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## The Ecocide Project

**Human Rights Consortium, School of Advanced Study, University of London**

<http://www.sas.ac.uk/hrc/projects/ecocide-project>

### **'Ecocide is the missing 5<sup>th</sup> Crime Against Peace'**

A report by Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulwicki, Damien Short and Polly Higgins

*"man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace"<sup>1</sup>.*

Draft Ecocide Convention 1973

*This is the first of a series of research papers for the Ecocide Project. As the new director of the Human Rights Consortium I am delighted to introduce this timely and vital piece of research that answers many questions and poses many more. The paper provides a foundation of understanding on which we must build; there is more vital work to be done. It points the way towards a potential solution to the destructive behavior that has created the ecological crisis we now face. Following the failures of Copenhagen and Rio it strikes a note of positivity at a time when a new solution is needed.*

Dr Damien Short, Director of the Human Rights Consortium, School of Advanced Study, University of London

### **Summary**

The term ecocide was used as early as 1970, when it was first recorded at the Conference on War and National Responsibility in Washington, where Professor Arthur W. Galston "proposed a new international agreement to ban 'ecocide'"<sup>2</sup>. Ecocide as a term had no strict definition at that time: "although not legally defined, its essential meaning is well-understood; it denotes various measures of devastation and destruction which have in common that they aim at damaging or destroying the ecology of geographic areas to the detriment of human life, animal

<sup>1</sup> Falk, Richard A. (1973): 'Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals'. In: Thee, Marek (ed.) (1973). *Bulletin of Peace Proposals*. 1973, Vol.1.

<sup>2</sup> New York Times, 26 February 1970; quote in Weisberg, Barry (1970). *Ecocide in Indochina*. Canfield Press, San Francisco.

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life, and plant life"<sup>3</sup>. What was recognised was that the element of intent did not always apply. "Intent may not only be impossible to establish without admission but, I believe, it is essentially irrelevant."<sup>4</sup> Richard A. Falk, in his draft (1973) Ecocide Convention, explicitly states at the outset to recognise "that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace"<sup>5</sup>. By the end of the 1970s the term itself seems to have been well understood. So how was it that an international crime whose name was familiar to many who were involved in the drafting of the initial Crimes Against Peace was completely removed without determination? Documents that have only now been examined and pieced together shed a whole new light on a corner of history that would otherwise be buried forever. What is so remarkable is that the collective memory has erased this crime in just 15 years, and yet documents tell a story of engagement by many governments who supported the criminalisation of ecocide in peacetime as well as in wartime. Extensive debate over 40 years, with committees of experts specifically tasked to undertake examination of ecocide and environmental crimes, documented in the paper trail left behind tells us that this was well-considered law; early drafts, which have been referred to in some of the papers that have been uncovered, provide definitive reference to ecocide as a crime which was to stand alongside genocide as a Crimes Against Peace – both during peacetime as well as wartime.

When ecocide was excluded in 1995 by the ILC, many countries that had specifically spoken on the topic subsequently went on record calling at the very least for the retention of then Article 26 (crime against the environment). What is remarkable about the decision to exclude ecocide is that in 1993, when ecocide was listed as a Crime Against Peace in the draft *Code of Crimes Against the Peace and Security of Mankind* (precursor to the 1998 Rome Statute, which excluded ecocide in the final document), only three countries are on record as having opposed its inclusion; namely the Netherlands, the United Kingdom and the United States of America.<sup>6</sup> Despite the overwhelming support for a law to prohibit ecocide during war and peacetime in the following three years (1993-1996),<sup>7</sup> the proposal was unilaterally removed overnight without record of why this occurred. What was

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<sup>3</sup> Fried, John H.E. (1972): 'War by Ecocide'. In: Thee, Marek (ed.) (1973). *Bulletin of Peace Proposals*. 1973, Vol.1. Universitetsforlaget, Oslo, Bergen, Tromsö.

<sup>4</sup> Westing, Arthur H. (1974): 'Proscription of Ecocide'. In: *Science and Public Affairs*, January 1974.

<sup>5</sup> Falk, Richard A. (1973): 'Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals'. In: Thee, Marek (ed.) (1973). *Bulletin of Peace Proposals*. 1973, Vol.1.

<sup>6</sup> A/CN.4/448 and Yearbook of the ILC 1993, Vol. II, Pt. 1. Documents of the 45<sup>th</sup> session. A/CN.4/SER.A/1993/Add.1 (Part 1) (includes A/CN.4/448 and Add.1) While the Netherlands deems the list without the crime of ecocide sufficient, the USA and the UK at that point don't support the draft Code itself. The USA criticises the vagueness of the relevant article, whereas the UK speaks of crimes against the environment as an unknown international crime. (see Netherlands: pp. 82-88; United Kingdom: pp. 97-102; United States of America: pp.102-105.) At the same time seven governments specifically endorsed the inclusion. Comments and observations received from governments in regard to the draft articles of the draft Code: As of 29 March 1993, the Secretary-General had received 23 replies from Member States and one reply from a non-member State. Namely, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Costa Rica, Ecuador, Greece, Netherlands, the Nordic countries (Denmark, Finland, Iceland, Norway, Sweden), Paraguay, Poland, Senegal, Sudan, Turkey, UK, USA, Uruguay and Switzerland.

