

ECOCIDE LAW HISTORICAL BACKGROUND

International crime

1945

United Nations Charter: "The General Assembly shall initiate studies and make recommendations for the purpose of a. encouraging the progressive development of international law and its codification" United Nations Charter Article 13.1

1947

General Assembly Resolution 174 (II): establishing the International Law Commission and approving its Statute.

General Assembly Resolution 177 (II): preparation of a Draft Code of Crimes against the Peace and Security of Mankind (renamed the Rome Statute from 1998). A/RES/177 (II)

General Assembly Resolution 178 (II): draft declaration on the rights and duties of States.²

1948

The International Law Commission is established by the United Nations General Assembly for the "promotion of the progressive development of international law and its codification." A/RES/174(II).³

1970s onwards: there was growing support from government, the United Nations and communities to make include Ecocide as the fifth International crime to stand alongside the crime of Genocide by amending the Rome Statute. It is recognised as part of an emerging body of Earth Law or Earth Jurisprudence. In an obiter dictum in the 1970 Barcelona Traction case judgment, the International Court of Justice identified a category of international obligations as 'erga omnes', namely obligations owed by states to the international community as a whole, intended to protect and promote the basic values and common interests of all.⁴

1978

Draft Code of Crimes Against the Peace and Security of Mankind discussions commence. At the same time, State responsibility and international crimes are discussed and drafted. A/CN.4/SER.A/1978/Add.I (Part 2), Page 80, Article 19.2.(d)⁵

1998

Draft Code of Crimes Against the Peace and Security of Mankind, renamed the Rome Statute, includes only four international crimes (minus ecocide) and is the founding document of the International Criminal Court (ICC). The ICC is classified as a Court of last resort - to be used when a state is either unwilling or unable to bring their prosecutions for international crimes.

2001

Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Article 19 (State crimes) has been removed.⁶

2002

The Rome Statute of the International Criminal Court⁷ entered into force, including only four international crimes of 'the most serious crimes of concern to the international community as a whole'.

Ecocide law

Over 40 years of discourse surrounds and gives legal weight to the 2010 proposal for Ecocide law. The concept of creating an international crime of Ecocide has a history dating back to the 1970s.

1970

¹ <http://www.un.org/en/documents/charter/chapter4.shtml>

² <http://www.un.org/documents/ga/res/2/ares2.htm>

³ http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/174%28II%29

⁴ The Barcelona Traction case [1970] ICJ Rep 3, page 33, paras 33 & 34

⁵ http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1978_v2_p2.pdf&lang=EFS

⁶ Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, A/56/106

⁷ <http://legal.un.org/icc/statute/rome.htm>

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The word 'ecocide' was recorded at the Conference on War and National Responsibility in Washington 1970, where Arthur Galston proposed a new international agreement to ban ecocide.⁸ Galston was a US biologist who identified the defoliant effects of a chemical later developed into Agent Orange. Subsequently a bioethicist, he was the first in 1970 to name massive damage and destruction of ecosystems as an ecocide.

1972

In 1972 at the United Nations Stockholm Conference on the Human Environment (which adopted the Stockholm Declaration) Olof Palme the Prime Minister of Sweden, in his opening speech spoke explicitly of the Vietnam war as an ecocide and it was discussed in the unofficial events running parallel to the official UN Stockholm Conference on Human Environment. Others, including Indira Gandhi from India and Tang Ke, the leader of the Chinese delegation, also denounced the war in human and environmental terms. They too called for ecocide to be an international crime. A Working Group on Crimes Against the Environment was formed at the conference, and a draft Ecocide Convention was submitted into the United Nations in 1973.

