

## Rights in Crisis: Should ecocide become the 5<sup>th</sup> International Crime Against Peace?

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The climate crisis is directly threatening the physical and cultural integrity, and economic functioning, of our world at large. The overwhelming evidence is that Island Nations are the lowest contributors to global warming, yet according to scientific projections, they are likely to be among the first to become uninhabitable and to feel the worst effects of ecological destruction and biodiversity loss caused by climate changed and human caused ecocide<sup>1</sup>.

Ecocide, committed repeatedly over decades, is a **root cause** of the climate and ecological emergency that we now face. Ecocide which translates to mean literally the killing of one's own home, is generally understood to mean mass damage and destruction of ecosystems – severe harm to nature which is widespread or long term.

According to the European Law Institute it refers to ‘the devastation and destruction of the environment to the detriment of life.’<sup>2</sup> While no legal definition by States have been agreed, there is one that is gaining significant traction globally. This is the definition derived by an independent panel of legal experts<sup>3</sup> convened by Jojo Mehta, Chair to the Stop Ecocide Foundation. The panel, defined ecocide as:

*“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.”*

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<sup>1</sup> <https://www.stopecocide.earth/legal-definition>

<sup>2</sup> <https://www.europeanlawinstitute.eu/projects-publications/completed-projects/ecocide/>

<sup>3</sup> <https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide>; <https://www.stopecocide.earth/legal-definition>

Belgium was the first country in Europe to announce adding ecocide to its domestic penal code, with the core operative text, though narrower in scope, coming from the Independent Legal Definition<sup>4</sup> (“ILD”). In April of 2023, the European Parliament voted unanimously for the inclusion of ecocide into its new Environmental Crime Directive, and the definition adopted is identical to the “ILD.”<sup>5</sup>

On 5<sup>th</sup> June 2023 as the world observes, World Environmental Day, the Brazilian Political Party, Partido Socialismo e Liberdade, announced it will be submitting a Bill to criminalize ecocide, by criminalizing “...*illegal or wanton acts with the knowledge that they generate a substantial probability of serious and widespread or long-term damage to the environment.*”<sup>6</sup> The Bill’s wording strongly reflects the language contained in the “ILD.”

Ecocide is happening globally and it is taking a toll on the planet and humanity yet crimes of this nature continue to be treated with impunity. Organized environmental crimes are highly lucrative. Statistically it is the third largest crime sector<sup>7</sup> in the world and is estimated to generate between \$110 and \$281 billion per year in criminal proceeds.<sup>8</sup>

Given the highly lucrative nature of environmental crimes, perpetrators are not deterred by existing law and policy nationally or internationally, and in fact have become so emboldened that they now budget for strategic litigation against public participation lawsuits otherwise known by

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<sup>4</sup> <https://www.stopecocide.earth/breaking-news-22/belgium-government-proposes-adding-ecocide-to-domestic-penal-code>

<sup>5</sup> <http://opiniojuris.org/2023/04/10/european-parliament-votes-unanimously-for-ecocide/>

<sup>6</sup> [https://www.stopecocide.earth/breaking-news-2023/ecocide-bill-submitted-to-congress-in-brazil?ss\\_source=sscampaigns&ss\\_campaign\\_id=647da15198dc430242e945db&ss\\_email\\_id=647e33888ffbef74084cf410&ss\\_campaign\\_name=Breaking%3A+ecocide+law+proposed+in+Brazil&ss\\_campaign\\_sent\\_date=2023-06-05T19%3A12%3A14Z](https://www.stopecocide.earth/breaking-news-2023/ecocide-bill-submitted-to-congress-in-brazil?ss_source=sscampaigns&ss_campaign_id=647da15198dc430242e945db&ss_email_id=647e33888ffbef74084cf410&ss_campaign_name=Breaking%3A+ecocide+law+proposed+in+Brazil&ss_campaign_sent_date=2023-06-05T19%3A12%3A14Z)

<sup>7</sup> <https://globalinitiative.net/wp-content/uploads/2018/09/Atlas-Illicit-Flows-FINAL-WEB-VERSION.pdf>

