Justifying the Creation of an International Environmental Criminal Court (IECC) to Protect World Biodiversity

25th January 2015

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A. Necessity to Acknowledge Biodiversity and Ecosystem Services as our Life Supporting Systems

The stress on the importance of Planet Earth's life support systems could not have been better expressed than by the thematic declaration of **GBO3**:

> The assessment of the state of the world's biodiversity in 2010, as contained in GBO-3 based on the latest indicators, over 110 national reports submitted to the Convention Secretariat, and scenarios for the 21st Century should serve as a wake-up call for humanity. Business as usual is no longer an option if we are to avoid irreversible damage to the life-support systems of our planet"
>
> Global Biodiversity Outlook- GBO3 (2010)[1]

That wake-up call does not appear to have happened in practice, except in rhetorics. We still have no clear idea of the number of species that populate earth, some estimates being 1.589,361 (**IUCN**, 2007)[2], or 7,227,130 (**UNEP**, 2011)[3], with 1.9 million extant species (Chapman, 2009)[4] and an expectation of between 3-5 million going extinct in time (Costello et al., 2013)[5]. The human population stands at around 7.2 billion, rising, and unprecedented mass extinction of life on Earth is occurring, with 150 to 200 species becoming extinct every 24 hours (**UNEP**, 2010)[6].

There have been periods of extinction in our planet's history, but the present species extinction rate proves to be greater than any our planet has experienced since the events that wiped out the dinosaurs 65 million years ago. The present extinction is mainly attributed to human activities, including climate change, and predictions have emanated from many quarters, including the UN:

> Climate change is forecast to become one of the biggest threats to biodiversity. Approximately 20-30 per cent of plant and animal species assessed so far are likely to be at greater risk of extinction if increases in global average temperature exceed 1.5 to 2.5 Celsius. (**UN** Convention on Biological Diversity, 2007)[7]

Biodiversity contributes directly or indirectly to many aspects of our well-being, mainly in the form of ecosystem services, and although many individuals benefit from those activities that lead to biodiversity loss and ecosystem change, the full costs borne by society often exceed the benefits.

To achieve greater progress towards biodiversity conservation, it will be necessary – but not sufficient – to urgently strengthen actions on the conservation and sustainable use of biodiversity and ecosystem services, for humanity's wellbeing. World leaders agreed at a 2002 **UN Summit in Johannesburg**[8] to:

> Achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on earth.

And it has further been recommended that:

> To tackle the root causes of biodiversity loss, we must give it higher priority in all areas of decision making and in all economic sectors. The Status of Global Biodiversity (2009)[9]

Given the vast amount of information and testimonials available on all negative human actions, whether intentional or accidental, to cause harm to biodiversity that may in turn result in loss of species and ecosystems, and eventual disruption of ecosystem services, biodiversity protection and preservation becomes a primary task for humanity.

Biodiversity and ecosystem services continuity can only been ensured through appropriate legislative instruments, and we can make the following assumptions as a preamble to building up a case for an **International Environmental Criminal Court** (**IECC**):

1. That Planet Earth is inhabited by a large range of different life forms, collectively known as biodiversity;
2. That most of these life forms require clean water, clean air, and little human interferences in order to survive, grow, reproduce and perform their natural functions;
3. That many species require different habitats during their various life stages: to feed, mate, reproduce, give birth, nurture their young, shelter, and associate with conspecifics or other species;
4. That those habitats should meet the needs of the resident, vagrant or migrant species;
5. That any impact, natural or human-related, whether to a greater or lesser degree, will affect both habitat and biodiversity supported.
6. That Planet Earth freely provides the habitats and supporting systems that enable all species to exist.
7. That all species have the same need to access whatever resources they require in order to live.
8. That the interactions between and within species are varied and include predator-prey and host-parasitic relationships, as well as mutually beneficial activities, such as seed dispersal, pollination or nutrient provision.
9. That degradation, restriction, or loss of a habitat through any form of impact, whether human-related or natural, will cause its inhabitants to suffer in some way; impacts may be successive, incremental, or cumulative.
10. That the effect of a particular impact is the same, no matter what its cause. This means that any impacted species will suffer some loss, limitation, reduction, or even extinction that will be relative to the intensity and duration of the impact.
11. That the effects of an impact may not be clearly understood and so the *'precautionary principle'* should be adopted. In other words, any activity that raises concern is assumed to have some detrimental effect until proven otherwise.
12. That most species live in balance with their environment. They use their habitats to acquire food and water, to provide shelter, and to dispose of their waste. Very few species, other than a small number of parasites, deliberately destroy their habitats, as this would mean they cause their own demise.

B. Origins and Effects of Human Impacts on Biodiversity and Ecosystem Services

It has become an accepted fact that humanity has negatively impacted biodiversity in many ways and on many fronts, especially since the industrial revolution. Directly through daily human needs, and indirectly through industrial and development needs, the toll taken on biodiversity has led to alteration of the global environment triggering the sixth major extinction event in the history of life and caused widespread changes in the global distribution of organisms. Such changes have altered ecosystem processes and reduced the resilience of ecosystems to other environmental changes. The consequences on ecological, societal and human-derived ecosystem services are alarming.

The call for renewed efforts to protect biodiversity and the services it provides humanity has come from more than one direction and efforts are reflected in several initiatives, such as in the **Millenium Ecosystem Assessment** (**MA-2005**),[10] the **Johannesburgh Earth Summit**,[11] and the **WSSD** reports[12]

In his address to the **Johannesburgh Earth Summit**, Kofi Annan, the United Nations Secretary-General could not be plainer:

> We invited the leaders of the world to come here and commit themselves to sustainable development, to protecting our planet, to maintaining the essential balance and to go back home and take action. It is on the ground that we will have to test how successful we really are. But we have started off well. Johannesburg is a beginning.

Further, the **United Nations Millennium Declaration** 2000 (**IV:21**)13 on Protecting our common environment states:

> We must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of

> living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs.