In 1972 Dai Dong, a branch of the International Fellowship of Reconciliation sponsored a Convention on Ecocidal War which took place in Stockholm, Sweden. The Convention brought together many people including experts Richard A. Falk, expert on the international law of war crimes and Robert Jay Lifton, a psychohistorian. The Convention called for a United Nations Convention on Ecocidal Warfare, which would amongst other matters seek to define and condemn ecocide as an international crime of war. Richard A. Falk drafted an Ecocide Convention in 1973, explicitly stating at the outset to recognise "that man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace."⁹

It was recognised from the outset that the element of intent did not always apply. "Intent may not only be impossible to establish without admission but, I believe, it is essentially irrelevant."¹⁰

1970s

The idea of expanding the 1948 Genocide Convention led to extensive enquiry as to whether ecocide should be included as an international crime by the United Nations. The Sub-Commission on Prevention of Discrimination and Protection of Minorities prepared a study discussing the effectiveness of the Genocide Convention, proposing the adoption of ecocide as well as cultural genocide to the list of crimes¹¹. In the following years making ecocide a crime was examined by various working groups and mentioned in several studies. Although primary source documents are not fully comprehensive or available, some of the key documents are listed here.

1978

Draft articles on State Responsibility and international crime include: "an international crime (which) 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."¹² Supporters who spoke out in favour of a crime of ecocide included Romania and the Holy See, Austria, Poland, Rwanda, Congo and Oman, pages. 115-117. Ecocide was debated for consideration in the Sub-Commission on Prevention of Discrimination and Protection of Minorities' Study of the Question of the Prevention and Punishment of the Crime of Genocide. 4 July 1978.

1985

Ecocide as a crime continued to be addressed. The Whitaker report, commissioned by the Sub-Commission on the Promotion and Protection of Human Rights on the question of the prevention and punishment of the crime of genocide was prepared by then Special Rapporteur, Benjamin Whitaker.¹³ "Some members of the Sub-Commission have however proposed that the definition of genocide should be broadened to include cultural genocide or "ethnocide", and also "ecocide": adverse alterations, often

⁸ Megret, Frederic. "The Case for a General International Crime Against the Environment" (2010).

⁹ Falk, Richard A. "Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals" In: Thee, Marek (ed.) *Bulletin of Peace Proposals*, Volume 1 (1973).

¹⁰ Weisberg, Barry. *Ecocide in Indochina*, Canfield Press, San Francisco (1970).

¹¹ known as The Ruhashyankiko Report.

¹² A/CN.4/SER.A/1978/Add.1 (Part 2), Page 80, Article 19.2.(d).

http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1978_v2_p2.pdf&lang=EFS

¹³ The Whitaker Report E/CN.4/Sub.2/1985/6.

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irreparable, to the environment - for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest - which threaten the existence of entire populations, whether deliberately or with criminal negligence." page 17, para 33.14 A draft resolution, prepared for the Commission on Human Rights submitted by Deschênes and Mubanga-Chipoya as part of the review, included the recommendation to have Whitaker expand and deepen the study of the notions of cultural genocide, ethnocide and ecocide. In the UN report on its 38th session, a reference is missing as to whether the Sub-Commission finally determined what route they were to take.

1987

Discussion of international crimes continued in the International Law Commission, where it was proposed that "the list of international crimes include "ecocide", as a reflection of the need to safeguard and preserve the environment, as well as the first use of nuclear weapons, colonialism, apartheid, economic aggression and mercenarism". 1987 Yearbook, Vol I, p. 56, para 38.15

1991

The Draft Code of Crimes Against the Peace and Security of Mankind contain 12 crimes. 1991 Yearbook:16 Ecocide was replaced by 'wilful and severe damage to the environment' (Article 26) without vote. The Draft Articles were transmitted to governments for their comments and observations.

