



Critical review

From 'polluter pays' to 'polluter does not pollute'



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ABSTRACT

Non-binding agreements, minor sanctions in the form of payment obligations and shaming have been the usual policy responses against environmental harms. In addition to this, many existing pieces of legislation on international environmental law and governance are based on good intent and voluntary agreement and they have proven to be limited or ineffective. This article argues that, at the current state of the climate crisis, there is no more room for negotiations and proposals which lead to false solutions. Acknowledging that, legal solutions to environmental problems require new formulations which incorporate a different understanding of nature and its non-human inhabitants; this article suggests that an international law of ecocide has the potential to become a very powerful tool to transform structures which cause environmental damage and climate crimes.

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1. Introduction

The destructive impact of humanity on its own natural environment is an undeniable fact. Impacts of human-induced environmental damage and degradation have become more and more evident during the past fifty years. With growing public awareness of environmental issues, the urgent need to take legal precautions to limit economic development at the expense of environmental destruction was realized on a global scale starting from early 1970s. Since then, various international instruments and mechanisms have been created in the environmental field; non-binding agreements, minor sanctions in the form of payment obligations and shaming have been the usual policy responses against environmental harms. Seeing that such measures are not adequate to

respond to and prevent serious environmental destruction and damage, international environmental lawyer Polly Higgins, proposed an amendment to the Rome Statute to include ecocide, an extensive damage to or destruction of ecosystems, as the fifth crime against peace.¹

Coined in the aftermath of the Vietnam War, ecocide is not a new concept; it has been a subject of debate in the international arena since 1970s. The growing necessity of establishing a more rigorous approach to respond to problems of environmental damage and climate change led to the resurfacing of the debate in international environmental arena on introducing an international law of ecocide to prevent and prohibit acts that cause mass environmental destruction and damage.

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¹ Rome Statute of the International Criminal Court is the treaty that established the International Criminal Court that has jurisdiction over four crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

2. Ecological destruction and capitalism

Before exploring what criminalization of ecocide would entail, it is necessary to give a brief overview of the relationship between capitalism and nature to locate environmental harms, crimes and degradation within the context of political ecology. Marx's theory of metabolic rift as developed by John Bellamy Foster provides a powerful tool to study and understand global climate and environmental degradation (Clark and York, 2005). Metabolism denotes the relationship of exchange within and between nature and men (Clark and York, 2005: 396), whereas metabolic rift is the destruction of the metabolism between human beings and the soil for the sake of accumulation (Foster and Clark, 2009: 6). As Clark and York (2005) underlines, metabolic rift between nature and society include the disruption of natural cycles, accumulation of waste and degradation of environment (2005: 391). A metabolic approach illustrates that "the root cause of the environmental problem lies in our socioeconomic system and particularly in the dynamic of capital accumulation" (Foster and Clark, 2012: 5). Under an unstable global capitalist system, nature is seen as a gift ready to be exploited to a point of depletion due to capitalism's unsustainable expansionary logic. As scientific evidence clearly indicates, continuing to operate under the capitalist logic that undermines planetary boundaries is the path to global disaster (Magdoff and Foster, 2010: 5).

Large-scale agriculture, trade, industrialization, urban growth, chemical fertilizers and economic activities intensify metabolic rift between people and the earth, which results in the disruption of the carbon cycle (Clark and York, 2005). Recent attempts to "reorganize" national and global economic activity toward "green economy" principles, such as energy efficiency, decoupling economic growth from environmental externalities and technological adjustments does not necessarily ensure that social and environmental justice concerns are sufficiently taken up (Okereke and Ehresman, 2015). In addition to this, as White and Kramer (2015) point out, carbon emissions are not shrinking, dirty energy industries continue to expand and "the dominance of neo-liberal ideology as a guiding rationale for the commodification of nature and the concentration of decision-making in state bureaucracies and transnational corporate hands accelerate the rate and extent of environmental degradation" (2015: 386). To conclude, metabolic rifts, such as global climate change and widespread environmental damage are human-caused ecocides and these harms demand urgent and effective legal response, which will facilitate a deeper engagement with social and ecological justice.

