

The Crime of Ecocide Through Human Rights: A New Tool For Climate Justice

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www.internationalcrimesdatabase.org

ICD Brief 27
May 2022

ABSTRACT

The purpose of international criminal law is to contribute to ending impunity for the perpetrators of the most serious crimes of international concern, and in doing so, help to prevent such crimes from occurring. To date, however, there is no international crime prohibiting acts of mass destruction of the environment, in spite of the catastrophic consequences that such acts have on the natural systems on which human life depends. The addition of ecocide as the fifth crime under the jurisdiction of the International Criminal Court would help to fill this accountability gap.

The rapidly evolving relationship between human rights, climate change and the environment, as manifested in the increasing use of human rights in climate litigation, suggests that human rights law has a critical role to play in shaping the crime of ecocide. Using a human rights lens helps deepen our understanding of ecocide's vastly disproportionate impacts by revealing the ways in which environmental destruction exacerbates existing poverty and inequalities, and compounds intersecting forms of discrimination. Interpreting ecocide in this way will help generate a body of law which delivers real environmental and climate justice.

A human rights lens also reveals accountability gaps which the new crime of ecocide helps close, bringing accountability for influential decision-makers both within and outside of government, such as heads of industry. The due diligence standards established by the Guiding Principles on Business and Human Rights can help businesses understand how to avoid ecocide charges, and make the crime an effective and enforceable deterrent.

This ICD Brief will argue that an international crime of ecocide that is informed in its application by human rights law and practice holds the potential to enhance accountability for serious environmental harm and prevent further damage, as well as deliver on climate justice.

I. INTRODUCTION

The ecological crisis that has resulted from anthropogenic climate change, mass deforestation, loss of biodiversity, and pervasive plastic pollution is having a profound impact on the environment, and on the human and other beings that depend upon it. As people around the world lose their homes, are forced to migrate, suffer hunger and thirst and see their way of life destroyed, the human consequences of climate and environmental destruction become increasingly clear.

Reflecting this reality, there is now a deeper understanding that human rights and the protection of the environment are closely interrelated imperatives, and not separate or even opposing goals. Whilst the protection of the environment is a necessary enabling condition for the effective enjoyment of human rights, protecting human rights can help to protect ecosystems and prevent serious damage to the environment, as well as mitigate against the impacts of climate change. As this understanding grows, so do creative strategies for addressing environmental harm through human rights accountability mechanisms.

The adoption of a new international crime of ecocide is an expression of this appreciation of the interconnection between human rights and the environment, bringing concern for the environment into a system of law primarily concerned with the protection of human life and dignity. Adding ecocide to “the most serious crimes of concern to the international community as a whole” recognises the climate and biodiversity crisis, with its potentially catastrophic consequences for our common environment, as one of the greatest threats to human rights of our era. At the same time, in the draft definition proposed by the Independent Expert Panel,¹ the crime of ecocide recognises the intrinsic value of the environment and offers a way out of an overly anthropocentric approach.

Using a human rights lens helps deepen our understanding of ecocide’s vastly disproportionate impact on vulnerable and marginalised communities. Interpreting ecocide in this way will help generate a body of law which delivers real environmental and climate justice. It also reveals accountability gaps which the new crime of ecocide helps close, bringing

¹ The Independent Expert Panel for the Legal Definition of Ecocide convened by the Stop Ecocide Foundation issued its Commentary and Core Text in June 2021. Available at <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf>

accountability for influential decision-makers both within and outside of government, such as heads of industry. On the other hand, the due diligence standards established by the UN Guiding Principles on Business and Human Rights can help businesses understand how to avoid ecocide charges, and make the crime an effective and enforceable deterrent.

The following section outlines developments in the area of human rights and the environment, and situates the new crime of ecocide in these. Section III considers how ecocide complements human rights by moving beyond anthropocentrism, and Section IV theorises how a human rights approach can in fact maximise the potential of the crime of ecocide to contribute to environmental and climate justice. In Section V, the Brief examines corporate responsibility in particular, noting that ecocide offers a path to accountability for corporate actions where international human rights law does not, but also that the Guiding Principles on Business and Human Rights can be used to flesh out the content of corporate responsibility, most notably in relation to the proportionality test in the proposed crime.