<sup>7</sup> 19 countries spoke out in the Legal Committee in favour of retaining ecocide on the list of crimes covered in the draft Code. In the same session only three countries, namely France, Brazil and the USA called for the exclusion. See discussions in the Sixth Committee (Legal) of the General Assembly addressing the draft Code: 12<sup>th</sup> – 25<sup>th</sup> meeting; summary records: A/C.6/50/SR.12 to A/C.6/50/SR.25.

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retained in the final Rome Statute was a watered-down version of a war-crime – not a peace-crime - against the environment. Article 8(2)(b) (War crimes) adopted the 1977 Environmental Modification Convention definition of a crime against the environment and criminalises “Intentionally launching an attack in the knowledge that such attack will cause... widespread, long-term and severe damage to the natural environment...” There was however, one crucial difference; “widespread, long-term *or* severe” had been watered down; ‘or’ was replaced with ‘and.’ History has demonstrated that proving destruction “widespread, long-term and severe” is almost impossible to prosecute.<sup>8</sup>

There was a moment in time when a law to prevent mass damage or destruction had a name and was embraced both in peacetime and wartime. The paper trail that has been followed for the purpose of this research has opened up more questions - reasons as to why ecocide and a peacetime crime against the environment was suddenly removed have not been recorded. One key rapporteur during that time was Christian Tomuschat; he was noted to have said “One cannot escape the impression that nuclear arms played a decisive role in the minds of many of those who opted for the final text which now has been emasculated to such an extent that its conditions of applicability will almost never be met even after humankind would have gone through disasters of the most atrocious kind as a consequence of conscious action by persons who were completely aware of the fatal consequences their decisions would entail.”<sup>9</sup>

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### **The paper trail**

1972 was an important year. At the United Nations Stockholm Conference on the Human Environment 1972, Olof Palme the Prime Minister of Sweden, in his opening speech spoke explicitly of the Vietnam war as an “ecocide”.<sup>10</sup> The Stockholm Conference focused international attention on environmental issues perhaps for the first time, especially those relating to environmental degradation and “transboundary pollution.” The last concept was particularly important, as it highlighted the fact that pollution does not recognise political or geographical boundaries, but affects territories, countries, regions and people beyond its point of origin. Other heads of State, including Indira Gandhi from India and the leader of the Chinese delegation Tang Ke, also denounced the war on human and environmental terms.<sup>11</sup> There was no reference to ecocide in the official outcome

<sup>8</sup> Under the Environmental Modification Convention 1977 (ENMOD) the test for war-time environmental destruction is ‘widespread, long-term **or** severe’, whereas Article 8(2)(b) of the Rome Statute 1998 modified the test with the change of one word to ‘widespread, long-term **and** severe.’

<sup>9</sup> Tomuschat, Christian (1996). 'Crimes Against the Environment'. In: *Environmental Policy and Law*. 1996. Vol. 26, 6. p.243.

<sup>10</sup> Tord Björk *The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972* (1996) Department of Political Science, University of Stockholm. <http://www.folkrorelser.org/johannesburg/stockholm72.pdf>, p.15; last accessed 16/07/12.

<sup>11</sup> *Ibid.*

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document of the Stockholm conference. The conference did, however, establish the United Nations Environmental Programme (UNEP).

Ecocide was also discussed in the unofficial events running parallel to the official UN Stockholm Conference. “Almost every popular movement and group of NGOs addressed the issue. A demonstration with 7,000 participants was held.”<sup>12</sup> The Folkets Forum (The People’s Forum) running parallel to the official conference established a working group on Genocide and Ecocide.<sup>13</sup> Dai Dong, a branch of the International Fellowship of Reconciliation<sup>14</sup> sponsored a *Convention on Ecocidal War* which took place in ABF-huset, Stockholm, Sweden.<sup>15</sup> The Convention brought together many people including experts Professor Falk, expert on the international law of war crimes; Dr. Lifton, a psychohistorian; Drs. Westing and Pfeiffer, biologists; Messrs, Luce and Branfman and it was coordinated by John Lewallen.<sup>16</sup> The Convention called for a *United Nations Convention on Ecocidal Warfare*, which would amongst other matters seek to define and condemn “ecocide” as an international crime of war.<sup>17</sup>

During the 1970s the idea of expanding the 1948 Genocide Convention led to extensive enquiry as to whether ecocide should be included as a Crime Against Peace. The *Sub-Commission on Prevention of Discrimination and Protection of Minorities*<sup>18</sup> prepared a study discussing the effectiveness of the Genocide Convention, proposing the adoption of ecocide as well as cultural genocide to the list of crimes. The study was prepared by the Special Rapporteur Nicodème Ruhashyankiko, with the final draft published in 1978. Many governments voiced their concerns that the Genocide Convention had proven to be ineffective, because up until that time genocide was still a reality in many part of the world. Many were supportive of the idea that additional instruments be adopted.<sup>19</sup> Supporters who spoke out in favour of a crime of ecocide included Romania and the Holy See.<sup>20</sup> In 1985, ecocide surfaced again, within a report on the question of the prevention and punishment of the crime of genocide prepared by then Special Rapporteur Mr.