1993

As of 29 March 1993, the Secretary-General had received 23 replies from Member States and one reply from a non-member State. They were: Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Costa Rica, Ecuador, Greece, Netherlands, the Nordic countries (Denmark, Finland, Iceland, Norway, Sweden), Paraguay, Poland, Senegal, Sudan, Turkey, UK, USA, Uruguay and Switzerland. For summarised commentary of responses see 1993 Yearbook of the ILC.¹⁷ Only three countries, the Netherlands, the United Kingdom and the United States of America, opposed the inclusion of an environmental crime. The Netherlands supported only four crimes (minus ecocide); the USA and the UK objected to the draft Code per se. The USA cited 'vagueness' and the UK cited crimes against the environment as being unknown international crime and a step too far. 1993 Yearbook Documents of the 45th session (Part 1).¹⁸

In tandem, see the extensive records re State Responsibility for significant environmental harm, as discussed at length and recorded in 1993 Yearbook Documents of the 45th session (Part 2).¹⁹

The issue of adding a high test of intent ('wilful') was of concern; e.g Austria commented: "Since perpetrators of this crime are usually acting out of a profit motive, intent should not be a condition for liability to punishment." See Australia, Belgium and Uruguay, who also took the position that no element of intent was necessary for Article 26. 1993 Yearbook Vol II, Part 1, p.68, para 30.²⁰

1995

The International Law Commission reduced the 12 crimes to 6. The draft code discussions moved to the Sixth Committee of the General Assembly (see: 12th - 25th and 44th meetings reports). At the GA Sixth Committee's 12th Meeting held on 12 October 1995: "the Special Rapporteur on the topic had presented his thirteenth report recommending that only 6 of the 12 crimes identified in first reading for inclusion in the Code should be retained, namely... wilful and severe damage to the environment (article 26)." page 3, para 9.²¹ Records show concerns were raised, and reasons for retaining it included the fact that environmental harm is a state responsibility. 1995 Yearbook Vol II, Part 2, page 30, paras 119 – 121.²²

¹⁴ E/CN.4/Sub.2/1985/6

¹⁵ A/CN.4/SER.A/1987 http://legal.un.org/ilc/publications/yearbooks/english/ilc_1987_v1.pdf

¹⁶ A/CN.4/SER.A/1991

http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1991_v1.pdf&lang=EFSRC

¹⁷ http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1993_v1.pdf&lang=EFSRAC

¹⁸ A/CN.4/SER.A/1993/Add.1 (Part 1) http://legal.un.org/ilc/publications/yearbooks/english/ilc_1993_v2_p1.pdf see Netherlands: pp. 82-88; United Kingdom: pp. 97-102; United States of America: pp.102-105.

¹⁹ A/CN.4/SER.A/1993/Add.1 (Part 2) http://legal.un.org/ilc/publications/yearbooks/english/ilc_1993_v2_p2.pdf

²⁰ A/CN.4/448 and Add.1 http://legal.un.org/ilc/publications/yearbooks/english/ilc_1993_v2_p1.pdf

²¹ A/C.6/50/SR.12 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/815/69/PDF/N9581569.pdf?OpenElement>

²² A/CN.4/SER.A/1995

http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1995_v2_p2.pdf&lang=EFSRAC

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By the General Assembly Sixth Committee's 16th meeting held on 17 October 1995, 'wilful and severe damage to the environment' was removed. Various countries including Chile did not agree. page 3, para 11.²³ It was recorded that environmental crime during peace-time was removed from the 1996 Draft Code because the Special-Rapporteur wanted "to limit the list of crimes to be considered during the second reading to offences whose characterization as crimes against the peace and security of mankind was hard to challenge."

1996

Meanwhile in the ILC, 'wilful and severe damage to the environment' (Article 26) had been tasked to a working-group: "The Commission further decided that consultations would continue as regards [Article 26] ...the Commission decided ... to establish a working group that would meet ... to examine the possibility of covering in the draft Code the issue of wilful and severe damage to the environment." 1996 Yearbook Vol II, Part 2, p16, paras 40 & 41.²⁴ In the same year, Canadian/Australian lawyer Mark Gray published his 1988 proposal for an international crime of ecocide, based on established international environmental and human rights law.²⁵ He demonstrated that states, and arguably individuals and organisations, causing or permitting harm to the natural environment on a massive scale breach a duty of care owed to humanity in general. He proposed that such breaches, where deliberate, reckless or negligent, be identified as ecocide where they entail serious, and extensive or lasting, ecological damage; international consequences; and waste.