II. ECOCIDE EMERGES FROM THE UNDERSTANDING THAT HUMAN RIGHTS AND THE ENVIRONMENT ARE INTERRELATED

The crime of ecocide is a product of the understanding that human rights and the protection of the environment are deeply interwoven. It is now beyond dispute that the climate and biodiversity emergency we are living through - with its record wildfires, droughts and flooding; deadly heatwaves, melting glaciers and rising sea levels - is a global 'human rights threat multiplier'. The far-reaching consequences for the rights to life, health, housing, self-determination and more are projected only to worsen as the climate crisis intensifies. At the same time, some measures taken by States and corporate actors to tackle climate change and address environmental damage have themselves had negative human rights consequences. There is, therefore, increasing pressure on States, and corporate actors, to focus on protecting both people and the planet, and in so doing, to satisfy both their human rights obligations and climate commitments.

The international human rights system, national human rights institutions, and courts at national and regional levels, have helped to deepen the appreciation of these interlinkages and clarify the responsibilities of States and non-State actors in relation to human rights and

the environment.² Since 2008, the UN Human Rights Council has adopted a series of resolutions which have highlighted issues related to climate change and the environment, as well as mandated panel discussions and analytical studies to address specific human rights concerns and protection gaps.³ The Council's special procedures mandates have addressed human rights issues related to climate change and the environment through country visits, individual communications procedures, thematic studies and reports, and technical cooperation.⁴ In 2012, the Council appointed an independent expert specifically to address the issue of human rights obligations relating to the enjoyment of a clean, healthy and sustainable environment, extending this to a Special Rapporteur mandate in 2015.⁵

Building on the significant work developed over many years by the Special Rapporteur, in October 2021, the Council adopted a resolution recognising the independent human right to a clean, healthy and sustainable environment and calling on UN Member States to cooperate to implement this right.⁶ While variations on this right have been reflected already in legislation in over 150 countries, as well as in treaties at a regional level, resolution 48/13 represented the first time it had received international recognition.⁷ At the same session, the Council adopted a resolution establishing the new mandate of a Special Rapporteur on the promotion and protection of human rights in the context of climate change, further underscoring the important interlinkages.⁸ The new mandate-holder will develop recommendations on how to address and prevent the adverse effects of climate change on the enjoyment of human rights, and on ways to strengthen the integration of human rights concerns into climate policymaking and legislation, among other tasks.

² See, for example, the substantive work of the Office of the UN High Commissioner for Human Rights on human rights, climate change and the environment at <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRCClimateChangeIndex.aspx>

³ For a list of UN Human Rights Council resolutions related to human rights and climate change, see the Office of the UN High Commissioner for Human Rights at: <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx>

⁴ See OHCHR, 'Human rights mechanisms addressing climate change' at <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HumanRightsMechanisms.aspx>

⁵ Details on the history and mandate of the UN Special Rapporteur are available at: <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>

⁶ UN Human Rights Council resolution 48/13, 'The human right to a clean, healthy and sustainable environment', 21 October 2021, A/HRC/RES/48/13, <https://undocs.org/A/HRC/RES/48/13>

⁷ The right to a 'satisfactory environment' enshrined in article 24 of the African Charter on Human and Peoples' Rights, adopted in 1981, was the first representation of this right in an international human rights instrument.

⁸ UN Human Rights Council resolution 48/14, 'Mandate of the Special Rapporteur on the promotion and protection of human rights in the context of climate change', 13 October 2021, A/HRC/RES/48/14, <https://undocs.org/A/HRC/RES/48/14>

UN human rights treaty bodies - the committees of independent experts that review implementation of the core international human rights treaties - also have addressed the relationship between human rights and protection of the environment, and provided guidance for States. For instance, the UN Human Rights Committee has emphasised that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life, and asserted in this regard that States' parties obligations under international environmental law and international human rights law should inform each other.⁹ The Committee on Economic, Social and Cultural Rights has stated that failure to prevent foreseeable human rights harm caused by climate change, or a failure to mobilise the maximum available resources in an effort to do so, could constitute a breach of a State's legal obligations.¹⁰

More recently, in response to a petition filed by 16 children from 12 countries against a group of States, the UN Committee on the Rights of the Child affirmed that a State party to the Convention could be held responsible for the negative impact of its carbon emissions on the rights of children, both within and outside its territory.¹¹ The Committee also committed to devote its next General Comment on children's rights and the environment with a special focus on climate change, which will provide authoritative guidance in this regard to the governments of the 196 states that have ratified the Convention on the Rights of the Child and, according to the Committee, "serve as an impetus for global-level change and as a powerful tool for children and young people as well as their advocates to hold governments and other relevant actors accountable".¹²

Courts at national and regional levels, too, increasingly have been called upon to address the human rights consequences of environmental damage and the climate crisis, as affected