However, other voices found cause to believe that there are other issues that are not being addressed, and may lead to continued biodiversity degradation, as expressed by Kenny Bruno (**Corp Watch**)[14]:

> With the world's most powerful governments fully behind the corporate globalisation agenda, it was agreed even before the Summit that there would be no new mandatory agreements. Rather the focus was to be on implementation of old agreements, mainly through partnerships with the private sector. In other words, those aspects of sustainability that are convenient for the private sector would be implemented. **The Earth Summit's Deathblow to Sustainable Development; CorpWatch, September 4**

With all the good intentions that have been shown so far by several international organisations, there is a feeling that there has been too much lip-service and not enough action. It cannot be helped but to re-iterate the dangers that our planet faces through the following statements:

1. Planet Earth has been drastically, and perhaps irreversibly, impacted by humans and their myriad activities, above and below ground, in shallow waters and the deep seas. Humans have visited most of the regions of the world, and evidence of their presence, especially pollution is plainly visible. Pollution also occurs at the microscopic level. Unfortunately, humans seem to pay little heed to the impact of their activities, with total disregard to the importance of ecosystem services: with many believing that they are an exception to the Laws of Nature.
2. The effects of human impacts are cumulative and often exacerbating.
3. There are very few habitats globally that remain in pristine condition. This means that many, if not most, species have also suffered some level of limitation, reduction or loss of quality of life. All too often these impacts are not known or unclear (data deficient). The entirety of biodiversity on Earth is not yet fully understood. Knowledge of inter- & intra-specific complexities of such a complex system remains incomplete.
4. Humans have devised complex systems of thought to justify their environmental impacts. These include the requirement to make a profit (business needs); to deliberately destroy some habitat or cause suffering to its inhabitants through warfare; to oppress a population (political will); or to limit or remove access to natural resources.
5. An urgent need now is to reverse, or reduce local and global impacts on biodiversity, whether caused by anthropogenic or other human-related activities, and that can only be achieved through appropriate legislations and legal actions. Where relevant legislation actually exists, it is mostly ambiguous, merely soft laws that can rarely be enforced. This is for several reasons, including the financial cost of enforcement, a lack of political will, or by assigning a priority where the most usual order of precedence is financial profit, development priorities, keeping the human population placid enough to maintain the status quo, and finally any environmental benefit.

C. The Present State of Environmental Legislations

Environmental law is a rapidly evolving and constantly changing legal field. The nature of environmental issues in so far as our understanding of natural resources and biodiversity, and the impact we are having on all facets of the environment is always improving, so the legal frameworks which govern planning, use and management of the environment must also adapt accordingly.

Protecting and enhancing the environment have attained such national and global importance over the years that all sovereign countries of the world have enacted national environmental regulations, based either on existing or newly implemented environmental regulations.

Internationally, the United Nations, through its satellite organisations, and its member countries, have over the years found it necessary to institute environmental protection and prevention legislations in the form of soft laws throughout the world. The list of international environmental treaties, protocols, agreements and conventions is quite long.[15]

That necessity for environmental legislations was further emphasized by **UNEP** at the **RIO 1992**

Meeting:

> One of the critical challenges facing all environmental issues is the need develop or enhance national and international laws to effectively and equitably protect, manage and conserve natural resources and living species for current and future generations. In this respect, environmental laws provide the platform on which institutions, policies, and compliance/enforcement regimes at different levels can be built in order to regulate all human uses and interactions with the environment.**UNEP-DELC** (1992). **UN Conference on Environment and Development**, 3-14 June 1992, Rio de Janeiro.[16]

However, whereas hard laws that can be effectively enforced exist at national levels in all countries of the world, and in spite of the long list of international soft laws binding all signatory countries, such laws can hardly be enforced in a satisfactory and expedient way through international actions. All of these soft laws leave the onus of enforcement to the signatory sovereign state, even if the "crime" committed has transboundary or international implications. This discrepancy leaves legal actions against "environmental crimes" to be dealt with at the domestic level. This becomes problematic in countries where bad governance, vested interests and lobbying are likely to ensure that justice fails.

Both the **International Criminal Court** (**ICC - The Hague**)[17] and the **International Court of Justice** (**ICJ**)[18] may entertain cases where there is reason to believe there has been or is about to be environmental injustice, but the **ICJ** will only consider complaints from one or several sovereign states, not from individuals or collectivities. This leaves a substantive gap in the delivery of environmental justice, when domestic courts also fail to do so.

From this preamble, it becomes clear that:

1. Most countries have developed some measures for environmental protection. These may include written laws, perhaps supported by regulations; but also traditional or customary practices that are usually unwritten and passed down through the generations verbally. These two approaches may be at variance with each other.
2. Legislation frequently is framed in terms of property; financial gain or loss; assumed ownership or special entitlement, often erroneously, to a particular resource or habitat. The needs of the other species are rarely considered.
3. In many cases compliance with, and enforcement of environmental laws is weak or absent. Few, if any, countries have a dedicated environmental police force. A small number of well-developed countries, such as New Zealand and Canada, place high value on their environment, but even these have recently been thwarted by vested interests, which have manipulated the political establishment by offering money or future benefits, so that non-compliance with environmental laws is ignored.
4. The avoidance of environmental laws becomes more complex where more than one country is involved. Businesses that utilise natural resources tend to register their entity in whichever country is offering the most favourable terms: for profit, for abundance of resources, and for weak law enforcement or political corruption.
5. In practice this means that a business entity can be registered in one country, but is operating in another, or several others. It avoids the laws in the operational country, by claiming that it is governed by the laws of the country of registration. In fact neither set of legislation may actually be applied. This approach is often closely linked to a similar use of tax laws: to maximise profit, while minimising costs.
6. A similar situation exists for the high seas (those areas of the global ocean outside the Exclusive Economic Zone (EEZ) of any country; the EEZ usually extends for 200 nautical miles from shore). Ships may be registered under a 'flag of convenience', which means the laws of the registrant country apply to that particular vessel. In practical terms, some countries, such as Liberia, issue 'flag' registration documents to vessels, in the full knowledge that no laws will actually apply or be enforced. Yet, this situation is accepted by governments and inter-governmental organisations globally as being legal. Flags-of-convenience are often used for illegal activities, such as trafficking arms, narcotics, people, or endangered species. The United Nations Law of the Sea (UNCLOS) and the International Maritime Organisation (IMO) are the best attempts at addressing these issues, but are still limited in their ability to prevent, monitor, or reduce criminal activities.
7. One particular country, the United Sates of America (USA), places the highest regard on money and profit to the exclusion of all else. The USA has developed a business 'empire' that spans the globe. They use their military and trading power to reinforce their business presence globally. The way this unfolds is complex, but includes manipulation of inter-governmental organisations, such as the United Nations (UN) and NATO (North Atlantic

Treaty Organisation); establishing inequitable trading pacts; political oppression of weaker or developing countries; and war.

