



**Human Rights Consortium**

SCHOOL *of* ADVANCED STUDY  
UNIVERSITY OF LONDON

**Ecocide Project**



**The Ecocide Project**  
**‘Ecocide is the missing 5th  
Crime Against Peace’**

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A report by Anja Gauger, Mai Pouye Rabatel-Fernel,  
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# Ecocide is the missing 5th Crime Against Peace

Anja Gauger, Mai Pouye Rabatel-Fernel, Louise Kulbicki, Damien Short and Polly Higgins

This is the first of a series of research papers for the University of London Human Rights Consortium's Ecocide Project. As the 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 about the history of the Law of Ecocide within the United Nations. There are still gaps in the research which need to be filled, but this paper provides a foundation of understanding on which we must build. It points the way towards a potential solution to the destructive behaviour that has created the ecological crisis we now face. Following the failures of the UN at the Climate Change Negotiations at Copenhagen in 2009 and the Rio+20 Earth Summit in 2012 to combat escalating environmental problems this paper strikes a note of positivity at a time when a new solution is needed more than ever.

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

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## Summary

The term 'ecocide', the extensive destruction of ecosystems, has been around since the 1970s when it was first recorded at the Conference on War and National Responsibility, Washington in February of that year.

From the 1970s onwards many academics and legal scholars argued for the criminalisation of ecocide and debated the elements required for such an international crime. During the 1970s, 80s and 90s making ecocide an international crime was also considered by the United Nations International Law Commission (ILC) for inclusion in the Code of Crimes Against the Peace and Security of Mankind ('the Code'), which later became the Rome Statute,<sup>1</sup> and by the Sub-Commission on Prevention of Discrimination and Protection of Minorities for inclusion in the extension of the Convention on Genocide.<sup>2</sup> A number of questions kept arising: Should ecocide be a crime in peacetime and wartime? Does the offender's intent to commit the crime matter or are the consequences of extensive destruction of ecosystems severe enough to warrant ecocide being a crime of strict liability regardless of the offender's intent?<sup>3</sup>

This report pieces together and examines the history of the Law of Ecocide, shedding a whole new light on a corner of history that would otherwise have remained buried. Perhaps one of the most interesting issues highlighted by this report concerns the manner in which ecocide, a concept that was familiar and supported by many as one that should be enshrined in international law, was dropped by the ILC in 1996.

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1 Rome Statute of the International Criminal Court 17 July 1998 (last amended 2010).

2 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.

3 Strict Liability makes a person legally responsible for an offence regardless of his or her intention to commit it.

### Becoming a recognised term and the academic debate

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>4</sup> The term itself became well-recognised and in 1972 at the United Nations (UN) Stockholm Conference on the Human Environment, Mr Olof Palme, then Prime Minister of Sweden, spoke explicitly in his opening speech of the Vietnam War as an 'ecocide'.<sup>5</sup> The Stockholm Conference focused international attention on environmental issues perhaps for the first time, especially in relation to environmental degradation and trans-boundary pollution. The latter 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 Ms Indira Gandhi from India and the leader of the Chinese delegation, Mr Tang Ke, also denounced the Vietnam War on human and environmental terms.<sup>6</sup> There was no reference to ecocide in the official outcome document of the Stockholm conference. The Conference established the UN's Environment Programme (UNEP) and thirty years later at the Rio+20 Earth Summit governments recognised the need to strengthen UNEP as the leading global environmental authority that sets the global environmental agenda.

The potential for a law criminalising ecocide was also discussed in the unofficial events running parallel to the official UN Stockholm Conference, including at the 'Folkets Forum' – the People's Summit – where a working group on the Law of Genocide and Ecocide was established.<sup>7</sup> 'Almost every popular movement and group of NGOs addressed the issue. A demonstration with 7,000 participants was held.'<sup>8</sup> Dai Dong, a branch of the International Fellowship of Reconciliation,<sup>9</sup> sponsored a 'Convention on Ecocidal War' (CEW) which took place in Stockholm, Sweden.<sup>10</sup> The CEW brought together many people including Professor Richard A. Falk, expert on the international law of war crimes; Dr Robert J. Lifton, a psycho-historian; Dr Arthur H. Westing and Dr Egbert L. Pfeiffer, biologists; Mr Don Luce and Mr Fred Branfman, academics; and it was coordinated by John Lewallen.<sup>11</sup> The CEW called for a UN Convention on Ecocidal Warfare, which would, amongst other matters, seek to define and condemn ecocide as an international crime of war.<sup>12</sup> A draft International Convention on the Crime of Ecocide was prepared by Falk for a journal article he published in 1973.<sup>13</sup> It recognised that the Convention on Genocide was deficient and that there was a need for another international law that could address ecological crimes. Falk's draft convention, though, primarily focused on ecocide as a war-crime committed with intent, failing to set out peacetime provisions.

