

TIMELY AND NECESSARY:
ECOCIDE LAW AS URGENT AND EMERGING.

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INTRODUCTION:

This paper explores an international law of ecocide, which at its simplest is the mass damage and destruction of the environment resulting from human action. The renowned Indian jurist M.C. Mehta stated in the recently released Oslo Principles on Global Climate Change Obligations the following guide for those engaged in legal processes: “When our legal systems become overly technical and convoluted they can stray too far from reality. Lawyers and the courts must see to it that their interpretations of the law adhere to reality as closely as possible. Otherwise legal systems become rudderless and stray, from that single trajectory, which must be towards justice, into technicalities.”¹ While technical complexity and political questions have become increasingly understood as law, our current ecological crisis asks profound legal questions and for the re-emergence of legal reasoning, rather than technical translation. This paper will focus on the deeper, increasingly ignored, role of law to use reason and judgement in interpreting and guiding the major issues of our times and briefly justifies why a law of ecocide is a legal imperative.

¹ <http://www.yale.edu/macmillan/globaljustice/Oslo%20Principles.pdf>

The vital principle of *nulla poena sine lege* articulates that there is no penalty without law. While there are many interpretations of this in international law, in this case it speaks to the reality that there is no law against criminal mass damage and destruction of ecosystems in peacetime. At this historical juncture of climate change and environmental destruction this omission seems like legalised madness and violence. Ecocide challenges international law and asks it to fulfil its mandate of law beyond nation state sovereignty regarding environmental destruction. As one influential judge at the International Criminal Court stated when asked about the viability of ecocide law, ‘rather than anything else it will mainly take courage.’ The Oslo Principles state that avoiding severe global catastrophe is both a moral and legal imperative.²

Since the 1990s a whole area of criminological scholarship, termed environmental or ‘green’ criminology, has emerged that seeks to identify important environmental harms and draws attention to their impacts for humans, non-human animals and ecosystems more generally as well as their causes and potential remedial action, including the criminalisation of such otherwise ‘legal’ harms.³ This body of scholarship has recently considered the necessity of a law prohibiting ecocide and concluded that such a law is necessary and arguably essential to protect the planet and its ecosystems from destruction.⁴ Embracing this argument, this paper attempts to place a law of ecocide within emerging jurisprudences where the criminalisation of ecocide will take place because it must, and briefly outlines the jurisprudential support for its inclusion as an international crime in peace and war. Some crimes are so self-evidently wrong, morally and legally, that efforts to shackle such crimes to overly technical application and execution renders them devoid of utility from the perspective of protecting the

² Ibid.

³ Higgins, P, Short, D and South, N (2013) ‘Protecting the Planet: A proposal for a law of ecocide, *Crime, Law and Social Change*, 59, No1.

⁴ Ibid.

environment. No area of law is an island and ecocide is a vital part of an emergent jurisprudence that clarifies the duty of care towards the environment.

WHAT IS ECOCIDE?

Outside a legal definition, ecocide is any extensive damage or destruction of the natural landscape and disruption or loss of ecosystems of a given territory to such an extent that the survival of the inhabitants of that territory is endangered. The term ecocide was born from science. The plant biologist and chair of the Department of Botany at Yale University Arthur Galston first publicly used the term ecocide in 1970 after researching herbicides. David Zierler's 2011 book *The Invention of Ecocide* traces how the use of herbicidal warfare in the Vietnam war led to the defoliation of large areas of that country and resulted in a movement of scientists who advocated for ecocide to be an international crime.⁵ This was the first known time the crime of ecocide was named, explored and advocated for, yet the political arena failed to respond to the scientific community's witnessing and evidence of the reality of environmental destruction.

Since the Vietnam War, the last fifty years has seen advocacy from influential legal scholars for ecocide to be included as a crime against peace, including the intention for it to be included in the Rome Statute until a last minute removal, which occurred without prior discussions. This process has been outlined by the University of London's Human Rights Consortium report of 2012.⁶ Also the 2013 publication of the Science Po report on Ecocide outlines and clarifies the majority of the research and scholarship around

⁵ Zierler, David. *The Invention of Ecocide: Agent Orange, Vietnam and the scientists who changed the way we think about the environment*, The University of Georgia Press, London, 2011.

⁶ A draft ecocide Convention was submitted in 1973 into the UN and ecocide was included in the draft Rome statute as both a peace-time and war time crime.

legally defining ecocide.⁷ Gray, Beret and Higgins have proposed definitions of ecocide. Beret focuses upon geocide as a counterpart to genocide and species destruction is central to her definition.⁸ Mark Gray states that three conditions need to be met for ecocide: serious extensive or long lasting ecological damage that has an international dimension and is wasteful. Higgins defines ecocide as the extensive damage to, destruction of or loss of ecosystems 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.⁹ All of them hold individuals with superior responsibility accountability as per all international crimes, and Higgins and Gray agree that it be a strict liability crime which is widely used in many jurisdictions. More recently Neyret has proposed that crimes of ecocide are intentional acts that threaten the security of the planet and are committed as part of a widespread or systematic action, and this definition is refined by reference to specific dangerous activities.¹⁰ These definitions of ecocide have their critics that this paper doesn't have the

