

Closing the door to dangerous industrial activity

A concept paper for governments to implement emergency measures



On 15 March 2012 the Organisation for Economic Co-operation and Development (OECD) issued a stark warning: carbon dioxide emissions from energy use are expected to grow by 70 per cent in the next 38 years because of our fossil fuel dependence. As a result, by 2100 the global average temperature will have increased by between 3 and 6 degrees Celsius. The risk of injury or harm to human and non-human life is real and immediate. Humanity is faced with a difficult choice: continue with business as usual or confront the urgent need to adapt.

In April 2010 international environmental lawyer Polly Higgins proposed to the UN Law Commission an amendment to the Rome Statute to include a law against Ecocide. Governments will adapt when a stabilisation policy is in place; the law of Ecocide sets a framework of intervention to stop dangerous industrial activity that causes increase in carbon dioxide emissions.

This paper expands upon the proposal and answers many questions asked. It sets out a route-map to implementing a law against Ecocide by 2020 and explains why existing policies are unable to disrupt our current trajectory.

You can download this document online at www.eradicatingecocide.com

Earth Charter, Preamble:

'We stand at a critical moment in Earth's history, a time when humanity must choose its future. As the world becomes increasingly interdependent and fragile, the future at once holds great peril and great promise. To move forward we must recognise that in the midst of a magnificent diversity of cultures and life forms we are one human family and one Earth community with a common destiny. We must join together to bring forth a sustainable global society founded on respect for nature, universal human rights, economic justice, and a culture of peace.'¹

Lessons UNlearned, Natural Resource-fuelled Conflicts: A Threat to International Peace and Security:

'Economic activity, in particular the extraction and trade in natural resources, can be a driver of conflict. The outward appearance of war zones as chaotic and violent masks the fact that commerce continues. Such activity can help to sustain households in the midst of crisis, but can also be used to fuel the fighting.....de-linking armed violence and natural resource exploitation is critical to resolving conflict and re-launching development and democracy. Taking the gun out of natural resource management is a prerequisite for taking the gun out of politics'.²

Global Biodiversity Outlook, 2010 Report:

'Voluntary mechanisms to abate the destruction of the Earth do not work... The ecological footprint of humanity now exceeds the biological capacity of the Earth by a wider margin than ever before... Most future scenarios project continuing high levels of extinctions and loss of habitats throughout this century, with associated decline of some ecosystem services important to human well-being... Effective action to address biodiversity loss depends on addressing the underlying causes or indirect drivers of that decline...We can no longer see the continued loss of and changes to biodiversity as an issue separate from the core concerns of society'.³

The moral imperative trumps the economic imperative; putting people and planet before profit is our number one duty. We've done it before and each time business went on to flourish. We abolished slavery, we outlawed apartheid, we prohibited genocide. The next step is to eradicate Ecocide.

The seven critical issues being discussed at Rio+20: Jobs, energy, cities, food, water, oceans, disasters,⁴ can all be addressed by creating a law of Ecocide. Job creation will accelerate, clean energy will be prioritised, cities will benefit from both, food will be grown using regenerative agriculture principles, water will become less polluted and water poverty will be abated, oceans will be protected from mass damage, and disasters will be better managed.

¹ <http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>

² *Lessons Unlearned: How the UN and Member States must do more to end natural resource-fuelled conflicts*, Global Witness Report, January 2010

³ <http://www.unep.org/pdf/GBO3-en.pdf>

⁴ www.uncsd2012.org/rio20/7issues.html

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Executive Summary

On 15 March 2012 the Organisation for Economic Cooperation and Development (OECD) announced that carbon dioxide emissions from energy use are expected to grow by 70 per cent in the next 38 years because of our dependence on fossil fuels. As a result, by 2100 the global average temperature will have increased between 3 and 6 degrees Celsius. Current projections demonstrate that existing measures cannot address the problem. **What is needed is a disruptor to our current trajectory and a law to set a framework for intervention.**

To rely on existing policies is nothing short of a miscarriage of justice. A law of Ecocide can prevent escalating carbon dioxide emissions by prohibiting activity that causes risk of injury or loss of life to both humans and non-humans. This is a law which facilitates investment into the green economy at a rate necessary to tackle a number of social and environmental crises. This document sets out the core elements of the proposal and how to implement the law.

Implementation of the law of Ecocide will halt the flow of destruction at source and create a pre-emptive duty on corporate activity to prohibit the mass damage and destruction to ecosystems from the outset. Chief Executive Officers (CEOs), Heads of State and heads of financial institutions will have direct responsibility to ensure their decisions do not support or finance mass damage and destruction.

