damage, this damage must have an international dimension<sup>29</sup>, and be wasteful, i. e. inflict higher costs on society than benefits. He advocates for ecocide to be recognised as crime of strict liability, as "[t]his standard would best encourage preventive behavior, advance the "polluter pays" and "precautionary"

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<sup>26</sup> Drumbl, Mark A. (1998): Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes. *Fordham International Law Journal*. 22:1. pp. 122-153.

<sup>27</sup> Berat (1993), p. 343.

<sup>28</sup> Berat (1993).

<sup>29</sup> this can be fulfilled either because they "*threaten significant interests and values of the global community, including life, health and resources vital to both*", or because citizens of more than one state are victims or perpetrators; or because "[p]olitical, social, economic and technological considerations mean they can only be halted, reversed or prevented from recurring through international cooperation" (Gray, Mark Allen (1995): The international crime of ecocide. *California Western International Law Journal*. 26, pp. 215-271).

*principles, and simplify issues of proof of knowledge, intent and causation*"<sup>30</sup>. States, individuals, as well as organisations, where they are recognised as having international legal personality, should be liable. As he demonstrates, ecocide breaches several internationally recognised rights and norms<sup>31</sup>.

In 2010, British barrister Polly Higgins handed in a proposal to the ILC to amend the Rome Statute to include 'ecocide' as additional Crime against Peace. She defines ecocide as the "*extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished*"<sup>32</sup>. She proposed ecocide, as well as the risk of ecocide as a crime for which a person, company, organisation, partnership, or any other legal entity responsible shall be held to account according to the principle of superior responsibility. Ecocide should be a crime of strict liability. Even if ecocide is not intended but rather the side-effect of another activity, responsible must still be strictly liable for the damage they cause. She further recognises the responsibility of those 'aiding and abetting, counselling or procuring' ecocide. The ecocide law shifts the focus from assessing risks and probabilities towards assessing potential consequences. An activity with potentially devastating consequences, even if the risk these materialise is small, will thus not be allowed.

Following her international definition of 'ecocide', she also proposed a national act and a European Ecocide Directive which over 135,000 EU citizens have supported with their signature so far. This initiative was run by the citizens' movement End Ecocide in Europe<sup>33</sup>. Contrary to existing EU legislation such as the Environmental Liability Directive and the Environmental Crimes Directive, it allows for warrants of arrest and applies to entire ecosystems, taking a holistic approach.

Higgins' proposed Ecocide Act outlines the need to perform a three-fold test to assess whether the damage to an ecosystem has been extensive: size, duration, and impact of the damage. Higgins suggests to refer to the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)<sup>34</sup> which understands 'widespread' as 'encompassing an area on the scale of several hundred square kilometres', 'long-lasting' as 'approximately a season'

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<sup>30</sup> Gray, Mark Allen (1995): The international crime of ecocide. *California Western International Law Journal*. 26, pp. 215-271, p. 218.

<sup>31</sup> Gray (1995).

<sup>32</sup> Eradicating Ecocide (2014): *What is ecocide?* Available at <http://eradicatingecocide.com/overview/what-is-ecocide/> [Accessed 06.04.2014]

<sup>33</sup> Full text of the directive available at <http://www.endecocide.eu/wp-content/uploads/2012/11/Draft-Ecocide-Directive.pdf>.

<sup>34</sup> Higgins, Polly (2010): *Eradicating Ecocide*. London: Shephard-Walwyn Publishers. p. 64.



and 'severe' as 'involving serious or significant disruption or harm to human life, natural and economic resources or other assets'.

This interpretation has, however, been criticised. The Geneva Conventions and their additional Protocols, which form the basis of international humanitarian law, in its 1977 Additional Protocol I at Article 35(3) prohibit "*to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment*". In this case, long-term has been defined as 'decades, 20 or 30 years as being a minimum' and Hulme argues that this definition rather than the ENMOD should apply to new legislation such as the ecocide law, especially if included in the ICC which follows the Geneva Protocol definition for the war crime in Article 8.2.b.iv<sup>35</sup>. This is confirmed by the International Geneva Committee's interpretation of the terms in ENMOD<sup>36</sup> and Drumbl<sup>37</sup>. Hulme suggests that one simple qualification of damage: 'severe' could be sufficient to cover all dimensions of size, duration, and impact. She further criticises the notion of naturally-caused ecocide, as well as the notion of a state "crime" which was rejected in the 2001 Articles on State Responsibility<sup>38</sup>.