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> An independent organisation (1970 – 1976) which built awareness among governments and society on damage to nature by human misuse of technology and chemical products.

<sup>15</sup> The purpose of the Convention was to describe the destruction of the Indochinese peoples and environments by the United States Government; and to call for a United Nations Convention on Ecocidal Warfare, which would receive evidence of the devastation of the human ecology of Indochina caused by the Indochina War, determine which belligerent caused that devastation, request reparations from the responsible belligerent or belligerents, and seek to define and proscribe “Ecocide” as an international crime of war. See <http://www.aktivism.info/rapporter/ChallengingUN72.pdf>; last accessed 16/07/12.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> The Sub-Commission on Prevention of Discrimination and Protection of Minorities “undertakes studies and makes recommendations to the Commission concerning the prevention of discrimination against racial, religious and linguistic minorities. Composed of 26 experts, the Sub-Commission meets each year for four weeks. It has set up working groups and established Special Rapporteurs to assist it with certain tasks”. See <http://www.un.org/rights/dpi1774e.htm>; last accessed 16/07/12.

<sup>19</sup> Austria, Holy See, Poland, Romania, Rwanda, Congo and Oman; see E/CN.4/Sub.2/416, pp. 115-117.

<sup>20</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities. Study of the Question of the Prevention and Punishment of the Crime of Genocide. Prepared by Mr. Nicodème Ruhashyankiko. 4 July 1978. E/CN.4/Sub.2/416, p.124 and 130.

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Benjamin Whitaker.<sup>21</sup> The report was a follow-up on the 1978 study and stresses the opinion of the members of the Sub-Commission who were vocal in their support for a crime of ecocide.<sup>22</sup> Within another report of 1985 Sub-Commission member Whitaker recommended that "further consideration should be given to this question."<sup>23</sup> In subsequent discussions in the Sub-Commission, again members spoke out in favour of ecocide. A draft resolution, prepared for the *Commission on Human Rights*, submitted by Mr. Deschênes and Mr. Mubanga-Chipoya as part of the review, included the recommendation to have Mr. Whitaker expand and deepen the study of the notions of "cultural genocide", "ethnocide" and "ecocide". In the UN report on its 38<sup>th</sup> session, a reference is missing as to whether the Sub-Commission finally determined what route they were to take.

In the intervening 40 years since the Stockholm Conference, many States supported an internationally legally binding law that would create a mechanism to hold States accountable for their environmental crimes. The most significant convention within which ecocide was discussed, was the draft ***Code of Crimes Against the Peace and Security of Mankind***.<sup>24</sup> This document was eventually to become the Rome Statute of the International Criminal Court, adopted in 1998 and entered into force on 1st July 2002. As of July 2012 there are 121 state parties to this internationally legally binding statute.<sup>25</sup> It now codifies four named Crimes Against Peace - genocide, war crimes, crimes against humanity, crimes of aggression.

From the very outset of the United Nations, the **International Law Commission (ILC)** had been assigned by the General Assembly in 1947 to formulate "the principles of international law recognized in the charter of the Nuremberg Tribunal and in the judgment of the Tribunal" and to "prepare a draft **code of offences against the peace and security of mankind**, indicating clearly the place to be accorded to the [aforementioned] principles".<sup>26</sup> The draft ***Code of Offences Against the Peace and Security of Mankind*** ('the Code') was on the agenda of the ILC from 1949-57 and 1982-96. The gap in time arose out of difficulties defining the Crime of Aggression and as a result, the General Assembly parked the drafting of *the Code*. *The Code* was revisited between 1978 and 1996; in 1982 Doudou Thiam was appointed as the Special Rapporteur on the topic. His work picked up at the last adoption of *the Code* by the ILC in 1954.<sup>27</sup> The first reading began in 1985. The second and final reading began in 1992 and it was adopted in 1996. In total, Thiam issued 13 reports before *the Code's* final adoption in 1996 and his death three years later.

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<sup>21</sup> E/CN.4/Sub.2/1985/6.

<sup>22</sup> E/CN.4/Sub.2/1985/6, para. 33.