<sup>8</sup> <https://www.sipri.org/commentary/topical-backgrounder/2022/organized-environmental-crime-why-it-matters-peace-operations>

its acronym “SLAPP” lawsuits to *inter alia* bury litigants and/or intimidate local NGOs and/or local environmentalists and/or reporters in “endless litigation and costs,” knowing they will not have the means to fight back.<sup>9</sup> The inadequacy of environmental laws and/or the absence of a strong deterrent in the form of international law and policy, has contributed to *inter alia* to severe harm and wanton destruction of nature, the extinction of many species from the Earth, and it has put the rights of humanity in crisis, with the most vulnerable already feeling the effects. Despite calls by the UN Human Rights Experts for Governments to enact anti-SLAPP laws, the door on a litigant’s right to access to justice remains closed.<sup>10</sup>

Assuming countries do adopt anti-SLAPP laws, which some have done already, are anti-SLAPP laws alone sufficient? As more countries also look towards adopting ecocide into their national legislation and call for its international recognition and implementation, could this also be part of the solution? For the purposes of this paper, the latter question will be the focus. In answering that question, it warrants a look at why in addition to the above impediments, the global community needs an international law of ecocide so desperately and urgently?

## **Rights in Crisis**

It is an undisputable global fact that the climate crisis is exacerbating existing international human rights violations<sup>11</sup>. Whether constitutional and/or human rights, all rights are in crisis, because of human caused climate change.<sup>12</sup> The climate crisis is a major threat to every aspect of daily living - health, nutrition, education, development, survival and future potential and it is the blameless and vulnerable that are bearing the consequences.

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<sup>9</sup> <https://www.ohchr.org/en/press-releases/2022/12/un-experts-concerned-systematic-use-slapp-cases-against-human-rights>

<sup>10</sup> <https://www.ohchr.org/en/press-releases/2022/12/un-experts-concerned-systematic-use-slapp-cases-against-human-rights>

<sup>11</sup> <https://www.unep.org/resources/report/climate-change-and-human-rights>

<sup>12</sup> <https://www.unep.org/resources/report/climate-change-and-human-rights>

Hard earned gains and decades' worth of progress in the development of international human rights laws and treaties all stand on the precipice of regression. Much like the Covid-19 pandemic, the climate crisis poses a threat to every single country, individual and to every single sector of society, hence solving the crisis warrants a united and interdisciplinary approach. At COP 27, one of the leading scientists Johann Rockström, in the context of the 10 scientific insights released in 2022, echoed similar sentiments calling for a deeper need for science to connect with policy.<sup>13</sup> It is clear that an all hands on deck approach is needed.

Scientists previously projected more than ½ of humanity is at stake, now according to the latest Intergovernmental Panel on Climate Change, "IPCC" synthesis report "**everything** is at stake."<sup>14</sup> This begs the question what does all of this mean in the context of a legal and human rights based framework?

Firstly, it means living in a world where already 85% of it has already been affected by human caused climate change.<sup>15</sup> Additionally, it means living in a world, where we may not get to gender equality by 2030<sup>16</sup>, as it is a globally understood reality that the climate crisis is disproportionately affecting the rights of older persons and persons with disabilities, children and in particular women and girls<sup>17</sup>. A world where UNESCO has already projected more than 11

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<sup>13</sup> <https://www.youtube.com/watch?v=dpEHODe3nGk>; <https://public.wmo.int/en/media/news/ten-essential-climate-science-insights-2022-presented-cop27>

<sup>14</sup> <https://www.ipcc.ch/report/ar6/wg2/>; <https://www.theguardian.com/environment/2022/feb/28/what-at-stake-climate-crisis-report-everything>

<sup>15</sup> <http://www.publichealthnewswire.org/?p=climate-update-2021>

<sup>16</sup> <https://www.un.org/sustainabledevelopment/gender-equality/>

<sup>17</sup> <https://sahiyo.org/sahiyo-blog/the-climate-crisis-human-rights.html>

**million girls** are now at risk of never returning to school.<sup>18</sup> It also means living in a world where **1 billion children**, nearly half the world's 2.2 billion children, are already vulnerable to multiple climate and environmental shocks<sup>19</sup>. By 2050, it will be **all children**.<sup>20</sup> “There may be no greater growing threat facing the world’s children – and their children – than climate change.” [UNICEF](#)