⁷ M. Garin, B. Glasenhardt, R. Houston, J. Pham, *Report on the ecocide project*, Law Clinic- Sciences Po Paris, 7 December 2013 : http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr.ecole-de-droit/files/rapport_ecocide_project.pdf

⁸ Beret defines geocide 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. Lynn Berat, “Defending the right to a healthy environment: toward a crime of geocide in international law”, *Boston university International Law Journal* (1993) (pp.327-348)

⁹ With others Higgins proposes the use of the existing laws of war be extended to peacetime activities in the 1977 United Nations Convention on the Prohibition of Military or any other Hostile Use of Environment Modification Techniques (ENMOD) which defines the terms ‘widespread, long lasting and severe as:

- a) widespread: encompassing an area on the scale of a several hundred square kilometres.
- b) long lasting: lasting for a period of months, or approximately a season.
- c) severe: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

¹⁰ L. Neyret dir., *Des éco-crimes à l'éco-cide, le droit pénal au secours de l'environnement*, Bruylant, 2015, p. 288 :

“Ecocide” means any of the following intentional acts when they threaten the security of the planet and are committed as part of a widespread or systematic action:

- a. the discharge, emission or introduction of a quantity of substances or ionizing radiation into air or the atmosphere, soil, water or aquatic environments;

scope to explore. Needless to say definitions are emerging, being refined and ultimately it's the responsibility of member states to do the work of definition.

Ecocide law has been proposed as inclusively applying to peacetime as well as wartime, aimed at prosecution of individuals rather than state bodies and therefore also addresses those engaged in non-state activities such as those individuals within transnational corporations who hold positions of superior responsibility.¹¹ This has been called unprecedented however individual accountability is an ancient principle of criminal law and there is precedent for prosecuting directors and other non-military leaders within international and national criminal jurisdictions.¹² Balthazar Garzon, a senior advisor to

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- b. the collection, transport, recovery or disposal of waste, including the supervision of such operations, and the after-care of disposal sites, including action taken as a dealer or a broker in any activity in relation to waste management;
 - c. the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used;
 - d. the production, processing, handling, use, holding, storage, transport, import, export or elimination of nuclear materials or other hazardous radioactive substances;
 - e. the killing, destruction, possession or taking of specimens of wild fauna or flora species whether protected or not;
 - f. other acts of a similar nature which are committed intentionally and threaten the security of the planet.
2. The acts referred to in paragraph 1 threaten the security of the planet when they cause:
 - a. widespread, long-term and severe damage to air or the atmosphere, soil, water, aquatic environments, fauna or flora, or to their ecological functions; or
 - b. death, permanent disabilities or serious, incurable diseases to a population or cause a population to be dispossessed of its lands, territories or resources on a lasting basis.
 3. The acts referred to in paragraph 1 must be committed intentionally and in the knowledge of the widespread or systematic character of the action of which they are part. Such acts are also considered intentional when their author knew or should have known that there was a high probability that they would threaten the security of the planet.

¹¹ Article 8(2)(b)(iv) of the Rome Statute prohibits intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long term and severe damage to the non-human environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. Therefore there is provision for the prosecution of ecocide within the Rome Statute but only within wartime. There have been calls to strengthen this provision within wartime most recently from Prof. Steven Freeland. Freeland, S. (2015), '*Addressing the Intentional Destruction of the Environment During Warfare Under the Rome Statute of the International Criminal Court*', : Intersentia 9781780683140.

¹² There is precedent for prosecuting directors and other non-military leaders for aiding and abetting and/or conspiracy charges of genocide/crimes against humanity/war crimes such as Wilhelm Frick in the Nuremberg trials. The removal of the corporate veil is well establish in most standard corporations

the ICC, expert criminal law practitioner and pioneer of universal jurisdiction is currently arguing that this doctrine of accountability extend to corporate crime.¹³

Despite legal and civil society advocacy for half a century, and the presence of ecocide law in at least ten national jurisdictions, international criminal law has been resistant to the inclusion of ecocide within its canon with the exception of the never used provisions in the Rome Statute regarding environmental damage in wartime.¹⁴ This is despite solid historical and extant national legal and moral foundations for its inclusions, the least of which is that humanity depends upon ecosystems for survival.¹⁵

Like all new laws, to legally define ecocide might be a long journey. However genocide, obviously a crime, was once a moral crime without precedent or legal articulation but wasn't quickly defined as an international crime in the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG). In 1946, after the evident horrors of the Holocaust, the first session of the United Nations General Assembly adopted a resolution that affirmed that genocide was a crime under international law, but did not provide a legal definition of the crime.¹⁶ Eventually genocide as a *jus cogens* norm, therefore a fundamental overriding principles of international law from which no derogation is ever permitted, was defined, clarified and incorporated into international

legislation used since the 19th century where offences by officers of bodies corporate are liable for offences committed by the body corporate.

