

The link between ecocide and environmental justice: a study of SIDS and Latin American countries

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Abstract

As the impacts of environmental degradation and climate change are becoming increasingly visible, it is undeniable that global South countries, especially Small Island Developing States (SIDS) and Least Developed Countries (LDCs) are bearing most of the brunt of the environmental crisis. As stewards of the environment, we have the responsibility to protect our natural world from anthropogenic climate change, the rapid extinction of species, annihilation of habitats, and ecological collapse. However, despite the existence of a wide range of international agreements which are meant to safeguard the natural environment, it is disappointing to note that our planet is reeling from an ecological malaise. It therefore becomes fundamental to make those responsible for destroying our Earth legally accountable for their actions. This can be achieved through the leverage of international criminal law. Weisberg (1970) was the first one to coin the term “ecocide” and he defined it as “the wilful destruction of the environment”. From being applied to describe the massive environmental destruction caused by the US during the Vietnam War, to the Russian attacks on Ukrainian nuclear facilities, as well as oil extraction in Canada and mining in Venezuela, the term ecocide is gaining traction as a potential tool to not only persecute those who wreak havoc against our planet, but also to deter the commission of environmental harm. The purpose of this research will be to study the link between the potential crime of ecocide and environmental justice. To achieve this, the study will focus on how the proposed amendment to the Rome Statute of the International Criminal Court (ICC) could be used to effectively prosecute those responsible for deliberate environmental degradation in the global South. For the purposes of this study, the author will focus on the impact of the introduction of the crime of ecocide vis-à-vis SIDS and Latin American countries.

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Introduction

Background

There is no denying that the anthropogenic impact on our natural environment has been catastrophic. Indeed, human impact on the environment is having dire effects on our ecosystems, natural resources and biodiversity. The number of environmental problems we have to cope with as humans has increased since the first three industrial revolutions² and they include unsafe levels of air pollution, the depletion of fishing stocks, toxins in soils and rivers, land and ocean waste, deforestation, ocean acidification and sea level rise, climate change, loss of habitat, and noise pollution. In the age of the Anthropocene³, there is a pressing need to deploy mechanisms, frameworks, policies and laws to deter humans, governments and corporate giants from harming our already fragile and endangered natural environment. So far, international environmental law has failed to adequately halt the destruction of the environment⁴ or make perpetrators of environmental harm accountable for their accounts whether at national, regional or global level. Indeed, despite a panoply of multilateral environmental agreements which have burgeoned since the 1970s, as well as domestic environmental law instruments, a litany of irreparable environmental harms are surfacing across the world. The current international courts are not adequately equipped to adjudicate on environmental crimes. Indeed, the International Court of Justice has the mandate to deal only with inter-state claims and the International Criminal Court can only deal with environmental damages if they were perpetrated within context of the commission of war crimes as defined in the ICC Statute. This is why deterrence and accountability for environmental damage constituting ecocide are urgently needed. For this purpose, the Stop Ecocide Foundation assembled an Independent Expert Panel for the Legal Definition of Ecocide (the Panel) in late 2020, tasked with working towards presenting a proposition that the Rome Statute of the International Criminal Court be amended to include the crime of ecocide.

Definition of Ecocide

Several definitions have been given to ecocide, but prior to 2020, no consensus had been reached as to a legal definition, although such definitions had floated around as early as the

² Jahda Swanborough, 'The Previous Industrial Revolutions Broke the Environment: Can the Current One Fix It?', World Economic Forum, 2017, [The previous industrial revolutions broke the environment. Can the current one fix it? | World Economic Forum \(weforum.org\)](https://www.weforum.org/articles/2017/01/25/the-previous-industrial-revolutions-broke-the-environment-can-the-current-one-fix-it/?_lang=en), (accessed 25 August 2022)

³ Ashley Dawson, *Extinction: A Radical History*, (OR Books, 2016), 19

⁴ Report of the UN Secretary-General on 'Gaps in international environmental law and environment-related instruments: towards a global pact for the environment', 30 November 2018, UN Doc A/73/419.

