GREAT TRANSITION INITIATIVE
TOWARD A TRANSFORMATIVE VISION AND PRAXIS

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Against Ecocide: Legal Protection for Earth

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The current legal regime allows states and corporations to despoil the environment with impunity. This injustice has inspired a new movement of legal experts and citizens calling for the codification of *ecocide* as a fifth crime against peace, joining genocide, crimes of aggression, crimes against humanity, and war crimes. Their work aims to transform our understanding of nature from property to an equal partner with humans in building sustainable societies. The political and enforcement hurdles are formidable, but an awakened and engaged citizenry, strengthened by the Paris climate agreement, may prove powerful enough to elevate the prevention of crimes against nature to an internationally recognized norm.

The Rights of Nature

Last summer, I sat in a Dutch courtroom and listened to a verdict that would make headlines around the world. The judges of The Hague District Court ruled that the government of the Netherlands had a legal obligation to act in the best interests of current and future generations by lowering its CO_2 emissions. For the first time, a court had established a "duty of care" towards future citizens in matters of climate policy.

This landmark verdict encouraged non-governmental organizations (NGOs) in Belgium, France, the Philippines, and other countries to seek climate justice through legal and human rights frameworks.[1] For example, a groundbreaking judgment in Seattle last fall ruled that the State of Washington had a constitutional obligation and public trust duty to preserve, protect, and enhance air quality for current and future generations.[2] The rise—and success—of climate litigation has been an exciting development in the legal landscape. Such litigation challenges short-term political thinking with legal action that focuses on the long-term consequences of today's decisions.

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An even bigger breakthrough might be on the horizon, as lawyers around the world are advocating for the introduction of a legal duty of care towards the natural world. This effort aims to make ecocide—the massive damage and destruction of ecosystems, such as the deforestation of the Amazon, the Deep Horizon oil spill, the Fukushima nuclear disaster, and Athabasca tar sands extraction—an international crime. Their strategy is to add ecocide to the Rome Statute of the International Criminal Court (ICC) as the fifth crime against peace (along with genocide, crimes of aggression, crimes against humanity, and war crimes), and to have ecocide law introduced in the national jurisdictions of the member states of the ICC.[3]

Initiatives to criminalize ecocide express an emerging ecocentric worldview in law that affords intrinsic value and rights to nature.[4] This duty of care toward nature demands that human laws be harmonized with nature's laws. To achieve this, we must act as "Earth guardians," giving voice and legal standing to nature's rights and interests when crafting legislation and public policy. In an ecocentric framework, it is not enough to integrate the interests of future generations in lawmaking; the interests of nature must also be integrated to do justice to our interconnection with and dependence on the natural world.

This ecocentric worldview challenges the dominant legal paradigm in which nature is seen as "property," and humans its owners. In prevailing legal and economic

systems, the human relationship with the natural world has been one of exploitation and domination, and environmental destruction has been accepted as collateral damage in the pursuit of profit. Ecocide law challenges the view of nature as a lifeless "object" for human use, drawing a clear line beyond which massive anthropogenic damage to ecosystems is a crime.

A Short History of Ecocide

Though the concept of ecocide may seem novel to some, it has been a part of environmental discourse for over four decades. The term was coined in 1970 by the American biologist Arthur Galston at the Conference on War and National Responsibility. In the 1950s, he had worked in a laboratory helping to develop a chemical component of the defoliant Agent Orange, infamously used in the Vietnam War to destroy vegetation and poison communities on a massive scale. Appalled by the use of his creation, Galston became an antiwar activist and the first person to label the massive damage and destruction of ecosystems as *ecocide*. The word derives from the Greek *oikos*, meaning "house or home," and the Latin *caedere*, meaning "to demolish or kill." *Ecocide* thus literally translates to "killing our home."

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In 1972, Swedish Prime Minister Olof Palme explicitly referred to the Vietnam War as ecocide in his opening speech for the United Nations Conference on the Human Environment. "The immense destruction brought about by indiscriminate bombing, by large scale use of bulldozers and herbicides is an outrage sometimes described as ecocide, which requires urgent international attention," he expounded. The conference adopted the Stockholm Declaration, the first international legal document to explicitly recognize the right to a healthy environment. At the People's Forum, an unofficial event running parallel to the UN Conference, thousands of people took to the streets, demanding that ecocide be declared a crime.

The 1970s and 1980s saw extensive study and debate within the UN about expanding the 1948 Genocide Convention, with several countries advocating the inclusion of ecocide. In 1985, the official Whitaker Report recommended the inclusion of ecocide in the draft Code of Offences Against the Peace and Security of Mankind, the precursor to the 1998 Rome Statute. The following year, *ecocide* was defined in the draft Code as "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment," language that was broadly supported by most members of the UN's International Law Commission. The 1991 version of the Code included draft Article 26: "An individual who willfully causes or orders the causing of widespread, long-term, and severe damage to the natural environment shall, on conviction thereof,

be sentenced." In 1995, however, such language was withdrawn from the draft code through a unilateral decision by the commission chairman, likely under pressure from a few states and the nuclear lobby.[5] Whatever the reason, ecocide was never included in the Rome Statute of the ICC.