¹³ Also the renowned Spanish judge Baltasar Garzon has made recent comments of a positive nature, in his role as advisor to ICC, on the subject of trans boundary corporate responsibility. See <http://www.theguardian.com/world/2015/aug/20/spain-judge-baltasar-garzon-prosecute-global-corporations>

¹⁴ Ten nations already have existing domestic ecocide law including Georgia, Republic of Armenia, Ukraine, Belarus, Kazakstan, Kyrgyzstan, Republic of Moldova, Russian Federation, Tajikistan, Uzbekistan, and Vietnam.

¹⁵ Equally, the myopia of law to address the greatest threat to humanity at this historic juncture, a reality most strongly expressed in science, may result in the collapse of law as a norm bearing and protective instrument.

¹⁶ In 1948, the UN General Assembly adopted the *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG).

law to the point that the jurisdiction of the International Criminal Court (ICC) is now based upon that original work.¹⁷ International crimes affect the peace or safety of more than one state or are so reprehensible in nature and extent as to justify the intervention of international agencies in the investigation and prosecution thereof.¹⁸ Genocide and ecocide address different forms of harm: one is directed at social groups, the other at the dependence of humanity upon eco-systems.¹⁹ They can both result in similar amounts of death and destruction, and potential prosecution rests upon both criminal and human rights jurisprudence. At this juncture what is essential is the moral recognition that ecocide should be an international crime, and that resultant processes are set in motion for its incorporation into law.

EMERGING JURISPRUDENCE.

Ecocide law is not a radical expansion of the foundations of western law, and nor does it threaten to undermine these foundations. If anything, it is a natural progression and response to immediate and long-term consequences of harm on a significant scale.²⁰ While more recent ecocide law advocates base their arguments upon the rights of nature and earth law, more traditional jurisprudence such as constitutional and criminal law also opens ecocide law into the international law constellation, which has been explored in the work of Christian Tomuschat, Mark Drumbl, Richard Falk and Mark Gray among

¹⁷ See Ian Brownlie, *Principles of Public International Law* (5th ed., Oxford, 1998).

¹⁸ "Conservation crime can be defined as any intentional or negligent human activity or manipulation that impacts negatively on the earth's biotic and/or abiotic natural resources, resulting in immediately noticeable or indiscernible natural resource trauma of any magnitude." Ed. Rob White, *Environmental Crime: A Reader*, Willan Publishing, Devon, 2009.

¹⁹ Higgins, P, Short, D and South, N (2013) 'Protecting the Planet: A proposal for a law of ecocide, *Crime, Law and Social Change*, 59, No1.

²⁰ Each ecocide is different and will be subject to evidentiary procedures. Some potential situations that might be prosecuted as ecocide if they occurred at such a time that an ecocide law was in place could be Chevron/Texaco's pollution of the Lagos Agro region in Ecuador, the toxic waste dump of the ship Probe Koala on the Ivory Coast and Shell's pollution of the Niger Delta.

others.²¹ What is also stated in the Oslo principles is that no single source of law alone requires states and enterprises to fulfil their principles. These sources are local, national, regional and international and derive from diverse substantive canons, including *inter-alia*, international human rights law, environmental law and tort law. Environmental law has primarily been based on statutory and regulative force, and hasn't yet possessed a strong philosophical or jurisprudential base.²² It has existed almost delinked from legal history and been forced to rely upon deference to the political question and unnecessarily ended in a web of technical complexity that often supports environmental degradation rather than protect against it. In law, ecocide will not stand-alone and will emerge as environmental law grapples with its proper place as a canon of law with its own rich historical links. What follows is only a few of the important developing bodies of law that support the inclusion of ecocide as an international crime against peace by building upon doctrines that link humanity with the environment as trustees, stewards and equally, potential violators of the duty to protect.

- International environmental crime.

Importantly, a well-established international legal regime exists for environmental crimes (eco-crimes) however its mandate is limited to transboundary harm in relation to the movement of hazardous wastes and illegal fishing, logging and wildlife trade. Penalties

²¹ Mark-Allan Gary, "The international crime of ecocide", *California Western International Law Journal*, Volume 26, Num. 2, pp. 215-271

Mark A. Dumbly, "Waging War Against The World: The Need To Move From War Crimes To Environmental Crimes" 22 *Fordham International Law Journal* (1998), pp. 122 ss.

Mark A. Dumbly, "International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?", *ILSA Journal of International & Comparative Law*, Vol. 6, Issue 2 (Spring 2000), pp. 305-342

Falk, Richard A. (1973): 'Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals'. In: Thee, Marek (ed.), *Bulletin of Peace Proposals*. 1973, Vol. 1. Universitetsforlaget, Oslo, Bergen, Tromsø; pp.80–96.

Tomuschat, Christian (1996). 'Crimes Against the Environment'. In: *Environmental Policy and Law*. 1996. Vol. 26, 6. p.243.

