

# Closing the door to dangerous industrial activity: *A concept paper for governments to implement emergency measures.*



*Athabasca Tar Sands, Canada; one of the world's largest ecocides*

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

In April 2010 international environmental lawyer Polly Higgins proposed to the UN Law Commission an amendment to the Rome Statute to include a law of Ecocide. Governments will adapt when a stabilisation policy is in place; the law of Ecocide sets a framework of intervention to stop dangerous industrial activity that causes increase in carbon dioxide emissions. This paper expands upon the proposal and answers many questions asked. It sets out a route-map to implementing a law of Ecocide by 2020 and explains why existing policies are unable to disrupt our current trajectory.

### **Earth Charter, Preamble:**

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

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

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

### **Global Biodiversity Outlook, report 2010:**

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

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

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

You can download this document online at [www.eradicatingecocide.com](http://www.eradicatingecocide.com)

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

<sup>2</sup> *Lessons UNlearned - How the UN and Member States must do more to end natural resource-fuelled conflicts*, Global Witness report, January 2010

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

<sup>4</sup> [www.uncsd2012.org/rio20/7issues.html](http://www.uncsd2012.org/rio20/7issues.html)

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## Executive Summary

On March 15th the Organisation for Economic Cooperation and Development (OECD) announced that carbon dioxide emissions from energy use are expected to grow by 70 percent in the next 38 years because of our dependence on fossil fuels. As a result, by 2100 the global average temperature will have increased between 3 and 6 degrees Celsius. Current projections demonstrate that existing measures cannot address the problem. **What is needed is a disruptor to our current trajectory and a law to set a framework for intervention.** To rely on existing policies is a miscarriage of justice. A law of Ecocide can prevent escalating carbon dioxide emissions by prohibiting activity that causes risk of injury or loss of life to both humans and non-humans. This is a law which facilitates investment into the green economy at a rate necessary to tackle a number of social and environmental crises. This document sets out the core elements of the proposal and how to implement the law.

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

There are four compelling reasons why governments can support a law of Ecocide. To:

1. create the legislative framework for a green economy
2. create jobs and build resilient economies
3. gain electoral support.
4. meet your sustainable development targets.

During war-time, it is already an international crime to destroy the environment.<sup>5</sup> During peace-time no international crime exists. By making an international law that effectively ends extensive damage and destruction to the environment during peace-time, human-made ecocide can be outlawed for all time. Most corporate ecocides are crimes of consequence – the damage is something that few consider as an issue to prevent and if considered is treated as an externality, to be factored in as an external cost. The damage is rarely intended, it is considered a by-product of decisions that maximise profit without looking to the consequences. Ecocide is a crime of strict liability; intention to commit the crime does not need to be proved. This will prevent years of unnecessary litigation and costs.

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

Continuing fossil fuel consumption at current rates is tantamount to a crime - of Ecocide. To do so will put humanity at jeopardy; and not just humanity, but all life on Earth. Catastrophic climate change is a risk we have to face. It is crucial to change our course of action. Once we accept that we can no longer continue business as usual, we can create the legislative framework to ensure a rapid and smooth transition. What is needed is adaptive leadership; leadership that can adapt to the size and magnitude of change envisaged. Leadership that is bold, moral and courageous. Not one Member State can justify putting humanity at risk when the whole of civilisation stands on the brink of disaster.

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<sup>5</sup> Rome Statute Article 8.2.b (iv)

Carbon emissions are just one of the adverse impacts of dangerous industrial activity. There are many more; soil erosion, pollution and biodiversity are all at the brink of triggering mass crisis. International law, laws that are superior to national laws, can impose a new system that changes the rules for us all. A law of Ecocide will close the door in one direction. Only when we do that can we open another door in a completely different direction.

A handwritten signature in black ink, reading "Polly Higgins". The signature is fluid and cursive, with the first name "Polly" and the last name "Higgins" clearly distinguishable.