⁹ UN Human Rights Committee, 'General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life', 30 October 2018, CCPR/C/GC/36, para 62. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf

¹⁰ UN Committee on Economic, Social and Cultural Rights, 'Climate change and the International Covenant on Economic, Social and Cultural Rights', 8 October 2018, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>

¹¹ UN Committee on the Rights of the Child, *Sacchi et al. v Argentina*, Communication n.104/2019, Decision adopted on 22 September 2021, UN Doc. CRC/C/88/D/104/2019, https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ARG/CRC_C_88_D_104_2019_33020_S.pdf

¹² See details of the global online consultation related to the Committee on the Rights of the Child General Comment No. 26, 'Children's Rights and the Environment with a Special Focus on Climate Change' at <https://childrightsenvironment.org>

individuals and groups have sought to hold governments and companies to account for their actions and, in some cases, to compensate them for the harm they have suffered.¹³ In *SERAC v Nigeria*, the African Commission on Human Rights held in October 2001 that Nigeria had violated a number of provisions of the African Charter on Human and Peoples' Rights, including the right to a satisfactory environment, by facilitating environmentally degrading and polluting oil exploitation practices in the traditional Ogoniland of the Niger Delta.¹⁴ The number of rights-based climate litigation cases around the world since then has risen exponentially, particularly in recent years as the actions (or inactions) of State and corporate actors have been challenged on the basis of existing policy commitments and legal obligations, as well as irrefutable climate science. An assessment of these cases suggests that an increasing proportion are being brought by young people on behalf of future generations, such as the *Duarte Agostinho and others vs Portugal and 32 other states* case currently pending before the European Court of Human Rights.¹⁵ These cases underscore the demand for more ambitious policy responses to the climate crisis, as well as the call for greater accountability for actions that cause serious damage both to the environment and to human rights.

The creation of an international crime of ecocide is an expression of this trend, bringing concern for the environment into a system of law primarily concerned with the protection of human life and dignity. It acknowledges the scientific evidence which points to the conclusion that the emission of greenhouse gases and the destruction of ecosystems at current rates will have catastrophic consequences for our common environment. It introduces individual accountability on an international level for extreme environmental damage, in the same way that individual responsibility for gross human rights violations was created by earlier international criminal law. International criminal law, in the words of the Rome Statute of the International Criminal Court, deals with "unimaginable atrocities that deeply shock the conscience of humanity" and which "threaten the peace, security and well-being of the world". Adding ecocide to the pantheon of international crimes recognises that extreme environmental

¹³ For a detailed overview of key global developments in climate litigation see Setzer J and Higham C (2021), 'Global trends in climate change litigation: 2021 snapshot', London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, at https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf

¹⁴ African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*, 27 October 2001, Decision, at https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf

¹⁵ European Court of Human Rights, *Duarte Agostinho and others v Portugal and 32 other states* (communicated case), 13 November 2020, Appl n. 39371/20, at: <https://hudoc.echr.coe.int/fre?i=002-13055>. See also Chatham House Briefing, *Climate change and human rights-based strategic litigation*, 11 November 2021, at <https://www.chathamhouse.org/2021/11/climate-change-and-human-rights-based-strategic-litigation>

damage is of the same order and threatens the same interests as the existing international crimes: genocide, crimes against humanity, war crimes and aggression.

III. ECOCIDE COMPLEMENTS HUMAN RIGHTS BY MOVING BEYOND ANTHROPOCENTRISM

While we are seeing an increased understanding of the interrelationship of human rights and the protection of the environment, it is inescapable that a human rights approach is anthropocentric, placing humans at the centre of its concern. A human rights approach can only address the negative effects of environmental damage on people, or our own need for a healthy environment. Human rights law is silent in the face of disappearing ecosystems whose value to people is either not apparent or unknown. The definition of ecocide proposed by the Independent Expert Panel for inclusion in the Rome Statute complements this by including elements of the environment as protected values per se: it does not require damage to human beings to result in order for the crime to be committed.

According to the Independent Expert Panel, “ecocide” means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”¹⁶ Severe and either widespread or long-term damage to the environment is defined as follows:

*“Severe” means damage which involves very serious adverse changes, disruption or harm to **any element of the environment**, including grave impacts on human life or **natural, cultural or economic resources**;*

*“Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by **an entire ecosystem or species** or a large number of human beings;*

“Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;¹⁷

(emphasis added).

¹⁶ See note 1 above.

¹⁷ Ibid.