<sup>23</sup> *Ibid.*

<sup>24</sup> Draft Code of Offences Against the Peace and Security of Mankind until 1987; see: General Assembly resolution 42/151 of 7 December 1987.

<sup>25</sup> [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en); last accessed 16/07/12.

<sup>26</sup> General Assembly resolution 177 (II) of 21 November 1947.

<sup>27</sup> Yearbook of the ILC, 1954, Vol. II, pp. 151-152.

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The ILC is mandated to promote the progressive development of international law and its codification.<sup>28</sup> In addition to drafting *the Code*, the ILC also drafted international articles on state responsibility, and a provision linking state responsibility and damage to the environment had been adopted in 1976.<sup>29</sup> The ILC prepared draft articles for an act that concerned itself with international liability for transboundary harm “carried out in the territory or otherwise under the jurisdiction or control of a State.”<sup>30</sup> One of its draft provisions of 1976 defines environmental damage as an international crime<sup>31</sup>. Making states liable for transboundary harm was extensively scrutinised by the ILC and the term “transboundary harm” came to refer largely to damage done to the environment by events such as the pollution of the air, sea or rivers, consequences of nuclear pollution, or oil spills.

Research of UN papers demonstrate that members and delegates of several institutions, including the *Sub-Commission on Prevention of Discrimination and Protection of Minorities*<sup>32</sup> and the *Legal Committee of the General Assembly* discussed at different times over the last fifty forty years a crime that would protect the environment. In addition, the *Sub-Commission on Prevention of Discrimination and Protection of Minorities* considered the supplementing of the 1948 Genocide Convention<sup>33</sup> with the crime of ecocide.

All of these institutions explored Crimes Against the Environment at length and met frequently to discuss many aspects that arose, including whether ecocide could be considered a crime of intent, recklessness or absent of knowledge.

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## **Lessons from genocide**

To understand the importance of the full criminalisation of destructive behaviour that can potentially shock ‘the conscience of mankind’<sup>34</sup> we need to appreciate the

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<sup>28</sup> Statute of the International Law Commission, 1947. Adopted by General Assembly resolution 174 (II) of 21 November 1947, amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

<sup>29</sup> Art 19. International crimes and International Delicts. Art.3: [A]n international crime may result, inter alia, from:  
(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas. See: Yearbook of the ILC 1980, Vol. II, Part 2, p.32, and Yearbook of the ILC 1996, Vol.II, Part. 2. p.60.

<sup>30</sup> International liability for injurious consequences arising out of acts not prohibited by international law.

<sup>31</sup> Yearbook of the ILC 1980, Vol. II, Part 2, p.32: “a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas”.

<sup>32</sup> The Sub-Commission on Prevention of Discrimination and Protection of Minorities undertakes studies and makes recommendations to the Commission concerning the prevention of discrimination against racial, religious and linguistic minorities. Composed of 26 experts, the Sub-Commission meets each year for four weeks. It has working groups and established Special Rapporteurs to assist it with certain tasks.

<sup>33</sup> 1948 Convention on the Prevention and Punishment of the Crime of Genocide, see <http://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>; last accessed 16/07/12.

<sup>34</sup> December 11th 1946 United Nations General Assembly passed Resolution 96(I), which stated that “Genocide is a...denial of the right of existence [that] shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.”

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problems that can arise with a partial approach. Indeed, to fully appreciate where we are now with the potential international crime of ecocide, which in the age of ecological crisis, shocks the conscience of many, we need to take a step back and look at the history of its more famous relation – genocide.

In 1933 a Polish Jurist by the name of Raphael Lemkin spoke at the International Conference for Unification of Criminal Law in Madrid, and urged the international community to converge on the necessity to ban the destruction, both physical and cultural, of human groups, invoking the linked concepts of ‘barbary’ and ‘vandalism’. In his subsequent seminal text *Axis Rule in Occupied Europe* Lemkin combined his prior formulations, barbarity and vandalism, to form a new, more comprehensive concept – *genocide*, combining the Greek word *genos* meaning tribe or race and the Latin *cide* meaning destruction.<sup>35</sup> Lemkin envisaged a law consisting of the deliberate destruction of a nation or ethnic group in *one or both of the following ways*: a) By killing its individual members, i.e. physical genocide (derived from Lemkin’s notion of ‘barbary’); b) By undermining its way of life, i.e. cultural genocide (derived from ‘vandalism’).<sup>36</sup> His original definition crucially identified the destruction of a people by other factors not directly involved in killing. Ecocide can and often does lead to cultural damage and destruction. Like genocide, ecocide can be direct and indirect; it can be the destruction of a territory and it can also be the undermining of a way of life - ecological as well as cultural.