19 countries spoke out in the Legal Committee in favour of retaining damage to the environment on the list of crimes covered in the draft Code. In the same session Mr. Lukashuk objected: "at the fiftieth session of the General Assembly, the majority of Member States had come out in favour of characterizing "ecocide" as a crime, and only three States, France, Brazil and the Czech Republic were against it." 1996 Yearbook, Vol 1, page 111, para 29. ²⁶ But within weeks, the International Law Commission had also reduced the 6 crimes to 4 without vote. On 5 July, 1996, the final Draft Code of Crimes Against the Peace and Security of Mankind was adopted on second reading by the ILC. Ecocide was not reinstated and 'wilful and severe damage to the environment' had been removed, as was the section on State Responsibility.

1998

The final Draft Code was renamed as the Rome Statute; ecocide was excluded and any mention of environmental harm was restricted to war-crime only, not a peace-crime. Under the Environmental Modification Convention 1977 (ENMOD) the test for war-time environmental destruction is 'widespread, or long-term or severe', whereas Article 8(2)(b) of the Rome Statute 1998 modified the ENMOD test with the change of one word to 'widespread, long-term and severe.' Under Article 8(2)(b) of the Rome Statute, environmental harm is a crime only in limited circumstances when "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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." Christian Tomuschat noted that this was done so that "only harm of exceptional circumstances shall be taken into account"²⁷, despite objections.

2010

The international environmental lawyer and author Polly Higgins proposed to the United Nations that ecocide be made the fifth international crime. At that time she was unaware of the history that preceded her proposal. The full proposal, which was submitted to the International Law Commission, is set out in chapters 5 and 6 of her book *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet*, published September 2010. ²⁸ Her legal proposal was developed further in her second book, *Earth is our Business: Changing the Rules of the Game*, published May 2012.²⁹

²³ A/C.6/50/SR.16

²⁴ A/CN.4/SER.A/1996 Add.1 (Part 2)

http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf&lang=EF SRAC

²⁵ Gray, Mark Allan. "The international crime of ecocide" *California Western International Law Journal* (1996) volume 26 page 215 et seq.; and "The international crime of ecocide" (2003) in *International Crimes, The Library of Essays in International Law*, ed. N Passas, Ashgate Publishing, Aldershot UK

²⁶ A/CN.4/SR.2448

http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1996_v1.pdf&lang=EF SRAC

²⁷ Tomuschat, Christian. 1996 Yearbook, volume II, page 24.

²⁸ Higgins, Polly. *Eradicating Ecocide*, Shephard Walwyn, (2010).

²⁹ Higgins, Polly. *Earth is our Business* Shephard Walwyn (2012)

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2011

Higgins drafted the Ecocide Act,³⁰ which was then tested in the UK Supreme Court in a mock trial.

2012

A concept paper by Higgins on the Law of Ecocide was sent out to governments.³¹ In June 2012 the idea of making ecocide a crime was presented to legislators and judges from around the world at the World Congress on Justice Governance and Law for Environmental Sustainability held in Mangaratiba before the Rio +20 Earth Summit, the United Nations Conference on Sustainable Development. Making ecocide an international crime was voted as one of the top twenty solutions to achieving sustainable development at the World Youth Congress in Rio de Janeiro in June 2012.