1970s. In 1973, Falk proposed an International Convention on the Crime on Ecocide.⁵ In 1985, the Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed a broadening of the definition of genocide to include: “adverse alterations, often irreparable, to the environment – for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest – which threaten the existence of entire populations, whether deliberately or with criminal negligence.”⁶ For its part, in 1991, the International Law Commission proposed a Draft Code of Crimes and Security of Mankind which included the crime of “wilful and severe damage to the environment” (Article 26).⁷ The drafters of the Draft Code envisioned that criminalising acts of environmental destruction would lead to a change in consciousness, and they invoked a positive preventive effective which would go beyond negative deterrence.⁸

Freeland, in 2005, broadly defined “crimes against the environment”, the breach of which could potentially trigger international criminal liability, as follows: “a deliberate action committed with intent to cause significant harm to the environment, including ecological, biological and natural resource systems, in order to promote a particular military, strategic, political or other aim, and which does in fact cause such damage”.⁹ Higgins defines ecocide as “the extensive loss or damage or destruction 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.”¹⁰ Higgins submitted a draft law of Ecocide to the International Law Commission in 2010, whose elements include “(1) the perpetrator’s acts or omissions caused, contributed to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to, or destruction of ecosystems(s) of a given

⁵ Richard A. Falk, *Environmental Warfare and Ecocide – Facts, Appraisal and Proposals*, 9 (1) *Revue Belge de Droit International*, (1973), 21-24.

⁶ Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised and Updated Rep. on the Question of the Prevention and Punishment of the Crime of Genocide*, 33, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985)

⁷ Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991, *Official Records of the General Assembly, Forty-sixth session, Supplement No. 10, Extract from the Yearbook of the International Law Commission, 1991, vol II (2)*, [Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, Official Records of the General Assembly, Forty-sixth session, Supplement No. 10 \(un.org\)](#), accessed 20 August 2022

⁸ Kai Ambos, *Protecting the Environment through International Criminal Law*, Blog of the European Journal of International Law (June, 2021), [Protecting the Environment through International Criminal Law? – EJIL: Talk! \(ejiltalk.org\)](#), accessed 21 August 2022

⁹ Steven Freeland, *Crimes Against the Environment—A Role for the International Criminal Court?*, *Droit de l’Environnement dans le Pacifique Problématiques et Perspectives Croisées [Environmental Law in the Pacific: International and Comparative Perspectives]*, (Alberto Costi & Yves-Louis Sage eds: 2005), 358.

¹⁰ Polly Higgins, *Eradicating Ecocide: laws and governance to prevent the destruction of our planet*, (2010, 2nd Edition), pp. 61- 92.

territory (ies); (2) the perpetrator's activity has or will severely diminish peaceful enjoyment by the inhabitants; (3) the perpetrator had knowledge or ought to have had knowledge of the likelihood of ecological, climate or cultural harm; and (4) the perpetrator was a senior person within the course of State, corporate or any other entity's activity in times of peace or conflict."¹¹ Neyret proposed a Convention Against Ecocide in 2015 and defined ecocide as "the intentional acts committed in the context of a widespread [or] systematic action that have an adverse impact on the safety of the planet."¹² Fast forward to 2021 and we now have a legal definition of ecocide, as per the Panel, which is as follows: "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."¹³

Ecocide as a Crime under the Rome Statute of the ICC

Industrial activities and climate upheavals which have potential dangerous consequences are ultimately the responsibility of the very parties that have the power to control and prevent such serious harm, namely States and corporations. Undoubtedly, a robust ecocide law will be a legal route that will hold the promise of reducing climate chaos, environmental damage, and protect millions of lives, thus leading to the prevention of serious harm through the imposition of State and corporate responsibility for dangerous climate and industrial activity. As at now, existing laws, including international treaties, protocols, agreements and declarations do not impose a universal legal obligation for States and corporations to be accountable for environmental and climate harm. The Rome Statute of the ICC, which sets our existing international crimes, do not address the protection of ecology; the protection of indigenous and cultural rights, and loss, damage and destruction that occur in peace time. The definition offered by the Panel gives the opportunity for State Parties to the Rome Statute to add a new crime to international criminal law, extending the protection for serious environmental harm in a world where pollution, loss of biodiversity, deforestation, ocean acidification, climate change and loss of habitat are becoming uncontrollable and unfettered.