8. The USA's military-industrial complex, and its biotechnical development and manufacturing industries need a continual supply of natural resources to operate. These resources most often are sourced from other countries. Where favourable trade options can be negotiated these will be used, otherwise nations are invaded, occupied, or subjected to war in order to acquire their natural resources. The USA's defence budget is more than $2 billion *per diem*. As a consequence this means that the USA needs to be perpetually at war. The environmental impacts of warfare do not form part of the decision to attack another country.
9. Furthermore the USA intentionally uses weapons and techniques that are known to create severe environmental damage and long-term detriment. Three examples are: i) detonating nuclear WMD (Weapons of Mass Destruction) over Japan in 1945. USA is the ONLY country to use these devices against another country; this also means that our planet has been radioactively polluted since 1945. ii) The use of 'Agent Orange' (a toxic defoliant) in Vietnam during the late-1960s and early-1970s. iii) The use of white phosphorous and depleted uranium in 'tank-busting' munitions.
10. A further impact of this perpetual warfare is the gross emission of 'greenhouse gases' (mainly hydrocarbons) that have been implicated in modifying atmospheric chemistry globally (i.e. climate change). Military aircraft account for 25% of all greenhouse gases produced by air traffic; likewise, every exploding munition worsens atmospheric pollution.
11. The long-term damage caused by military pollution to the soil and fresh water supplies is poorly understood; or, if known, unreported in the public domain. The persistent nature of the pollutants (such as radiation half-life, or the bio-cumulative effects of heavy metals) implies that the impacts will contaminate our world for decades, if not centuries.
12. The final points concerning the USA are that, because it considers itself to be the most-powerful nation on earth, it can do exactly as it pleases. It has no interest in the well-being of other people, their needs, their resource requirements, or impacts to their local environments. The USA needs, and takes, the resources that should be sustaining many people. To put this into perspective, the USA uses more than one quarter of the world's natural resources, yet it only has 300 million people out of a global population of 7,200,000,000: so this means that the majority of people have to exist on less than three-quarters of the global resource. In addition the USA is particularly wasteful, with a considerable proportion of their consumer goods being discarded. This is starkly contrasted by China, the world's most populous nation, where almost everything is used, consumed, or recycled.

***NOTE**: The USA is by no means the only country involved in trading, polluting, and unsustainable usage of natural resources; its money-centric approach does mean that it is implicated in much of global trade. A new emerging situation is the BRICS nations (Brazil, Russia, India, China and South Africa). If BRICS were to consume resources at the same rate as the USA, we would very soon have nothing left to sustain life on Earth.*

13. The self-perceived superiority of the USA also means that they have little interest in accepting legislation that is designed elsewhere to share equitably or protect natural resources and ecosystems. In the latest geopolitical games (e.g. Trans-Pacific Trade, and Trans-Atlantic Trade Agreements) the USA seeks to establish a system whereby their businesses can over-rule another nation's laws, such as human rights or environmental protection, on the pretext that these laws infringe upon the USA's business opportunities or ability to make a profit. The USA does have environmental protection legislation, and some is good, but it is too vulnerable to manipulation, political lobbying and corruption.
14. The burning question of modern times is how to achieve equitable sharing of natural resources for every species, and also environmental justice. This is extremely challenging, because of vested interests by those parties that have already hogged most of the world's natural resources. They have no wish to share what they consider is their property.
15. But in fact, although these vested interests have spent funds on locating, extracting or acquiring natural resources, they did not purchase them from Planet Earth; which made them available to all.

D. Attempts Towards Globalising Environmental Law

The birth and evolution of the specialised field of **International Environmental Law** (**IEL**) is conventionally narrated as progressing through a series of conferences, beginning with the 1972 **Stockholm Conference on the Human Environment**[19] through to the 1992 **Rio Earth Summit** [20] and the 2002 Johannesburg Conference [21], leading up to the most recent 2012 Rio +20 Conference on Sustainable Development[22]. The embryonic field of **IEL** has gradually constituted itself through these conferences and many others, as states, non-state actors, scholars, experts, and other interested

parties have built up a body of treaties, legal principles and concepts to guide international law.

International human rights instruments have normally accorded little attention to linking the environment with human rights. The three main international human rights covenants,the **International Covenant on Civil and Political Rights**,[23] the **International Covenant on Economic, Social and Cultural Rights**,[24] and the **Universal Declaration of Human Rights**,[25] do not adequately establish a relationship between protecting the environment and that being implicitly a human right.

The Stockholm Declaration of 1972[26] can be considered as the first major international legal instrument that links human rights and environmental protection, with Principle 1 stipulating that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears solemn responsibility to protect and improve the environment, for present and future generations...

In addition to the **United Nations Council on Sustainable Development** (**UNCED**),[27] the **Earth Council**[28] was established in 1992 to promulgate and ratify a **Charter of Environmental Rights**.[29] Once enacted, the **Charter** will establish valuable international standards and principles linking human rights, the environment and economic development, thus providing the necessary framework for addressing disputes impacting on human welfare and environmental quality.

However, environmental problems are global and international law alone cannot solve global environmental problems. And since political boundaries necessitate that these problems be primarily resolved through the implementation of legislations at country level, international law will only be effective when rules and norms regarding environmental protection exist at the national level, as stressed by M.F. Strong, in *Critical Challenges and Global Solutions* (1991)[30]

> .....nature does not acknowledge or respect the boundaries with which we have divided our planet. As important as these boundaries are for the management of our own political affairs and relationships, they are clearly transcended by the unitary nature of the natural systems on which our lives and well-being depend.

