

Green Crimes and International Criminal Law

Edited by

Regina M. Paulose

International Criminal Law Attorney

Series in Law



VERNON PRESS

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www.vernonpress.com

In the Americas:
Vernon Press
1000 N West Street, Suite 1200
Wilmington, Delaware, 19801
United States

In the rest of the world:
Vernon Press
C/Sancti Espiritu 17,
Malaga, 29006
Spain

Series in Law

Library of Congress Control Number: 2021930376

ISBN: 978-1-64889-109-0

Cover design by Vernon Press. Cover image by Sagina Vadakal and Tess M. Paulose.

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Foreword

As a human rights lawyer, I welcome this compilation of in-depth articles written on green crimes and international criminal law by outstanding lawyers and scholars. Although the range of variety is wide from environmental personhood to crimes in outer space, I am particularly keen on the indigenous perspective. This perspective needs more attention.

Indigenous peoples around the world are living in harmony with nature and often see their livelihood destroyed for profit from timber, mining or otherwise. “You have ate my body. Which part that you have not eaten?” Mama Yosepha Alomang, an elderly woman of the Amungme tribe in the Indonesian province Papua, cried out to express the deeply felt connection with the land.¹ The land destroyed is by a US company Freeport McMoran (Freeport), through the exploitation of the biggest gold and copper mine in the world. From 1967 up until this very day, Freeport exploits the Grasberg mountain and its surroundings. In 2019 alone, Freeport's revenue was 3,232 million US dollars.² Deforestation, pollution of the rivers and change of current through sediment settlements have led to an ecological disaster. Moreover, the indigenous people have been killed and tortured for protesting against these crimes.

In fact, Freeport is seen as the root cause for the fact that Papuan people are being oppressed and denied a free exercise of their right of self-determination. After World War II, West Papua, being the Western half of the island New Guinea, became subject of a conflict between the new Republic Indonesia and The Netherlands. The Netherlands wished that West Papua would be an independent state. However, Indonesia seized control over West Papua in 1963. The promising revenues from a large gold mine played an important role. The contracts for the exploitation of the Grasberg between Freeport and the Indonesian government were signed in 1967 without any involvement of the Papuan people. In 1969 a sham referendum was held in which 1025 Papuans, representing 800,000 Papuans at that time, were forced

¹ Mama Ypsepha Alomang, Markus Haluk, *You have ate my body. Which part that you have not eaten, An overview of Humanity Crimes and Ecological Destruction by Freeport McMoran Copper and Gold in Timika West Papua, Timika - West Papua*, (May 20, 2018).

² FREEPORT -MCMORAN, *On Building Strength*, (2019), https://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_FCX_2019.pdf.

to vote in favor of annexation to Indonesia.³ Since then, the Papuan people, outnumbered by newcomers from other parts of Indonesia through well-organized transmigration programs, are discriminated against and marginalized. Human rights organizations like Human Rights Watch, Amnesty International, and the International Coalition for Papua have reported gross human rights violations throughout the years.

Therefore, it is of great importance that international companies like Freeport, which commit these crimes, will be prosecuted and will be held accountable for their actions. In 2016 I had the great fortune of meeting Polly Higgins, lawyer of the Earth, who dedicated her life until her passing in April 2019 to establish ecocide as a crime at the International Criminal Court. Beatrice L. Hamilton will explain more about the crime of ecocide in her chapter. Criminalization is an important first step in reducing green crimes. In situations where perpetrators are aware of possible prosecution, they will start changing their behavior. This is the reason I am very motivated to be part of the Stop Ecocide Campaign and continue the work of Polly Higgins.

Hopefully, this book can guide lawyers and equip them to fight the battle for indigenous peoples in order to preserve the Earth and our future.

Leiden, November 22, 2020

Mrs. F.R. Schouten-Korwa, human rights lawyer

Ancillary activities:

Member of the Advisory Board of the Stop Ecocide Campaign

Pro bono counselor of Papua Support Foundation, The Netherlands

Member of the Preparatory Body of the Congress of Nations and States, scheduled for 2022

³ P.J. Drooglever, *An Act of Free Choice*, BOOM, Amsterdam-The Netherlands, (2005), http://resources.huuygens.knaw.nl/indonesischebetrekkingen1945-1969/DekolonisatieVanIndonesieEnHetZelfbeschikkingsrechtVanDePapoea/papers_pdf/summary_afc.