²² The foundations of environmental law differ within different jurisdictions, are unsettled and intersect with state regulation, the tortious duty of care and international treaties

range from imprisonment, the paying of fines to restorative damages. This area of international law has been enacted and extended within many domestic jurisdictions, and despite its narrow mandate and administrative law foundations, the growth of environmental criminal jurisdictions speaks to development of norms prohibiting violence against the environment. However these eco-crimes may occur within weak governance states without the resources to prosecute and, as international eco-crimes currently have a strictly defined frame of reference they often don't cover legalised crimes such as those permitted by state regulation and often perpetrated by transnational corporations, which have resulted in large swathes of territory and eco system destruction.²³ In July 2015 a resolution of the General Assembly of the United Nations explicitly encouraged member states to adopt effective measure to counter crime that impact upon environment and connected the illicit trafficking in wildlife with undermining good governance, the rule of law and threatening national stability which points to an articulation of the importance of ecocide law. While ecocide is part of the family of eco-crimes its proposed status as a *jus cogens* norm means that it is the final threshold of accountability and not yet accounted for in law.

- Human rights

Environmental law is now seeking roots outside the regulatory frameworks of statutory delegation of administrative and planning law into the increasing intersection between

²³ Further support for Ecocide emerged in the recent Resolution of the General Assembly of the United Nations on "Tackling illicit trafficking in wildlife"(30 July 2015) which included: encouraging Member States to adopt effective measures to prevent and counter the serious problem of crimes that have an impact on the environment and recognised that illicit trafficking in wildlife contributes to damage to ecosystems and rural livelihoods (...), undermines good governance and the rule of law and, in some cases, threatens national stability as well as reaffirming the intrinsic value of biological diversity and its various contributions to sustainable development and human well-being, and recognizing that wild fauna and flora and their many beautiful and varied forms an irreplaceable part of the natural systems of the Earth which must be protected for this and the generations to come". Resolution A/RES/69/314 on *Tackling the Illicit Trafficking in Wildlife*

human rights regimes and environmental degradation. Many proponents of ecocide law base their reasoning upon the rich areas of international human rights and environmental law. The influential theory of Vasak's concept of three generations of rights which separated civil and political, economic and social from environmental and collective rights meant that human rights that intersect with environmental conditions were in the third category of emerging rights which includes group and collective rights, right to self-determination, right to economic and social development, right to natural resources, right to communicate and communication rights, right to participate in cultural heritage, right to food, right to life, health human dignity and international equity and sustainability.^{24 1}

The rise of the indivisibility doctrine of international human rights law serves well to make the necessary connection between those human rights traditionally seen as inalienable such as civil and political rights, and their inherent dependence with environmental rights. This doctrine of interpretation allows the linkage between the right to livelihood with the right to life, the right to freedom from persecution with land rights and the right to human health with environmental degradation to become clearer. The indivisibility doctrine extends Vasak's theory beyond his argument of the temporality of rights within a generational emergence, which perhaps resulted in states avoiding the full gambit and interconnected nature of human rights. However what remains is that the bypassing of the third generation of rights, where the human environmental connection is most articulated, is endemic both domestically and in the international law regime. If the indivisibility of human rights doctrine, with all its difficulties of balancing and conflict

²⁴ Vasak's concept of three generation of rights is useful to examine the emerging rights that are important within these jurisdictions. He proposes that the first generation of rights are the civil and political whose responsibility mainly rests with the state, the second are economic and social right and the third emerge as environmental and collective rights which are the responsibility of states but also affect non-state actors such as transnational corporations. For the purposes of this paper the third generation of rights, and their overlap with the second generation, are what ecocide, eco-crimes and environmental rights elucidate. A recent and precient paper on the crimes against future generations is E. Gaillard, Crimes against Future Generations, *Epublico Revist Electronic De Direito Publico*, No5, 2015, ISSN 2183-184X accessed at <http://e-publica.pt/pdf/artigos/crimes-against-future-generations.pdf>

of laws, prevailed in judicial interpretation and legislative action, then the human right to health and right to livelihood could extend into environmental protection. The increased legal proximity between human and environmental rights is being seen in the interpretative method of the European Court of Human Rights (ECtHR) as well as the administration of the African Charter on Human and Peoples Rights (The Banjul Charter).

Significantly, the ECtHR has taken an approach increasingly responsive to shifting social realities in ECHR Member States (an approach often referred to as ‘evolutive’), to the scope of guaranteed rights, and which crucially expresses ‘growing and legitimate concern both in Europe and internationally about offences against the environment’²⁵. The Court has emphasised that effective enjoyment of Convention rights depends on a healthy environment and as environmental concerns have moved up the agenda both internationally and domestically, the Court has increasingly reflected the idea that human rights law and environmental law are mutually reinforcing.²⁶ It is also highly significant that the ECtHR has shown increasing willingness to draw upon international environmental principles, standards and norms to draw out the human rights implications of environmentally risky actions. The ECtHR is highly responsive to ‘evolving convergence as to the standards to be achieved’ and has held that it is ‘of critical importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory’.²⁷