Polly Higgins  
Chair, The Earth Community Trust

## Justification: why a law of Ecocide is necessary

A recent report issued by the O.E.C.D. stated that:

“Unless the global energy mix changes, fossil fuels will supply about 85 percent of energy demand in 2050, implying a 50 percent increase in greenhouse gas emissions and worsening urban air pollution... in 2050...the world will use around 80 percent more energy. But the global energy mix is not predicted to be very different from that of today” O.E.C.D. Environmental Outlook to 2050.<sup>6</sup>

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

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

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

To prevent the worst effects of global warming international climate action should start in 2013. The report recommends a global carbon market be set up, the energy sector transformed to low-carbon and all low-cost advanced technologies should be explored, including biomass energy and carbon capture. Failure to do so will make it more difficult to meet the 2 degree limit and will require very rapid rates of emissions cuts after 2020 to catch up. Scrapping inefficient fossil fuel subsidies are essential for renewables growth — which could increase global real income by 0.3 percent in 2050, the report said.<sup>7</sup>

All States have a legal duty of care to prevent loss of life. Where humanity at large is placed at immediate and real risk, emergency measures are called for. This document sets out the law to close down dangerous industrial activity and impose a legal duty of care on all nations to provide assistance to those at risk of naturally occurring ecocide, by 2020. It is already established law in the EU that where human right to life has been put at risk, dangerous industrial activity must be closed down.<sup>8</sup> Such a precedent now applies globally. The next step is to create an international law that prohibits not only dangerous activity that causes ecocide, but also imposes a duty on all who are profiting from business that causes injury to remodel their strategies.

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<sup>6</sup> [http://www.oecd.org/document/11/0,3746,en\\_2649\\_37465\\_49036555\\_1\\_1\\_1\\_37465,00.html](http://www.oecd.org/document/11/0,3746,en_2649_37465_49036555_1_1_1_37465,00.html)

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

<sup>8</sup> *Oneryildiz v Turkey* [2004] ECHR 657

## Definition

### Ecocide, the 5th international Crime against Peace

Proposed amendment to the Rome Statute:

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

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

- (a) “widespread”: encompassing an area on the scale of several hundred square kilometers;
- (b) “long-lasting”: lasting for a period of months, or approximately a season;
- (c) “severe”: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

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

Under the Rome Statute, the ICC can only investigate and prosecute the core international crimes – known as the 4 Crimes against Peace (genocide, crimes against humanity, war crimes and the crime of aggression) – where states are unable or unwilling to do so themselves.

## Manmade ecocide

There are two types of ecocide. The first type is manmade or ascertainable ecocide.

This is ecocide caused by human agency. Here, an individual responsible for the activity which has resulted in ecocide can be identified. Usually this is corporate ecocide, examples include the Athabasca tar sands, the Niger Delta, and the destruction of the Amazon.

## Naturally occurring ecocide

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

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

## Basis for making Ecocide the 5th international Crime against Peace

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

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

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

1. close the door to existing subsidies to dangerous industrial related activity;
2. prohibit activity that gives rise to mass damage and destruction;
3. open the door to subsidies to innovation in another direction.

## What are the implications of a law of Ecocide?

By closing the door to ecocide, all companies that cause ecocide will become liable to prosecution. We shift from the "polluter pays" principle to "polluter no longer pollutes". By creating a law of Ecocide, specific legally binding duties and responsibilities that place people and planet before polluter will take precedence in decision-making in boardrooms, governments and banks. Instead of years of lengthy litigation where companies can refuse to pay out when judgment is made, companies will think twice: prosperity without austerity will become the new norm.

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

## A law of Ecocide:

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

## Trusteeship Council

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

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

## Restructuring Social and Ecological Protection Systems

Currently there is little in our legal systems to protect long-term interests. By placing stewardship as the number one priority, health and well-being of people and planet comes first. Creating an economy that looks to fostering more for others, rather than taking from future generations, turns the tables. Instead of destroying what we have now and leaving less for the future, our investment flows to systems that give more in the long-run. By setting up systems now, what are known as health and well-being provisions, that emphasise wellness instead of life-threatening activity, risk of injury or harm to life is pre-empted and prevented from the outset. In so doing, resilient and thriving systems can be created.