Prior to the **Copenhagen Climate Conference** in 2009, Chancellor Merkel of Germany and President Sarkozy of France expressed a necessity to overhaul traditional environmental governance, and asked for the Climate Conference to progress into the creation of a World Environment Organisation.[31] Since then, environmental governance reform has been a key agenda item at **UNEP** meetings, and culminated with **UNEP**'s recommendation for the establishment of a **World Environment Organisation** to the Rio +20 conference in 2012.[32]

It appears that all efforts towards international environmental laws would not materialise until there is a global or world environmental organisation, and a decision taken as to under which umbrella such an organisation would be established, and the necessity for a neutral international executive office, with the objective of representing and implementing existing and future multi-lateral environmental agreements (the soft laws). As far back as 1987, the **Experts Group on Environmental Law** of the **Brundtland Commission** recommended the appointment of a **UN High Commissioner for Environmental Protection and Sustainable Development**.[33]

The proposal for a **High Commissioner** was revived recently, as part of the **International Environmental Governance Process**, and its justification was described by the Norwegian Environment Minister as follows:

> Overall, environmental questions need to get a higher international profile and I believe that a High Commissioner for the Environment could help in achieving this. This role would in one respect be similar to that of the High Commissioner for Refugees; someone who can cut across bureaucratic and political

boundaries when necessary.[34]

This suggests a structure that:

> ....would allow citizens concerned about environmental protection to circumvent national governments that presently stall on corrective measures. (Tinker, 1990)[35]

Pending a consensus as to which direction the application of environmental law will take at the national and international levels, the following points have been raised:

1. The choices available for achieving resource equality are few:
   i) voluntary redistribution of resources, so that every species has its needs fully met;
   ii) some form of global commons, whereby Earth's natural resources are 'owned' by all;
   iii) legislative compulsion.
2. The first two options are unlikely, although they remain a possibility. That means legislation is the more likely approach. Several steps need to be taken before this can be achieved:
   i) a global authority has to be established that has universal powers;
   ii) a system of enforcing any global laws;
   iii) a means of penalising nations, entities, or individuals that fail to comply with the law.
3. An examination of existing authorities reveals three main options:
   i) United Nations (and its environment programme UNEP). Its strength is that it is the only forum where any country can have a voice; its major weakness is that, because it incorporates many different aspects of global co-operation, actions can be subverted during diplomatic bargaining. For instance, some environmental benefit may be discarded during a negotiation on terrorism.
   ii) European Court of Justice & International Criminal Court. The strength is that the judiciary are international (European Union consists of 28 sovereign nations doing their best to live together in harmony), and the courts aim for impartiality. The weaknesses are that the legal processes are slow, and only states can submit a case. At present environmental issues are rarely addressed.
   iii) Establish a novel body that focuses solely on environmental crimes and justice.
4. The main steps necessary to establish an International Environmental Criminal Court (IECC) are:
   i) identify a country willing to host the court;
   ii) find sufficient countries willing to support this venture (in time it is expected that the majority of nations would subscribe, especially in the face of global challenges, such as climate change, lack of fresh water, desertification, & biodiversity loss);
   iii) devise suitable penalties for non-compliance;
   iv) establish how monitoring & enforcement would be achieved;
   v) create the means for funding such a venture;
   vi) determine exactly who the court is responsible to (e.g. the population of Planet Earth).
5. Assuming that an appropriate authority on the global environment can be achieved, it would need to be beyond political manipulation. In other words its remit is first and foremost to Planet Earth and the biosphere. Given that most impacts are the direct or indirect result of anthropogenic activities, it is the human world that needs regulating rather than the natural one.
6. Bolivia recently passed a law granting 'Mother Earth' personhood status. Importantly, although some people may think this idea is nonsense, it potentially gives Nature the ability to be represented in court.
7. Tunisia, in 2014, has included the environment in its new Constitution: this makes a healthy and sustainable environment a fundamental human right. It is this aspect that should be promulgated around the world: that having a clean, safe, abundant and diverse environment is everyone's basic right.
8. The Earth Charter is a good document, and has been signed by a considerable number of people and countries; yet it is still relatively unknown. The Charter could be used as the basis for global commons, but it needs to be developed further and strengthened. Raising awareness of the Charter would be beneficial, even if the document is subsequently revised. Two modern options could be used to achieve widespread awareness:
   i) electronic petitions via social media;
   ii) 'crowd-funding' (a process where money is raised from the general public).

   If a good campaign is planned it could well be that a very large number of people subscribe in support of an IECC.
8. A major issue in establishing the IECC will be from those countries and businesses that do not want to be regulated; i.e. the vested interests that believe they 'own' the Earth and all its resources. To change this attitude will require the majority of opinion to be in favour of an IECC. In other words, for the polluters and despoilers to become pariahs. This is not expected to be easy, but it may open a door to how compliance could be achieved.
9. If a penalty for non-compliance with an opinion issued by the IECC were to be that other nations or businesses were not to conduct trade with the penalised nation or entity, that might be sufficient to cause a change of practice. This

has already happened voluntarily amongst individual consumers, where they boycotted some product or company (e.g. GMOs & Monsanto; or cosmetics that involved animal-testing) for ethical or moral reasons. If this were extended to nation level then a significant turn-around might be achieved quite quickly.

E. Justifications for Establishing an International Environmental Criminal Court (IECC)

The growing complexity of international environmental dispute adjudication arrangements and the success of specialist environmental courts and tribunals at the domestic level have prompted calls for the establishment of international judicial institutions for better environmental adjudication, as reflected by C.C Boyd:

> Given that environmental crime can be said to cause substantially more illness, injury, and death than street crime, the introduction of criminal sanctions into the arsenal of possibilities for environmental crime sentencing makes sense. (C.C. Boyd. 2008)[36]

At the United **Nations Conference on the Human Environment** in 1972, a significant principle was adopted, which to this day has been the backbone towards efforts in developing international environmental law, **Principle 21** that declares:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.[37]

In 1989, a conference entitled **Congress on a More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations** took place in Rome.[38] The Conference called for a convention to establish a right to a healthy environment, and suggested that a permanent world commission on the environment be established to examine violations against this right, violations being then judged before an international court for the environment. These ideas were further discussed in 1991 at the **International Conference for an International Court of the Environment** in Florence, Italy,[39] leading to a a **Draft Convention**, presented in 1992, suggesting that States would be:

> legally responsible to the entire International Community for acts that cause substantial damage to the environment in their own territory, in that of other States or in areas beyond the limits of national jurisdiction and shall adopt all measures to prevent such damage.