In the aftermath of natural disasters UNICEF identified 3 main threats to the rights of children, youth and families, and in particular women and girls. The first threat identified was the **right to health** of women and girls in particular. Extreme weather gravely affects pregnant women & neonatal care for infants. Without access to healthcare and no access to clean water, adequate sanitation and menstrual hygiene facilities and in the case of pregnant women no safe place to deliver their babies, women and girls are more prone to disease and even death. According to UN Women, every year **800,000 women and girls** die due to lack of clean water, basic sanitation and hygiene.<sup>21</sup> An estimated **2.4 billion people** still use unimproved sanitation facilities that can pollute water and spread diseases such as diarrhoea, cholera, dysentery, typhoid and polio.<sup>22</sup>

The second threat identified was **extreme poverty**. Currently, **over 380 million** women and girls face extreme poverty living on less than \$1.90 USD per day. This means, globally 1 in 5 girls under age 15, are growing up in extreme poverty. 1 in 10 women aged 15+ are living in extreme poverty. The implications of this is placing girls who in many parts of the world are still seen as property or in cases of extreme poverty an extra mouth to feed, at severe risk of early,

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<sup>18</sup> <https://www.unesco.org/en/articles/girls-education-and-covid-19-new-factsheet-shows-increased-inequalities-education-adolescent-girls>

<sup>19</sup> <https://www.unicef.org/reports/coldest-year-rest-of-their-lives-children-heatwaves>

<sup>20</sup> <https://www.unicef.org/reports/coldest-year-rest-of-their-lives-children-heatwaves>

<sup>21</sup> <https://www.unwomen.org/en/digital-library/publications/2022/09/progress-on-the-sustainable-development-goals-the-gender-snapshot-2022>

<sup>22</sup> <https://www.who.int/news/item/30-06-2015-lack-of-sanitation-for-2-4-billion-people-is-undermining-health-improvements>; <https://www.who.int/news-room/fact-sheets/detail/drinking-water>

forced and child marriages often used as a guise for human trafficking for labour and/or sexual exploitation.

An estimated 4.3 million children are now at heightened risk of being subjected to female genital mutilation, “FGM” a practice which can lead to severe health consequences and even death.<sup>23</sup> According to UNICEF drought in the horns of Africa is exacerbating rates of child marriage and FGM.<sup>24</sup> In countries where both child marriage and FGM co-exist, the risk of girls being subjected to FGM is greater as it seen as a coming of age ritual and/or a sign of purity.<sup>25</sup>

Additionally, UNICEF projected as more people are pushed into extreme poverty resulting from the climate crisis and/or conflict, **9 million more children may suffer from wasting** which is the **most life-threatening form of malnutrition** by the end of 2022. With the worsening of the climate crisis driving up rates of extreme poverty and food insecurity, the number of children impacted will continue to rise.

The third threat UNICEF identified, is an increased risk of **gender based violence**. Living under such stressful conditions places women and girls at increased risk of violence. Globally 1 in 3 women and girls alive today are victim to Gender Based Violence<sup>26</sup>. In 80% of water deprived households, women and girls carry the burden of water collection, which puts them at an added risk of violence. They often face impossible dangerous circumstances and perilous journeys.

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<sup>23</sup> <https://www.unicef.org/press-releases/world-will-miss-target-ending-fgm-2030-without-urgent-action-including-men-and-boys>

<sup>24</sup> <https://www.unicef.org/press-releases/child-marriage-rise-horn-africa-drought-crisis-intensifies>

<sup>25</sup> <https://www.girlsnotbrides.org/learning-resources/child-marriage-and-health/fgmc-and-child-marriage/>

<sup>26</sup> <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>

In addition to these threats to fundamental human rights, it also means countries are now at severe risk of disappearing in their entirety and parts of the earth becoming uninhabitable. Consequentially, this would result in 100s of millions of people forcibly migrating because of actions they had nothing to do with and then facing the risk of being dehumanized in receiving countries in part as a result of growing authoritarian populism.

It is an open secret that almost  $\frac{3}{4}$  of the world's refugee population are housed in the developing world.<sup>27</sup> It is also an open secret that there is no legal pathway internationally that provides a means for climate refugees to gain refugee status and asylum in other countries. Additionally, it is also no secret that those seeking asylum are likely to be individuals coming from countries that had the least to do with the crisis!