July 2012: the University of London Human Rights Consortium launched The Ecocide Project ³² to further carry out research into the history of the Law of Ecocide and develop the law further. The research paper, Ecocide is the Missing 5th Crime Against Peace was published.³³

October 2012: a range of experts gathered at the international conference Environmental Crime: Current and Emerging Threats, held in Rome at the UN Food and Agricultural Organization Headquarters hosted by the United Nations Interregional Crime and Justice Research Institute (UNICRI) in cooperation with United Nations Environmental Programme (UNEP) and the Ministry of the Environment (Italy). It was recognized that environmental crime is an important new form of transnational organized crime in need a greater response. One of the outcomes was that UNEP and UNICRI head up a study into the definition of environmental crime, suggested new environmental crime and give due consideration to the history of making ecocide an international crime once again.³⁴

2013 - 2014

European citizen Initiative for criminalising ecocide

On January 22, 2013, a committee of eleven citizens from nine EU countries officially launched the "European Citizens Initiative "End Ecocide in Europe."³⁵ The European Citizens' Initiative, or ECI, is a tool created by the Lisbon Treaty to promote participative and direct democracy. The ECI is a way for EU citizens to propose new or suggest amendments to legislation directly to the European Commission which is the institution proposing new EU laws. This initiative aimed at criminalising ecocide, the extensive damage and destruction of ecosystems, including the denial of market access for products based on ecocide to the EU and investments in activities causing ecocide. Three MEPs, Keith Taylor, Eva Joly, and Jo Leinen, publicly gave the first signatures on this day. The ECI obtained less than 120 000 signatures, far less than the required 1 million signatures required for it to be considered by the European Commission.

State Responsibility

Ecocide law imputes a state responsibility on a number of fronts. First and foremost the crime of ecocide safeguards and ensures the preservation of ecosystems. The state therefore has the responsibility to ensure the welfare of citizens and that includes prohibiting, preventing and pre-empting ecocide. Attendant to this responsibility is the duty of the state to bring criminal prosecutions where there is evidence of or a risk of ecocide occurring.

Secondly the state has a responsibility to assist other states suffering from ecocide, in particular where that state is unable to self-govern (eg. rising sea-levels). As proposed by Higgins in first her book, *Eradicating Ecocide*,³⁶ the United Nations Trusteeship Council can be re-opened to uphold its original mandate - to help non-self governing territories (NSGTs): 'the interests of the inhabitants are paramount, and accept as a sacred trust the obligation to promote to the utmost... the well-being of the inhabitants of these territories.'³⁷ Where a territory or state suffers ecocide that renders the state unable to self-govern,

³⁰ <http://eradicatingecocide.com/the-law/ecocide-act>

³¹ Higgins, Polly. *Concept Paper: Closing the Door to Dangerous Industrial Activity* (2012).

³² The University of London Human Rights Consortium Ecocide Project
<http://www.sas.ac.uk/hrc/projects/ecocide-project>

³³ <http://www.sas.ac.uk/node/1033>

³⁴ <http://unicri.it>

³⁵ <http://www.endecocide.eu>

³⁶ Higgins, Polly. *Eradicating Ecocide*, Shephard Walwyn, (2010), Chapters 5 & 6.

³⁷ Article 73, United Nations Charter.

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Higgins proposes putting back into use the Trusteeship Council. By re-opening the UN Trusteeship Council (closed in 1994) chamber, member states have a ready-made forum in which to determine what support and aid to put in place for non-self governing territories facing ecocide.

Concerns that resistance may be met from a number of very important countries to making ecocide a crime³⁸ have been raised. As was the case previously, just a few countries objections prevented one of the most important crimes from being implemented. Likewise it caused the removal of the parallel State Responsibility under Article 19.3(d) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. More countries, however, are inclined to become signatories of the Rome Statute where ecocide is reinstated due to climate change concerns; an amendment to the Rome Statute does not require all signatory parties to agree.