This **Draft Convention** was eventually made into a "**Draft Treaty for the Establishment of an International Court for the Environment** (**IEC - Draft Treaty**) in 1999, paving the way towards an IEC.

However, these proposals for an **IEC** were rejected by **UNEP**'s then executive director Shaqfat Kakakhel in 1999. In evaluating the proposal, Kakakhel specifically rejected an **IEC** that would be able to mandate moral sanctions against governments that do not enforce compliance with environmental laws, as well as against corporations that violate these laws.[40]

And that closed the chapter on the **UN**'s efforts to establish an **International Environmental Court** for a period of time.

In August 2002, the **United Nations Environment Programme** (**UNEP**) hosted the three-day **World Summit on Sustainable Development** in Johannesburg with the world's top judges.[41] It tackled enforcement of international environmental laws, and stated that:

> The fragile state of the global environment requires the judiciary, as the primary guardian of the rule of law, to boldly and fearlessly implement and enforce international and national laws.[42]

The Executive Director of **UNEP**, Klaus Toepfer, emphasized the importance of enforcing environmental regulations. Toepfer stated that:

> This is an issue affecting billions of people who are effectively being denied their rights and one of not only national but regional and global concern.

And to address this problem, arguments were made that a stronger judiciary with "the teeth to implement environmental laws" is necessary.

However, the call for the establishment of an **Environment Criminal Court** (apart from the **UN**) did not die out, and reasons thereof have come from many quarters, and those that have been busy working on such a project include the **European Union**,[43] **Globe International,** [44] **The International Academy of Environmental Sciences,** [45] the **International Court for the Environment Coalition,** [46] the **International Environmental Agency** and **the International Court of the Environmen**t.[47]

As early as 1994, the **International Court of Environmental Arbitration and Conciliation** (**ICEAC**) was set up in Mexico by a group of international lawyers, to facilitate settlement of environmental disputes between States, natural or legal persons by conciliation and arbitration, [48] However, the **ICEAC** does not appear to have achieved much to this day.

In recent years, the **International Court for the Environment Coalition**, led by Stephen Hockman QC, has developed a movement calling for the establishment of an international court for the environment.[49] Hockman argues that an international environmental court is necessary to develop jurisprudence on some of the fundamental unanswered issues in international environmental law, such as whether there is a general customary law obligation on states to protect and preserve the environment. According to Hockman, the arrangements for such a court would include: an international convention on the right to a healthy environment; direct access to the court by **NGO**s, private parties and individuals as well as states; and a scientific body to assess technical issues.

As far back as 1945 when the **Charter of the United Nations** was signed, the vision for international jurisdiction was reflected in its Preamble:

> To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.

Some 70 years later the **UN** is still debating the relevency of an International Environmental Court, and the output of soft laws in the form of agreements, protocols, conventions, directives still keep a constant flow of recommendations and directives that have had little or no effect on environmental destruction. Over the last decade, there has been a further plethora of international ethical statements and commitments in relation to both the environment and sustainability. The main ones include the **World Charter for Nature**,[50] the **Rio Declaration** (**UNCED**),[51] and the **World Summit on Sustainable Development** (**WSSD**)[52]. Such documents can be regarded as "soft laws" or "paralegal rules" in the form of values, principles, and directives for policies, practices, and outcomes, and hardly enforceable since no legal instruments have been or could have been devised for that purpose. What is also of relevance are the ethical principles (such as the precautionary principle) contained within the introductory sections of the "para-legal" instruments such as the **United Nations Framework Convention on Climate Change** (**UNFCCC**)[53], UN **REDD Programme** [54]. and the more recent **Nagoya Protocol** [55]

The growing number and complexity of international environmental disputes has without doubt impressed on the necessity for a court that would resolve adjudication arrangements. The success of specialist environmental courts and tribunals at the domestic or regional level have further emphasized on and prompted calls for the establishment of international judicial institutions for better environmental adjudication. In spite of all challenges encountered, and hesitations to act, an international court for the environment would be more appropriate in addressing the continuous growth in global environmental disputes, and to develop specialised international environmental jurisprudence that would tackle the worst ill of our times: **Environmental Crime**.

The last document produced by the **UN** on the subject of environmental law and the possibility, or impossibility of the creation of an an environmental court, *The Future of International Environmental Law* (2010), [56] is yet another elaborate document that does not do much except taking us back to the starting point.

In the meantime it appears the world would continue existing in a lethargic state that gives rise to some fundamental realisations:

1. Our choices are quite stark. We either continue to do nothing and pretend that all is well, or we change our entire approach to business and natural resource use. The first option is weak, because we live in a world with finite resources; yet businesses require unlimited resources and perpetually increasing sales figures (i.e. growth). To use an example of fossil fuel reserves: it is likely that we have passed the point of peak supply (i.e. more than 50% of the reserves have been used). Because it takes millions of years for plant material to turn into coal, for instance, this is not going to be replenished soon. If we wish to generate energy (power) then we have to utilise alternative methods. Vested interests behind oil and gas exploration do not want to lose their control over such a precious resource, but continued use of fossil fuels greatly affects the global atmosphere: CO_2 concentration in the air is greater now than it has been for many millennia.
2. One frequent objection made against change is that it costs money. But it is likely to cost a great deal more if we do nothing. Already we see the first environmental refugees (from Africa due to a lack of water; from Tuvalu because of impending sea level rise); there will undoubtedly be more.
3. The way humans live now is flawed. Over 50% of the world's population is now urban (2013). Yet most cities produce no food, have insufficient drinking water, and are unable to cope with their waste. Additionally the air in many cities is polluted and detrimental to human health. [My personal observation from Mumbai & New Delhi was that a thick brown haze extended higher than 10,000 metres; on the ground it was difficult to breathe (M White)].
4. Yet, Earth has vast areas that could be used to produce food and other resources sustainably. If we chose to grow foodstuffs for the good of all, to use our water supplies carefully and wisely, to aim to leave our planet in a much better condition than we presently find it: we will have moved a long way towards environmental justice and equitable use of natural resources.
5. In a perfect, perhaps Utopian, world an IECC would be unnecessary. But in our ravaged world an IECC might be a step towards a change in global awareness: common 'ownership' of our planet. Why should we be concerned about this? At present some nation can go to war for little reason. Military pollution is merely accepted as a byproduct; and deaths or injuries are collateral damage. A similar picture emerges from those entities destroying vast areas of rainforest to raise cattle for 'beefburgers', or for monoculture, such as palm oil. Little thought is given to the people who live in the forest, nor for the other species of life there. The loss of biodiversity is likely to have a profound effect for us all. It is time to end the abuse of our Planet Earth. To wake up enough to become wise and responsible stewards. And above all to think of those that will come after us. They also have rights. The right to live on a clean, healthy, abundant and diverse planet.
6. To move the process of an IECC forwards we can do several things:
    i) produce a clear document on the need (revelant existing legislation can be annexed)
    ii) send that document to countries and organisations that are most likely to support it (IUCN)
    iii) write a scientific article in a suitable journal (Conservation Biology, Oryx etc.)
    iv) launch an e-petition once our ideas are clear
    v) consult with legal specialists to design a 'Sovereign Earth' charter
    vi) find realistic ways to force compliance with IECC judgements
    vii) create a changed awareness whereby the resources of Earth belong to everyone (or all species)

NOTE: 24th April 2014 The Marshall Islands submitted nine cases to the International Court of Justice at The Hague against the nuclear weapons states. The plaintiffs are USA, Russia (that inherited the Soviet Union's arsenal), China, France, United Kingdom,

India, Pakistan, North Korea, and Israel. The Marshallese case is that none of the plaintiffs have made an effort to get rid of their nuclear WMD, and in fact may be increasing their arsenals. The Marshall Islands, and several other island nations in the Pacific, were used for nuclear testing over many years. The Marshallese do not seek financial reward, but intend that no other people on Earth should have to suffer the misfortunes that they did. This is a another good reason why an IECC is needed, and it definitely seems that the time is right.

F. Environmental Law, Environmental Crime and the International Environmental Criminal Court – Future Prospects

Are there any reasons to take seriously yet another proposal for an **International Environmental Criminal Court**? On the face of it, there may appear to be little gained from another attempt to garner support for such a court which, following more than 20 years of advocacy, has not yet materialised. But rather than dwell on discussions about Environmental Law, which has been the case since 1945, there is a need to move on to **Environmental Crime**.

From the distant date of the creation of the **UN** in 1945 through **The Charter of the United Nations**, the **UN** has expanded in most directions and come up with more than 900 multilateral and over 1500 bilateral treaties and other international agreements dealing with environmental issues. [57] In addition there have been thousands of "soft law" or "para-legal" instruments, such as declarations and plans of action which have been the product of environmental diplomacy in recent decades. But despite the proliferation of international environmental agreements, environmental degradation has proceeded and new environmental challenges continue to emerge.[58]

In spite of all these "legal" instruments environmental crime has continued unabated, unpunished, and environmental crime has been on the rise. It is interesting to note that for the past 40 years or so there have been innumerable reports about how much environmental harm is being caused, directly or indirectly, but appropriate actions to stop such harms have not materialized.

In its **Global Environment Outlook - GEO 4** [59] published in 2007 the **United Nations Environment Programme** (**UNEP**) paints a bleak picture of the state of the global environment and the connection of environmental degradation with development and human well-being. In the introductory words to this report, **UNEP** observes:

> Imagine a world in which environmental change threatens people's health, physical security, material needs and social cohesion. This is a world beset by increasingly intense and frequent storms, and by rising sea levels. Some people experience extensive flooding, while others endure intense droughts. Species extinction occurs at rates never before witnessed. Safe water is increasingly limited, hindering economic activity. Land degradation endangers the lives of millions of people. This is the world today.

Obviously a state of affairs that need regulating, at national, regional or international levels, and the emergence of international environmental law through decisions of arbitral tribunals and other international judicial bodies has been the exception rather than the rule. For the large part, international environmental law has emerged through bilateral and multilateral negotiation of treaties and "soft law" instruments in the form of declarations and plans of action.

Traditionally, international environmental protection and international economic law have been treated separately. The traditional old model has focused mainly on controlling specific pollutants or conserving particular species. The present day models, focus not only on biodiversity and ecosystems conservation, ecosystem services protection, and pollution prevention, within a framework of agreements and through a precautionary approach. These can be viewed not only as environmental goods but as integral to sustainable development. The new issues regarding global warming and climate change have now been added.

And yet, to this day there is no accepted definition of **International Environmental Law**, except perhaps the one commonly accepted and proposed by Philippe Sands [60]:

> International environmental law comprises those substantive procedural and institutional rules of international law that have as their primary objective the protection of the environment.

Whereas from Web definitions, [61] there is a slightly different view:

> Environmental law is a collective term describing international treaties, statutes, regulations, and common law or national legislation that operates to regulate the interaction of humanity and the natural environment, toward the purpose of reducing the impacts of human activity. .

However, looking carefully at existing procedural and institutional rules, as embodied in international treaties, statutes, and regulations, it is noticed that however elaborate they may be, the responsibility for enforcement rests on the signatory or participating country, with little room for exceptions and international interference. This is the case with one of the more conspicuous, more relevant, and most acclaimed **Convention on Biodiversity Diversity** (**CBD**).[62] **CBD Principle 21** declares:

> States have, in accordance with the **Charter of the United Nations** and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction.

What is interesting to note in Principle 21 is that, although it makes reference to the Charter of the United Nations, hardly binding for sovereign states, and the non-applicable "principles of international law," sovereign states are at liberty to "exploit their own resources pursuant to their own environmental policies." Such shortcomings in the **CBD**, as much as in other international treaties, have allowed the continuing destruction of pristine biodiversity in many parts of the world, especially in developing countries.