²⁵ Grant, E, Grear, A, Kerns, T, Morrow K and Short, D. (2014) ‘A Human Rights Assessment of Hydraulic Fracturing and Other Unconventional Gas Development in the United Kingdom’, Report for the Bianca Jagger Human Rights Foundation. Available at <http://extremeenergy.org/2014/10/30/full-report-a-human-rights-assessment-of-hydraulic-fracturing-and-other-unconventional-gas-development-in-the-united-kingdom/>

²⁶ Ibid, 14

²⁷ Ibid, 15

Admittedly the rights held by humans' amounts to a list as long as the genealogy in the book of Genesis. What many laws lack, but is becoming increasingly articulated, is recognition that the original point of the fulfilment of all rights rests upon the existence of a viable environment. The inalienable dignity of humanity has roots in the earth, therefore environmental degradation and the climate crisis attack the viability of human rights, both legally and literally. In this context contemporary conditions ask for legally binding and enforceable instruments at the international, and not only regional, level to protect them. What the indivisibility doctrine of human rights does, in conjunction with the evolutive interpretative method, is draw seemingly competing rights of civil and political, social and economic into greater proximity and realistic encounter with environmental rights and the duty to protect the environment as a pre-condition of the realisation of human rights.²⁸

The right to a healthy environment is not a *jus cogens* norm - yet.²⁹ If the right to a healthy environment was *jus cogens* then ecocide law stands as a positive enforcement of this right and is a logical and practical extension of the human right to life. The prophetic dissenting judgement of Weeramantry J in the *Danude* case at the International Court of Justice indicates the possible emerging legal reasoning that elucidates ecocide as the prohibitive point of the international norms in human rights, sustainable development and other international treaties.³⁰ While ecocide is not mentioned in his judgement, the reasoning articulated the emerging jurisprudence outlined in this paper. The very recent Oslo principles also express demands from influential jurists from around the world that law step into its role as adjudicator and interpreter of contemporary realities. This

²⁸ Currently an International Human rights and Business Treaty is being negotiated at the United Nations that could potentially close some gaps in the accountability and governances relating to the human rights that intersect with the environmental degradation perpetrated by Trans- national corporations. The existence, even of such a proposal, indicates that international law is moving towards pre-emptive steps.

²⁹ This is despite this right being enshrined in the majority of domestic constitutions. The right to a healthy Environment is rising as a point of concern and investigation by many United Nations agencies including the Human Rights Council and UNEP.

³⁰ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (1997) ICJ Rep. 7, 429-555.

document explicitly outlines specific obligations to be met by states and businesses if climate change and its catastrophic effects are to be averted and implies that critical legal responsibility needs to be taken and can be achieved by a radical movement of the law into obligations and enforcement. This steps into a new era of environmental law: not merely about regulation and statutes, but situated in deep principles of human and environmental rights and obligations. However, at the time of writing, civil claims have consistently failed because the evidentiary requirements for casual connection between the environment and human rights are too tenuous within that jurisdiction. This is where ecocide law would enter as a clear prohibition not solely dependent upon human rights law. In light of the changing human rights culture where the environment is increasingly becoming an explicit part of claims, ecocide law is a reasonable and vital part of this growing legal culture, which would elucidate the indivisibility of human rights, within a criminal framework.

- Public interest, duty of care, fiduciary relationships and the global commons.

Across the globe, within different jurisdictions and with diverse legal mechanisms, a legal movement is growing that proposes a renovation of environmental jurisprudence. This jurisprudence has its basis in environmental law as well as the commons, fiduciary duties, trust and public interest doctrines. Across numerous domestic jurisdictions, from the USA, to India and Holland, cases are being launched in civil and administrative law against governments and statutory authorities to fulfil their duty of care towards those within their jurisdiction, and beyond, and the claims are based upon the protection of the trust and public interest doctrines, tortious claims and an extension of duty of care principles.³¹ While outside criminal law's ambit, all of these cases and judgements,

³¹ *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* [2015] Case C/09/456689/HA ZA 13-1396 [English Translation].

At the time of writing state appellate courts in the USA have allowed Atmospheric Trust Litigation lawsuits and administrative petitions brought by students to go forward in New Mexico, Texas, Alaska, Oregon,

particularly those from India, point to the growing body of law that express the prohibitive parameters of the harm that can be permitted by state bodies against the environment and confirms a responsibility to protect. This is being witnessed in the atmospheric trust and public interest cases and the rise of tortious claims based upon negligence, nuisance etc.

Ecocide law might seem outside the ambit of these cases, however the work of Mary Woods follows in the footsteps of many legal theorists and scholars who argue that while we exist within the confines of the social contract in law, we are yet to enshrine or enact recognition of what Michel Serres calls the *Natural Contract*, or Woods calls *Natures Trust*.³² The public trust doctrine compels government, as trustee, to protect natural inheritances such as air and water for all humanity and asserts public property rights to crucial resources. This doctrine is present in numerous jurisdictions across the world, as well as the international community itself. It also doesn't contradict state sovereignty. Rather than being based upon the political discretion of government officials, as a constitutional right these public trust cases express ancient Roman origins in public property rights (*res communes*) and has roots in European, Asian, African, Islamic and Anglo and indigenous legal cultures.