There are four compelling reasons why governments should support a law of Ecocide:

1. Establish the legislative framework for a green economy
2. Create jobs and build resilient economies
3. Gain electoral support
4. Meet their sustainable development targets

It is already an international crime to destroy the environment in wartime:⁵ but during peace time no such international crime exists. This legal anomaly effectively means that we are free to commit in peacetime acts which would otherwise constitute a war crime. By making an international law that effectively ends extensive damage and destruction to the environment during peace time, human-made Ecocide can be outlawed forever. Most corporate Ecocides are crimes of consequence: the damage is something which, if considered at all, is classified as no more than an external cost. The damage is rarely intended but is instead a by-product of decisions that maximise profit without looking to the consequences. However, Ecocide is a crime of strict liability: intention to commit the crime does not need to be proved. This will prevent years of unnecessary litigation and costs.

Ecocide is a law to stem the flow of destruction from the outset. It is an upstream solution; far more cost effective to implement preventative measures than to pay fines and restoration costs after the damage has been caused. Moreover, it is a law that will create a level playing field for business across the world.

There is increasing recognition that current and projected rates of fossil fuel consumption reflect a criminal disregard for our environment. That crime is Ecocide. To continue in this way will jeopardise

⁵ Rome Statute Article 8.2.b(iv)

not only human but all life on Earth. Catastrophic climate change is a threat we have to face in order to change our course of action. Once we accept that we can no longer continue business as usual, we can create the legislative framework to ensure a rapid and smooth transition. What is needed is adaptive leadership; leadership that can adapt to the size and magnitude of change envisaged. Leadership that is bold, moral and courageous. Not one single Member State can justify putting humanity at risk when the whole of civilisation stands on the brink of disaster.

Carbon emissions are just one of the adverse impacts of dangerous industrial activity. There are many more: soil erosion, pollution and biodiversity are all at the brink of triggering mass crisis. International law, laws that are superior to national laws, can impose a new system that changes the rules for us all. A law of Ecocide will slam the door on our destructive past and present, enabling us to take the first steps toward a safer and truly prosperous future for people and planet.

A handwritten signature in black ink, appearing to read 'Polly Higgins', with a stylized, flowing script.

Polly Higgins
Chair of the Earth Community Trust

Justification: why a law of Ecocide is necessary

A recent report issued by the OECD stated that:

‘Unless the global energy mix changes, fossil fuels will supply about 85 per cent of energy demand in 2050, implying a 50 per cent increase in greenhouse gas emissions and worsening urban air pollution... in 2050...the world will use around 80 per cent more energy. But the global energy mix is not predicted to be very different from that of today’ OECD Environmental Outlook to 2050.⁶

The report highlighted that based on current policies, by 2050 fossil fuels such as oil, coal and gas will make up 85 per cent of energy sources. Renewables, including biofuels, are forecast to make up 10 per cent and nuclear the rest. Because of such dependence on fossil fuels, carbon dioxide emissions from energy use are expected to grow by at least 70 per cent, which will drive up the global average temperature by 3 to 6 degrees Celsius by 2100 — exceeding the warming limit of within 2 degrees agreed to by international bodies.

Global carbon dioxide emissions from energy reached an all-time high of 30.6 gigatons in 2010 despite the economic downturn, which reduced industrial production. The financial cost of taking no further climate action could result in up to a 14 per cent loss in world per capita consumption by 2050, according to some estimates. Human costs would also be high as premature deaths from pollution exposure could double to 3.6 million a year.

Demand for water could rise by 55 per cent, increasing competition for supplies and resulting in 40 per cent of the global population living in water-stressed areas, while the number of plant and animal species could decline by a further 10 per cent, according to the report.

International climate action should start in 2013 if the worst effects of global warming are to be prevented. The report recommends the creation of a global carbon market, a low-carbon energy sector transformation, and the exploration of all low-cost advanced technologies including biomass energy and carbon capture. Failure to do so will make it more difficult to meet the 2 degree limit and will require very rapid rates of emissions cuts after 2020 to catch up. Scrapping inefficient fossil fuel subsidies are essential for renewables growth — which could increase global real income by 0.3 per cent in 2050.⁷

All States have a legal duty of care to prevent loss of life. Where humanity at large is placed at immediate and real risk, emergency measures are called for. This document proposes a law to close down dangerous industrial activity and impose a legal duty of care on all nations to provide assistance to those at risk of naturally occurring Ecocide - all by 2020. It is already established law in the EU that where human right to life is at risk, dangerous industrial activity must be closed down.⁸ Such a precedent now applies globally. The next step is to create an international law which not only prohibits ecocidal activity but also imposes a duty on those who profit from it to remodel their commercial approach.

⁶ http://www.oecd.org/document/11/0,3746,en_2649_37465_49036555_1_1_1_37465,00.html

⁷ <http://www.oecdbookshop.org/oecd/display.asp?sf1=identifiers&st1=972012011P1>

⁸ *Oneryildiz v Turkey* [2004] ECHR 657

Defining Ecocide, the fifth international Crime against Peace

Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.