Other definitions, whether from **UNEP**, or from the **Law Dictionary**, or from other sources, all associate environmental law with existing laws, whether hard or soft laws, whether at international or national, or regional levels.

Regarding this difficult situation, and the impossibility to curtail environmental harm and environmental crime around the world, Sands (2003) further remarked that:

> Given that the land – and the sea – and the air-spaces of planet Earth are shared, and are not naturally distributed among the states of the world, and given that world transforming activities, especially economic activies, can have effects directly or cumulatively on large parts of the world environment, how can international law reconcile the inherent and fundamental interdependence of the world environment? How could legal control of activities adversely affecting the world environment be instituted, given that such activities may be fundamental to the economy of particular states?

Whereas there has been so much said, discussed or proposed about **Environmental Law**, and an **Environmental Criminal Court**, little has been discussed about environmental crimes, in spite of the fact that an **International Court of Justice** (**ICJ**) [63] was established as far back as 1947, to act as a world court. The Court has a dual jurisdiction :

1. It decides, in accordance with international law, disputes of a legal nature that are submitted to it by States (jurisdiction in contentious cases), and
2. It gives advisory opinions on legal questions at the request of the organs of the United Nations or specialized agencies authorized to make such a request (advisory jurisdiction).

From 22 May 1947 to 8 May 2014, 160 cases were entered in the General List of the **ICJ**, with some landmark judgements, as in the Japan whaling case of 2014. But even the **ICJ** has its limitations, as expressed by Lord Jennings in 1994 [64]

> There seem to be an urgent need for more and more complex regulation and official intervention, yet this is in our present system of international law and relations, extremely difficult to bring about in a timely and efficient manner. The fact of the matter surely is that these difficulties reflect the increasingly evident inadequacy of the traditional view of international relations as composed of pluralistic separate sovereignties existing in a world where pressures of many kinds, not least of scientific and technological skills, almost daily make those separate so-called sovereignties, in practical terms, less independent and more and more interdependent. What is urgently needed is a more general realisation that, in the conditions of the contemporary global situation, the need to create a true international society must be faced. It needs in fact a new vision of international relations and law. After all, this is not just a question of ameliorating the problems of our civilisation but of our survival. Lord Robert Jennings (1994).

The main contention in defining and recognising harm or damage to the environment as a crime punishable in a criminal court is due to the fact that nature does not have a personhood. Bolivia [65] has moved forward in giving nature a personhood, and Tunisia [66] has opted for including nature in its constitution, thus giving nature constitutional rights equal to human rights. In both cases nature becomes endowed with the right to sue (in legal terms). But it is hardly expected that other countries around the world will follow suit.

A common agreement has been that legal criminal action could be based on existing para-legal instruments or soft laws in the form of international agreements, since the majority of sovereign states have endorsed the long list of existing agreements. However, one problem that arises is that these agreements bind sovereign states within their own legal and judiciary systems, hardly an instance for international legal action.

It is suggested that the **The Earth Charter** [67] could be revised, strengthened and turned into an international legal environmental document that would bind all sovereign states to protecting the environment in its entirety, and any deviations could be labelled environmental crime liable to legal action. But that has not happened yet and other alternatives have to be sought.

One school of thought is that environmental crime should be linked to human rights, in which case legal instruments and an **International Human Rights Court** [68] exist. Yet, no case regarding environmental crime, linked to human rights, has been taken to this existing court yet. That is probably due to the fact that there is little information and no clear definition of environmental crime.

Judge Weeramantry (1997), [69]former Vice President of the **International Court of Justice**, wrote:

> The protection of the environment is … a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself.

The International Court of the Environment Foundation (**ICEF**), [70] founded in 1992 in Rome, set up a series of resolutions at its 1999 Conference at the George Washington University (USA), [71] of which resolutions one needs quoting and reflecting upon:

> There is a fundamental human right to a healthy environment that can be protected, inter alia, through the establishment of an International Environmental court. There is undoubtedly an urgent need for such a court to resolve transnational and international disputes in environmental matters, and thereby to conserve and protect global environment and all species from further degradation and extinction.

Unfortunately the one element left out regards national environmental mismanagement, misuse and ensuing national disputes, as opposed to transnational and international disputes. The same

shortcoming restricts legal action through the **ICJ** only to state-oriented actions. And the recommendations of the **ICEF** were too UN-centred to be of any immediate effectiveness.

Within the same flow of reasoning R.S. Pathak, in *Issues in international environmental law -The human rights system as a conceptual framework for environmental law*, [72] argues that:

> ….the emergence of the right to a healthful environment as a new human right. He suggests that international human rights law may provide a conceptual framework for environmental rights, and he re-examines the relation between environmental protection and development within the human rights context..... for the first time in history, the human mind has turned to recognizing, preventing, and repairing environmental damage..... [because of] emerging global consensus on the necessity of preserving our natural and cultural heritage in order to assure both the continued existence of human life and the quality of that life.

There cannot be any call for an **International Environmental Criminal Court** without some proper definition of environmental crime. There have actually been numerous definitions of environmental crime, some of which include:

1. An environmental crime is an act committed with the intent to harm the natural environment.
2. An environmental crime is an act committed with the intent to harm, or with the potential to cause harm to ecological and/or biological systems.
3. An environmental crime is an act committed with the intent to harm, or with the potential to cause harm to ecological and/or biological systems, for the purpose of securing business advantage, and in violation of state or federal statutes for which criminal sanctions apply.
4. An environmental crime is any act that violates an environmental protection statute.

Following up on the consequences of environmenatl crime, Timoshenko, in *Issues in international environmental law -Ecological security: response to global challenges* [73] sees three different levels of ecological security:

- Environmental problems may threaten economic and political stability
- Environmental disagreements may erupt into military conflicts
- Most importantly, from the global perspective, ecological imbalances may become so severe that they will disrupt the life-sustaining processes of the Earth.

All three are equally important to take a more serious approach to environmenat law and environmental crime.