The jurisprudential void that has existed regarding humanity's responsibilities towards the environment, and the global commons, can be filled by the enforceable enshrining of obligations such as *jus cogens* norms that are elevated to the level of international crimes.

Colorado and Pennsylvania ([Amicus briefs](#)). Petitions on Atmospheric Trust Litigation are pending in the Philippines, the Ukraine, Uganda and Belgium. In Pakistan : <http://www.theguardian.com/environment/2015/oct/07/pakistan-high-court-comes-to-defence-of-climate>

³² Serres, Michel. *The Natural Contract*. trans. Elizabeth MacArthur and William Paulson. Ann Arbor: The University of Michigan Press, 1995.

Wood, Mary Christina, *Nature's Trust. Environmental Law for a New Ecological Age*, New York, Cambridge University Press, 2014.

Cases that proceed under the public trust doctrine ask for clarification on the positive duty to protect both human citizens and natural environments, and ecocide law enforces these obligations. Thus public interest (nature's trust) and ecocide law are complementary as ecocide can be envisioned as not just a breach of a legal duty of care (civil) but the violation of the duty to protect. Transboundary harm and the protection of the global commons are central to the reasoning that elevates ecocide as an international crime against peace.

While awaiting international recognition these issues are being played out in domestic claims with increasing intensity. It is important to recognise that national jurisdictions are often deficient in addressing transboundary or transnational affects without international legal support. Equally, due to the rise in cases and claims based upon arguments of potential or existing transboundary harm, there currently exists both an overburdening of domestic jurisdictions and a void within international law that does not aid the ability of domestic jurisdictions to respond to the acute problems of climate change and ecocide, which are crisis of the global commons. For example, the global commons are generally only protected by soft law instruments; thus the Arctic effectively remains open for exploitation unless political will determines otherwise as the legal restraints are very weak.

The public trust doctrine connects with intergenerational justice and the inter-temporal trusteeship of the planet, which Edith Brown Weiss put forward in 1989.³³ There is a growing body of law that recognises the interests of future generations but, as yet, no binding international legal instrument enforces them. Intergenerational equity has been recognised in the celebrated decisions of the Philippines Supreme Court such as in *Oposa*

³³ E. Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198,200-02 (1990); *see also* E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 25-26 (1989).

*v Factoran, J.R*³⁴ where the plaintiff children, representing future generations, were recognised as legal persons. As such they were given legal standing to file the case based on the concept of intergenerational responsibility. Intergeneration rights are articulated in international human rights doctrines so future generations rights have also been considered at the ICJ in the case of *Denmark v Norway*³⁵ and the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.³⁶ Transgenerational rights are complementary to the application of the precautionary principle, which emerged from the Rio Declaration in 1992 and has subsequently become part of judicial reasoning in many jurisdictions. The precautionary principle, which originated in the middle-ages as ‘first do no harm’, has a weightier significance due to the temporality of climate change and has been enshrined in numerous conventions in international law. Ecocide law protects the interests of future generations by protecting territory from harm. Crimes against future generations, implied within ecocide law, would apply to acts or conduct undertaken in the present which seriously harms the natural environment, human populations, species or ecosystems in the present and has long term consequences.

Across the world there are numerous court cases and emerging (or re-emerging) legal doctrines, within very diverse jurisdictions and based upon very different legal claims, which range from tortious claims against governments for not fulfilling their obligations to cut their emissions quotas to challenging permits for new coal mines to the prevention

³⁴ *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources* or *Oposa vs. Factoran, G.R. No. 101083 July 30, 1993*, (S.C., January 1994) (Phil.), 33 I.L.M. 173 (1994)).

Also in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* (Supreme Court of Philippines, 1993): focused on intergenerational responsibility and justice where it was found that the government had an obligation to preserve the environment and a corresponding “duty to refrain from impairing” it (p.240)

³⁵ *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 I.C.J. 38, 277 (June 14) (Sep. Op. Weeramantry), available at <http://www.icj-cij.org/docket/files/78/6761.pdf>.

³⁶ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 243-244 (July 8), available at <http://www.icj-cij.org/docket/files/95/7495.pdf>. The ICJ embraced a broad definition of the environment. It “represents the living space, the quality of life and the very health of human beings, including generations unborn.” *Id.* at 241.

or compensation for ecocide. From the smallest administrative land tribunals to national Supreme Courts, citizens and organisations are asking law to move, and what they have in common is a call for recognition of the violence being done to both the earth and the livelihoods of humans and other inhabitants. Each jurisdiction adapts the limit point of harm against ecosystems according to their pre-existing canons and hopefully what will emerge in this process is *a jus cogens* norm of universal jurisdiction owed to all (*erga omnes*) with regards to humanity's intimate and interdependent relationship with the environment and its duty to not violate that obligation. The enshrining of this obligation is the responsibility of international law.

ECOCIDE LAW: THE PROHIBITION AGAINST HARM.