Although at this time ecocide was not legally defined, there was much academic debate over what would constitute the crime, in particular whether intent to commit destruction of ecosystems was a necessary element of the crime. John H.E. Fried, an educator, specialist in international law and member of the Lawyers' Committee on Nuclear Policy, believed ecocide to denote 'various measures of devastation and destruction which... aim at damaging or destroying the ecology of

4 New York Times, 26 February 1970; quoted in Weisberg, Barry (1970), *Ecocide in Indochina*. Canfield Press, San Francisco.

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

6 Ibid.

7 Ibid.

8 Ibid.

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

10 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. <http://www.aktivism.info/rapporteur/ChallengingUN72.pdf> last accessed 16/07/12.

11 Ibid.

12 Ibid.

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

geographic areas to the detriment of human life, animal life, and plant life'.<sup>14</sup> It was recognised by others, however, that ecocide often occurs simply as a consequence of business rather than being a result of a predetermined, intended direct attack on the environment. Falk, in his draft (1973) Ecocide Convention, explicitly states at the outset that 'man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace.'<sup>15</sup> Westing stated that 'intent may not only be impossible to establish without admission but, I believe, it is essentially irrelevant.'<sup>16</sup>

### From academic debate to UN discussions

With much academic debate around the concept of ecocide and an increase in awareness amongst civil society as to the severe consequences of environmental damage, pressure mounted on governments to address the issue. But how? During the 1970s the idea of expanding the 1948 Convention on Genocide led to an extensive inquiry by the UN as to how it could be improved, including the possibility of criminalising ecocide alongside genocide. It is here that the institutional history of the Law of Ecocide within the UN begins. But before delving into this history it is important to first take a step further back in time to understand the concept - or rather misconception - of ecocide's more well known counterpart; genocide and the lessons to be learned from the process of its legal codification.

#### *Lessons from 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 of banning the destruction, both physical and cultural, of human groups, invoking the linked concepts of 'barbarity' 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>17</sup> Lemkin envisaged a law addressing the deliberate destruction of a nation or ethnic group in one or both of the following ways:

- a. Physical genocide; by killing its individual members, derived from Lemkin's notion of 'barbarity'; and/or
- b. Cultural genocide; by undermining its way of life, derived from Lemkin's notion of 'vandalism'.<sup>18</sup>

Lemkin's original definition crucially identified the destruction of people by means other than direct physical extermination, which could include the destruction of the environment. Ecocide is the direct physical destruction of a territory which can in some instances lead to the death of humans and other beings. Ecocide can and often does lead to cultural damage and destruction; and the direct destruction of a territory can lead to cultural genocide. For example, destroying an indigenous peoples' territory can critically undermine its culture, identity and way of life.

The second element of Lemkin's 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

14 Fried, John H.E. (1972): 'War by Ecocide'. In: Thee, Marek (ed.) (1973). *Bulletin of Peace Proposals*. 1973, Vol.1. Universitetsforlaget, Oslo, Bergen, Tromsø.

15 Rome Statute of the International Criminal Court 17 July 1998 (last amended 2010).

16 Westing, Arthur H. (1974): 'Proscription of Ecocide'. In: *Science and Public Affairs*, January 1974.

17 Lemkin, Raphael (1944): *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944), pp. 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.

18 Lemkin, R. (1944: 79).

material needs. 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; each cultural group has its own unique, distinctive genus deserving of protection.<sup>19</sup> National culture for Lemkin was an essential element of world culture and nations have a life of their own that is 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>20</sup>

### **From cultural genocide to ecocide: the history of the Law of Ecocide within the UN**

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 was the most important part of the Convention. In his 1958 autobiography<sup>21</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>22</sup>

Lemkin had to drop a cause that, in his words, 'was very dear to me'.<sup>23</sup> For him, the heart had been ripped out of the Convention on Genocide and a major method of genocidal destruction was not criminalised. The removal of this method led to a preoccupation, in legal and scholarly realms, with proving perpetrator intention rather than genocidal impacts, and to the popular (mis)understanding of the crime of genocide as simply racially-motivated mass killing.<sup>24</sup>