What is both interesting and important to consider are the concepts of **Green Crime - Green Criminology**,[74] **Corporate Crime**,[75] **Bio-Piracy**,[76], **White Collar Crimes,**[77] and **Eco-Global Criminology**[78], which have been been around for a while, with one definition of business-related environmental harm:

> .....the abuse and exploitation of ecological systems, including animal life; corporate disregard for land, air, and water quality; profiteering from trades and practices that destroy lives and leaves a legacy of damage for subsequent generations. Beirne and South 2007. [74]

Perhaps the most important message depicting the birth of economic and political systems that led to the birth of environmental criminology came from B. Brown in Richard Hartley's treatise on *Corporate Crime: A Reference Handbook* (2008) [75]

> During the Industrial revolution, the United States was rapidly expanding both economically and geographically. Production and manufacturing swelled as did international trade. In order to protect themselves from competition, large manufacturing businesses became corporations. These corporations began not only to take over the business world, but U.S. courts, politicians and society.

That today appears to be the trend in the West, with both China and India joining in, and spreading

their controlling and dictating tentacles to the developing South. The role and involvement of corporations in the destruction of biodiversity and wildlife in several African countries, Madagascar, Indonesia, and South American countries are well documented.

And later, a definition of corporate crime was proposed by Frank and Lynch in 1992 (*Corporate Crime, Corporate Violence*):[79]

> Corporate crime involves injurious acts that result in physical, environmental and financial harms, committed by entities for their own benefits.

Today, corporations and politicians have joined hands around the world, and are busy developing and implementing strategies to further profit-oriented initiatives with total disregard to the environment and in blatant contravention to existing "soft laws". Several controversial plans and decisions have been under scrutiny recently, all regarding political decisions that favour corporations, and some need mentioning.

Last year (2014), Public Health England, on behalf of the Department of Health, and with the full knowledge of the Minister for Health, violated the public's rights under the **Aarhus Convention**,[80] thus infringing civil rights, in failing to properly inform or consult the British public on the health risks associated with shale gas extraction (fracking). The ground is open for legal action.[81]

In 2013, the Prime Minister of Australia decided to authorize opening of a shipping route though the **Great Barrier Reef**, a protected **UNESCO National Heritage** [82] site, for the transportation of coal from recently opened mining sites, resulting in the remark:

> Australia is facing a hard choice right now whether to make a quick buck from coal exports or whether to preserve an economically, long-standing national treasure. We fear Tony Abbott could overturn all the steps that have been taken domestically to protect the environment, to instead fast track coal export developments and drastically weaken environmental laws that were created to protect the country.

The **UN** report expressed "extreme concern" over development along the Great Barrier Reef coast, calling for all building to cease until an assessment of the ecosystem's health was carried out, and UNESCO has issued a warning against the construction of new ports or increased shipping in the area. [83]

And again in the UK in 2014, developers intend to bulldoze 20 acres of a 12th-century historical forest (Smithy Wood), designated as a local wildlife site within Sheffield's Green Belt, and a haven for plants, fungi, butterflies and threatened birds including the song thrush, dunnock, bullfinch and stock dove to make way for a motorway petrol station. UK Environment Secretary Owen Paterson appears to be in favour of the project. [84]

In 2014, Australia's Prime Minister Tony Abbott declared that too many of Australia's forests are "locked up" and vowed to set up a new advisory council to support the timber industry, and committed to repealing part of Tasmania's Wilderness World Heritage Area made under the Tasmanian forest peace deal, which added 170,000 hectares of forest to the World Heritage area. [85]
The above are just a few recent examples where the tandem politician-corporation is not afraid to defy existing laws and public opinion to install the corporate dominancy over nature. The list of cases is far too long to go into here.

Perhaps it is because environmental crimes have been going on unpunished for too long that the term **Ecocide**[86] was brought in as early as the 1970s to consider any extensive damage or destruction of the natural landscape, or disruption and loss of ecosystems of a given territory to such

an extent that the survival of the inhabitants of that territory may be endangered. But until presently Ecocide is not considered an international environmental crime.

In 2010, Polly Higgins (UK), proposed a legal definition of ecocide to the UN 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.[87]

Since the 1970s, governments, businesses and communities have increasingly supported the proposition to make **Ecocide** the fifth **International Crime against Peace**, thus standing alongside the crime of **Genocide**. The proposition, initiated by a new organisation known as **Earth Law** or **Earth Jurisprudence**[88] has continued to be actively supported. But to this day, all efforts have led to nowhere.

Today, **Green Criminology** concentrates on the study of environmental harm, crime, law, regulation, victimization, and justice, and has further increased its coverage to include **Green-Cultural Criminology**,[89] **Conservation Criminology**,[90] **Eco-Global Criminology** to consider transnational environmental crime.[91]

Environmental criminology has increasing relevance to contemporary problems at local, national, and international levels, appearing at a time when societies and governments worldwide seek new ways to alleviate and deal with the consequences of various environmental harms as they relate to humans, non-human animals, plant species, and the ecosystem and its components.

Green Criminology offers a unique theoretical perspective on how human behaviour causes and exacerbates environmental conditions that threaten the planet's viability. The available literature on environmental crime includes such topics and controversies as corporate environmental crime, the complicity of international financial institutions, state-sponsored environmental destruction, and the role of non-governmental organizations in addressing environmental harms. The intersections between green criminology and other branches of criminology, and other areas of law, such as human rights and national security have also been studied in depth.

Interestingly, **Green Criminology** stresses on the importance and currently common trends in environmental crime being associated with actions at state, political and corporate levels. It is becoming more and more common that environmental crime is being associated with these three entities, and the necessity for an **International Environmental Criminal Court** has the main objective of seeking justice and redressment for the negative and deleterious actions, and environmental implications of activities which, today, are hidden behind the objectives of development.

So, where do we stand today? Guided by the Invisible Hand? There is a need to look back to that famous and meaningful UN (Stockholm) declaration of 1972: [92]

> A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depends. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes..

And how can that "**wiser action**" be achieved, 43 years down the road, if not through the immediate institution of an International Environmental Criminal Court (IECC)?

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