Conceptual Comeback

The idea of codifying ecocide as an international crime has enjoyed a resurgence in recent years. In 2010, Scottish lawyer Polly Higgins proposed to the International Law Commission that the Rome Statute be amended to include ecocide, defining it 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 or will be severely diminished." Notably, she speaks of the "inhabitants" of a territory instead of its "human population," aiming to protect not only humans, but also all other members of the animal kingdom.

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Since 2010, Higgins has been seeking support for her ecocide amendment from heads of state, lawyers, business leaders, civil society, and the international community.[6] This year, she has focused in particular on the officials of Small Island Developing States, whose countries are under severe threat from intensifying storm activity and rising sea levels induced by climate change. Higgins's goal is to create a legal duty of care compelling the international community to provide assistance to these and other territories that suffer from such human-induced ecocide.

An emerging social movement, notably End Ecocide on Earth, has complemented this work. An international team of lawyers (French, American, and Togan) have drafted End Ecocide on Earth's own ecocide amendment to the Rome Statute, which focuses on protecting ecosystem services and the global commons (including the atmosphere, the oceans and seas beyond territorial waters, the Arctic, Antarctic, and migratory species). The team defines *ecocide* as "an extensive damage or destruction which would have for consequence a significant and durable alteration of the global commons or ecosystem services upon which rely a group or subgroup of a human population" within the framework of known planetary boundaries.[7] The protective space for the global commons and ecosystem services they propose aims to stop the exploitation of these resources resulting from national sovereignty and unbridled capitalism.

The movement has been gaining momentum in political, academic, and legal circles. At the climate conference in Paris this past December, the Ecuadorian president Rafael Correa, with the support of Bolivia and Venezuela, called for the creation of

an international court of environmental justice to punish crimes against nature and for the adoption of an international declaration of nature's rights. Argentinian Nobel Peace Prize winner and human rights activist Adolfo Pérez Esquivel has been advocating since 2009 on behalf of the International Academy of Environmental Sciences for the establishment of an international tribunal for crimes against the environment. Various legal scholars have also put forth detailed blueprints for making environmental destruction a crime under international law.[8]

A Tool for Peace

This increasing support for the international prohibition of ecocide comes at a time of unprecedented ecological crisis. Severe environmental damage engenders a cycle of violence that abrogates the rights to life, health, and security of people living in the affected areas. Furthermore, such destruction and pollution can lead to food scarcity, forced displacement, and conflict between displaced peoples and the inhabitants of the territories to which they migrate. In this way, the ecological crisis is closely connected to the social and humanitarian crises of the early twenty-first century.

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Designating ecocide an international crime against peace can catalyze a transition to a green economy and a more peaceful global civilization. It would alert corporations and states that there are legal consequences to serious damage and destruction of ecosystems, and establish a normative threshold which it is illegal to cross.[9] Harmful extractive practices would thus become riskier for transnational corporations and their investors, stimulating greater investment in renewables and sustainable agriculture. Just as abolition in the nineteenth century radically changed people's view of slavery in a short period of time, so, too, does an international prohibition of ecocide promise to realign prevailing value systems, placing the preservation of ecological integrity above the profit motive.

Political consensus and enforcement remain formidable but surmountable barriers. Amending the Rome Statute requires a two-thirds majority of signatories, i.e., the heads of state for eighty-two countries. Small Island Developing States and Andean countries such as Bolivia and Ecuador, with indigenous cultures supportive of legal protection for the Earth, might formally propose the ecocide amendment at the ICC this year. If this proves successful, the next challenge would be to get Russia, India, China, and the United States on board. These major powers are not party to the ICC, complicating effective, long-term global enforcement of a prohibition of ecocide.

Enforcement of ecocide law under the Rome Statute would follow the "complementarity principle," under which the ICC would only intervene when national judicial systems fail and a state party is either unwilling or unable to bring

perpetrators of ecocide to justice. Of course, this will likely prove challenging. The ICC, lacking a "global" police force or other enforcement arm, depends on the cooperation of the international community and its own standing as a reputable international institution. Yet while enforcement of the prohibition of genocide under the Rome Statute has been a thorny challenge, genocide is now the exception, rather than the norm. The same will likely happen with ecocide. Adding ecocide to the Rome Statute as the fifth crime against peace will provide the legal tools for lawyers to act and speak on behalf of those harmed by massive environmental damage and destruction, making it increasingly unlikely that the international community will deem it acceptable for ecocide to occur.

Despite the immense challenges this movement faces, the December 2015 Paris climate agreement offers grounds for optimism. The move among investors from fossil fuels to renewables, the environmental advocacy of religious leaders such as Pope Francis, and the increasing pressure of climate litigation on policymakers suggest that a global ecological sensibility may be rising. Anchoring this sensibility in laws that protect the intrinsic value of the natural world would be a significant step in the Great Transition to a sustainable world.

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Endnotes

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