This is the basis of the proposed amendment to the Rome Statute. Anything which causes extensive damage, destruction to or loss of ecosystems can constitute Ecocide. 'Extensive' can be either widespread, long lasting or severe. The 1977 United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) defines these terms as follows:

Widespread: encompassing an area on the scale of several hundred square kilometres.

Long-lasting: lasting for a period of months, or approximately a season.

Severe: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

The Rome Statute is the treaty that established the International Criminal Court (ICC). It entered into force on 1 July 2002. As of 1 February 2012, 121 states are party to the statute. Among other things, the statute establishes the Court's functions, jurisdiction and structure.

Under the Rome Statute, the ICC can only investigate and prosecute the core international crimes where states are unable or unwilling to do so themselves. These are known as the four Crimes against Peace (genocide, crimes against humanity, war crimes and the crime of aggression).

There are two types of Ecocide. The first type is manmade or ascertainable Ecocide. This is Ecocide caused by human agency. Here, an individual responsible for the activity which has resulted in Ecocide can be identified. Usually this is corporate Ecocide, an example is the extensive damage and destruction in the Athabasca tar sands.

The second type of Ecocide is caused by 'other causes'. These are catastrophic events; what is referred to in law as a force majeure or an 'act of God', such as flooding or an earthquake. Such events can be termed 'non-ascertainable Ecocide' as no one perpetrator can be identified.

This type of Ecocide cannot be stopped as it occurs naturally. However, when manmade Ecocides are stopped, Ecocides which destroy carbon sinks and create escalating carbon emissions, this will help prevent naturally occurring Ecocides such as runaway climate change.

Basis for making Ecocide the fifth international Crime against Peace

Ecocide is a Crime against Peace because the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s) leads to:

- breaches of human rights;
- heightened risk of conflict;
- diminution in the quality of life to all inhabitants of a given territory and of territories further afield;
- diminution in the health and well being to inhabitants, arising out of or leading to catastrophic disaster, food poverty, water pollution and shortages and unnatural climate change.

The institutional framework for sustainable development and international environmental governance does not yet exist. To be fully effective, three crucial steps are required:

1. Close the door to existing subsidies to dangerous industrial related activity.
2. Prohibit activity that gives rise to mass damage and destruction.
3. Open the door to subsidies to innovation in another direction.

What are the implications of a law of Ecocide?

We shift from the 'polluter pays' principle to 'polluter no longer pollutes'. Those who continue to pollute to an extent which crosses the legal threshold for Ecocide will become liable for prosecution. By creating a law of Ecocide, specific legally binding duties and responsibilities that place people and planet before polluter will take precedence in decision-making in boardrooms, governments and banks. Instead of years of lengthy litigation where companies can refuse to pay out when judgment is made, companies will think twice: prosperity without austerity will become the new norm.

The law of Ecocide will create a pre-emptive, preventative and post-operative criminal regime. Ecocide is preventative because it becomes a 'think before you act' law; action can be taken before the damage is done, and restorative justice can be proffered alongside traditional sanctions.

A law of Ecocide

- Imposes an international and trans-boundary duty of care on any person exercising a position of superior responsibility in either private or public capacity, without exemption, to prevent the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s).
- Prohibits any person exercising a position of superior responsibility from committing or aiding and abetting Ecocide, through the imposition of criminal sanctions.
- Restores the damage caused by manmade Ecocide by proffering restorative justice.
- Imposes an international and trans-boundary duty of care on governments, specifically Heads of State and Ministers with environment/energy/climate change portfolios, to provide emergency assistance to other territories at risk or adversely affected by naturally occurring Ecocide, utilising the UN Trusteeship Council.
- Redirects investment away from dangerous industrial activity into the green economy

Trusteeship Council

The UN Trusteeship Council was a founding pillar of the UN in 1945; its purpose was to assist non-self governing territories after the Second World War when colonies were disbanded. Under the Charter, the Trusteeship Council is authorised to examine and discuss reports from the Administering Authority on the political, economic, social and educational advancement of the peoples of Trust Territories and, in consultation with the Administering Authority, to examine petitions from and undertake periodic and other special missions to Trust Territories. Former colonies were named non-self governing territories (NSGT's) because it was recognised that these were territories that were unable to self-govern and required a period of transition until they were able to self-govern again.

The UN Trusteeship Council was closed in 1994. However, it still exists (it cannot be removed as it is a founding pillar of the UN). The role of the Trusteeship Council was to give assistance to territories that have become non-self governing (after former colonial power had withdrawn). Ecocide can render a territory non-self governing overnight. With the threat of rising sea-levels, melting ice and floods, the Trusteeship Council provides an existing mechanism to enable Member State representatives to determine how to discharge their legal duty of care to assist territories that are at risk or have become non-self governing, and ensure that the best interests of the inhabitants are placed first (Articles 73-77, Charter of the United Nations).