By focusing on the risk of severe and either widespread or long-term damage to the environment, without requiring that damage to have a negative impact on human beings, the proposed definition of ecocide dissolves the anthropocentric vs ecocentric division, recognising that people and planet have both intrinsic and interrelated value. This vision is emphasised by the new paragraph suggested for addition to the preamble of the statute, which would broaden the context in which the international community has come together to outlaw the most serious crimes of concern. The current reference to millions of children, women and men having been victims of atrocities in the 20th century would be complemented by the concern that “*the environment is daily threatened by severe destruction and deterioration, gravely endangering **natural and** human systems worldwide*” (emphasis added).

Defined in this way, the crime of ecocide addresses the limits of a human rights approach to the protection of the environment. Animals, plants and other elements are recognised to have value in their own right. While ecocide expresses the interrelationship of human rights and the environment, therefore, it also complements a human rights approach by moving beyond anthropocentrism.

IV. A HUMAN RIGHTS LENS HELPS CONTRIBUTE TO ENVIRONMENTAL AND CLIMATE JUSTICE

So far, we have considered how the crime of ecocide proposed by the IEP relates to the human rights framework. That framework can also help ecocide law address the full scope of the environmental and climate crisis. Using a human rights lens to interpret ecocide highlights the disproportionate impact of environmental destruction on vulnerable and marginalised individuals and groups. It is important for prosecutions to reflect this reality, as jurisprudence which encompasses the full impact of the criminality will be an important step in achieving environmental and climate justice.

An assessment of the climate crisis through a human rights lens reveals that the most vulnerable sectors of global society are affected in grossly unequal ways. The impacts of climate change and environmental destruction exacerbate existing poverty and inequalities, and can compound intersecting forms of discrimination. Even conservative estimates suggest that without urgent action, 120 million more people will have been pushed into poverty by

2030.¹⁸ Entrenched and systemic gender-based discrimination has intensified human rights harms related to serious environmental damage and led to gendered impacts, with women and girls suffering disproportionately from the impacts of climate breakdown.¹⁹ A racialised analysis demonstrates how the climate and biodiversity crisis is linked to economic and political frameworks that have systematically disregarded the rights of indigenous peoples, people of African descent, and others.²⁰ At the same time, individuals and communities that are profoundly affected by climate change have not had a meaningful voice in decision-making processes around climate change solutions – and yet their free and informed participation is both critical for effective climate action and the prevention of serious environmental damage, and a human rights imperative.

Climate change has a profound impact on small island developing States, for example, where communities with limited capacity to mitigate risks, build climate-resilient economies and infrastructures, and absorb the economic and social aftershocks after already suffering the effects of extreme weather events.²¹ Rising sea levels and intense weather systems have threatened the right to life and caused damage to infrastructure, jeopardising the rights to housing, water and sanitation, and health. Individuals, families and communities have been displaced, with further ripple effects on the right to education, cultural rights, and the right to development.

A human rights assessment also reveals the particular vulnerability of children to the impacts of environmental destruction. While all children are exceptionally vulnerable to the negative impacts of climate change, with the youngest being most at risk, nearly half of the world's children live at 'extremely high risk' in places where poverty and a lack of access to clean

¹⁸ UN Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights, 'Climate Change and Poverty', 17 July 2019, A/HRC/41/39, p. 4 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/218/66/PDF/G1921866.pdf?OpenElement>; and World Bank, *Shock Waves: Managing the Impacts of Climate Change on Poverty* (2016), p. 12 <https://openknowledge.worldbank.org/handle/10986/22787>

¹⁹ UNEP, UN Women and UN Human Rights, *Human Rights, Gender Equality and the Environment: Key Messages*, November 2021, https://www.ohchr.org/sites/default/files/2022-03/Final_HumanRightsEnvironmentGenderEqualityKM.pdf. See also CEDAW, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, 7 February 2018, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_37_8642_E.pdf

²⁰ UN Human Rights Council, Report of the UN Working Group of Experts on People of African Descent, 'Environmental justice, the climate crisis and people of African descent', 21 September 2021, <https://undocs.org/A/HRC/48/78>

²¹ Thomas, Baptiste et al, 'Climate Change and Small Island Developing States', Annual Review of Environment and Resources, 2020, 45:1–27, at <https://www.annualreviews.org/doi/pdf/10.1146/annurev-environ-012320-083355>

water, healthcare and education intersect to diminish the likelihood of a child's ability to survive the climate crisis.²² This dire situation is eroding development gains and undermining the full spectrum of the rights of children, who are often unable to protect their own rights. The inter- and intra-generational impacts of environmental destruction increasingly are recognised and addressed by courts at the national level, where decision-makers are being held to account for actions or omissions which will impact the enjoyment of rights by both present and future generations.²³