Introduction

Regina Menachery Paulose

International Criminal Law Attorney

Since the 1980s, the Narmada Bachao Andolan (NBA) movement has been raising awareness concerning the destructive impact hydropower dams continue to create in the Narmada River Valley in India.¹ In the 1990s, campaigns launched by the NBA focused on human rights violations hydropower projects created - forced displacement, ecosystem destruction, and the erasure of Peoples and cultures. Eventually, the World Bank, which planned to finance the construction of the Sardar Sarovar Dam, withdrew, citing human rights concerns.² While they are not given credit, it was movements like the NBA which inspired the creation of the World Bank Inspection Panel in 1993. The Inspection Panel allows communities to challenge World Bank projects in their localities.³

In 2013 I wrote an article that focused on the NBA's attempt to gain redress through the Indian legal system, specifically focusing on the 2000 Indian Supreme Court judgment *Narmada Bachao Andolan v. Union of India and others*.⁴ Despite the subsequent judgments ordering people displaced by the dams to be rehabilitated (compensated and relocated) to date, the people of the Narmada Valley are still ignored.

¹ THE INDIAN EXPRESS, *A short history of the Sardar Sarovar Dam on river Narmada*, (September 17, 2017), <https://indianexpress.com/article/research/a-short-history-of-the-sardar-sarovar-dam-on-river-narmada-4847807/>.

² See Narula, Smita, *The Story of Narmada Bachao Andolan: Human Rights in the Global Economy and the Struggle Against the World Bank* (December 12, 2008), in HUMAN RIGHTS ADVOCACY STORIES, Deena R. Hurwitz, Margaret L. Satterthwaite, Douglas B. Ford, eds., West, 2009, NYU School of Law Public Law Research Paper No. 08-62, Available at SSRN: <https://ssrn.com/abstract=1315459>.

³ *Id.* See also THE WORLD BANK, THE INSPECTIONAL PANEL, available at: <https://www.inspectionpanel.org/>.

⁴ Regina M. Paulose, *Water politics: Narmada Bachao Andolan vs. Union of India and others*, LEX-WARRIER, (January 5, 2013), <http://www.journal.lex-warrier.in/?s=narmada+dam>.

The NBA movement continues to operate with the same goals. As I write this, 500 victims, whose homes were submerged in water because of the Sardar Sarovar Dam on the Narmada River in Madhya Pradesh, staged a sit-in at the Grievance Redressal Authority's office.⁵ The victims and survivors are *still* asking for various court orders to be fulfilled by state governments. Rohini Mohan eloquently reported, “[t]he Narmada valley is an unbearable spectre of displacement today, the losses largely hidden from the rest of the country. To witness the process of forced displacement is like watching the beginnings of a terminal illness. It's ugly, and you know it's going to get worse.”⁶

I am mortified that after all this time, governments, despite national, regional, and international commitments to protect human rights *and* the environment, cannot create coherent policies that can do both. The Narmada Valley and other ecological disasters where people are raising awareness about damage and fighting for redress are the inspiration behind this volume.

This volume explores how green crimes fit within international criminal law. Green crimes have a harmful impact on humans, wildlife, and ecosystems. After reading this text, the reader may be pleasantly surprised to find that international criminal law is not the solution in some cases, but it may be a useful tool in other cases.

The movement to recognize green crimes within the international criminal law community has been slow but appears hopeful. In 2016 the International Criminal Court's Office of the Prosecutor issued a policy paper that mentioned the contours of green crimes. This policy paper is discussed throughout this volume in different contexts.⁷ To date, there are no cases involving green crimes which have been prosecuted under the Rome Statute. Although, there are victims who have filed a communication with the Office of the Prosecutor alleging that illegal dispossession of their lands is taking place

⁵ PTI, *Dam-affected persons stage protest in Indore*, (November 19, 2020), <https://www.devdiscourse.com/article/politics/1314064-dam-affected-persons-stage-protest-in-indore>.