It is remarkable how much Higgins' proposal resembles a crime of 'geocide' proposed by Berat in 1993, and draws on elements of Gray's proposal of ecocide. All three authors argued that ecocide/geocide should be a crime without intent (while Higgins and Gray go further than Berat with their requirement of strict liability). Another aspect they have in common is that they all follow the concept of superior responsibility. Higgins and Berat both suggest that liability would extend not only to those actually committing ecocide/geocide but also implies complicity (supported also by Falk's Draft Ecocide Convention). Further, they both include a holistic perspective of the Earth's ecosystem and argue for reparations or restorative justice. The idea has survived and developed over the last decades and the next paragraphs will demonstrate how ecocide is well in line with recent developments in

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<sup>35</sup> Hulme, Karen (2012): *Eradicating Ecocide. A Critical Appraisal*. Available at <http://www.ecocultures.org/category/author/karen-hulme/>

<sup>36</sup> The International Geneva Committee clarifies that the "*Understanding relating to Article I gives to the terms "widespread", "long-lasting" and "severe" an interpretation limited to the ENMOD Convention and one which is not intended to prejudice the interpretation of the same or similar terms if used in connection with any other international agreement*". International Geneva Committee: Treaties and State Parties to such Treaties. Available at: <http://www.icrc.org/ihl/INTRO/460> [Accessed 06.04.2014]

<sup>37</sup> Drumbl (1998).

<sup>38</sup> Hulme (2012).

international law, concluding with the call for an international court to try those responsible for ecocide.

## A Crime against Humanity

Ecocide can lead to the death of humans. As such, under certain conditions, ecocide should be recognized as a Crime against Humanity under the scope of the internationally recognized Crimes against Peace.

Crimes against Humanity are particularly odious offenses at a large scale. To fall under the Rome Statute, a Crime against Humanity, defined in Article 7.1, must be "*part of a widespread or systematic attack directed against any civilian population*". Murder, extermination, slavery, deportation, imprisonment, torture, rape, political, racial, or religious persecution and other inhumane acts reach the threshold of Crimes against Humanity only if they are part of a widespread or systematic practice. Ecocide would thus classify as a Crime against Humanity when it is part of a widespread or systematic attack directed against any civilian population.

Today, the world faces a major threat to its peace and security because ecosystems around the world are being destroyed with unprecedented speed and scale. We deplete our natural resources, and with the increasing scarcity of resources such as drinking water, food, as well as valuable minerals, oils, and other natural resources, we will see an increase in conflicts<sup>39</sup> and climate migration, as well as ultimately casualties due to lack of access to basic resources such as food and water. Ecocide thus threatens not only the right to life of those living in its closest proximity but ultimately the very survival of the human species on this planet. It constitutes a severe threat to civilian populations. Given increased recognition of the human right to a healthy environment as demonstrated above, it might be possible to broaden the scope of Crimes against Humanity to include the destruction of ecosystems leading to loss of human life on a large scale. By destroying the ecosystems we depend on, we are destroying the very basis of our civilisation.

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<sup>39</sup> see for example the Environmental Justice Atlas for a selection of already existing conflicts: *Mapping ecological conflicts and spaces of resistance*. EJOLT. Available at: <http://ejatlas.org/> [Accessed 06.04.2014]

## A Crime against Nature

In recent years, states have increasingly started to recognise the rights of nature, ecosystems, and animals. The proposed ecocide crime is in line with this movement. Even if no humans are affected, the destruction of an ecosystem to such an extent that the peaceful enjoyment of its inhabitants has been or will be severely diminished, falls under Higgins' definition of ecocide. She interprets 'inhabitants' as any living species dwelling in a particular place and 'peaceful enjoyment' as the right to peace, health and well-being of all life<sup>40</sup>.

Making Ecocide a crime sits at the heart of an emerging body of law called Earth Law. The Earth Law movement seeks to transform the law to recognize the inherent rights of all of the Earth's inhabitants and ecosystems to exist, thrive and evolve<sup>41</sup>. Our current legal framework has not been able to prevent environmental catastrophes. These problems partially result of the fact that we treat the Earth as property which can be exploited rather than as a living being with its own rights to exist and thrive. The law of ecocide prevention wants to change this and these efforts are well in line with ongoing developments worldwide.