Environmental Justice

¹¹ See note 9 above.

¹² Laurent Neyret, *Projet de Convention contre l'écocide, Des Écocrimes à l'Écocide : Le droit pénal au secours de l'environnement*, (2015), 287-288

¹³ Independent Expert Panel for the Legal Definition of Ecocide, *Commentary and Core Text*, (June 2021), [SE+Foundation+Commentary+and+core+text+rev+6.pdf \(squarespace.com\)](#), accessed 21 August 2022

Background

Criminalising environmental harm, which equates to making perpetrators of environmental crimes accountable for their action, would be a big win in the context of environmental justice. Indeed, Valerie Cabanes, one of the panellists on the Panel, who is also an international lawyer and human rights expert from France expressed in strong terms that “by destroying the ecosystems on which we depend, we are destroying the foundations of our civilization and mortgaging the living conditions of all future generations. This is no less serious than war crimes, crimes against humanity, or the crimes of genocide or aggression. As well as being a major issue of global socio-environmental justice, is it not ultimately the survival of the human species that is at stake?”¹⁴ Environmental justice is closely linked with the criminalisation of environmental harm because the latter would seek to address serious violations of environmental rights caused by States and corporations. By prosecution those responsible for environmental and climate harm within the International Criminal Court, those disproportionately affected by environmental and climate catastrophes caused by States and corporations will be meted with justice, and the crime of ecocide will have the potential of acting as a deterrence to prevent environmental rights degradation, especially in Global South countries. Currently, developing nations, especially Latin American nations, as well as SIDS, often find themselves legally and politically powerless against the interests of States and corporations, because domestic environmental regimes are limited by geographical considerations, are ill equipped to deal cross border environmental issues, and subject to corruption. Thus, the crime of ecocide presents an opportunity to serve justice to communities and groups from the Global South, that are bearing the brunt of environmental and climate destruction at the hands of States and corporations, especially those emanating from the Global North, which can be also understood, in a way, if we consider the principle of common but differentiated responsibilities.

Definition of Environmental Justice

Environmental justice has as its foundation the reality that some groups in society bear unequal environmental and economic consequences such as poor air and water quality, unhealthy living conditions as a result of industrial, municipal and commercial activities, and/or federal, state and local laws, regulations and policies. It is based on the premise that all people and

¹⁴ Sean Fleming, 'What is Ecocide and can it be prosecuted by the International Criminal Court?', 2021, [What is Ecocide and Can it be Prosecuted by the International Criminal Court? | World Economic Forum \(weforum.org\)](https://www.weforum.org/articles/what-is-ecocide-and-can-it-be-prosecuted-by-the-international-criminal-court/), accessed 26 September 2022

communities should have the right to the enjoyment of equal environmental protection under the law, and to the right to live, work and play in communities that are healthy, safe and free of life-threatening conditions.¹⁵ There is no single definition for environmental justice, as the principle continues to evolve over time. According to the US Environmental Protection Agency (EPA), environmental justice is “the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies”.¹⁶ Meanwhile Scott defines environmental justice “is a social movement, and a theoretical lens, that is focused on fairness in the distribution of environmental benefits and burdens, and in the process that determine those distributions.”¹⁷ The Mary Robinson Foundation for Climate Justice, for its part, identifies 7 principles of climate justice and they are respecting and protecting human rights; supporting the right to development; sharing benefits and burdens equitably; ensuring that decisions on climate change are participatory, transparent and accountable; highlighting gender equality and equity; harnessing the transformative power of education for climate stewardship; and using effective partnerships to secure climate justice.¹⁸