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

A law of Ecocide will stop the flow of destruction at source. To do so has a beneficial impact; it is good for economies, people and planet. It is always far more expensive to remedy something after it has happened. A law of Ecocide is preventative – it stops the ecocide before it happens.

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

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<sup>9</sup> <http://www.cbd.int/gbo3/?pub=6667&section=6689>

## Economic Justification

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

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

## Business Opportunities

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

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

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

Stewardship becomes the number one priority. The law currently places care below profit. By realigning priorities that hinder our progress with new overriding duties, decision-making will shift. New solutions will be sought and found; new technologies will be researched and invested in; new policy will be implemented.

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

## Ease of implementation

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

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

A Review Conference should be called for as soon as possible, preferably before the end of the year, to table the proposed amendment to make Ecocide the 5th Crime against Peace. In June 2012 all Heads of state, or their representatives, will attend the Rio+20 Earth Summit. A commitment to making Ecocide a crime can be announced then. The timetable for implementation of the law of Ecocide can be determined at the Earth Summit.

## Time scale for implementation: 2012 – 2020

2012 June	Rio+20: Governments commit to making Earth law
2012	Review Conference convened
	Amendment and Annex to Rome Statute adopted by two-thirds majority
2014 – 2019	Five year transition period
2020	Law of Ecocide in force

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

## About Earth Law

Ecocide, Earth rights and restorative justice. All three are the cornerstones of a growing movement throughout the world to put in place new laws to protect both people and planet. The Universal Declaration of the Rights of Mother Earth<sup>10</sup> was proposed by Polly Higgins in 2008 (as a Universal Declaration of the Planetary Rights). The Declaration was taken up by Bolivia, who has created their own national law of Earth Rights. Ecuador has similar provisions in their Constitution.

In law we already use the concept of legal guardians in legal proceedings regarding children; a Guardian is appointed to represent the best interests of the child and to speak on his or her behalf. The same principle can be extended to speaking on behalf of the Earth in court.

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

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<sup>10</sup> [www.rightsofmotherearth.com](http://www.rightsofmotherearth.com)

## Amendment rules<sup>11</sup>

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.
6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

## Arguments against

Three primary arguments are levied against a law of Ecocide:

1. economic concerns
2. necessity to retain current systems
3. public demand for job security

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<sup>11</sup> Article 121, Rome Statute (entered into force 2002). State Parties refers to State Parties to the Rome Statute. As of March 2012, there are 121 State Parties to the Rome Statute. [www.untreaty.un.org/cod/icc/statute/rome121.htm](http://www.untreaty.un.org/cod/icc/statute/rome121.htm)

## Response

The gravity and consequence of extensive damage and destruction to the environment requires the crime of Ecocide to be strict liability (intention to commit the crime need not be proved). This is in line with existing international pollution laws. Historically, courts have assumed that since a corporation could not have a criminal state of mind in isolation from its directors, it could only be guilty of an offence that did not include any mental element. Strict liability therefore ensures application of international governance of corporate created ecocide.

Ecocide is a crime of consequence, rarely intent. It is not the conduct itself that is in question but the consequences of the conduct. For instance, a company in the business of creating and generating energy may be at risk of committing ecocide depending upon where it procures its energy. Use of extractive practices would render the operators liable, whereas procurement from renewable sources would not.

Enforcement is crucial, but the aims of international criminal justice are not confined to the sole punishment of the individuals. International criminal justice has also a strong restorative aspect as well as a punitive element. An international crime of Ecocide is a powerful disincentive as well as a remedy for miscarriages of justice.

Impact of such a law upon the economy is to change the course of current trajectories, which in the current climate will escalate instability and place humanity at risk. A resilient economy is one where investment is secure and provides jobs. A law of Ecocide opens the door to both, giving long-term guarantees of investment and prioritising industry that is non-carbon-intensive.

Preventing harm is central to the crime, not the desire to close businesses. By helping businesses transition into a clean economy, the problem can become the solution. By creating a pre-emptive binding obligation, the crime of Ecocide is focused on prevention from the outset. The legislation would be rendered largely ineffective in the event that the law cannot prosecute persons in a position of superior responsibility. To ensure economies remain stable throughout the duration of a period of transition, major businesses will require a robust financial support package.