In the years following the implementation of the 1948 Convention on Genocide many governments began to voice their concerns about its effectiveness. Genocide was still a reality in many parts of the world and seemed to offer little to those groups it was designed to protect. This was, in part, due to the narrow interpretation of what constituted genocide described above and the omission of cultural genocide as a crime. Such concerns eventually led to an extensive inquiry into the Convention on Genocide by the UN in and it was in just such a review that we find the first attempt to criminalise environmental destruction in international law.<sup>25</sup>

UN papers demonstrate that members and delegates of several UN institutions, including the Sub-Commission on Prevention of Discrimination and Protection of Minorities,<sup>26</sup> the Legal Committee of the General Assembly and the International Law Commission discussed, at different times over a

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19 Short, Damien (2010): 'Cultural genocide and indigenous peoples: a sociological approach', *The International Journal of Human Rights* Vol. 14, Nos. 6–7, November–December 2010, pp. 831–46.

20 Lemkin, R. (1944: 91).

21 Docker, John (2008): '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.

22 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.

23 Ibid.

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

25 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.

26 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. <http://www.un.org/rights/dpi1774e.htm> last accessed 16/07/12.



forty-year period, how to define a crime that would protect the environment. These institutions met frequently to discuss the elements and issues involved in formulating such a definition, including the level of intent required for an offence to constitute ecocide.

*The Sub-Commission on Prevention of Discrimination and Protection of Minorities*

The Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) prepared a study for the UN's Human Rights Commission discussing the effectiveness of the Genocide Convention, proposing the addition of ecocide, as well as reintroduction of cultural genocide, to the list of crimes. The study was prepared by the Special Rapporteur Mr Nicodème Ruhashyankiko, with the final draft published in 1978. At this time many Sub-Commission members were supportive of the idea that additional instruments be adopted.<sup>27</sup> Supporters who spoke out in favour of a crime of ecocide included Romania and the Holy See.<sup>28</sup> Within the Sub-Commission Mr Abdelwahab 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>29</sup>

In 1985, the concept of ecocide surfaced again, within a report on the question of the prevention and punishment of the crime of genocide prepared for the Sub-Commission by then Special Rapporteur Mr Benjamin Whitaker.<sup>30</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 the inclusion of a crime of ecocide.<sup>31</sup> Whitaker recommended that 'further consideration should be given to this question'.<sup>32</sup> In subsequent discussions in the Sub-Commission, again members spoke out in favour of the creation of a law criminalising ecocide. A draft resolution, prepared for the Commission on Human Rights, submitted by Mr Jules Deschênes, a Justice of the Court of Appeal of Quebec, and Mr Chama Mubanga-Chipoya, Sub-Commission Member, as part of the review, included the suggestion that Whitaker expand and deepen the study of the notions of 'cultural genocide', 'ethnocide' and 'ecocide'. In addition, a draft article on cultural genocide had also been prepared<sup>33</sup> although not adopted. In the UN report on its 38th session in 1985,<sup>34</sup> there is no reference as to how the Sub-Commission finally determined what route they were to take. For reasons not known the effort to enshrine ecocide as a crime was not pursued any further by the Sub-Commission.

### **The UN's International Law Commission**

In the 1980s the UN's International Law Commission (ILC) considered the inclusion of an environmental crime within the Draft Code of Crimes Against the Peace and Security of Mankind<sup>35</sup> ('the Code'). This document eventually became the Rome Statute of the International Criminal Court, adopted in 1998 and entered into force on 1 July 2002. As of July 2012 there are 121 state parties to this internationally legally-binding statute.<sup>36</sup> It now codifies four named international crimes – genocide, war crimes, crimes against humanity, and acts of aggression.

27 Austria, Holy See, Poland, Romania, Rwanda, Congo and Oman; see E/CN.4/Sub.2/416, pp.11–117.

28 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 p.130.

29 E/CN.4/Sub.2/SR.658, p.53.

30 E/CN.4/Sub.2/1985/6.

31 E/CN.4/Sub.2/1985/6, para.33.

32 Ibid.

33 Ibid. p.124. Supportive governments: Austria, Holy See, Ecuador, Israel, Oman, and Romania.

34 Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 38th session, Geneva, 5–30 August 1985 E/CN.4/Sub.2/1985/57.

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

36 [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.