In the matter of *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107<sup>28</sup> the Supreme Court of New Zealand denied refugee status to a Kiribati citizen seeking refugee status, under the 1951 Refugee Convention. The appellant's case was premised on the threat climate change posed to his rights as a result of rising sea levels and environmental degradation. Noteworthy, in 2014 Kiribati became the first Pacific island to purchase land to relocate its people, due to the threat of the island being besieged.<sup>29</sup>

The Appellant took his case to the UN Human rights Committee where a landmark decision was given stating "that countries may not deport individuals who face climate change-induced conditions that violate the right to life."<sup>30</sup> The Committee also clarified that asylum seekers are

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<sup>27</sup> <https://www.unhcr.org/us/about-unhcr/who-we-are/figures-glance>

<sup>28</sup> <http://climatecasechart.com/non-us-case/ioane-teitiota-v-the-chief-executive-of-the-ministry-of-business-innovation-and-employment/>

<sup>29</sup> <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu>

<sup>30</sup> <https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims>

not required to prove imminent harm if returned to their countries. While the Committee's decision was hailed to be historic in opening the door to climate refugees seeking protection, neither the 1951 Refugee Convention nor the 1967 Refugee Protocol has been amended to reflect the Committee's decision. In the circumstances, it is unclear whether the Committee's decision on its own will be sufficient to be authoritative and binding on all countries that are parties to Refugee Convention and/or 1967 Protocol.

### **How did Humanity get to this point?**

It comes from the way human beings view the Earth, and there are two pre-dominant views. The first is human beings generally see the Earth as an inert thing, a commodity, something a value is imposed on with a price tag, something to sell, use, abuse and exploit. Property law dictates human beings are the only species on the planet which puts a value on the earth which they *inter alia* own, sell, purchase, destroy and exploit. This way of viewing the earth, also triggers the laws of corporation to put profit first. Companies in fact have a legal duty to maximize its profits to its shareholders. While this may have served them well, no one looked at the consequences.

The second way of perceiving the Earth which is becoming increasingly more prevalent is that of the Earth as a living being, spiritual something of intrinsic value for which we all have a responsibility. This view triggers trusteeship law- which imposes a primary duty of care on all human beings to put the health and well-being of people and planet first. This view of the earth is supported by Article 73 and 75 of the United Nations Charter which is considered a living document and it is this view of the earth that underscores the philosophy behind ecocide law.

Stemming from the second world view, there is also a very real failure by many in the global community to understand our interconnectedness as a world. Put simply, what happens in one country, can mean life or death, or reduced quality of life in another. Put another way, as long as



the world's largest or top polluters continue to operate as is, even if those countries with the lowest emissions meet all their global climate goals, it will not change the consequences that the countries and the people which had the least to do with the crisis, shall be forced to bear.<sup>31</sup> As members of the legal community of the Commonwealth we can help lead the charge for climate justice and accountability nationally and internationally, through law and policy.

### **International Climate Justice & the Role of Lawyers**

The late Polly Higgins, Female Scottish Barrister hailed as the pioneer and catalyst for defining ecocide and the movement to make ecocide international law, famously remarked "The Earth is in need of a good lawyer." The context of her quote was grounded in the reality that the global community is facing the threat of mass extinction stemming from melting ice caps, deforestation, drought, rising sea temperatures, food insecurity, resource depletion, forced migration, which could lead to geopolitical tension which can manifest into conflict and even war, taking us full circle back to mass extinction. A vicious cycle which has the same end result because there is no one defending the rights of nature or the Earth from destruction. Existing environmental laws have not evolved to meet the challenges our world faces today.

The late Barrister Higgins paved the way for those in the legal community and beyond to take up the mantle of responsibility in demanding accountability and climate justice through international law and policy. Specifically, the criminalization of ecocide at an international level which would in effect provide a pathway to access to justice for those most affected by the climate crisis.

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<sup>31</sup> <https://edition.cnn.com/2022/02/28/world/un-ipcc-climate-report-adaptation-impacts/index.html>;  
<https://edition.cnn.com/2021/12/06/africa/south-sudan-floods-climate-cmd-intl/index.html>

Often transnational corporations are the ones committing grave environmental destruction, and more often than not, the consequences of those actions may not show up right away and when it becomes blatant, the CEOs of these companies are nowhere to be found. If current law and policy geared towards environmental protection were adequate, would we find ourselves facing crisis level risks? Simply put internationally and nationally, environmental laws as outlined above are woefully inadequate.