Restructuring Social and Ecological Protection Systems

Legal systems currently offer few protections for humanity's long term interests, but establishing a new regime based on stewardship will turn the tables. Instead of stealing from future generations, we can foster responsible economies which ensure the future health, safety and prosperity of people and planet together.

The persistent and intensified loss of biodiversity offer cogent evidence that habitat loss and degradation, excessive nutrient load, and other forms of pollution, over-exploitation and unsustainable use are escalating.⁹ Extractive industries are the number one culprit.

A law of Ecocide will stop the flow of destruction at source, benefitting economies, people and planet. It is always far more expensive to remedy something after it has happened. A law against Ecocide would prevent crimes from occurring in the first place.

Humans and non-humans alike are afflicted by the same threats, such as disease and lack of nutrition and clean water. Other threats include loss of ability to survive when faced with mass destruction. Humans benefit by having land and water that is clean, healthy and fertile. Replenishment of land and water are crucial to the well-being of all of humanity. By placing Ecocide and the Earth's right to life on the same legal footing as humans' right to life, both human and non-human beings benefit. Both flourish.

⁹ <http://www.cbt.int/gbo3/?pub=6667§ion=6689>

Economic Justification

We now know that there is a real need for global policies with clear rules and signals in order to provide predictable financing flows and create a new economic foundation. The additional resources needed to tackle climate change are unprecedented. Whilst a major share of investment is expected to come from the private sector, additional support for public sector investments is essential. Until a global policy and legal framework is in place, it will be impossible to fully cover the financing gap. Slow progress on agreeing and creating such architecture will cause unacceptable delay. The extent of implementing a law of Ecocide is also dependent on the availability of additional resources, both for adaptation and mitigation efforts. Recognising the critical importance of additional financing for developing countries, a global fund managed through the auspices of the UN is crucial. Opening the door to the use of the UN Trusteeship Council for the purpose of governance of such a fund will provide a process of assistance in line with existing practices.

The Trusteeship Council can provide leverage for re-development with adaptation co- benefits. By prioritising the mobilisation of additional resources for adaptation, emergency response measures to catastrophic disasters can be quickly and simply deployed. By imposing a legal duty of care, a more urgent response is required.

Business Opportunities

A law of Ecocide is an upstream solution. By closing off the flow of damage and destruction at source, new and sustainable business practices will flourish in its place.

Currently law protects the polluter. We have laws that provide pollution permits; if a company exceeds its limits, it can be fined. A fine does not stop the damage in the first place; often the damage is left for so long before a fine is levied that much more than a patch of land has been lost. Often the fines do not reflect the loss on a wider scale and often the communities adversely affected are inadequately assisted. Remediation of the harm to the ecosystem can take many years; the community may take even longer. Very little regard is given to the long term loss. The law has set up a system that has given implicit rights to those companies: the right to pollute and to destroy.

Ecocide is a law to protect people and planet. By placing the interests of others first, consequence of actions takes priority: if a decision is going to lead to extensive damage and destruction, then the door closes.

Stewardship becomes the number one priority. The law as it stands effectively accords profit special status above care for people and planet. By realigning priorities that hinder our progress with new overriding duties, decision-making will shift. New solutions will be sought and found; new technologies will be researched and invested in; new policies will be implemented.

Businesses that are already working successfully in the green sector will be able to expand exponentially, encouraging investment and creating jobs. Industry will be in a position to undergo a seismic change, with the help of banks who will invest in business that can demonstrate that they are compliant with their legal duty of care to the Earth. Instead of the 'polluter pays,' the new rule 'polluter doesn't pollute' becomes the enforceable determinant.

Ease of implementation

An international law of Ecocide requires only 81 signatories to the Rome Statute to be declared a lawful amendment. Amendments to the Rome Statute of the International Criminal Court must be proposed, adopted, and ratified in accordance with articles 121 and 122 of the Statute (see page 11 below). Any State Party to the Rome Statute can propose an amendment. The proposed amendment can be adopted by a two-thirds majority vote in either a meeting of the Assembly of States Parties or a Review Conference called by the Assembly. An amendment comes into force for all States Parties one year after it is ratified by seven-eighths of the States Parties.

The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court. It is composed of representatives of the States that have ratified and acceded to the Rome Statute. Each State Party is represented by a representative who is proposed to the Credential Committee by the Head of State of government or the Minister of Foreign Affairs (Ch IV of the Rules of Procedure of the Assembly of States Parties).

A Review Conference should be convened at the earliest opportunity and preferably before the end of 2012 to enable sufficient preparation.

Proposed time scale for implementation: 2012-2020

2012-14	Review Conference convened
2014	Amendment and Annex to Rome Statute adopted by two-thirds majority
2014-19	Five year transition period
2020	Law of Ecocide comes into force

All Heads of State have the power to pass emergency laws overnight. Emergency powers will be required here.