The ILC is mandated to promote the progressive development of international law and its codification.<sup>37</sup> 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>38</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>39</sup> From the very outset of the United Nations, the 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>40</sup> The Code was on the agenda of the ILC from 1949–57 and 1982–96. The gap in time arose out of difficulties in defining the Crime of Aggression and, as a result, the General Assembly postponed the drafting of the Code. The Code was revisited between 1982 and 1996; in 1982 Mr 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>41</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.

The period between 1984 and 1996 proved to be pivotal; during this time there had been extensive engagement in the ILC about the inclusion of a law regarding extensive environmental damage in the Code. Article 26 of the Code stated, ‘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...’; this was in light of precedence<sup>42</sup> and corresponded with 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 with the Code.<sup>43</sup>

Between 1984 and 1986, consideration of whether to include in the Code ‘acts causing serious damage to the environment’<sup>44</sup> led some members<sup>45</sup> to re-open the debate in 1986 on whether ecocide was a crime of intent.<sup>46</sup> Criticisms centred on the inclusion of the element of intent and on the fact that the final draft of Article 26 did not address environmental crime by name – it contains no reference to ecocide. 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 of the fact that ecocide during peace-time is often a crime without intent as it occurs as a by-product of industrial and other activity.

Belgium stated: ‘[t]his difference between articles 22 [war crimes]<sup>47</sup> and 26 [“wilful and severe damage to the environment”] does not seem to be justified. Article 26 should be amended to conform

37 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.

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

39 <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.

40 General Assembly resolution 177 (II) of 21 November 1947.

41 Yearbook of the ILC, 1954, Vol. II, pp. 151–2.

42 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, pp.94–6.

43 A/CN.4/377 and Corr.1, para.46, p.95.

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

45 Yearbook of the ILC, 1986, Vol. I: Mr. Stephen C. McCaffrey (USA), pp.119–20, 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.

46 Yearbook of the ILC, 1986, Vol. II, Pt. 2, p.46, para.96.

47 One provision of Art. 22 on war crimes covers damage caused 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.

with the concept of damage to the environment used in article 22, since the concept of wilful damage is too restrictive.<sup>48</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’,<sup>49</sup> 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>50</sup>

However, the ILC – instead of removing reference to the element of intent from the Article – determined to remove Article 26 altogether. Reactions within the ILC to the announcement of the withdrawal of Article 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 discussions between ILC members failed to further the progress of the debate about the law of ecocide: in 1995 it was decided at least twice to hold informal meetings ‘to facilitate the consultations and ensure a truly frank exchange of views’.<sup>51</sup> Consequently in 1995, at the ILC’s 47th session, it was decided to establish a further Working Group that would meet at the beginning of the 48th session to examine the possibility of covering the issue of wilful and severe damage to the environment in the Draft Code of Crimes Against the Peace and Security of Mankind.<sup>52</sup> The group came together at the beginning of the ILC’s 48th session in 1996, to consider this far more limited inclusion of crimes of environmental damage in the Code.<sup>53</sup> The members of the Working Group included Thiam, Mr Christian Tomuschat, Mr Mochtar Kusumaatmadja, Mr Alberto Szekely and Mr Chusei Yamada.<sup>54</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>55</sup> by Tomuschat. In his recommendations he suggests either to:

- a. retain environmental crimes as a distinct and separate provision; or
- b. include environmental crimes as an act of crimes against humanity; or
- c. include environmental crimes as a war crime.

Despite this document, none of his recommendations were followed up. Worse still, 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’. Szekely immediately objected.<sup>56</sup> What was finally put to the vote was far more narrow in scope; 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, which would be applicable in peacetime. 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>57</sup>

48 Yearbook of the ILC 1996, Vol.II, Pt.1, p.18, para.27.

49 *Mens rea* is the necessary element of a crime – in this case intent to inflict environmental damage.

50 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).

51 A/CN.4/448 and Add.1, contained in Yearbook of the ILC 1995, Vol. I, 2386th m., p. 52; and 2387th m., pp. 52–3.

52 ILC(XLVIII)/DC/CRD.3 (included in Yearbook of the ILC, 1996, Vol. II, Pt. 1) para.1.

53 Working Group was established at the 2404th meeting. See: Vol. I and Vol. II, Pt. 2 of the Yearbook of the ILC, 1995.

54 Yearbook of the ILC, 1996, Vol. I, 2428th meeting, p.5, para.5. Draft articles on State Responsibility (adopted in 1980) Article 19. International crimes and international delicts, (adopted 1980) 3. Subject to paragraph 2, and on the basis of the rules of international law in force, an 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.

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

56 Yearbook of the ILC, 1996, Vol. I, 2431th meeting, 21 May 1996.

57 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.