⁶ Rohini Mohan, *Madhya Pradesh villagers displaced by Sardar Sarovar Dam wait in tin sheds for new life*, THE HINDU, (October 6, 2019), <https://www.thehindu.com/society/madhya-pradesh-villagers-displaced-by-sardar-sarovar-dam-wait-in-tin-sheds-for-new-life/article29596657.ece>.

⁷ “[T]he Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.” The Office of the Prosecutor, *Policy paper on case selection and prioritisation*, ¶41, INTERNATIONAL CRIMINAL COURT, (September 15, 2016), https://www.icc-cpi.int/items/Documents/20160915_OTP-Policy_Case-Selection_Eng.pdf.

in Cambodia.⁸ While there are many lessons that can be gleaned from this text, the biggest take away is that the international criminal law community must create space for *meaningful action* around environmental crimes so that environmental justice can take root. The current effort by a coordinating panel on the crime of ecocide to be included within the Rome Statute is a positive step to that creating space,⁹ although it could have come sooner had the state parties to the Rome Statute listened to Polly Higgins.

The volume begins with the philosophical underpinnings of green crimes. What are green crimes, and who has the right to pursue redress? Has the time come for the environment to be given legal personality? What rights are there for nature? After this discussion, the volume moves on to an examination of how courts and tribunals are handling green crimes, the crime of ecocide, environmental crimes in conflict, and whether it is time for us to consider the idea of an international environmental criminal court. Finally, the volume examines ongoing and diverse situations in the status quo and questions whether international criminal law can respond to perceived environmental injustices. The cases presented in this volume explore discussions on cultural genocide, ecocide, and space pollution. Every discussion in this text likely deserves its own book. My goal in creating this volume was to start the conversation, and hopefully, it will blossom and continue in many iterations and forms by all those who are committed to stopping the wanton destruction of Peoples and the environment.

The authors who I asked to contribute to this volume are passionate about these topics. The authors have, where possible, worked together to discuss and consider each other's viewpoints. I imagine if all the authors were to sit in a room together, it is unlikely a consensus would be reached on how to address all the issues presented in this book, but I am sure that everyone would agree that more attention needs to be given to the idea of marrying certain green crimes with international criminal law. I wholeheartedly believe that these authors are the right people to light the way for that discussion to evolve into something deeper and, more importantly, actionable.

⁸ FIDH AND GLOBAL DILIGENCE, *Questions and Answers: Crimes against Humanity in Cambodia from July 2002 until Present*, https://static1.squarespace.com/static/5bf447e7365f02310e09e592/t/5eb176ba9e5da97b82efe15f/1588688581121/qanda_cambodia_icc-2.pdf (last visited November 28, 2020).

⁹ Owen Bowcott, *International lawyers draft plan to criminalise ecosystem destruction*, THE GUARDIAN, (November 30, 2020), <https://www.theguardian.com/law/2020/nov/30/international-lawyers-draft-plan-to-criminalise-ecosystem-destruction>.

With that in mind, I want to thank the contributors for indulging my invitation to participate. The cover for this text was drawn by my family members, Tess M. Paulose and Sagina Vadakal. I am grateful that both of them for their patience with me in describing what I had in mind and their artistic abilities. As with all art, it is best to leave the interpretation up to the person who views it, but I will note that the cover was inspired by the Dark Hedges in Northern Ireland.

Special thanks also go to Mrs. ER. Schouten-Korwa, Anne Watanabe, Tim Franklin, Dr. Corinne Lewis, and Tamara Olsen for their valuable feedback. Pats on the head go to Bowser and Dolce, my four-legged friends who know about this book but will never read it. Finally, my appreciation goes out to the extremely responsive staff at Vernon Press for working closely with me despite the difficulties COVID 19 presented during the course of this publication.

I am constantly inspired by the determination of victims, survivors, defenders, and engaged citizens who mobilize for recognition of their rights and justice. I am also inspired by the lawyers who also work on these issues, which enables us to have discussions like the ones contained in this book. I look forward to hearing from those of you who work in this space and engaging in further dialogue on these issues.