The Relationship between Ecocide and Environmental Justice

Ecocide and environmental justice are intrinsically linked. This is because environmental justice at its core, seeks to empower those who have been affected by environmental harm, while making those who have committed crimes against the environment and the climate accountable for their actions. Environmental justice is increasingly focused on studying the relationship between “profit incentives, the unsustainable production of waste, exploitative labour practices and differential exposure to pollutants.”¹⁹ This makes environmental justice share a close rapport with the aim of making ecocide gain the status of an international environmental crime, which is to end the culture of impunity when it comes to irreversible damage to the environment. At the same time, the environmental justice movement, through activism from indigenous communities in Latin America, Asia, and parts of Africa and Australia, tend to emphasize the interconnectedness of people and their environments, instead

¹⁵ Detroiters Working for Environmental Justice, ‘What is Environmental Justice?’, 2019, [What is Environmental Justice? | Detroiters Working for Environmental Justice \(detroitenvironmentaljustice.org\)](https://www.detroitenvironmentaljustice.org/), accessed 20 September 2022

¹⁶ US Environmental Protection Agency, Environmental Justice Guidance Under the National Environmental Policy Act, Executive Order 12898 of February 11, 1994, Federal Register, Vol. 59, No. 32

¹⁷ Dayna Nadine Scott, Environmental Justice, in M. Broydon-Miller and D. Coghlan (eds), The Sage Encyclopaedia of Action Research, (2014), Osgoode Legal Studies Research Paper No. 72, Vol. 10, Issue 16, 232

¹⁸ Mary Robinson Foundation, Principles of Environmental Justice, 2015

¹⁹ See note 16 above.

of making a distinction between humans and the natural environment in which they live in. This is in line with the spirit of criminalising environmental harm which impacts not only on humans but on our fragile ecosystems on which we are so dependent.

Ecocide, Small Island Developing States and Latin American Countries

The Environmental Justice Organisations, Liabilities and Trade (EJOLT) has drawn up an Environmental Justice Atlas, which is a global database of ecological conflicts, which can be considered as ecocide. Many of these ecological conflicts are located in the Latin America region. Some of them include Chemical contamination at the Cidade dos Meninos, Duque de Caxias, in Brazil; the Comuna of Agua Blanca against poly-oil pipe, in Ecuador; the Contamination in El Salto, in Mexico; the Esmeraldas refinery, in Ecuador; the Fracking in the Parana Basin, in Brazil; the Laguna Verde, in Mexico; the Los Micos Beach and Golf Resort Project, in Honduras; the OCP-Heavy Crude Oil Pipeline, in Ecuador; the Oil Exploitation in Campo de Libertador, in Ecuador; the Red Frog Beach Tourist Complex, in Panama; and the Yasuni National Park – ITT Oil Extraction, in Ecuador.²⁰ Undeniably, Latin America faces an ecosystem of interconnected environmental crimes. The region is in need of binding legal instruments and mechanisms to address environmental injustice and what better way to address this than by criminalising, on a global scale, environmental harm that is being committed against the people and communities living there.

So far, efforts at bringing perpetrators of environmental destruction in the Latin America region to justice have proved rather unsuccessful, such as the case of gold mining in Venezuela, which led to the degradation of some of the most beautiful natural areas on Earth through pollution, deforestation and the destruction of entire species of plants and animals: indeed, a 2017 climate report predicted that Venezuela could potentially lose 30% of the Orinoco Delta, which is rich in biodiversity, by 2050, if no remedial measures are taken to halt this catastrophe.²¹ Speaking at the COP26 climate change talks in Glasgow in November 2021, Mexican senator Raul Paz Alonso has formally requested the Mexican government to recognise ecocide as a serious crime in the Mexican federal penal code²². He went further and exhorted the Mexican government to