Practical application of the law

2011

A mock ecocide trial was held in the Supreme Court of the United Kingdom to test how the International Crime of Ecocide would work in practice. Three counts of ecocide were tried. One specific aspect of harm was examined to test whether ecocide as a crime could be established applying the test as set out in the Ecocide Act (the disjunctive ENMOD test of size, duration or impact). The jury upheld findings of guilt on two of the three counts. Sky news live-streamed the trial worldwide and the court building was opened to the public to watch on additional screens. The legal teams were headed up by Chris Parker QC for the defence and international human rights lawyer Michael Mansfield QC acted as the prosecution in the case.³⁸

2012

A restorative justice sentencing hearing was held at the University of Essex. Lawrence Kershen, chair of the Restorative Justice Council, UK facilitated the process and the hearing included a number of participants including a member of First Nations people of Northern British Columbia.³⁹

Existing domestic ecocide law

Ten countries have codified ecocide as a crime during peacetime. Although there are Laws of Ecocide in place, the effectiveness of these laws depends on a number of factors including the enforcement of the law, an independent judiciary and respect for the rule of law. Many of the countries with national laws of ecocide in place are ranked very highly for corruption and low for respect for the rule of law by Transparency International.

Georgia 1999 Article 409. Ecocide: "Ecocide, i.e. contamination of atmosphere, land and water resources, mass destruction of flora and fauna or any other action that could have caused ecological disaster - shall be punishable by ..."

Republic of Armenia 2003 Article 394. Ecocide: "Mass destruction of flora or fauna, poisoning the environment, the soils or water resources, as well as implementation of other actions causing an ecological catastrophe, is punished ..."

Ukraine 2001 Article 441. Ecocide: "Mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster, - shall be punishable by ..."

Belarus 1999 Art 131. Ecocide: "Deliberate mass destruction of flora and fauna, or poisoning the air or water, or the commission of other intentional acts that could cause an ecological disaster (ecocide), - shall be punished by ..."

Kazakhstan 1997 Art 161. Ecocide: "Mass destruction of flora or fauna, poisoning the atmosphere, land or water resources, as well as the commission of other acts which caused or a capable of causation of an ecological catastrophe, - shall be punished by..."

³⁸ Tenz, Courtney. "UK supreme court explores 'ecocide' in mock trial", *Deutsche Welle*, 30 September 2011.

³⁹ Rivers, Liz. "Shareholder return – the Nuremburg defence? Ecocide and Restorative Justice" 2012.

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Kyrgyzstan 1997 Art 374. Ecocide: "Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable ..."

Republic of Moldova 2002

Art 136. Ecocide: "Deliberate mass destruction of flora and fauna, poisoning the atmosphere or water resources, and the commission of other acts that may cause or caused an ecological disaster shall be punished ..."

Russian Federation 1996 Art 358. Ecocide: "Massive destruction of the animal or plant kingdoms, contamination of the atmosphere or water resources, and also commission of other actions capable of causing an ecological catastrophe, shall be punishable by ..."

Tajikistan 1998 Art 400. Ecocide: "Mass destruction of flora and fauna, poisoning the atmosphere or water resources, as well as commitment of other actions which may cause ecological disasters is punishable ..."

Uzbekistan 1994 Art 196. Pollution of Natural Environment: "Pollution or damage of land, water, or atmospheric air, resulted in mass disease incidence of people, death of animals, birds, or fish, or other grave consequences – shall be punished ..."

Vietnam 1990 Art 342 Crimes against mankind: "Those who, in peace time or war time, commit acts of ... as well as other acts of genocide or acts of ecocide or destroying the natural environment, shall be sentenced ..."

External links

- Official information portal for ecocide law: <http://eradicatingecocide.com>
- International Law Commission Yearbooks <http://legal.un.org/ilc/publications/yearbooks>
- The Hague Peace Palace Library Ecocide database
 - <http://www.peacepalacelibrary.nl/research-guides/special-topics/environment/ecocide>
- Institute for Environmental Security <http://www.envirosecurity.org>

Further reading

- Higgins, Polly (2010, 2nd Ed. 2015). *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet*. Shepheard-Walwyn.
- Higgins, Polly (2012) *Earth is our Business: Changing the Rules of the Game*, Shepheard-Walwyn
- Franz, Broswimmer (2002). *Ecocide: A Short History of Mass Extinction of Species*. Pluto Press.
- Svatikova, Katarina (2012) *Economic Criteria for Criminalization: Optimizing Enforcement in case of Environmental Violations*. Cambridge.