## Critique of current proposals to deal with environmental degradation

In 2020 a new legal instrument has been proposed to come into effect that will replace the Kyoto Protocol. The core elements are: voluntary promises rather than binding commitments to reduce emissions, more flexibilities for developed countries to meet their emission reduction promises, and an even weaker compliance mechanism. The new legal instrument will cover all the States, effectively removing the difference between developing and developed countries. A Green Fund with no funds now has an institutional structure in which the World Bank is a key player. The \$100 billion is only a promise and will not be provided for by the developed countries. The money will come from the carbon markets (which are collapsing), from private investments, from credits (to be paid) and from the developing countries themselves.

REDD (Reducing Emission from Deforestation and Forest Degradation): the safeguards for indigenous peoples are voluntary. The offer of funding for forests is postponed until the next decade due to the fact that demand for carbon credits will not increase until then because of the low emission reduction promises.

All proposals fail to disrupt existing models. None are enforceable, none are capable of delivering on time and none have proven to be effective.

Whilst trading schemes for SO<sub>2</sub> emissions in the US was successful in reducing emissions of a particular pollutant in one country, artificially induced market mechanisms such as these have their challenges because they are examples of mechanisms that treat the symptoms of a problem rather than the cause. The European Emissions Trading Scheme has failed - the climate negotiations have collapsed and REDD has not saved forests.

## The solution

**Create a green economy. Remove all subsidies for business that leads to the extensive damage or destruction to the environment; prohibit all dangerous industrial activity with a law of Ecocide and put in place subsidies for business that contributes to a low carbon economy.**

The outcome will be a green economy, a new dominant economic paradigm, based on equity, prosperity and well-being of people and planet world-wide. Acting as a disruptor, the law of Ecocide will create a new wave of innovation and new solutions that are non-destructive to ecosystems. Cities and countries throughout the world will benefit by wealth generated as the world invests trillions of dollars into new jobs.

End-date for a law of Ecocide entering into force is dependent upon 3 factors:

1. when a meeting of the Assembly of States Parties or review conference is called by the Assembly; (proposed: end of 2012)
2. the adoption of an amendment receives the minimum of two-thirds majority of states parties; (proposed: by 2014)
3. enforcement of the amendment will occur one year after it is ratified by seven-eighths of the states parties. (proposed: 5 year transition period)

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

**A law of Ecocide will end the asset raiding of our future.** It creates a level playing field for all taking into account intra and inter generational justice. Fast-forward the clock a decade: our lands will no longer be shackled by the burden of ecological debt, instead we will have turned our world around.

## What is required next

**Analysis of the largest carbon emitting companies (the carbon majors).** Analysis of major companies in all parts of the world whose primary business is contributing to escalation of greenhouse gases is currently being undertaken by the Natural Resources Defense Council (headed up by Richard Heede).<sup>12</sup>

**Agreement by governments to adapt and make use of the proposal.** With knowledge comes responsibility to adapt. A law of Ecocide is a law that can disrupt existing systems and unlock current global discourse about taking responsibility for humanity and Earth. Responsibility is owed by all; superior responsibility is owed as well - by governments, businesses and banks - over and above any other duty of care.

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<sup>12</sup> <http://www.nrdc.org/>

**Set in motion a date for a meeting of the Assembly of States Parties or review conference.**

Once it is set, announce at the Rio+20 Earth Summit in June the timetable of planned steps. A commitment at Rio+20 will open the door to development of substantial renewable energy sources for transportation, domestic and industrial uses. Opportunities in the green sector will become attainable; to announce the timetable for implementation of a law of Ecocide will open the door to the green economy and kickstart the process.