Environmental destruction also has had a particularly devastating impact on the human rights of indigenous peoples, many of whom depend on ecosystems that are particularly prone to the effects of climate change and extreme weather events such as floods, droughts, heatwaves, wildfires and cyclones.²⁴ Colonialism, and the ecological destruction that has accompanied it, continues to threaten not only the natural resources and livelihoods of indigenous peoples in countries around the world, but also their cultural identity and survival. Resource extraction projects in some countries have led both to the destruction of ecosystems and to serious violations of the rights of indigenous peoples. To highlight one example, in Canada, the findings of the national inquiry into missing and murdered indigenous women and girls in 2019 recognised the link between resource extraction projects, the 'boomtown'²⁵ and 'man camp'²⁶ environments that these projects created, and violence against indigenous women and girls.²⁷ Noting that 'substantial evidence' exists of the correlation between

²² UNICEF (2021), *The Climate Crisis is a Child Rights Crisis: Introducing the Children's Climate Risk Index*, www.unicef.org/reports/climate-crisis-child-rights-crisis. UNICEF reports a major disconnect between the countries where greenhouse gas emissions are generated and those where children are enduring the most significant climate-driven impacts, with the 33 countries listed as 'extremely high-risk', in terms of the impact on children, emitting only 9 percent of global CO2 emissions. The 10 highest emitting countries collectively account for nearly 70 percent of emissions.

²³ See Chatham House Briefing, note 15 above.

²⁴ UN Human Rights Council, Report of the UN Special Rapporteur on the rights of indigenous peoples, A/HRC/36/46, 1 November 2017, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/330/97/PDF/G1733097.pdf?OpenElement>

²⁵ Large-scale resource extraction projects can cause an influx of predominantly male workers to a rural or remote indigenous community, creating a sudden, often short-lived economic 'boom', with significant direct and indirect consequences for indigenous women and girls. See, for example, Amnesty International, 'Out of Sight, Out of Mind Report: Gender, Indigenous Rights, and Energy Development in Northeast British Columbia, Canada' (2016), at <https://www.amnesty.ca/sites/amnesty/files/Out%20of%20Sight%20Out%20of%20Mind%20EN%20FINAL%20web.pdf>

²⁶ 'Man camps' are temporary housing facilities constructed for predominantly male workers on resource extraction projects.

²⁷ Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019), <https://www.mmiwg-ffada.ca/final-report/>

resource extraction and violence against indigenous woman, girls and 2SLGBTQQIA people,²⁸ the national inquiry cited the perspective of one indigenous woman to describe the linkages:

The industrial system of resource extraction in Canada is predicated on systems of power and domination. This system is based on the raping and pillaging of Mother Earth as well as violence against women. The two are inextricably linked. With the expansion of extractive industries, not only do we see desecration of the land, we see an increase in violence against women. Rampant sexual violence against women and a variety of social ills result from the influx of transient workers in and around workers' camps.²⁹

The reality reflected in the findings of the national inquiry was amplified by indigenous activists at the COP26, who urged greater awareness of the linkages between extractive industries, climate destruction and violence against indigenous women and girls, and asserted that "femicide is directly linked to the ecocide".³⁰

The lack of respect for the human rights of indigenous peoples also disregards indigenous peoples' perspectives and knowledge of their environments, and the vital role of indigenous land stewardship. Indigenous peoples play an invaluable part in sustainable environmental management of natural resources and biodiversity conservation in many areas of the world, as manifested through indigenous-led climate research and monitoring initiatives such as the Indigenous Guardians programmes.³¹ This role has particular significance given that traditional indigenous territories encompass over 20 percent of the world's land surface and overlap with areas that hold 80 percent of the planet's remaining biodiversity. Still, the voices of indigenous peoples continue to be marginalised and silenced through repressive measures, threats to their livelihood and even violence.³²

²⁸ The National Inquiry has chosen to use the term "2SLGBTQQIA" (representing Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual people) as well as people who are non-binary or gender non-conforming. See National Inquiry into Missing and Murdered Indigenous Women and Girls, *Lexicon of Terminology* at https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/MMIWG_Lexicon_FINAL_ENFR.pdf

²⁹ See note 27 above, at p 586.