The second element of Lemkin’s prior formulation, vandalism — the destruction of culture — was for him a major technique of group destruction. Lemkin’s central contention was that culture integrates human societies and consequently is a necessary pre-condition for the realisation of individual material needs. Indeed, he was more worried by the loss of culture than the loss of physical life in and of itself, as culture is the social fabric of a *genus*. Indeed, in Lemkin’s formulation, culture was the unit of collective memory, whereby the legacies of the dead can be kept alive and each cultural group has its own unique distinctive *genius* deserving of protection.<sup>37</sup> National culture for Lemkin was an essential element of world culture and nations have a life of their own comparable to the life of individual. On this point Lemkin wrote: “*The world represents only so much culture and intellectual vigour as are created by its component national groups. The destruction of a nation, therefore, results in the loss of its future contributions to the world. Moreover, such a destruction offends our feelings of morality and justice in much the same way as does the criminal killing of a human being*”.<sup>38</sup>

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<sup>35</sup> Raphael Lemkin, (1944) *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress*, (Washington, D.C.: Carnegie Endowment for International Peace, p. 79 - 95. For further discussion on this see Dirk Moses, (2010) ‘Raphael Lemkin, Culture, and the Concept of Genocide’ in Donald Bloxham and A. Dirk Moses (eds) *Oxford Handbook of Genocide Studies* Oxford University Press.

<sup>36</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944), p 79.

<sup>37</sup> Damien Short, ‘Cultural genocide and indigenous peoples: a sociological approach’, *The International Journal of Human Rights* Vol. 14, Nos. 6–7, November–December 2010, pp 831–846.

<sup>38</sup> Lemkin, R (1944: 91). Op cit.

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### *Evolution: from cultural genocide to ecocide*

For Lemkin, culture animates the *genos* in genocide - the social group exists by virtue of its common culture. For this reason it is not surprising that during the process of construction of the draft UN Convention on Genocide, Lemkin argued that 'Cultural Genocide is the most important part of the Convention'.<sup>39</sup> In his 1958 autobiography<sup>40</sup> Lemkin subsequently wrote: "I defended it (cultural genocide) successfully through two drafts. It meant the destruction of the cultural pattern of a group, such as the language, the traditions, the monuments, archives, libraries, churches. In brief: the shrines of the soul of a nation. But there was not enough support for this idea in the Committee...So with a heavy heart I decided not to press for it".<sup>41</sup> Lemkin had to drop an idea that, in his words, 'was very dear to me'.<sup>42</sup>

The heart had been ripped out of the Convention and a major method of genocide was not criminalised. The removal of this method led to a preoccupation, in legal and scholarly realms, with establishing perpetrator intention rather than genocidal effects, and to the popular (mis)understanding of the crime of genocide as simply racially motivated mass killing.<sup>43</sup> Eventually, it also led to reviews within the UN system of the Convention's effectiveness since it was not being used and seemed to offer little to those groups it was designed to protect. It was in just such a review that we find the first attempt to criminalise in international law, environmental destruction.<sup>44</sup>

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### **International Convention on the Crime of Ecocide 1973**

The draft ***International Convention on the Crime of Ecocide*** was prepared by Richard A. Falk and was introduced within the scope of evaluating the effectiveness of the Genocide Convention. The proposal for a law of ecocide that could address both direct ecological crimes and ancillary cultural ecocide was explored at length. It was widely recognised that the Convention on Genocide was deficient and that there were other international crimes that needed to be given a name. Richard A. Falk drew up the proposed Convention for a journal article he published in 1973.<sup>45</sup>

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<sup>39</sup> Dirk Moses (2008) 'Empire, Colony, Genocide: Keywords and the Philosophy of History' in Moses, D. (ed.) Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History (Oxford: Berghahn Books) pp. 3 – 54, p.12-13.

<sup>40</sup> John Docker, 'Are settler colonies inherently genocidal? Re-reading Lemkin', in A. Dirk Moses (ed), Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History (Oxford: Berghahn Books, 2008), p 82.

<sup>41</sup> Docker, J. (2004) 'Raphael Lemkin's History of Genocide and Colonialism', Contribution for United States Holocaust Memorial Museum, Center for Advanced Holocaust Studies, Washington DC, 26 February 2004.

<sup>42</sup> *Ibid.*

<sup>43</sup> For more information on this topic see Damien Short, 'Cultural genocide and indigenous peoples: a sociological approach', *The International Journal of Human Rights* Vol. 14, Nos. 6–7, November–December 2010, 831–846.

<sup>44</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities. Study of the Question of the Prevention and Punishment of the Crime of Genocide. Prepared by Mr. Nicodème Ruhashyankiko. 4 July 1978. E/CN.4/Sub.2/416.

<sup>45</sup> Richard A. Falk (1973): Environmental Warfare and Ecocide - Facts, Appraisal, and Proposals. In: Thee, Marek. Bulletin of Peace Proposals 1973, Vol. 1. Universitersforlaget, Oslo, Bergen, Tromsö; pp. 80-96.