List of Abbreviations

AU	African Union
EIA	Environmental Impact Assessment
EU	European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
UN	United Nations
UNEP	United Nations Environmental Programme
UNGA	United Nations General Assembly
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGPBHR	United Nations Guiding Principles on Business and Human Rights
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNSC	United Nations Security Council

Chapter 1

Green Criminology: A rights-based approach

Dr. Zoi Aliozi

International Human Rights Lawyer

Abstract: This chapter is an introduction to green criminology, enhanced by an analysis of the definition of green crimes. Green criminology involves the study of green crimes, which is the modern term for environmental crimes. Green crimes are an integral part of climate justice, and there is a vital need to illuminate this link and their role in global justice, in empowering environmental advocacy and in practically applying environmental ethics. Green crimes from a rights-based angle have strong links with human rights, with inter-generational equity and the rights of future generations, and these linkages reveal their critical connection to climate justice. The chapter is based on a multi-disciplinary methodology designed through the merging of law with philosophy and aims to describe: 'What is Green Criminology?'; 'What are Green Crimes?'; and 'How international law, criminal law, human rights, and eco-philosophy inform our conception of green crimes and fuel the development of green criminology?'. The author introduces the reader to the field of green criminology by looking into green crimes through a cosmopolitan rights-based perspective and a critical legal studies prism.

Keywords: Green crimes, green criminology, legal philosophy, environmental ethics, eco-philosophy, ecocide, ecocentrism, climate justice, animal rights, greenwashing, criminal law.

I. Introduction

Green Criminology is the study of environmental harms from a criminological perspective. It is the art of applying criminological thought to ecological

issues and thus “greening”¹ criminology. In this distinct, multi-disciplinary, and colorful area of criminological studies, there is one protagonist that requires our full attention, and that is the special legal category of harms against nature, labeled as 'green crimes'.

Green criminology's whole ontological existence is based on studying, analyzing, and decoding this important legal category of crimes. To gain a better understanding of this area, consider the case of ecocide,² which has inspired a movement of citizens and international lawyers wanting to make 'harming the environment' a crime. A legally enforceable green crime of ecocide³ that will criminalize the destruction of our world's ecosystems, is a much-needed addition to our international criminal justice system. The case of ecocide is a representative example of a unique green criminological term, describing mass-scale environmental harms, which are still waiting to be recognized, legitimized, and punished by law. It is essential to clarify that the harms falling within this classification must be caused by human action, while the fault must signify individual, governmental, or corporate⁴ responsibility. Considering the enormous size of corporate environmental damages, it is more likely for ecocide to be applicable to corporate or governmental environmental damages, since it is in cases like that where the damages are so large and widespread that they could amount to ecocide. An international crime of ecocide, as an essential component of green criminology, can be beneficial and a great addition to criminal justice due to the important regulatory impact it can have on both individual and state responsibility, and ideally in achieving the much-needed balance between the anthropocentric and ecocentric theories⁵ of environmental law for the survival of both humanity and nature. This is not a small matter, and any discussion about the justifications that can fuel the evolution of this body of

¹ See Matthew Hall et al., eds. *GREENING CRIMINOLOGY IN THE 21ST CENTURY*, London: Routledge, (2017).

² Mark Allan Gray, *The International Crime of Ecocide*, CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 215, (1996).

³ Anastacia Greene, *The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?* FORDHAM ENVIRONMENTAL LAW JOURNAL, Vol. 30, No. 3, (2019).

⁴ Consider that “[o]ver half of global industrial emissions since human induced climate change was officially recognized can be traced to just 25 corporate and state producing entities.” See THE CDP CARBON MAJORS REPORT, at 8, (2017), available at: <https://www.cdp.net/en/articles/media/new-report-shows-just-100-companies-are-source-of-over-70-of-emissions>.

⁵ Ronald E. Purser et al., *Limits to Anthropocentrism: Toward an Ecocentric Organization Paradigm?* ACADEMY OF MANAGEMENT REVIEW, 20(4) at 1053-89, (1995).

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