About Earth Law

Ecocide, Earth rights and restorative justice: the three cornerstones of a growing international movement to establish new laws which protect both people and planet. The Universal Declaration of the Rights of Mother Earth¹⁰ was proposed by Polly Higgins in 2008 (as a Universal Declaration of the Planetary Rights). The Declaration was taken up by Bolivia, which has created its own national law of Earth Rights. Ecuador has similar provisions in its Constitution.

In law we already use the concept of legal guardians in legal proceedings regarding children; a guardian is appointed to represent the best interests of the child and to speak on his or her behalf. This principle can easily be extended to enable representatives of the Earth to speak on its behalf in court.

Breaches of environmental crimes can be tried in the existing International Criminal Court or in the proposed International Court for the Environment under similar rules of procedure.

¹⁰ www.rightsofmotherearth.com

Amendment rules¹¹

After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Arguments against

Three primary arguments are levied against a law of Ecocide:

1. Legal issues, such as intent and punishment
2. Obstacles to effective enforcement
3. Economic concerns

¹¹ Article 121, Rome Statute (entered into force 2002). State Parties refers to State Parties to the Rome Statute. As of March 2012, there are 121 State Parties to the Rome Statute. www.untreaty.un.org/cod/icc/statute/romefra.htm

Response

The grave consequences of Ecocide are serious enough to render questions of intent otiose in most circumstances. The very nature of this crime demands a strict liability approach. This means that intention need not be proved because it is effectively irrelevant – simply establishing that the act was committed by the indicted person would be sufficient to secure a conviction. This may sound harsh but is in fact completely in line with existing international pollution laws. Historically, courts have assumed that since corporations do not have a ‘mind of their own’ but depend on their employees for direction, they could only be found guilty of offences which do not require an element of mental culpability. Strict liability will ensure that corporations as well as individuals can be successfully prosecuted for Ecocide.

The aims of international criminal justice are not confined to punishing individuals. They include the deterrence of undesirable conduct and the provision of effective remedies for victims. It follows that most Ecocide sentencing would probably involve restorative as well as punitive elements. For example, it may appropriate to combine a suspended jail sentence with financial sanctions and an order requiring a clean-up operation or other conservation work.

All laws must be enforced properly if they are to be effective and Ecocide is no different. Most of the specialist investigative and reporting networks required to gather evidence about alleged incidences of Ecocide are already in place – from national and international law enforcement agencies to NGOs and affected communities.

Some point to the flawed or inconsistent prosecutions of existing Crimes against Peace and ask how Ecocide would be any different. But the number of prosecutions in recent years demonstrates clearly that the international community is beginning to take these crimes seriously. Besides, a law against Ecocide is intended to have a stronger deterrent function than the other Crimes against Peace, meaning that only a few successful prosecutions might be needed for it to have full effect.

Criminalising Ecocide is emphatically not an anti-corporate agenda to try and undermine business and destroy people’s jobs and livelihoods. On the contrary - the impact of such a law upon the international economy would be to dramatically alter our current trajectory towards escalating economic, social and climatic instability, thereby opening the door to unprecedented exponential green growth. Establishing solid foundations for dynamic new forms of investment whilst stabilising employment conditions the world over are the true economic implications of a law against Ecocide.

Critique of current proposals to deal with environmental degradation

A new legal instrument has been proposed to come into force in 2020 and replace the Kyoto Protocol. It involves voluntary promises rather than binding commitments to reduce emissions; greater flexibility for developed countries to meet their emission reduction targets; and an even weaker compliance mechanism. The new legal instrument will apply to all states and fail to discriminate between developing and developed economies.

A Green Fund with no funds now has an institutional structure in which the World Bank is a key player. The \$100 billion will not be provided for by developed countries but through the carbon markets (which are collapsing), from private investments (which are unreliable), from credits (to be paid), and from the developing countries themselves.

REDD (Reducing Emission from Deforestation and Forest Degradation) provides only voluntary safeguards for indigenous peoples. Voluntary safeguards are not safeguards at all. The offer of funding for forests is postponed until the next decade on the basis that demand for carbon credits will not increase until then because of low emission reduction promises.

Whilst trading schemes for SO² emissions in the US were successful in reducing emissions of a particular pollutant in one country, such artificially induced market mechanisms are fundamentally inadequate because they address symptoms rather than root causes.

None of these proposals would disrupt the dominant economic paradigm sufficiently to protect the environment or trigger the transition to a green economy. None are enforceable; can be delivered on time; or have proved effective in the past.

The solution

Outlaw harmful industrial activity through Ecocide and divert subsidies for such activities to low-carbon, low-impact alternatives.