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This was then included in the study conducted by the *UN Sub-Commission on Prevention of Discrimination and Protection of Minorities* in regard to evaluating the effectiveness of the 1948 Genocide Convention. For Falk it was necessary to recognise “*that we are living in a period of increasing danger of ecological collapse [...] and “that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace.*”<sup>46</sup> Despite this recognition that environmental damage can be caused consciously and unconsciously, the majority of the Ecocide Convention primarily focuses on ecocide as a war-crime with intent, it does not set out the peacetime provisions. Westing argued at the time: “Intent may be not only impossible to establish without admission but, I believe, it is essentially irrelevant.”<sup>47</sup>

Within the Sub-Commission Mr. Bouhdiba voiced support for criminalising ecocide; “any interference with the natural surroundings or environment in which ethnic groups lived was, in effect, a kind of ethnic genocide because such interference could prevent the people involved from following their own traditional way of life.”<sup>48</sup>

By this time a sizeable majority of parties to the United Nations were in favour of ecocide as a crime during peacetime. However, for reasons not known, the draft International Convention on the Crime of Ecocide was also shelved.

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## **International Law Commission (ILC)**

Members of the ILC are “persons of recognized competence in international law [...that] sit in their individual capacity and not as representatives of their Governments”.<sup>49</sup> The ILC sits in session annually from May to July and prepares a report to the Legal Committee that sits from October to November.<sup>50</sup>

1984 – 1996 proved to be pivotal; during this time there had been extensive engagement in the ILC about the inclusion of environmental damage and Ecocide into the list of Crimes Against Peace. Special Rapporteur on the topic, Doudou Thiam had included the crime based on precedence in international law,<sup>51</sup> and in the light of the Article 19 of Part I of the draft Articles on State Responsibility: “wilful and severe damage to the environment” –legislation that the ILC was working on concurrently to the draft **Code of Offences Against the Peace and Security of**

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<sup>46</sup> *Ibid.* p. 93.

<sup>47</sup> Westing, Arthur H. (1974): Proscription of Ecocide. In: Science and Public Affairs, January 1974, pp. 24-27.

<sup>48</sup> E/CN.4/Sub.2/SR.658, p. 53.

<sup>49</sup> <http://untreaty.un.org/ilc/ilcmembe.htm>; last accessed 16/07/12.

<sup>50</sup> <http://untreaty.un.org/ilc/ilcsessions.htm>; [http://www.un.org/en/ga/sixth/66/66\\_session.shtml](http://www.un.org/en/ga/sixth/66/66_session.shtml); last accessed 16/07/12.

<sup>51</sup> The Special Rapporteur refers to following international instruments: the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; the Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water; the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies; and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques; see A/CN.4/377 and Corr.1, para. 44 and 51, p.94-96.

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**Mankind (the Code)** Crimes Against the Environment had been included in the draft Articles on State Responsibility.<sup>52</sup>

### *Article 26: to improve or exclude?*

Between 1984 to 1986 consideration of whether to include as a Crime Against Peace “acts causing serious damage to the environment”<sup>53</sup> led some members<sup>54</sup> to re-open the debate in 1986 on whether it was a crime of intent.<sup>55</sup> In 1991 criticisms centred on the inclusion of the element of intent and the final drafting of Article 26. For the purposes of *the Code* previous drafts were removed and Article 26 was reduced to “wilful and severe damage to the environment”. After the element of intent had been added, the governments of Australia, Belgium, Austria and Uruguay went on record criticising the re-drafting, in recognition that ecocide during peacetime is often a crime without intent. Belgium stated “[t]his difference between articles 22 [war crimes]<sup>56</sup> and 26 [“wilful and severe damage to the environment”]<sup>57</sup> does not seem to be justified. Article 26 should be amended to conform with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive.”<sup>58</sup> Australia objected on the grounds that “the requisite mens rea in Article 26 should be lowered so as to be consistent with article 22”, and Austria went on record stating that “since perpetrators of this crime are usually acting out of a profit motive, intent should not be a condition for liability to punishment.”<sup>59</sup>

However, the ILC – instead of removing the element of intent – was determined to remove the flawed Article 26 altogether. Reactions within the ILC and Legal Committee to the announcement of the withdrawal of Art. 26 were recorded only in part. Based on the observations recorded at the time, what we do know is that the decision taken was not based on agreement between the parties.

Subsequent off-the-record debates between Commission members failed to further the law of ecocide: the Chairman in 1995 decided twice to hold informal meetings “to facilitate the consultations and ensure a truly frank exchange of views”.<sup>60</sup>

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<sup>52</sup> A/CN.4/377 and Corr.1, para. 46, p.95.

<sup>53</sup> This was the wording used in 1984, see A/CN.4/377 and Corr.1, para. 79, p.100.