³⁰ The Guardian, 'Indigenous women speak out at Cop26 rally: 'Femicide is linked to ecocide'', 10 November 2021, <https://www.theguardian.com/environment/2021/nov/10/indigenous-women-speak-out-at-cop26-rally-femicide-is-linked-to-ecocide>

³¹ See, for example, the Intergovernmental Panel on Climate Change, 'Special Report on Climate Change and Land: Summary for policymakers', <https://www.ipcc.ch/srccl/chapter/summary-for-policymakers/>; and Indigenous Leadership Initiative, *Backgrounder: Indigenous-Led Conservation in the Boreal is Key to Climate Leadership*, 28 October 2021, www.ilinationhood.ca/guardians

³² Indigenous peoples accounted for more than one third of the 227 environmental and land defenders killed in 2020 alone - reportedly the deadliest year on record. Global Witness, *Last Line of Defense: The industries causing the climate crisis and attacks against land and environmental defenders*, September 2021,

Ultimately, a human rights lens helps to reveal the human stories of the impacts of climate change and environmental destruction, and in so doing to deepen our understanding of the interlinkages between people and the environment. This understanding will help to inform the crime of ecocide. By providing insights as to the grave impact of specific acts of ecocide on marginalised groups, or on “natural, cultural or economic resources”, it will assist prosecutors to frame their indictments to reflect the full impact of the criminality. We saw how the explicit articulation of gender-based violence in prosecutions and then judgements at international courts led to greater awareness of and accountability for those crimes, building a body of protective law towards gender justice.³³ Charges of ecocide which are informed by a human rights analysis have a similar potential to generate awareness, accountability and protection for all victims of environmental destruction. A response which centres on those most affected by the crime has the best potential to achieve environmental and climate justice.

V. HUMAN RIGHTS, ECOCIDE AND CORPORATE ACCOUNTABILITY

The proposed crime of ecocide can hold corporate actors internationally accountable in ways that the human rights framework alone cannot. At the same time, the responsibility of corporations to carry out human rights due diligence, as mapped by the UN Guiding Principles on Business and Human Rights (Guiding Principles), can flesh out the proportionality test in the proposed crime of ecocide and help make it an enforceable deterrent.

States are the primary duty-bearers under international human rights law. As part of their international human rights obligations, States must ensure protection against human rights abuse by business enterprises, as well as accountability and access to effective remedy in cases of business-related abuse. The Guiding Principles, endorsed by the UN Human Rights

<https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/> See also, UN Human Rights Council, Report of the UN Special Rapporteur on human rights defenders, ‘Final warning: death threats and killings of human rights defenders’, A/HRC/46/35, 24 December 2020, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/355/11/PDF/G2035511.pdf?OpenElement>

³³ See, e.g., Askin, Kelly, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’, *Berkeley Journal of International Law*, Volume 21, Issue 2, 2003; Campbell, Kirsten, ‘The Gender of Transitional Justice: Law, Sexual Violence and the ICTY’, *International Journal of Transitional Justice*, Volume 1, Issue 3, 2007; Durham, Helen and O’Byrne, Katie, ‘The Dialogue of difference: gender perspectives on international humanitarian law’, *International Review of the Red Cross*, Volume 92, Issue 87, March 2010; Brammertz, Serge, and Jarvis, Michelle (eds.), *Prosecuting Conflict-Related Sexual Violence*, Oxford University Press, 2016.

Council in 2011,³⁴ elaborate on this duty to protect, as well as outline the corporate responsibility to respect human rights, which requires that businesses “avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur”.³⁵ The Office of the UN High Commissioner on Human Rights has summarised these responsibilities in the context of climate change to include avoiding “the emission of greenhouse gases and toxic wastes, the contamination of air, water and soil, and deforestation – which adversely impact human life and health, ecosystems and biodiversity”.³⁶ The Guiding Principles outline how companies can identify, prevent, mitigate, and account for how they address their adverse human rights impacts through the exercise of human rights due diligence. This process involves four steps: assessing actual and potential human rights impacts; integrating and acting upon the findings; tracking the effectiveness of responses; and communicating on how impacts are addressed.³⁷

The Guiding Principles are binding only when translated into law at the national level, and discussions towards an international legally binding instrument on ‘transnational corporations and other business enterprises with respect to human rights’ - which began in 2014 - are still ongoing.³⁸ States have nonetheless considered implementing mandatory human rights due diligence regimes, both at domestic and regional levels, with a view to preventing environmental and climate harm, and enhancing corporate accountability.³⁹

The demand for due diligence stems in part from the acknowledgement by some corporate actors of the business imperatives of the climate crisis, as well as the importance of human

³⁴ UN Human Rights Council resolution 17/4, ‘Human rights and transnational corporations and other business enterprises’, 6 July 2011, A/HRC/RES/17/4, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4

³⁵ UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework”’, A/HRC/17/31, 21 March 2011, <https://digitallibrary.un.org/record/705860>

³⁶ UN OHCHR, *Fact Sheet No. 38: Frequently Asked Questions on Human Rights and Climate Change* (2021), p 36, https://www.ohchr.org/Documents/Publications/FSheet38_FAQ_HR_CC_EN.pdf

³⁷ See note 35 above, Guiding Principle 17.