The realities of the IPCC report is daunting, the environmental movement continues to be criticized, for more talk than actual action. That said, coastal regions and Island States may be the most vulnerable to the impacts of the crisis however they are by no means powerless. They have a very real collective power which can curb the destructive practices exacerbating ecological destruction and biodiversity loss and driving up human rights violations. This power is at the level of international law.

An international crime of ecocide would provide accountability for the worst offenders, justice for the blameless and most vulnerable, act as a legal deterrent or in other words a “think before you act” provision – in many countries, it is unclear whether any work is to be done which could potentially be hazardous to the environment and those living there, whether environmental assessments are required. If such assessments are required, who ultimately makes the decision that the contractor can go ahead? Is it the politician, or the state agency or is it an environmentalist with the requisite expertise? With a “think before you act” provision, intended litigants, can identify where the source of the problem originated, and it would force possible perpetrators, to act with due diligence, because the stakes are higher. Finally and most importantly this can help slow the pace of human caused ecocide.

### **How can Ecocide become International Law?**

Making ecocide international law, would be through harnessing the power of international criminal law at the International Criminal Court (ICC) to protect our global environment. This can be done by way of amending the Rome Statute which underpins the ICC. A two thirds majority is required to amend the Rome Statute and unlike the UN Security Council, there is no question of a veto power. The ICC since its creation has been premised on safeguarding the wellbeing of the world. Its remit is to deal with the largest threats to the world's peace and security. If you are looking for evidence that the climate crisis is one of the largest threats facing the world, one need not look any further, than the latest IPCC synthesis report.

In a post-World War II era, the world was at a precipice, and came together to establish binding precedent that would protect future generations through law, justice and accountability at the highest level. This gave birth to the three major crimes against peace, Genocide, Crime against Humanity and War Crimes. The Crime of Aggression was later added. Today humanity stands at the edge of another precipice which threatens the fate of all living beings and our natural environment.

Ecocide can fill in the gap that currently exists in national and international climate justice laws and policies. United the Commonwealth, by making ecocide the 5<sup>th</sup> International Crime against Peace, could provide a much needed legal guardrail to steer us back from the precipice by setting an outer boundary to deter, prevent and sanction the worst threats to ecosystems which are a root cause of climate change. This will act as a powerful brake on harmful extractive practices and a much-needed incentive for strategic change and innovation.

Ecocide is not by any means a new concept. The term “ecocide” was first coined by Professor Richard Falk back in 1973 when he proposed an international crime of ecocide in response to

the use of a chemical known as “agent orange” used by the United States to destroy crop fields to gain better visibility on their targets during the Vietnam War.<sup>32</sup> The consequence was mass environmental destruction and the poisoning of the health millions of Vietnamese children and families. An estimated three million Vietnamese have been affected, including an estimated 150,000 children born after the war with serious birth defects.<sup>33</sup>

It should therefore come as no surprise that there was a similar provision aimed at preventing this type of environmental destruction in the original draft of the Rome Statute, which ultimately did not make it in. Today the Global Community has the chance to make what ought to have been made international law years ago, a reality within infrastructures that already exist.

In the face of *inter alia* record breaking rates of displaced children, child labour, rising food insecurity, extreme poverty, rise of climate related diseases, human trafficking, forced migration, and a growing number of countries in conflict– where is the justice for those affected? The answer lies with what we choose to do next as a legal profession. Today, here and now we can advocate to defend the earth and humanity by calling for the criminalization of ecocide nationally and internationally, within structures that already exist. The IPCC report has made clear, the window for action is “rapidly closing” and “brief.”<sup>34</sup> The decisions we make today will affect the next millennia and as United Nations Secretary General, Antonio Guterres remarked “delay means death<sup>35</sup>.”

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<sup>32</sup> <https://www.jstor.org/stable/44480206> ; <https://sas-space.sas.ac.uk/4686/>

<sup>33</sup> <https://www.usip.org/publications/2022/01/addressing-harmful-legacy-agent-orange-vietnam>;

<sup>34</sup> <https://www.aljazeera.com/news/2022/2/28/climate-change-could-make-world-sicker-poorer-un-report>

<sup>35</sup> <https://news.un.org/en/story/2022/02/1112852>