<sup>54</sup> Yearbook of the ILC, 1986, Vol. I: Mr. Stephen C. McCaffrey (USA), p.119-120, para.10; Mr. Andreas Jacovides (Cyprus), p.121, para.28; Mr. Ahmed Mahiou (Algeria), p.128, para.11; Mr. Doudou Thiam (Senegal; Special Rapporteur on the draft Code), p.175, paras.17-18.

<sup>55</sup> Yearbook of the ILC, 1986, Vol. II, Pt. 2, pp.46, paras. 96.

<sup>56</sup> One provision of Art.22 on war crimes covers damage cause to the environment in times of war. “Article 22. Exceptionally serious war crimes: 2. For the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts: [...] (d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment; [...]”. See: Yearbook of the ILC 1995, Vol.II, Pt.2, p.97.

<sup>57</sup> “Article 26. Wilful and severe damage to the environment: An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to...].” See: Yearbook of the ILC 1995, Vol.II, Pt.2, p.97

<sup>58</sup> Yearbook of the ILC 1993, Vol.II, Pt.1, p.72, paras.26-27.

<sup>59</sup> A/CN.4/448 and Add.1, contained in Yearbook of the ILC 1993, Vol.II, Pt.1, p.66, para.50 (Australia), and p.68, para.30 (Austria)

<sup>60</sup> A/CN.4/448 and Add.1, contained in Yearbook of the ILC 1995, Vol.I, 2386<sup>th</sup> m., pp. 52; and 2387<sup>th</sup> m., p. 52-53

## **Ecocide is the missing 5<sup>th</sup> Crime Against Peace**

Consequently in 1995 it was decided to establish a further Working Group, it was restricted to the ambit “on the issue of wilful damage to the environment.” The group came together at the beginning of the ILC’s 48<sup>th</sup> session in 1996, to consider this far more limited inclusion of crimes of environmental damage in *the Code*.<sup>61</sup> The members included Mr. Thiam, Mr. Tomuschat, Mr. Kusuma-Atmadja, Mr. Szekely and Mr. Yamada<sup>62</sup>. As the group was not listed with the other working groups at the beginning of the 1996 Yearbook of the ILC, it has not been possible to detect exactly which members took part in its discussions.

What we do know is that this Working Group issued a report on the topic titled “Document on crimes against the environment”<sup>63</sup> by Mr. Tomuschat. In his recommendations he suggests a) to either retain environmental crimes as a distinct and separate provision; or b) to include environmental crimes as an act of crimes against humanity; or c) to add the ecocide part to the provision on war crimes.

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### **How any reference to a crime of ecocide disappeared**

In 1996 at a meeting of the ILC, the then Chairman, Mr. Ahmed Mahiou, unilaterally decided to remove the crime of ecocide completely as a separate provision. Without putting it to a vote, a decision was made by him despite the remit of the Working Group – “to work on crimes against the environment”. Mr. Szekely immediately objected.<sup>64</sup> What was finally put to the vote was a far narrower remit: with ecocide gone, all that was left to decide on was whether to include environmental damage solely in the context of a war crime or to include it as a crime against humanity. The result was that the Drafting Committee was notified only to draft the far smaller remit of environmental damage in the context of war crimes, and not in the context of crimes against humanity.<sup>65</sup>

The crime of ecocide had now been removed from all draft documents. What happened next is not entirely clear, but the documentation uncovered here gives an indication of how decisions made prior to a vote have changed the course of ecocide being implemented as a Crime Against Peace. Decisions were made contrary to prevailing opinion of the time.

The exclusion of a crime for damage to the environment during peacetime was sudden. Documentation as to why this occurred is less well-recorded. Our research has thrown up one comment by the Special Rapporteur of the *Draft Code of Offence against the Peace and Security of Mankind*, Mr. Thiam of Senegal, who stated in his 13<sup>th</sup> report that the removal was due to comments of a few

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<sup>61</sup> Working group was established at the 2404<sup>th</sup> meeting. See: Vol.I and Vol. II, Pt.2 of the Yearbook of the ILC, 1995.

<sup>62</sup> Yearbook of the ILC, 1996, Vol. I, 2428th meeting, p.5, para.5.

<sup>63</sup> ILC(XLVIII)/DC/CRD.3 (included in Yearbook of the ILC, 1996, Vol. II, Pt. 1)

<sup>64</sup> Yearbook of the ILC, 1996, Vol. I, 2431th meeting, Tuesday, 21 May 1996

<sup>65</sup> Ibid. Including environmental damage in the context of war crimes: 12 votes in favour to 1, 4 abstentions; in the context of crimes against humanity: 9 votes to 9, 2 abstentions.

## **Ecocide is the missing 5<sup>th</sup> Crime Against Peace**

governments from 1993 that Thiam describes as being largely opposed to any form of inclusion of Article 26. (Article 26 “wilful and severe damage to the environment”).<sup>66</sup>

### *Final Outcome*

Article 26 was removed in 1996. The final Article adopted by the ILC and further amended by the Drafting Committee refers to intentionally causing “widespread, long-term and severe damage to the natural environment” within a war context<sup>67</sup>. This was the final end reference to a crime against the environment which made it into the Rome Statute.