Ecocide law raises the normative value of civil doctrines and human rights that intersect with the environment. Eco-crime is a unifying term that incorporates ecocide, and ecocide law's function as a *jus cogens* international crime is to mark the final normative threshold beyond which it is illegal to cross. Currently no such threshold exists. Unlike human rights and other areas of criminal law, environmental law presently can be interpreted as possessing a seemingly an opened unanswered legal question without a strong prohibition point or capacity to hold individual perpetrators accountable. It often appears, as seen in the many civil legal cases where *forum non conveniens* has been used as a defence, that perpetrators of environmental destruction are fictive characters without concrete links, or accountability to the damage or territories upon which this destruction is visited.³⁷

³⁷ *Forum non Conveniens* is a common law, conflict of law doctrine - where courts may refuse jurisdiction over matters when there is a more appropriate forum available. Its abuse has been seen most strongly in the famous Chevron/Texaco law suits over the Lago Agrio pollution in Ecuador, which would potentially qualify as an ecocide. Also of interest is the work of the legal realist Felix Cohen and his influential essay "Transcendental nonsense and the functional approach" which is as applicable now for environmental law area as it was once for social realism. Cohen, Felix. Transcendental Nonsense and the Functional Approach, *Columbia Law Review*, Vol.xxxv, June 1935, No 6. Pg 809- 849.

Due to the transboundary nature of ecocide, it is most appropriate that it is enacted at the level of international law subject to the complementarity principle. Ecocide law, as a *jus cogens* statement, could be *sine qua non* of all the emerging jurisprudences around environmental law. Essentially, ecocide law would be a strong declarative statement by the international community as to the prohibition of significant human harm to nature and could encompass anthropocentric, biocentric and ecocentric approaches. Ecocide law recognises that law is primarily 'social' regulation, which prohibits significant harm on damage the social body of humans can do to the world in which they inhabit. Criminal law is the most powerful jurisdiction when it comes the regulation and prohibition of harmful activities within the social body due to its enforceability and backing by the state.

As every ecocide is different the courts role is to measure the duration, impact and significance of the evidence before them and this is where judicial reasoning becomes vital.³⁸ The introduction of ecocide at an enforceable international level also fulfils the normative desire to prohibit, pre-empt and prevent the most grievous of harm vital to any criminal law regime. And as mentioned, it would also protect against corporate crime and crimes against future generations as well as enforce indigenous rights, among many others.

Without criminal law as a counterpart to civil and public interest law that can enforce and penalise the violence enacted against the environment, we are left with a legal war against all: as Hobbes most aptly said *bellum omnium contra omnes*.³⁹ As science is clearly articulating, to be legitimate states must fulfil the role of sovereign power to protect their

³⁸ Many proposals for ecocide law refer to the 1976 ENMOD which applied to ecocide law this would apply outside warfare and applies a test that does not impose an arbitrary limit, but an analyses of size, duration and impact to be judicially determined.

³⁹ Ironically the statement rested upon the war being vested in the state of nature. Now we face a war of all against all unless we set limits on the violence against nature, inclusive of humanity.

territory, and others territory, upon which their rule relies. In various civil cases the evolution of state responsibility extending to a duty protect the environment is emerging.⁴⁰ In a nutshell, the failure to limit violence on the earth is an abdication of state responsibility, as seen in the public trust doctrine. This results in legal absurdities where it's legal for military and police forces to arrest or even shoot environmental protestors, yet not illegal for individuals to commit extreme violence against eco-systems that human life depends on.⁴¹ Environmental law is on the cusp of stepping into this legal void to negotiate with power, with sovereignty, where it can be recognised that the legal foundations of state power rest upon the viability, inclusive of ecological viability, of the territory under its care and control.

International ecocide law will not solve the world's problems. There is no one legal fix. Ecocide law, however, is an important part of the legal pantheon that can serve to halt massive damage and destruction and give environmental law legal weight, rather than leaving the most serious and dangerous environmental issues to soft consensus, extra-judicial forums or locked into the non - justiciable space between state sovereignties.

ECOCIDE LAW PROCEDURE.

Essentially ecocide law is a both a peacetime and wartime crime and aimed at the prosecution of individuals. Due to the ubiquitous nature of environmental harm, the difficult question of causation arises when it comes to climate change and taking into

⁴⁰ *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* [2015] Case C/09/456689/HA ZA 13-1396 [English Translation].

⁴¹ One example is Peru's law no. 30151 discussed at <http://www.theguardian.com/environment/andes-to-the-amazon/2014/jun/29/peru-licence-to-kill-environmental-protestors> accessed 12 October 2015.

account global supply chains as well as what Rob Nixon calls the slow violence of environmental harm⁴². In the pantheon of emerging environmental crimes ecocide law rests with the most serious, most obvious crimes against the environment. This addresses the accountability gap and the lacunae between transnational corporate power as one of the main perpetrators of ecocide, whether as a privatised state entity or as separate. As much environmental damage can be masked by either reliance on regulatory permits, or the labyrinthine and extra legal free trade adjudication process, ecocide seeks to make the corporate and state veil transparent. There will be, like all international legal reform, political and procedural difficulties in introducing ecocide into international law. But how much more violence has to occur before the law recognises that the environmental version of the Holocaust has already appeared on the landscape?

