Centre for
Climate Crime
and Climate Justice

Response to Call for Input to the Thematic Report on the role of Justice Systems in Addressing the Climate Crisis issued by Special Rapporteur on the independence of judges and lawyers

Our input is drawn from work done by the Centre for Climate Crime and Climate Justice on a long-term project *The Politics of Ecocide Law*. This statement relates specifically to the historical and current proposals to establish 'ecocide' as a stand-alone crime.

Historical Context

The call to establish a crime of ecocide has echoed far and wide, not just amongst lawyers – particularly Stop Ecocide – but amongst activists, indigenous peoples, trade unionists, politicians and governments. In establishing such a crime, it is argued, the world will be able to set itself against the destruction of the environment, treating it as seriously as the prevention of genocide and other international crimes.

International lawyer Richard Falk published a draft law of ecocide in 1973 that he intended to form the basis of a binding international treaty. In the article that proposes it, Falk launched a critique of the 'demonic logic' of counter-insurgency stressing that the US's intention was to separate the people from the land by making the land uninhabitable. Falk's set out a proposed new international convention of the crime of ecocide, an offence that was primarily (though not exclusively) constructed for prohibiting what he termed "environmental warfare". Falk's proposal was discussed in various UN fora but was never adopted. The proposal defined the offence as:

"…any of the following acts committed with
intent to disrupt or destroy, in whole or in part, a human ecosystem:
a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops;
d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives."

It is only at the very end of the text that the relevance of this offence to peacetime is apparent. "The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives" might apply to any deforestation project, to any land development project whether for agriculture, extraction or construction

purposes. With industrial application, might this draft ecocide law now merely be a summary of the complex and uncontrolled threats to our ecosystem we are facing for *both* military and industrial objectives?

From the mid-1980s, the UN's International Law Commission (ILC) discussed an approach based upon international criminal law, in which individuals could be held accountable. This, of course, marked a shift away from rooting ecocide within the concrete political-economic context of imperialism – and imperialist war in particular – and towards a more general focus on the misconduct of individuals. In this sense, whilst such a definition was in principle a broader one than those which preceded it – as it explicitly envisaged the crime as one which could occur in peacetime – it was significantly abstracted from the social and material context in which Falk's definition was advanced.

It was perhaps inevitable that during the 1980s and 1990s, when the full extent of the environmental collapse was being revealed, and the broader critique of capitalism began to recede, ecocide began to assume a broader meaning. The term came to be used by environmental movements to refer to any attack and destruction of the environment spanning the nuclear experiments in the Pacific islands, the pollution of rivers, the poisoning of fertile soil, the corporate destruction of the rain-forest in equatorial land, and the alarming acceleration of animal species because of the global warming.

That is, in recent decades the idea of ecocide has been taken out of anti-war and anti-imperialist context; it is now a looser concept that is used to refer to the killing of the environment by human activity. This tendency has been particularly marked by the transformation in the legal context.

This renewed call for a crime of ecocide in the first two decades of the new millennium was led by Scottish barrister Polly Higgins raised vital questions about the role of law in encouraging the political action needed to deal with the current environmental crisis. Her draft law of ecocide is widely regarded as the blueprint for the current version, and indeed Higgins was the founder and leader of Stop Ecocide. However, her original proposal is much more expansive.

Higgins used a relatively broad definition: "extensive damage to, destruction of, or loss of ecosystem(s) of a given territory", such that it severely diminishes peaceful enjoyment of that given territory or another territory by its inhabitants. This test was based on strict liability meaning that a defendant could be held legally responsible even where there is no clear fault or criminal intent on their part. This is important because it overcomes the prohibitively high threshold for senior managers in charge of large, complex firms or industrial processes to be found guilty using rules of *mens rea*. Finally, Higgins' proposal sets out a mechanism of superior responsibility in which Directors, Partners, Leaders and any other persons with superior responsibility can be held responsible for offences committed by other members of staff under their authority (as can members of governments, and ministers in positions of responsibility).

Ecocide Today

In recent years, proposals for a law of ecocide have been revived, partly as a result of the work of Stop Ecocide, an organisation that was co-founded by Polly Higgins. In November 2020, Stop Ecocide convened an expert panel of leading lawyers and legal thinkers to establish a

potential definition of ecocide. In June 2021 this work was completed and these proposals have become the key reference point.

The Stop Ecocide proposals define 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' (Stop Ecocide Foundation, 2021)

It is worth noting that this definition is significantly narrower than Higgins' earlier one. On a very basic level, it is not a strict liability offence, instead articulating a *mens rea* of 'knowledge' of a 'substantial likelihood'. Similarly, a threshold of extensive damage to an ecosystem is replaced with something that looks to be a higher threshold of severe and either widespread or long-term damage to the environment. Higgins' definition sets out damage caused by "human agency or other causes", whereas the Stop Ecocide proposal stipulates "acts." There is also no mechanism of superior responsibility to allow Directors, Partners, Leaders and any other persons with superior responsibility to be more easily convicted.

Perhaps most importantly the 'wanton' qualification severely limits the ability of ecocide law to tackle the climate crisis. It is widely acknowledged that the crisis stems not from exceptional or extraordinary acts, but by the everyday activities of industrial capitalism. The wanton requirement, defined as 'reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated' is focused on spectacular acts which cannot capture the structural drivers of the climate crisis.