³⁸ UN Human Rights Council resolution 26/9, 14 July 2014, A/HRC/RES/26/9, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>. A third revised draft of the ‘legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’, published on 17 August 2021, was discussed at 7th session of the intergovernmental working group on 25 – 29 October 2021. See <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

³⁹ See, for example, the European Commission initiative towards the adoption of mandatory human rights and environmental due diligence for certain companies, at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en

rights protection as a buffer against the human impacts of severe environmental harm. Businesses in some jurisdictions have recognised how developing and implementing appropriate due diligence policies can help them to identify, assess, prevent and mitigate adverse environmental and human rights impacts. Some businesses have called upon States to enact national legislation that would oblige corporate actors to prevent abuse of human rights and environmental harm in their global business operations.⁴⁰ According to the Business and Human Rights Resource Centre, to date, more than 70 large (e.g. those with over 1 billion Euro turnover) businesses, associations and investors have made statements in support of mandatory due diligence regulation.⁴¹

Clear legislative boundaries of this kind can help to level the playing field for businesses by establishing greater legal certainty around the standards expected of companies, as well as ensuring a measure of accountability when these standards are not met and providing access to a remedy for victims. While they are critically important for these reasons, however, such measures on their own are not sufficient to prevent or redress the most serious environmental damage, and human rights harms caused by corporate actors around the globe - and in reality, corporate actors rarely have been held accountable for acts that have caused severe and widespread or long-term damage to the environment.⁴²

While human rights-based cases increasingly have been brought against governments at the national level for actions, or inactions, in regard to climate change, courts also have begun to consider the human rights responsibilities of corporations for climate and environmental harms.⁴³ In a landmark case brought by the environmental group Milieudefensie/Friends of the Earth Netherlands and co-plaintiffs against Royal Dutch Shell (RDS), the district court in The Hague found that the RDS corporation had breached its duty of care under relevant provisions of the Dutch Civil Code, as further informed by obligations under articles 2 and 6 of the

⁴⁰ Business and Human Rights Resource Centre, 'UK businesses call for a new human rights and environmental due diligence law', 21 October 2021, at <https://www.business-humanrights.org/en/latest-news/uk-businesses-call-for-a-new-human-rights-and-environmental-due-diligence-law/>

⁴¹ Business and Human Rights Resource Centre, 'List of large businesses, associations & investors with public statements & endorsements in support of mandatory due diligence regulation', 6 June 2019, at <https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/>

⁴² One global initiative to address the well-documented barriers to securing corporate accountability and access to remedy for victims of business-related human rights abuses is the OHCHR Accountability and Remedy Project, launched in response to a request by the UN Human Rights Council in its resolution 26/22, at: <https://www.ohchr.org/en/business/ohchr-accountability-and-remedy-project>

⁴³ For a detailed overview of key global developments in climate litigation, including 'third wave litigation' and the private sector, see Setzer J and Higham C, note 13 above.

European Convention on Human Rights, and ordered the company to reduce its emissions by 45% by 2030, relative to 2019, across all its activities (including end-users emissions).⁴⁴ Legal action also was brought in April 2021 by ClientEarth against the Belgian National Bank for its failure to meet climate, environmental and human rights requirements, while purchasing bonds from fossil fuel and other greenhouse gas-intensive companies.⁴⁵

This trend is further reflected in recent actions by business entities calling for greater accountability in relation to human rights abuses and serious environmental harm, including individual criminal responsibility for the crime of ecocide. Some large investment funds are leaning on firms to change the way they do business, for example, requiring companies to provide detailed explanations of how they intend to meet environmental and human rights goals, with boards and individual directors reportedly to be held accountable where the pace of change does not reflect sufficient urgency.⁴⁶ With specific reference to the crime of ecocide, the International Corporate Governance Network, a global organisation led by investors responsible for assets of USD59 trillion, recently issued an expansive statement in which it also called upon governments and standard-setters to:

mandate regulations and collaborate internationally to criminalise ecocide; ensure sanctions, enforcement and resources to protect biodiversity, advance conservation and increase protected areas, as guided by science; [and] protect human rights and incorporate the perspectives of disadvantaged groups and regions adversely impacted by biodiversity measures and transition plans[...].⁴⁷