Christian Tomuschat, who was a long-term member of the ILC from 1985 to 1996 - 11 years in total - and a member of the Working Group on the issue of wilful damage to the environment, published another article in 1996 on the development of the provision on crimes against the environment during the drafting and codification process of the draft Code. Here he says “One cannot escape the impression that nuclear arms played a decisive role in the minds of many of those who opted for the final text which now has been emasculated to such an extent that its conditions of applicability will almost never be met even after humankind would have gone through disasters of the most atrocious kind as a consequence of conscious action by persons who were completely aware of the fatal consequences their decisions would entail.” The article on environmental crime was limited to a crime of intent, which is the only provision in international crime to hold a perpetrator responsible for environmental damage.<sup>68</sup>

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## **Ecocide is the missing 5th Crime Against Peace**

Although the Code of Crimes Against the Peace and Security of Mankind morphed into a lesser Rome Statute, some States transferred the draft Crimes Against Peace including ecocide into their own Criminal Penal Codes. Vietnam,<sup>69</sup> no doubt as a consequence of its experiences during the long Vietnam war was the first county to include a crime of ecocide in its domestic law, followed by Russia<sup>70</sup> in 1996, just prior to its collapse. Although ecocide had been taken off the table at the United Nations, the crime itself was adopted by States who preferred to include all the draft

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<sup>66</sup> A/CN.4/466, included in the Yearbook of the ILC 1995, Vol.II, Pt.1, p.35

<sup>67</sup> Article 8. War crimes:

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: [...]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...] (iv) Intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; [...]

<sup>68</sup> Article 14. Crimes against humanity: 6. Any serious and intentional harm to a vital human asset, such as the human environment. See: Yearbook of the ILC 1989, Vol.II, Pt.1, p.86, para.30.

<sup>69</sup> Penal Code Vietnam 1990 Art 278. “Ecocide, destroying the natural environment”, whether committed in time of peace or war, constitutes a crime against humanity.

<sup>70</sup> Criminal Code Russian Federation 1996 Art 358.

## **Ecocide is the missing 5<sup>th</sup> Crime Against Peace**

Crimes Against Peace. In the aftermath of the collapse of the USSR, over a period of seven years new States that were formed drew up their own Criminal Penal Codes. Some have included ecocide as a named Crime Against Peace in their Penal Codes, specifically Armenia,<sup>71</sup> Belarus,<sup>72</sup> Republic of Moldova,<sup>73</sup> Ukraine<sup>74</sup> and Georgia.<sup>75</sup> In addition three other countries have done the same; Kazakhstan,<sup>76</sup> Kyrgyzstan<sup>77</sup> and Tajikistan.<sup>78</sup>

Like a jigsaw puzzle the pieces are beginning to come together: there is explicit reference to ecocide as a crime in time of peace or war by Vietnam; a current prosecution by the Prosecutor General of Kyrgyzstan<sup>79</sup> demonstrates the use of the crime during peacetime and Georgia identifies the crime of ecocide to 'be punishable by imprisonment extending from eight to twenty years in length.'

Certain conclusions can be drawn here: these countries clearly favoured the legal concept of ecocide and have chosen to deliberately set out the crime in their own Criminal Penal Codes. Ecocide was a crime that had been previously set out for international adoption at some earlier date. In some of the Criminal Penal Codes there is explicit reference to the fact that ecocide constitutes a crime against the peace and security of mankind, which can be taken as an explicit reference to the Draft Code of Crimes against the Peace and Security of Mankind. Whether the crime of ecocide has been determined to be a crime of strict liability is not clear from these Criminal Penal Codes but what is clear is that ecocide was recognised as a crime which the international community was deeming to be so serious as to be included in its draft Code of Crimes against the Peace and Security of Mankind.

What this paper trail demonstrates is that the work has already been done. Discussions lasted over a decade. Maybe now is the time to include what has been missing all along. That crime is ecocide.



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<sup>71</sup> Criminal Code of the Republic of Armenia 2003 Art 394.

<sup>72</sup> Criminal Code Belarus 1999 Art 131.

<sup>73</sup> Penal Code Republic of Moldova 2002 Art 136.

<sup>74</sup> Criminal Code of Ukraine 2001 Art 441.

<sup>75</sup> Criminal Code of Georgia 1999 Art 409.

<sup>76</sup> Penal Code Kazakhstan 1997 Art 161.

<sup>77</sup> Criminal Code Kyrgyzstan 1997 Art 374.

<sup>78</sup> Criminal Code Tajikistan 1998 Art 400.

<sup>79</sup> See: <http://www.universalnewswires.com/centralasia/economy/viewstory.aspx?id=11285>; last accessed 17/07/12.