The exclusion of a crime addressing 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 Code, Mr Thiam of Senegal, who stated in his 13th report<sup>58</sup> that the removal was due to comments of a few governments from 1993<sup>59</sup> that Thiam describes as being largely opposed to any form of inclusion of Article 26.

### Final outcome

Article 26 was removed completely, and somewhat mysteriously, from the Code. In the final version adopted by the ILC, after further amendments by the Drafting Committee, Article 8 on War Crimes refers to the intentional creation of 'widespread, long-term and severe damage to the natural environment' within a war context.<sup>60</sup> This was the legal definition of a crime against the environment which made it into the final Rome Statute.

Tomuschat, who was a long-term member of the ILC from 1985 to 1996 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 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.<sup>61</sup>

Thus the Rome Statute's Article 8 (b IV) on War Crimes is the only provision in international law to hold a perpetrator responsible for environmental damage. Of course, the Article does, however, limit the crime to wartime situations and to intentional damage.

### *State responsibility and transboundary pollution*

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 was adopted in 1976.<sup>62</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>63</sup> One of its draft provisions of 1976 defines environmental damage as an international crime.<sup>64</sup> Making states

58 A/CN.4/466. Thirteenth report on the Draft Code of Crimes Against the Peace and Security of mankind, by Mr. Doudou Thiam, Special Rapporteur, Draft Code of Crimes Against the Peace and Security of Mankind (Part II) – including the draft statute for an international criminal court Extract from the Yearbook of the International Law Commission: 1995, vol. II(1) p.35, para. 8.

59 Ibid, p.35, para 2.

60 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; [...]

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

62 Art 19. International Crimes and International Delict: '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.

63 International liability for injurious consequences arising out of acts not prohibited by international law.

64 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.'

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. How did the concept of transboundary harm shift in this way?

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

Although the Code of Crimes Against the Peace and Security of Mankind morphed into the lesser Rome Statute, some states transferred the draft Crimes Against Peace, including ecocide, into their own national penal codes. Vietnam,<sup>65</sup> no doubt as a consequence of its experiences during the long Vietnam War, was the first country to include a crime of ecocide in its domestic law, followed by Russia<sup>66</sup> in 1996 after the collapse of the USSR in 1991. Although ecocide had been taken off the table at the United Nations, the crime itself was adopted by states that preferred to include all the draft Crimes Against Peace in their national penal codes. In the aftermath of the collapse of the USSR, over a period of seven years, new states that were formed drew up their own national penal codes. Some have included ecocide as a named Crime Against Peace, specifically Armenia,<sup>67</sup> Belarus,<sup>68</sup> Republic of Moldova,<sup>69</sup> Ukraine<sup>70</sup> and Georgia.<sup>71</sup> Georgia identifies the crime of ecocide to 'be punishable by imprisonment extending from eight to twenty years in length'. In addition, three other countries have done the same; Kazakhstan,<sup>72</sup> Kyrgyzstan<sup>73</sup> and Tajikistan.<sup>74</sup>

Certain conclusions can be drawn here: elements of the international community clearly approve of the legal concept of ecocide and have chosen to deliberately set out the crime in their own national penal codes. Ecocide was a crime that had been set out for international adoption at an earlier date. In some of the national 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. Further research is needed to determine whether the crime of ecocide in these national laws is a crime of strict liability and to assess how effective these laws are. But what is clear is that ecocide was recognised as a crime which the international community had deemed to be so serious that it was included in its Draft Code of Crimes Against the Peace and Security of Mankind.

This paper demonstrates that much of the background work required for developing the Law of Ecocide has already been done. Discussions within the UN lasted over a decade. Now is the time to include what has been missing all along: the 5th international crime against peace, ecocide.

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65 Penal Code Viet Nam 1990 Art. 278. 'Ecocide, destroying the natural environment', whether committed in time of peace or war, constitutes a crime against humanity.

66 Criminal Code Russian Federation 1996 Art. 358.

67 Criminal Code of the Republic of Armenia 2003 Art. 394.

68 Criminal Code Belarus 1999 Art. 131.

69 Penal Code Republic of Moldova 2002 Art. 136.

70 Criminal Code of Ukraine 2001 Art. 441.

71 Criminal Code of Georgia 1999 Art. 409.

72 Penal Code Kazakhstan 1997 Art. 161.

73 Criminal Code Kyrgyzstan 1997 Art. 374.

74 Criminal Code Tajikistan 1998 Art. 400.





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