In 1982, over 100 UN member States adopted the World Charter for Nature. Recognising that humans are part of nature, its preamble states that "*every form of life is unique, warranting respect regardless of its worth to man*". Principle 1 underlines that "*Nature shall be respected and its essential processes shall not be impaired*". Humans shall ensure when utilising natural resources that the "*integrity of those other ecosystems or species with which they coexist*" is not endangered (Principle 4).

Ecuador dedicated an entire chapter (number 7) to the Rights of Mother Earth (Pachamama) in its 2008 constitution, passed with an overwhelming majority. It includes the right to "*integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes*", as well as the right to be restored. Citizens have a right to a healthy and ecologically balanced environment, and a reciprocal duty to respect the rights of Nature. The state has the duty to ensure the restoration and apply preventive and restrictive measures and citizens can call

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<sup>40</sup> Higgins, Polly (2010): *Draft Ecocide Act*. Available at: <http://eradicatingecocide.com/wp-content/uploads/2012/06/Earth-is-Our-Business-Appendix-II.pdf> [Accessed 06.04.2014].

<sup>41</sup> see for example Earth Law Centre: *Mission and Visions*. Available at <http://earthlawcenter.org/about/> [Accessed 06.04.2014]

upon public authorities to enforce the rights of nature. This provision has already been applied in the first successful Rights of Nature case<sup>42</sup>. In 2011, the Provincial Court of Loja granted an injunction against the Provincial Government to stop a project to widen the river violating its constitutional rights to exist and maintain its vital cycles, structure, functions, and evolutionary processes.

In 2010, Bolivia adopted the Law of the Rights of Mother Earth. It grants nature the rights to life, biodiversity, water, clean air, equilibrium, restoration, and freedom from pollution. The law endorses guiding principles and requires the state and citizens to respect the Earth's rights. It also provides for an Ombudsman for Mother Earth to protect her interests<sup>43</sup>. In 2013, Mora County, in Northeastern New Mexico, became the first county in the United States to pass an Ordinance which establishes a local Bill of Rights - including a right to clean air and water, a right to a healthy environment, and the rights of Nature - while prohibiting activities which would interfere with those rights, including oil drilling and hydraulic fracturing or "fracking," for shale gas.<sup>44</sup>

Recognising Nature's inherent rights in human law as legally binding is essential to change our way to treat our environment, and ultimately to give the right to persons to speak on behalf of nature. Many countries recognize *locus standi/standing* for the public to issue legal proceedings in the public interest (e.g. Aarhus Convention) - which could be even directly on behalf of nature. There are an increasing number of court rulings which attribute rights to nature, ecosystems, or animals<sup>45</sup>. Belize ruled in 2009 in the case *Westerhaven vs. Belize* that "*it is really more accurate to describe and refer to the damage as "injury" to the Barrier Reef because the reef is a living organism*" and therefore obliged Westerhaven to pay \$11.5 million in reparation<sup>46</sup>. Several countries have recognised the rights or holyness of certain natural sites belonging to indigenous communities<sup>47</sup>. New Zealand extended personhood rights to great apes in 1999, and Spain followed suit in 2008<sup>48</sup>. Dolphins have

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<sup>42</sup> *Wheeler versus Director de la Procuraduria General Del Estado en Loja, Juicio*, see: Greene, Natalia: *The first successful case of the Rights of Nature implementation in Ecuador*. Available at: <http://therightsofnature.org/first-ron-case-ecuador/> [Accessed 05.04.2014]

<sup>43</sup> Bolivia (2010): *Ley de Derechos de La Madre Tierra*. Available at:

<http://www.ine.gob.bo/indicadoresddhh/archivos/alimentacion/nal/Ley%20N%C2%BA%20071.Pdf> [Accessed 05.04.2014]

<sup>44</sup> State of New Mexico, County of Mora (2013): Ordinance 2013-01. Available at

[http://www.celdf.org/downloads/Mora\\_Co\\_Community\\_Rights\\_Ordinance\\_042913.pdf](http://www.celdf.org/downloads/Mora_Co_Community_Rights_Ordinance_042913.pdf) [Accessed 05.04.2014]