²⁰ EJOLT Environmental Justice, Atlas of Ecocides and Ecological Conflicts, [EJOLT Environmental Justice Atlas of ecocides and ecological conflicts – End Ecocide on Earth](#), accessed 23 September 2022

²¹ SOS Orinoco, Illegal Gold Mining in Venezuela Causing Deaths, Malaria, Gang Fights and Deforestation, 2017, [Illegal gold mining in Venezuela causing deaths, malaria, gang fights and deforestation – SOS Orinoco](#), accessed 24 September 2022

²² Stop Ecocide International, Mexican Senator Calls on Government to Support International Crime of Ecocide, 2021, [Mexican senator calls on government to support international crime of ecocide — Stop Ecocide International](#), accessed 24 September 2022

be the first Latin American nation to support in the most unequivocal terms the inclusion of ecocide in the Rome Statute of the International Criminal Court. This came as Alonzo has witnessed one of the worst droughts that his country has faced in the last 20 years, and realising that within this time, the legal frameworks of his country and many others across the world have not been updated to reflect the growing number of crimes against the environment. Joining Senator Alonzo was Maite Momo, coordinator of Stop Ecocide Americas, who stated that “it is vital that Latin American states join the global movement to make ecocide an international crime and it is important that they also consider introducing this new crime into their own legislation.” She went on to point out that “in the face of the climate and ecological crisis we are experiencing, we need to put an end to this massive destruction of nature and to do so we urgently need to introduce the crime of ecocide into the Rome Statute of the ICC.”²³ In Brazil, the 2019 Brazilian fires brought the contested politics of environmental rights in the country under international scrutiny. Ecocide has the potential of offering a useful perspective with which to study and articulate the socio-ecological consequences of Former President Bolsonaro’s extractive imperialism and the ongoing failure of international governance frameworks to halt environmental degradation around the world. For instance, Raftopoulos argues that ecocide should include cultural ecocide as a method for “undermining a way of life and a technique of group destruction.”²⁴

Meanwhile, SIDS, as a group of nations, are also bearing the brunt of environmental and climate harm, even if they have contributed the least to these conundrums. SIDS are a distinct group of 38 UN Member States and 20 Non-UN Members/Associate Members of the UN regional commissions that face challenges due to their unique social, economic and environmental vulnerabilities. The three geographical areas in which SIDS are located are: The Caribbean, the Pacific, and the Atlantic, Indian Ocean and South China Sea (AIMS). SIDS were formally recognised as a special case for their environment and development at the 1992 UN Conference on Environment and Development held in Rio de Janeiro, Brazil. Climate change has a devastating impact on SIDS. Moreover, environmental degradation leading to loss in biodiversity heavily affects industries in SIDS such as tourism and fisheries. Beyond its economic value, biodiversity holds spiritual and aesthetic value for many island communities, as for centuries, the latter have benefitted from biodiversity

²³ See note 21 above.

²⁴ Malayna Raftopoulos, *Ecocide in the Amazon: the contested politics of environmental rights in Brazil*, *The International Journal of Human Rights*, (2020), Volume 24, Issue 10, 1616

services such as food supplies, reduced beach erosion, soil and sand formation, clean and potable water, as well as protection from storm surges. Despite these vulnerabilities faced by SIDS, more often than not, there are no laws or ineffective laws for the criminalisation of environmental and climate-related harm in these countries. However, in recent years, two SIDS have supported the efforts of amending the Rome Statute of the International Criminal Court in order to criminalise ecocide. These SIDS are Vanuatu²⁵ and Maldives.²⁶ Meanwhile, Samoa has also backed the campaign.