The Limits of the ICC

There is little reason to believe that the ICC is the appropriate venue for ecological crimes. Whilst there is not yet a crime of 'ecocide' in the Rome Statute, War Crimes already deal with environmental destruction.[1] However, despite a 2016 case selection policy from the Office of the Prosecutor explicitly seeking to prioritise ecological crimes, there have been no such cases in the past 5 years before the court, even though some have been presented to the Office (for example Cambodia and deforestation) (Global Witness, 2021).

This raises an important point about the ICC's political neutrality. In the context of limited funding, and the length of time that an ICC prosecution can take, the ICC must act *selectively* in its choice of which situations to investigate and which individuals to prosecute. In this way, despite its putatively apolitical character, the ICC must necessarily make political choices in how to allocate its resources (Schabas, 2010). This – on a very basic level – undermines a claimed advantage of international criminal law: namely that its status as law and not politics grants it a special level of legitimacy.

Aside from the ICC's failure to pursue environmental crime the ICC's 'positive' record is also problematic. As of January 2024, the ICC has indicted 51 people, of those 51, 3 are either Russian nationals or nationals from former Soviet states indicted in the context of the Russo-Georgian war (International Criminal Court, 2024). Furthermore in March 2023 the ICC issued arrest warrants were issued for Vladimir Putin and Maria Lvova-Belova in relation to the 2022 Russian invasion of Ukraine (International Criminal Court, 2023). The rest, are racialised people – of African and/or Arabic descent. No white individuals from Britain, the European Union or the United States have been indicted.

[1] Article 8(2)(b)(iv) of the Rome Statute.

The ICC's selectivity has been primarily turned against racialised people in the Global South and has recently hit upon enemies of 'the West'. On their own, these disparities are already a problem, but taken together they significantly undermine the possibility that – even if ICC's focus was shifted to ecocide – it would target the corporate power in the Global North most responsible for the planet's destruction.

What of the claims of effectiveness that are based on the deterrent power of ecocide? Deterrence theory is based upon the idea that individual conduct is governed by rational calculations. These rational calculations weigh up the chances of being caught and the severity of the punishment against the 'benefits' of committing a crime. However, the issue of the ICC's capacity compromises this reasoning. Due to the low number of cases being heard in the ICC, there is no plausible scenario in which an ICC indictment could be a realistic prospect for offenders. As noted above, there have been 31 cases tried at the ICC, and 51 individuals indicted, this amounts to a rate of less than 2 cases *per* year and 3 individuals *per* year. Even assuming around half of the cases processed by the ICC were cases of ecocide – which, as above, is highly unlikely – this would amount to less than 1 case *per* year and one or two individuals *per* year. Factoring in the ICC's track record of racialised indictment, the chances of an executive from the Global North being tried are extremely slim. Given corporate executives' access to accurate assessments of the chances of being caught and prosecuted, they are extremely unlikely to be deterred.

One universal guiding principle for senior officers and directors of profit-making corporations is the principle of shareholder primacy. While directors have some discretion in law to pursue policies that might benefit other groups, they can only do so if such policies can, in the final reckoning, be regarded as being in the interests of shareholders. The way the law establishes executives' and directors' fiduciary responsibilities ensures that their discretion to take decisions is ultimately limited by their primary duty to ensure the success of the corporation, a duty that is normally interpreted as acting on behalf of shareholders. Thus, even a guilt-ridden individual corporate executive must conform to corporate law, a set of rules that directly uphold capitalism's laws of motion.

What Role for Law?

Firstly, we must ask how legal changes can empower social movements, indigenous peoples, workers and their trade unions etc. in contesting ecocidal social relations. Here there are a whole host of potential avenues too exhaustive to list here, but they can include:

- strengthening land rights for indigenous communities;
- facilitating the ability of trade unions to collectively bargain over environmental issues;
- facilitating private law claims against corporate actors and;
- entrenching and protecting the right for activists to take direct action against corporations.

Secondly, we must ask how the law can best be used to weaken or at least slow down, the climate breakdown? Typically, the way to punish corporations *qua* corporations it through *fines*. However, more often than not, workers absorb those costs because decisions tend to cut staffing levels, wages, or delay maintenance programmes. This very often has perverse consequences. Fines tend to lead eventually to a further decline in service quality, pollution control, and so on. Fines ultimately have a negligible impact on shareholders. As we have noted above, because of the 'fiduciary duty' to act in the interests of shareholders as long as company executives are in left charge of deciding who pays the costs of a fine. Legal interventions must

be coupled with mechanisms to reduce this autonomy and, correspondingly, empower workers and social movements.

There is a way to deal with this issue. Civil society organisations in Britain have recently argued for a system of 'equity fines' in order to avoid communities and workers absorbing corporate punishment. Equity fines allow the courts to bypass the CEO and go straight to those that benefit the most from company wrongdoing. They target shareholders without allowing cuts elsewhere in the organisation. When it imposes an equity fine, the court orders an offending company to issue a set number of new shares in the firm. This proportion of the shares can be held in a public 'compensation fund' and controlled by a local authority, or a group of consumers, or could be controlled by workers in the company or indeed their trade union. The process effectively dilutes the value of shares held by the owners of the company without penalising communities, consumers or employees. Funds for investment would not be depleted but merely reallocated to the compensation fund from existing shareholdings. We would be willing to furnish the special rapporteur with a detailed outline of this proposal in future.

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