<sup>45</sup> a good overview is available at <http://www.gaiafoundation.org/earth-law-precedents>

<sup>46</sup> *Attorney General of Belize vs. MS Westerhaven Schiffahrts GmbH & Co KG, Reider Shipping BV* (2009), available at <https://www.elaw.org/system/files/westerhaven.26.4.10.pdf> [Accessed 06.04.2014]

<sup>47</sup> including Kenya, South Africa, Ethiopia, Uganda, Benin, India, see: Gaia Foundation (2014): *Earth Law Precedents*. Available at <http://www.gaiafoundation.org/earth-law-precedents> [Accessed: 05.04.2014]

<sup>48</sup> The UK, Sweden, Austria, Belgium, and the Netherlands have also banned research on apes for ethical reasons.

recently been attributed 'personhood' in India<sup>49</sup>. In 2008, the Criminal Court of Paris condemned the world's fourth largest oil group Total SA to a fine of €375,000 – the maximum allowable penalty for maritime pollution – claiming 'ecological prejudice' caused by the sinking of the Erika. This represents the first time that a French court convicted a company for environmental damage and the landmark ruling could establish a legal precedent for suing companies or persons over ecological disasters.

Notwithstanding these successes, attributing rights to nature is a considerably new concept in law and also one that is highly contested. Next to questions regarding its justiciability, it poses a number of new ethical and philosophical questions and considerations. As summarised by Bollier and Weston *"the real impediment is that any forthright recognition of nature's rights would disrupt existing legal norms and spark great political controversy: a scenario that courts are not prepared to instigate. Both legal theories [rights for nature and future generations] seek to persuade the existing State/Market regulatory system – which is fundamentally responsible for most of the environmental damage that threatens our collective future – to voluntarily abandon its core legal premises"*<sup>50</sup>. It remains to be seen, thus, whether they can succeed, but the recent developments look promising.

## A Crime against Future Generations

Ecocide aims to establish respect for future generations. Whenever a return to the previous *status quo* is impossible, when even conditions enabling life to flourish are adversely affected, the very concept of human rights becomes obsolete. The concept of ecocide brings into sharp relief the imperative need for a new historical era of justice towards future generations. It becomes possible to plead for a systemic, complex and prospective approach to Human Rights<sup>51</sup>.

In recent decades, legal instruments have increasingly referenced future generations. Principle 1 of the Stockholm Declaration states that *"[Humanity] bears a solemn responsibility to protect and improve the environment for present and future generations"*, reinforced 20 years later by the Rio

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<sup>49</sup> The Indian Ministry of Forests and Environment had 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. [http://cza.nic.in/ban\\_on\\_dolphinariums.pdf](http://cza.nic.in/ban_on_dolphinariums.pdf)

<sup>50</sup> Bollier, David; Weston, Burns (2013): The Human Right to a Clean and Healthy Environment. *CSR Wire*. Available at <http://www.csrwire.com/blog/posts/1157-the-human-right-to-a-clean-and-healthy-environment> [Accessed 01.04.2014]

<sup>51</sup> Gaillard, Emilie (2012): Pour une approche systémique, complexe et prospective des droits de l'homme. *Changements environnementaux globaux et droits de l'homme*. Bruylant, préf. O. de Schutter, pp.45-67.

Declaration “*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*”. The 1992 UN Framework Convention on Climate Change articulates how states parties must work for the ‘benefit’ of future generations: “*The Parties should protect the climate system for the benefit of present and future generations of humankind.*” These declarations and conventions exemplify how international law has embraced the principle of protecting future generations. The very next step could be the recognition of a High Commissioner for Future Generations at the UN, as requested at Rio+20<sup>52</sup>.

Domestic law from a variety of countries also enshrines this respect for the needs of future generations. At least six countries have included provisions in their constitutions<sup>53</sup> and five different countries and one region either have or have had offices for future generations<sup>54</sup>. 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 recognize the place of future generations<sup>55</sup>. The children’s case *Opposa v. Factoran* 1993<sup>56</sup> in the Philippines is a historic example of judiciary reasoning in order to prevent irreversible ecological damage (deforestation) in the name of present children and that of future generations.