The establishment of an international crime of ecocide would align with these corporate- and investor-driven demands for greater human rights and environmental accountability, and push States to take prompt and effective legislative action at a domestic level. Under the provisions

⁴⁴ The Hague District Court, *Milieudefensie et al. v Royal Dutch Shell PLC*, Judgment of 26 May 2021, case number C/09/571932 / HA ZA 19-379, at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339>

⁴⁵ In December 2021 the Brussels Tribunal of First Instance dismissed the application, however an appeal brought by ClientEarth in early 2022 is pending before the Brussels Court of Appeal. https://www.climate-laws.org/geographies/belgium/litigation_cases/clientearth-v-belgian-national-bank

⁴⁶ Forbes, 'Larry Fink, Stakeholder Capitalism and Climate Action', 23 January 2022, <https://www.forbes.com/sites/prakashdolsak/2022/01/23/larry-fink-stakeholder-capitalism-and-climate-action/>; The Guardian, "£262bn investor says it will target bosses who fail on climate or human rights", 24 January 2022, <https://www.theguardian.com/business/2022/jan/24/investor-bosses-climate-human-rights-aviva-investors>

⁴⁷ ICGN Statement of Shared Climate Change Responsibilities to the United Nations Climate Change Conference of the Parties 26, 20 October 2021, <https://www.icgn.org/sites/default/files/2022-03/23.%20UK%20-%20COP26%20-%20Statement%20of%20Shared%20Climate%20Change%20Responsibilities%2C%20October%202021.pdf>

of the Rome Statute, the crime of ecocide would hold individuals responsible for their acts and omissions, meaning that decision-makers in both government and industry could be found personally liable for actions that amount to ecocide.⁴⁸ Entering at the international level, the crime of ecocide would signal a clear moral and legal red line in terms of the most egregious acts of destruction of the environment. Closing this accountability gap where corporate activity is concerned could have a significant impact on decision-making processes across sectors where there is potential for environmental harm.

An international crime of ecocide that is informed in its interpretation and application by the Guiding Principles would provide an enforceable deterrent to underpin and reinforce existing climate, environmental and human rights commitments. In particular, the requirement to exercise human rights due diligence can help in the assessment of whether environmentally harmful acts are ‘wanton’, one of the two alternate criteria proposed in the Independent Expert Panel definition of ecocide. The definition reads: *“ecocide” means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.*⁴⁹ Where an act is not unlawful, therefore, it must be ‘wanton’, defined by the Panel as: *“with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated”*.

The due diligence framework requires businesses to assess both the environmental and human rights impact of their actions,⁵⁰ providing a way to evaluate both the damage and the social and economic benefits of environmentally harmful corporate actions. This would provide clarity to businesses on the scope of their responsibility under ecocide law: a business that has complied with the requirements of human rights due diligence should be protected against accusations of having acted ‘with reckless disregard for’ excessive environmental damage. At the same time, importing the due diligence requirements into ecocide further strengthens the human rights elements of the crime.

⁴⁸ Corporations can, in theory, also commit international crimes, although the International Criminal Court has jurisdiction only over natural persons.

⁴⁹ See note 1 above.

⁵⁰ See note 35 above, Guiding Principles 17 and 18.

VI. CONCLUSION

There is no doubt that severe environmental damage is contributing to the climate crisis, the collapse of biodiversity and threats to the very life-support systems of the Earth. While this crisis poses risks to us all, the impacts of severe environmental destruction are experienced on top of deeply embedded inequalities. A human rights assessment of the climate and biodiversity crises highlights the disproportionate impacts of severe and widespread or long-term environmental damage on marginalised and disempowered populations, while revealing significant accountability gaps.

The proposed international crime of ecocide reflects the understanding that human rights and the protection of the environment are deeply intertwined, bringing concern for the environment into a system of law primarily concerned with the protection of human life and dignity and moving it beyond pure anthropocentrism. Placing ecocide alongside existing international crimes under the jurisdiction of the International Criminal Court would redress the accountability gap by establishing individual criminal responsibility for perpetrators of such harm, whether they be decision-makers in government or corporate directors. It could also be pivotal in preventing and addressing environmental injustices which may not rise to the level of an ecocide crime, serving to support mechanisms for achieving justice at local levels and as a catalyst for systemic change. An international crime of ecocide that is informed in its definition and application by human rights holds the potential to enhance accountability for serious environmental harm, and deliver on climate and environmental justice.