3. An international framework for stopping environmental harm and climate crimes

Higgins et al. (2012) defines ecocide as "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" and urges that ecocide should be made a crime of strict liability (2012: 4). As stated above, their call for criminalization of ecocide is not unprecedented. A recent study uncovered United Nations documents proving that the criminalization of ecocide was discussed and debated many times between 1972 and 1996 (Gauger et al., 2012). Making ecocide a crime in times of war was discussed by academics, NGOs and experts at the side events of the United Nations Conference on the Human Environment in 1972. A draft International Convention on the Crime of Ecocide pointed out the shortcomings of 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which was prepared by Professor Richard A. Falk in 1973. In the following

years, despite increasing support for the inclusion of crime of ecocide to the revised version of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, no consideration was given to the crime of ecocide in the final version of the text. Perhaps the most significant development in terms of the institutional history of the concept of ecocide took place during the period between 1984 and 1996. The International Law Commission (ILC), while finalizing the Draft Code of Crimes against the Peace and Security of Mankind that served as a precursor to the Rome Statute, extensively considered the possible inclusion of offences that cause serious damage to the environment. On first reading of the draft Code in 1991, the text included the Article 26, which focused on offences causing widespread, long-term and severe damage to the environment (Document on Crimes Against the Environment, 1996). Subsequent to the forty-third session in 1991, several countries expressed their reservations with regard to the draft Article 26. In 1995, following the criticisms and debates about the provision, removal of the Article 26 was discussed. Despite the general opinion for keeping a provision on crimes against the environment in times of peace, the final Code did not address to offences causing serious damage to the environment in peacetime. The only reference given to a crime against the environment underlined the widespread, long-term and severe damage to the natural environment within a war context (Higgins et al., 2013: 261). Overall, the international community's initial response to the threat of ecocide was slow and ineffective (Teclaff, 1994: 934).

A significant development took place in 2010, when a proposal to amend the Rome Statute to include an international crime of ecocide was submitted by environmental lawyer Polly Higgins into the ILC. After the submission of the draft proposal, Higgins and several other lawyers have co-drafted a legislative framework entitled the "Ecocide Act", which advocates the criminalization of environmentally destructive acts (Higgins, 2014). The proposed Act imposes an international and transboundary legal duty of care on high-level decision makers to prevent the risk of and actual mass environmental damage and destruction. Additionally, the draft Act proposes to assign a legal duty of care on governments to provide assistance to those countries that are at risk of or are suffering from ecosystem collapse as a consequence of naturally occurring ecocide (Higgins et al., 2013: 257). Overall, the draft Ecocide law creates a legal duty of care to prevent, prohibit and pre-empt human-caused ecocide as well as naturally-occurring ecocide (Higgins, 2014).

An international law of ecocide promulgated in line with Higgins' proposal would entail significant consequences for populations, such as indigenous peoples and inhabitants of small island states that are more susceptible to negative impacts of climate change. Despite being among the least responsible of all nations for climate change, small island states are likely to suffer strongly from its negative impacts (UNFCCC, 2005). Similarly, indigenous communities are unique populations that are more vulnerable to climate related disasters, increasing diseases as well as changing climate, vegetation and wildlife (IPCC, 2001). An international law of ecocide would provide the legal basis for a mandatory duty of care to assist to indigenous populations and small island states that are at risk of or are suffering from adverse impacts of a naturally occurring ecocide regardless of whether the disaster is climate change related. Furthermore, making ecocide an international crime and a crime of strict liability would have unprecedented impacts on how multinational corporations and governments operate. If adopted, any dangerous activity leading to mass environmental destruction will become a crime at international level (Higgins, 2012). In other words, environmentally destructive activities of governments and multinational corporations that contribute to climate change will become illegal once an international law of ecocide is put into place. Additionally, adoption of such a law could fill a legislative gap regarding the

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