The pollution of food chains with heavy metals, genetic mutations due to radioactive contamination, and processes of bio-accumulation of chemical substances in living organisms all underline the urgent necessity to implement respect for future generations as foundation in law, through the recognition of future generations’ rights to health and life, just to name a few. Recognising the crime of ecocide would allow the inclusion of trans-generational legal provisions in environmental and criminal law, linked to other dynamics concerning the recognition of new institutions for the juridical defence of future generations, looking at the long term. Sanitary, environmental and nuclear disasters all demonstrate the need to act and implement legal provisions to safeguard future generations’ rights.

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<sup>52</sup>See UN Report of the Secretary General: *Intergenerational solidarity and the needs of future generations*. Available at: <http://sustainabledevelopment.un.org/content/documents/2006future.pdf> [Accessed 06.04.2014]

<sup>53</sup> Bolivia, Ecuador, Germany, Kenya, Norway and South Africa, see: UN Report of the Secretary-General (2013).

<sup>54</sup> Canada, Finland, Hungary, Israel, New Zealand, and Wales, see: UN Report of the Secretary-General (2013).

<sup>55</sup> Indiana underlines the purposes of environmental policy as “*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*” and Hawaii and Montana refer to future generations in their constitutions, see: UN Report of the Secretary-General (2013).

<sup>56</sup> *S.C. Philippines, Oposa v. Factoran*, 30 July 1993, in: Allen, T. (1994): *The Philippine Children’s Case : Recognizing Legal Standing for Future Generations*. *Georgetown International Law Review*. 6. pp. 713-741

## A Crime against Indigenous Peoples (Cultural Ecocide)

Like genocide, ecocide can be direct or indirect. It can be the destruction of a territory or it can be undermining the way of life of a people<sup>57</sup>. Ecocide then can lead to the destruction of a culture when a traditional way of life, which depends on a local ecosystem, collapses due to the destruction of the ecosystem. This is the situation Higgins calls 'cultural ecocide'. Mainly indigenous groups are at risk of cultural ecocide due to the growing depletion of their habitats around the world. As explained by Naomi Kipuri: "*The importance of land and territories to indigenous cultural identity cannot be stressed enough. The survival and development of indigenous peoples' particular ways of life [...] depend [...] on their access and rights to their traditional lands, territories and natural resources.*"<sup>58</sup>

The 2007 Declaration on the Rights of Indigenous Peoples establishes the rights of indigenous peoples and individuals not to be subjected to forced assimilation or destruction of their culture and obliges states to provide effective mechanisms to prevent any action to deprive them of their integrity as distinct peoples, their cultural values, or ethnic identities, or to dispossess them of their lands, territories, or resources (Article 8). Article 29 underlines their "*right to the conservation and protection of the environment and productive capacity of their lands or territories and resources*" and prohibits any storage or disposal of hazardous materials. The 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 ILO Convention 169 which is a major binding international convention concerning indigenous peoples' rights.

Based on the ILO Convention 169 and the Declaration of the Rights of Indigenous Peoples, it is evident that committing an ecocide on an indigenous land can lead to a violation of their human rights. When ecocide is committed with the intent to destroy, in whole or in part, an ethnic group, the violation falls under the definition of Genocide (Article 6 Rome Statute) and, in the case of war, under the War Crime (Article 8 Rome Statute). But what about a situation where an ecocide destroys an ethnic group by destroying the ecosystem on which it depends? The cultural ecocide definition seeks to cover this gap in existing law. Cultural ecocide involves taking an indirect action that puts people of a

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<sup>57</sup> Gauger et al, 2012.

<sup>58</sup> Naomi Kipuri, Chapter II Culture - STATE OF THE WORLD'S INDIGENOUS PEOPLES – Unicef 1993. P 53

certain race, religion, or culture at higher risk by polluting their environment. The concept of cultural ecocide does not involve any intent to kill but may lead to the same result.

## **The need for a Criminal Court of the Environment and Health**

The previous paragraphs have outlined how ecocide breaches not only human rights but also the rights of nature, future generations, and indigenous peoples. To ensure efficient access to justice for the victims of ecocide, a supranational court is needed. While a thorough discussion of the appropriate court system to enforce ecocide lies outside the scope of this paper, some headlines should be mentioned.