The outcome will be a truly green economy: a new dominant economic paradigm based on equity, prosperity and the well-being of people and planet. The law against Ecocide will act as a disruptor and catalyst, necessitating a new wave of investment in innovative, sustainable solutions to our consumption crisis.

Transitional provisions will be a necessity. Many companies will require assistance to transition out of their current business models. To do that will call for a phased withdrawal of projects that are causing mass damage and destruction. For oil companies, this will mean that their strategies for expanding into renewables will be prioritised and they will require subsidies to help build their infrastructure sufficiently during the 5 year transitional period.

A law of Ecocide will end the asset raiding of our future. Fast-forward the clock a decade: our skies, lands and oceans are released from the shackles of ecological debt. Acting now will ensure that our generation is remembered for turning our planet around – not writing its final chapter.

What is required next

Analysis of the largest carbon emitting companies (the carbon majors). This is currently being undertaken by the Natural Resources Defense Council, headed up by Richard Heede.¹²

Agreement by governments to adapt and make use of the proposal. With knowledge comes a responsibility to adapt. Criminalising Ecocide will disrupt existing systems and take the global discourse about responsibility for humanity and Earth to the next level. Everyone bears responsibility – but a superior responsibility to uphold our duty of care to the Earth is owed by those in positions of authority.

Establish a date for a convening the Assembly of States Parties or a Review Conference.

Everything depends on securing this opportunity to debate Ecocide and announce the timetable for enactment – which in turn will kickstart the green economy.

Commence engagement with communities adversely impacted by Ecocide and implement restorative justice. Open the UN Trusteeship Council to administer the process.

About Polly Higgins

Polly is a barrister, international lawyer and author who submitted a proposal to the UN in April 2010 setting out the law of Ecocide. Polly has spent the past four years advising and speaking on Earth law. She is an expert in her field.

2010	Submission to UN Law Commission, Ecocide law
2008-10	Member of Supervisory board, DESERTEC FOUNDATION
2006-09	EU legislative frameworks, Trans-Mediterranean Renewable Energy Co-operation
1998-2005	Barrister
1998	Called to the Bar, London
1997	City University (CPE Law), London

Polly speaks and advises on international law, in particular the law of Ecocide, at many levels. She has addressed parliamentarians, ambassadors and faith leaders of many countries. In past year alone, she has spoken on many public platforms in the UK, Switzerland, Germany, Norway, Sweden, South Africa, Australia, New Zealand, Canada and the USA. She is also a regular speaker on the law of Ecocide at business schools (eg Exeter, Said) and universities (eg Berkeley, Uppsala, LSE, Oslo, James Cook, Dunedin).

Author of:

- *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet*, Shephard-Walwyn, 2010.
- 'Towards a Garden of Eden: Ecocide, Eco-colonization and the Sacredness of All Life' in *Wild Law: A Reader in Earth Jurisprudence*, ed., P. Burdon, Wakefield Press, Adelaide, 2011.
- *Earth is our Business: Changing the Rules of the Game*, Shephard-Walwyn, May 2012

¹² <http://www.nrdc.org/>

Amendment for Rome Statute

Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.

Annex for Rome Statute

The objective and principles governing the creation of the offence of Ecocide as the 5th international Crime Against Peace are:

1. To stop 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.
2. Ecocide is a crime against peace because the potential consequences arising from the actual and/or future extensive damage to, destruction of or loss of ecosystem(s) can lead to:
 - i. loss of life, injury to life and severe diminution of enjoyment of life to human and non-human beings;
 - ii. the heightened risk of conflict arising from impact upon human and non-human life which has occurred as a result of the above;
 - iii. adverse impact upon future generations and their ability to survive;
 - iv. the diminution of health and well-being of inhabitants of a given territory and those who live further afield.
3. The aim of establishing the crime of Ecocide is to:
 - i. prevent war;
 - ii. prevent loss and injury to life;
 - iii. prevent dangerous industrial activity;
 - iv. prevent pollution to all beings.
4. The crime of Ecocide creates an international and trans-boundary duty of care to prevent the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s).
5. All Ministers, CEO's, Directors and any person(s) who exercise rights, implicit or explicit, over a given territory have an explicit responsibility under the principle of superior responsibility.
6. This law places upon all Heads of state, Ministers, CEO's, Directors and/or any person who exercises jurisdiction over a given territory a pre-emptive legal obligation to ensure their actions do not give rise to the risk of and/or actual Ecocide.
7. The burden of responsibility to prevent the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s) rests jointly with any person or persons, government or government department, corporation or organisation exercising a position of superior responsibility in respect of any activity which poses the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s).