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

## About Polly Higgins

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

- 1997 City University (CPE Law), London
- 1998 Called to the Bar, London
- 1998 – 2005 Barrister
- 2006 – 2009 EU legislative frameworks, Trans-Mediterranean Renewable Energy Co-operation
- 2008 – 2010 Member of Supervisory board, DESERTEC FOUNDATION
- 2010 Submission to UN Law Commission, Ecocide law

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

Author of:

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

## Amendment for Rome Statute

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

## Annex for Rome Statute

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

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

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

In this Statute: -

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

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

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

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

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

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

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

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

## Frequently asked questions & answers

### What is ecocide?

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

### What counts as ecocide?

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

- (a) “widespread”: encompassing an area on the scale of several hundred square kilometers;
- (b) “long-lasting”: lasting for a period of months, or approximately a season;
- (c) “severe”: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.

### What is meant by ‘human agency or by other causes’?

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

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

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

### What will a law of Ecocide do?

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

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

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

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

### **Is a crime of Ecocide anti-capitalist?**

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

Ecocide is pro-profit that does not cause mass damage and destruction. Currently the number one rule governing our world is that corporations must maximise profit to their shareholders, even if this means making profit out of mass damage and destruction to people and planet. There are certain things which are illegal for businesses to make profit from, things which are morally wrong, for example murder, genocide, corruption. It is a legal loophole that it is not illegal for businesses to make profit from mass destruction of the planet. This is not about saying no to profit or development, it is simply about changing the rules of the game to ensure truly sustainable business.

By making ecocide related activities criminal, business will be under enormous pressure to prevent such activity taking place. CEO's and directors of corporations will not wish to make decisions that will render them at risk of conviction, heads of banks will no longer want to sanction the funding of criminal activity and governments will not want to be seen to be making policy decisions which promotes such criminal activity. Innovation, finance and governmental support will by necessity flow in the other direction. It will make sense to invest in sustainable business. This is about corporations turning rapidly from being the problem to being a big part of the solution.

### **Why should business support the amendment to the Rome Statute?**

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

### **Who would initiate the legal proceeding of if ecocide is committed?**

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

## **How will governments be persuaded to become signatories if they have licensed ecocide activities?**

The law of Ecocide will not come into force overnight, and retrospective prosecution will not take place. There will be a transition period of at least five years to allow governments to implement policies to ensure they will not be prosecuted. Governments will be persuaded to become signatories because a law of Ecocide provides a means for them to meet sustainability and environmental goals and targets, and will create a level playing field for true sustainable business practices.

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

Enforcement of any ICC conviction is by a sentence of imprisonment. All international crimes begin with a minimum of two years. State Parties enforce the judgments.

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

Many academic institutions are using the book, *Eradicating Ecocide*, as a course book - law schools, environmental studies and business schools. Some are writing thesis and papers are being written for publication, some later this year. In May 2012, Oslo University held a 4 day conference on the Rule of Law for Nature; they received over 100 submissions on a law of Ecocide from over 50 countries.

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

Firstly, nations will be held legally accountable for helping those who have been, or are at risk of, naturally- occurring ecocide. Secondly, in so doing, emergency relief will become a legal requirement.

## **What are the practical workings of a crime of ecocide?**

Once a law of Ecocide is made international law, nations will transpose the law into domestic legislation. In September 2010 a mock trial was held at the UK Supreme Court as if this had already happened. Two legal teams tested the law of Ecocide. The event was live-streamed across the world and the outcome was two convictions. This demonstrated that a law of Ecocide can work in practice.

## **What is restorative justice?**

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

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

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

traditional sentencing. It has been demonstrated that restorative justice can work in practice to address the effects of ecocide.

### **Are Defendants exempt from going to prison?**

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

### **Can the Security Council veto the amendment?**

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

## **Summary**

A law of Ecocide will create a new overriding legal duty of care - corporations, banks and investors will place people and planet first; the primary legal obligation will be to build a new economy based on health and well being. We will move from risk to consequence-based law. The starting point will be: 'what is the consequence of our actions? Does this help people and planet?'

**A law of Ecocide will halt dangerous industrial activity. A law that prohibits extensive damage to, destruction of or loss of ecosystems closes the door to the carbon majors, the major industries that cause carbon dioxide emissions. The green economy can flourish; prosperity without austerity will become the norm.**