The fastest and most feasible solution would be the amendment of the Rome Statute to incorporate ecocide either as additional Crime against Peace as suggested by Higgins or to include the environmental catastrophe as Crime against Humanity as suggested by most of the initiators of the Charter of Brussels, a civil society call, launched on 30 January 2014, for a European and an International Criminal Court of the Environment and Health<sup>59</sup>. This would make ecocide a crime under the jurisdiction of the ICC. There are a number of obstacles which would have to be overcome: At the moment, the ICC can only become active if the state cannot prosecute itself or upon referral by the Security Council. Its jurisdiction applies only to individuals' criminal responsibility, while one of the main goals of the law of ecocide prevention is to hold not only decision-makers but also corporations themselves accountable. All of the current crimes under the jurisdiction of the ICC are intentional crimes, making it very difficult to implement demands for strict liability. Moreover, not all states are party to the Rome Statute, so jurisdiction does not extend to such large countries as the US, China, India, and Indonesia<sup>60</sup>. A further criticism of using the ICC to prosecute ecocide lies in the fact that currently it has only very limited possibility to order the restoration of the harm to the environment as sentencing is based on imprisonment and fines<sup>61</sup> and has limited environmental expertise in the ICC which might lead to ineffective rulings<sup>62</sup>. Suggested alternatives include an International Court for the

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<sup>59</sup> Charter of Brussels for the Creation of a European and an International Criminal Court of the Environment and Health. Available at <http://iecc-tpie.org> [Accessed 06.04.2014]

<sup>60</sup> International Criminal Court (2014): *About the Court*. Available at [http://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/frequently%20asked%20questions/pages/faq.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/pages/faq.aspx) [Accessed 31.03.2014]

<sup>61</sup> Drumbl (1998).

<sup>62</sup> Drumbl (1998).



Environment attached to the International Court of Justice<sup>63</sup> or a new court<sup>64</sup>. The first, however, would only have jurisdiction when actors consent and the second would take a long time to set up.

Therefore, incorporating ecocide into the mandate of the ICC seems the most appropriate way to ensure justice under the current UN system, as it is the only international tribunal with jurisdiction over criminal matters that can issue binding sentences. An additional protocol to the Rome Statute could overcome most of the caveats mentioned above. This could set up the crime of ecocide as a separate crime to be tried by a dedicated separate chamber solving the problem of the lack of environmental expertise. The text of the crime itself and sentencing guidelines could be drafted as to accommodate liability without intent, or at least introduce a crime of negligence and allow for orders of restoration. But most importantly, by recognising ecocide as a Crime against Peace, a moral imperative will be created to move away from dangerous industrial activity. Once ecocide becomes an international crime, corporations depending on positive customer image will not commit ecocide, banks will not finance crimes and civil society will be a watchdog with a strong tool at hand to hold corporations and politicians to account. Notwithstanding the solution at the international level, it is therefore imperative that States also incorporate ecocide in their national penal codes.

As suggested by the citizens' movement End Ecocide in Europe within the text of the Charter of Brussels, recognising Ecocide as a separate crime in itself would allow to cover all aspects of its definition, including the recognition of the rights of nature, future generations and indigenous people. It would further allow the introduction of the principle of strict liability or at least a crime of negligence. Incorporating ecocide as a Crime against Humanity, however, may reduce its scope of application and keep an anthropocentric legal view. Given the restraint of the Crime against Humanity to be 'part of a widespread or systematic attack directed against any civilian population' it might not even sufficiently safeguard the human right to a healthy environment. While the current Crimes against Peace were all confined to situations of conflict, the historic discussions have shown that it would have also been possible to include environmental damage as separate crime, applicable both in

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<sup>63</sup>For more details on the proposed court, see: Bruce, Stuart (2012): *International Court for the Environment: The Road Ahead to Opening its Doors*. Available at <http://icecoalition.com/wp-content/uploads/2012/09/ICE-The-Road-Ahead-to-Opening-its-Doors.pdf>. [Accessed 05.04.2014]

<sup>64</sup> see for example Drumbl (1998).

war and peace time<sup>65</sup>. And is the destruction of our natural environment not one of the most severe threats to peace?

Recognising ecocide as an international crime is a moral imperative. The idea has been discussed and persisted over the last 50 years. Different scholars independently from each other developed the concept of an international environmental crime. All the legal foundations are laid - what is needed is political will. The law of ecocide prevention has the power to trigger the transformation to the sustainable and low-carbon economy which is so urgently needed. Its time has come.

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<sup>65</sup> Tomuschat (1996).