Vanuatu and Maldives, at the Eighteen Assembly of State Parties to the Rome Statute, exhorted Member States to amend the Rome Statute to include ecocide as a serious crime within the jurisdiction of the International Criminal Court. In essence, their position is based on climate change and human rights. In making their case, they relied extensively on the reports of the Intergovernmental Panel on Climate Change (IPCC) and the Office of the Prosecutor Policy Paper on Case Selection and Prioritisation 2016.²⁷ At first glance, making ecocide an international environmental crime would be an opportunity for SIDS to bring to justice Global North countries which have historically contributed the more to global CO₂ emissions. For instance, the Chair of SIDS had described the actions of major greenhouse gas emitters as “tantamount to sanction ecocide.”²⁸ Additionally, it would open the door for the prosecution to of CEOs and Presidents of, or those with executive power within private companies and corporations within SIDS which are engaged in environmental and climate harm. It is interesting to pursue the notion of whether Government or State Ministers who are responsible for environmental protection within SIDS would also be able to be held

²⁵ Republic of Vanuatu, 'Individual Communication under the Rome Statute of the International Criminal Court – Original Communication'. Communication to the 18th Session of the Assembly of the States Parties to the International Criminal Court, 3 December 2019 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.VAN.2.12.pdf, accessed 25 September 2022

²⁶ Republic of Maldives, 'Individual Communication under the Rome Statute of the International Criminal Court – Original Communication'. Communication to the 18th Session of the Assembly of the States Parties to the International Criminal Court, 3 December 2019 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.MDV.3.12.pdf, accessed 25 September 2022

²⁷ Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, (2016), https://www.icc.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, accessed 25 September 2022

²⁸ Belize, 'Individual Communication under the United Nations Framework Convention of Climate Change' – Original Communication'. Communication on behalf of the Alliance of Small Island States at the Opening Plenary Meeting of the Conference of the Parties, Conference of the Parties Serving as the Meeting of Parties to the Kyoto Protocol, Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement, Subsidiary Body for Scientific and Technological Advice, Subsidiary Body for Implementation, 2 December 2019

accountable for the crime of ecocide. Right now, this is still unclear from the proposed amendments to be made to the Rome Statute.

Recommendations

Latin American countries and SIDS need to build robust coalitions within their regions to present a united front within the international community to advocate for ecocide to be added as a crime in the Rome Statute of the ICC. It is also crucial that the other countries from Latin America and SIDS which have not yet ratified the Rome Statute take active and urgent steps to ratify this instrument. Moreover, these countries should be at the forefront of law reforms within their domestic systems to make ecocide punishable under criminal law in their relevant local jurisdictions. Such a stance would send a strong signal to other State Parties to the Rome Statute of the International Criminal Court, exhorting them to press even harder for ecocide to become an international environmental crime. For example, SIDS and Latin American countries should emulate other nations that have criminalised ecocide in their domestic laws.²⁹ Additionally, SIDS and Latin American countries should ratify the provisions of the Rome Statute and also, in the case of dualist nations, more effort should be made in domesticating the articles of the Rome Statute. This will make it easier for these nations to criminalise environmental and climate harm within their national legislations should the proposed amendment to include ecocide in the Rome Statute become a reality in the foreseeable future.

Conclusion

This paper has focused on the relationship between climate justice and the prosecution of the crime of ecocide. It has premised that making perpetrators of environmental and climate harm accountable for their actions sits well within the aim of environmental justice. The special case of SIDS and Latin American nations within the ecocide discourse has been analysed and recommendations have been proposed for these countries, which are disproportionately affected by environmental disasters affecting communities and their livelihoods, to push for ecocide to be recognised as a crime in the Rome Statute of the ICC.

²⁹ Ecocide Law, Existing Ecocide Laws, <https://ecocidelaw.com/the-law/existing-ecocide-laws/>, accessed 26 September 2022

The campaign towards criminalising environmental and climate harm at an international level will be a real challenge, especially as history has attested to the ICC's tendency to be Eurocentric in its worldview and legal standpoint. Indeed, the norms, priorities and legal theories which have dominated the ethos of international law are Eurocentric and reflect European and Western imperialist values, perspectives and experiences. There will need to be a redefinition of the narrative within international criminal law, if there is a genuine willingness to hold accountable those responsible for the world's most serious environmental crimes.