Many commentators on ecocide law agree that strict liability and superior responsibility, as per all international crimes, be part of its elements.⁴³ Others argue that mens rea is an essential element of the crime following the established norms of the ICC.⁴⁴ Many argue

⁴² Nixon, Rob. *Slow Violence and the Environmentalism of the Poor*, London, Harvard University Press, 2011. This book also implies that ecocide law is linked to alleviation of poverty

⁴³There has been much discussion and disagreement over the strict liability proposals for ecocide law. Some argue that is important for the effectiveness of the ecocide provision to capture not only the actus reus standard of criminal law, but also negligence, reasonable foreseeability, wilful blindness, carelessness and objective certainty standards which animate tort and civil liability. This reflects a long legal tradition, certainly in the UK of not requiring mens rea for certain types of offences especially pollution offences. See also international: HNS Convention 1996 (International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea). The effectiveness of ecocide law is that it is free of the restrictions of criminal intent. Features that can highlight why an ecocide event occurs such as neglect, wilful blindness to risk or indeed intent, do not determine the commission of the offence but play pivotal role in the determination of the sentence. Whilst some suggest some form of mental element be included as part of the offence itself, by confining recklessness or intent as a factor in sentencing has a practical application; it is an aggravating feature. What is central to a pollution/hazardous/significant harm event is not so much why it occurred, but its factual impact.

⁴⁴ These arguments rest upon the refusal of a definition by the states without the condition of mens rea. Also these arguments point to ecocide being one of the most serious of crimes which not all ecocrimes are. The international law of the most serious crimes is exceptional, with specific rules (prosecution, prescription), and should be limited to a short list of actions against the environment. To counter this Neyret proposes an expansive definition of “intention” as the environmental criminality is specific and different than crimes against human dignity. The differences over whether mens rea should be included

that the adjudicating forum needs to be empowered to decide on both criminal and civil matters. Consistent with the liberal notion that criminal punishment should be a last resort, criminalising harm to the environment could incorporate alternate, non-penal means as has been proposed by many ecocide law commentators such as Higgins.⁴⁵ It has been proposed that the remedies for ecocide, with other challenges such as climate change, shall also be based upon restorative justice and compensatory elements.⁴⁶ This could be enacted within the criminal arena to reflect in the principles of state common but differentiated responsibilities, which is expanding within international law. Whether this is addressed within the current purview of the Rome Statute by the appointment of a separate prosecutor or administered by a separate UN body is a question to be decided.⁴⁷ Currently the ICC doesn't have much room for restitution, injunctive powers, the ability to determine civil liability or to clean up the harm. This introduces the well-formed argument for a separate international convention for ecocide and the environment administered by its own secretariat and enforced by its own court. However, part of the issue with all international law is that, with the exception of free trade agreements, enforcement and regulation remains a problem.

CONCLUSION.

The introduction of ecocide law would confirm the emerging environmental legal norms summarised above. In conjunction with civil and soft law movements', ecocide law announces to companies and states that responsibility and legal consequences flow from

also springs from different juridical histories and definitions of mens rea. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1940084

⁴⁵ Higgins, Polly, *Eradicating Ecocide*, London, Sheppard- Walwyn Ltd, 2010.

⁴⁶ The entry point for international criminal law is imprisonment. If Ecocide Law is a strict liability crime this lowers the entry point thereby allowing alternative sentencing to be included.

⁴⁷ There are also proposals for a separate United Nations Trusteeship to administer environmental assistance according to the mitigation, adaption and restoration needs of the affected communities and territories.

serious violence and damage of eco-systems.⁴⁸ The viability of ecocide being inserted into the Rome Statute, or alternatively being the impetus for an alternative forum such as an International Environment Court, is universally considered difficult at the present time, but there are numerous legal and political reasons why these hurdles need to be overcome. Civil society, jurists, scientists, United Nations agencies, individual citizens and nation states cognisant of the environmental degradation of their territories combine to express a groundswell of support for the urgent creation of a normative threshold regarding environmental violence. In this context, ecocide law is a legal necessity that surpasses considerations of political lethargy.

Ecocide law at the international level, or even the simplest gesture of declaring at a UN assembly that ecocide is an international crime, would address the accountability and governance gaps in current international environment law. Additionally it would send a message to Trans-National Corporate actors that certain activities will be too risky to undertake due to the potential penalties. While it may take awhile for the jurisprudence on ecocide, and more broadly environmental harm, both within the civil and criminal jurisdictions, to develop more nuanced coherent language, ecocide brings to the table the legal prohibitions. It is a legal urgency and asks law to regain its rightful and reasonable role. In light of science and civil society demands, ecocide law is a moral and legal imperative upon which much, including human and environmental livelihoods, depends.

⁴⁸ Across the world NGOs, governments and citizens are embarking in legal action in both defensive and affirmative claims to halt environmental damage. These immense legal efforts can be assisted and fast tracked by an international statement that ecocide is a *jus cogens* crime.