8. The primary purpose of imposing an international and trans-boundary duty of care is to:
 - i. hold those persons to public account for the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s);
 - ii. enforce the prevention of risk of or actual extensive damage to or destruction of or loss of ecosystem(s);
 - iii. evaluate consequence of risk of or actual extensive damage to or destruction of or loss of ecosystem(s).
9. The offences created by the Rome Statute are strict liability; sentence will be determined by the culpability of the person(s) and organisation found guilty under provisions set out in the Rome Statute.
10. This law shifts the primary focus away from evaluation of risk to evaluation of the consequences whereby risk of Ecocide gives rise to the potential for and/or actual extensive damage to or destruction of or loss of ecosystem(s).
11. This law creates a legal duty of accountability and restorative justice obligations for a given territory upon persons as well as governments, corporations and or any other agency found to have caused the Ecocide.

In this Statute:

“Ecosystem” means a biological community of interdependent living organisms and their physical environment.

“Territory” means any domain, community or area of land, including the people, water and/or air that is affected by or at risk or possible risk of Ecocide.

“Other causes” means naturally occurring events such as but not limited to: tsunamis; earthquakes; acts of god; floods; hurricanes and volcanoes.

“Peaceful enjoyment” means the right to peace, health and well-being of all life.

“Inhabitants” means any living species dwelling in a particular place.

“Ecocide” means the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.

“Restorative justice” means a process applied alongside conventional sentencing. Where guilt has been accepted, a defendant may choose to enter into a restorative justice process where he/she shall engage with representatives of parties injured to agree terms of restoration.

“Community” means a group of interacting people and or their environment.

Frequently asked questions & answers

What is Ecocide?

Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.

What counts as Ecocide?

Anything that causes extensive damage, destruction to or loss of ecosystems. 'Extensive' can be either widespread, long lasting or severe. The 1977 United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) specifies the terms 'widespread', 'long-lasting' and 'severe' as:

- (a) widespread: encompassing an area on the scale of 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.

What is meant by 'human agency or by other causes'?

Ecocide caused by human agency is 'ascertainable Ecocide'. Here, an individual responsible for the activity which has resulted in Ecocide can be identified. Usually this is corporate Ecocide.

Other causes are catastrophic events; what is referred to in law as a force majeure or an 'act of God', such as flooding or an earthquake. Such events can be termed 'non-ascertainable Ecocide' as no one perpetrator can be identified.

It is ascertainable Ecocide that is proposed as an international crime. However, for the purposes of law, non-ascertainable Ecocide can still be actionable in certain cases where a duty of care exists for territories that have been subject to, or are at risk of, Ecocide. For instance, where trust obligations exist.

What will a law of Ecocide do?

- By legally defining Ecocide, a legal duty of care is created. Companies will require a period of transition whereby no prosecutions are pursued whilst they change their practices from 'polluter pays' to 'polluter doesn't pollute'.
- Finance of dangerous industrial activity will be withdrawn. Bridging loans will be required during the transition period to assist companies to withdraw from certain illegal activities without threat of prosecution.
- Nature and humanity will be prioritised. Inhabitants, both human and non-human, will accrue the legal right to peace.
- By placing Ecocide on the same legal footing as the international crime of genocide, a superior law which overrides national laws will create a global level playing-field for all.
- Plans can be made to discharge the legal duty of care on all nations to provide assistance to those territories at risk of Ecocide in advance.
- A law of Ecocide will stop the flow of destruction at source. By going upstream to the source of the problem (where the Ecocide occurs), it is much cheaper to prevent it the first place. This is

good for economies, people and planet. It is always far more expensive to remedy something after it has happened. A law of Ecocide is preventative, pre-emptive and post-operative.

Does a crime of Ecocide put nature's needs above people's needs?

No. Mass environmental destruction is as much a human rights issues as an environmental one. There are nine planetary boundaries which have kept the Earth System functioning in a way which supports life for the past 10,000 years, which if crossed will have devastating consequences for all life on Earth. We have crossed three and are rapidly moving towards crossing others. We are polluting our waters, our air and our food; this causes cancers and diseases. We are wiping out species which provide vital services to humans.

Our human right to life means nothing without a corresponding crime to deal with those who violate these rights. This is why we have the crimes of murder and genocide. But when we allow the destruction of the very Earth System on which we all rely, we ultimately are violating our right to life. A law of Ecocide places people and planet over and above profit.

Is a crime of Ecocide anti-capitalist?

No. Profit per se is not the problem, but profit that leads to death or injury to life of people and planet cannot be justified.

Ecocide is actively supports commercial activity which does not cause mass damage and destruction. Currently the prevailing paradigm insists that businesses should maximise profits for their shareholders - even if this profit is the result of mass damage and destruction to the natural environment. There are certain things which are illegal for businesses to make profit from, things which are morally wrong, for example murder, genocide and corruption. The legality of profit from mass destruction of the planet is an unacceptable loophole. This is not about saying no to profit or development. It is simply about changing the rules of the game to ensure truly sustainable business.

Business leaders will no longer engage in criminal activity; banking chiefs will no longer fund criminal activity; governments will not make policy which facilitates criminal activity. Innovation, finance and governmental support will by necessity flow in the other direction. It will make sense to invest in sustainable business. Some businesses may currently be part of the problem, but they will undoubtedly be a bigger part of the solution.

Why should business support the amendment to the Rome Statute?

A law of Ecocide provides the missing legislative framework to enable private and public capital to flow into emerging technology providers and to impose on governments the legal duty to drive environmental improvements as the primary economic growth strategy. By enabling the transition to the green economy, business can plan ahead and investors will have security of long-term indicators and future market trends. It will accelerate gigaton-scale solutions to climate change.

Who would initiate legal proceedings if Ecocide is alleged?

As the International Criminal Court (ICC) is a court of last resort, the starting point is the State. Where a State Party is either unwilling or unable to act, the ICC will step in. A case can be brought to the attention of the ICC in any one of 4 ways; by the UN, by a State Party, by a prosecutor of the ICC of his own doing or by an individual writing to the ICC.

How will governments be persuaded to become signatories if they have licensed Ecocide activities?

The law against Ecocide should not be retroactive, so anyone who has engaged in or sanctioned harmful activities prior to enactment will not be liable for prosecution. There will be a transition period of at least five years to enable organisations to become fully compliant. Governments should welcome the proposed Ecocide regime as a roadmap for meeting their developmental and environmental targets.

Who will enforce the judgment of the ICC? What are the penalties and how will they work?

Any ICC conviction for Ecocide would carry a minimum sentence of imprisonment for two years. This would be enforced by the relevant State Party. Any restorative justice schemes would complement – but does not necessarily replace – conventional punitive measures.

Has anything has yet been written on this, particularly in the way of critical scholarly work?

Many academic institutions are now using Polly Higgins' book, *Eradicating Ecocide*, as a teaching resource. Some are also writing thesis and papers for publication in the near future. For example in May 2012, Oslo University held a four day conference on the Rule of Law for Nature; they received over 100 submissions on a law of Ecocide from over 50 countries.

What is the legal remedy for a naturally occurring event that causes environmental devastation?

States will be held legally accountable for providing assistance to those who have been, or are at risk of, naturally-occurring Ecocide. Emergency relief provision will also become a legal requirement.

How would Ecocide be introduced and enforced in practical terms?

Once a law against Ecocide is made international law, States Parties will be under an obligation to enact a 'mirror' law into their domestic legislation, enabling domestic enforcement. In September 2010 a mock trial was held at the UK Supreme Court as if this had already happened under the law of England and Wales. Two legal teams tested the law of Ecocide under realistic courtroom conditions. The event was live-streamed across the world and resulted in two 'convictions'. This demonstrated conclusively that a law of Ecocide will work in practice.

What is restorative justice?

Restorative justice is a process which brings victims and offenders into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward. Rather than focusing on punishment, three important principles that underpin this approach are the need for restoration, the need to make amends and the concept of 'healing'. In this way, we can change the problem into the solution.

What are the pre-conditions for restorative justice to be used/not used?

Businesses, banks and governments accept responsibility for restoring territories adversely impacted. Parties agree to meet with each other and with representatives of the parties who have been harmed, to engage in a process where all parties can speak. The aim of the process is to transform and restore; it is solution based and non-blame driven. Restorative justice is already used within the criminal justice process in many countries. Expanding the remit to include individuals who are in a position of superior responsibility has the power to resolve seemingly standstill disputes. Restorative justice shall be introduced alongside traditional sentencing. It has been demonstrated that restorative justice can work in practice to address the effects of Ecocide.

Are Defendants exempt from going to prison?

It depends on the judge and the severity of the damage or destruction caused. We advocate that restorative justice is a practical solution to be used alongside traditional sentencing. Restorative justice can be a diversion from criminal prosecution in the case of low-level offences. However, for more serious crimes, including the crime of Ecocide, it is unlikely that it would ever act as an alternative to a criminal sentence. The Judge may however, take into account the restorative justice process when sentencing the offenders.

Can the Security Council veto the amendment?

No. A member of the Security Council cannot veto a crime when it is established. The Security Council can veto a legal opinion handed down by the International Court of Justice, but the ICJ is not the body that will house the international crime of Ecocide - it will be the International Criminal Court or a newly established International Court of the Environment.

Summary

Criminalising Ecocide will impose an overriding duty of care on governments, businesses and citizens to cease and prevent environmentally harmful activity. This in turn will necessitate a swift transition to sustainable, greener economies which prioritise people and planet over material profit.

This legal enshrinement of the precautionary approach will ensure that the useless 'polluter pays' principle is consigned to the past. Instead, the proposed Ecocide regime will first and foremost provide a powerful disincentive to harmful activity – but it will also be poised to punish anyone who persists in stealing from future generations by damaging our environment.