

## THE NEW CLASH OF GENERATION

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**ABSTRACT:** Unlike in the sixties, today's clash of generations is not about creating (post-)materialistic values. It is about human species survival. The fear of decay (of the Empire through war) and the hope of revolution (coming back a new to a starting configuration) are similar. Social State's financial sustainability or the new generation of energy sources are partial problems. How to have justice for all, including the environment? that's a global problem. The main and also repressed question is about how climate change will impose new ways of living on us all. Political and cognitive alienation from the main human problems is pushing emotional responses in different directions. Alienation closes political systems from population and from it springs populist irrationality in politics, racist and sexist scapegoating, consumers street uprisings, etc. Considering the regulatory function of the law over technology, social exclusion, war, one can assess the way modern law focuses on intergeneration relationships and how a healthy environment has been dismissed as a human right. For this propose one will consider the ongoing legal attempts to criminalize ecocide.

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**KEYWORDS:** Law; Ecocide; Criminal Law; International Law; Generation; Environment; Alienation; Risk; Justice.

Generation is a noun commonly used to mention caring of children and youth, the respect they owe to the elders, to collective identities that depend on the living experience of historical episodes and social mores. War of generations was an expression coined in the 1960s, when Western youths began to lobby, demanding cultural and sexual freedoms, including the freedom of objecting to engage in war. The recent global youth demonstrations against the human causes of global warming call for a break with the political practices of adults who are preparing to leave a planet unrecognizable and devastated for future generations. Is it a prelude to a new war of generations? What will be the turning point around which new law are already or will be produced for future generations? The earth law? The criminalization of ecocide?

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This article is a multidisciplinary exercise between sociology and law, recognizing the contradictions between disciplines and trying to take advantage of them to understand what is being done and what can happen, what is desired and what is experienced. In the first part, we study the social characteristics of the exercise of the law, such as its social penetration, the ways in which societies escapade from the law, how institutions create a more stable space-time for themselves, in contrast with and in reference to the greater agitation of everyday life. In the second part, in the face of the evidence of an environmental crisis, we present some improving essays of the law with special attention to the criminalization of the ecocide, including references to their presumed limitations.

The article is a first joint venture between a senior academic sociologist and a young lawyer and activist, as authors.

### 1. INTRODUCTION: LAW AND SOCIETY

The law studies what should be, sociology studies what is. The law favors liberal ideology, sociology prefers social democracy. These are disciplines that create varieties of professions closed off from one another, with different authorities in different fields of action. Forensics psychology and economy exist, but forensic sociology does not. Seldomly do sociologists understand what Law is and vice versa, it's rare that a jurist knows what sociology is. In sociology of law everyone uses preexisting common sense ideas regarding what is the other part of the discipline's knowledge is. Regardless, the law and sociology agree on omitting climate change analysis from their courses and world views.

What motivates the death threats to Greta Thunberg's family, a young student that started a movement against the political inertia regarding climate change? How can or are law and sociology willing to help this new generation's struggle?

What is Law, and what is it for? What is sociology, and what is it for? Of what use could both be in the current historical context, for the new generations that are confronted with ecological catastrophe brought about by human inaction?

The Law, applied on a case-by-case basis by courts, whose spirit is ignored by neoliberal governments, is being denied by social and financial engineering practices that create predatory globalization and abandon humanity to its fate, despite today information technology allowing for long-distance communication and organizing, including injustice contestation movements organizing. Specialization in sociology often leads professionals to technologies' love/hate-idolatry/loathing (Latour, 2007). It also leads them to the extreme naivety of ignoring and alienating the references to environmental contexts indispensable to the reproduction of societies, claiming that they are not cultural: they are objects of natural sciences incompatible with the social sciences. Both disciplines, and science, in general, have led us to - or at least did not stop us from reaching - the point of risk we are in. Such sciences must be updated in the name of humanity's self-defense from itself (Dores, 2014, 2016, 2017; Schofield, 2018).



The way in which we are and we will deal with the earth law can serve as test and challenge to the direction and speed of cognitive transformations that can accompany or even help direct the action of harmonizing human life with nature. The way law and sociology will go on to consider the environment in their demands for social justice will reflect how science will adapt to the changing times. Will one overcome the way law and sociology isolate themselves, as disciplines? How will the hyperspecialized science be transformed in ways that avoid that these disciplines ignore the need of minimum environmental conditions for the existence of humanity, as if these were not their responsibility as well?

With the emergence of the announced climate crisis and its implications in altering people's way of life, the law will certainly, as everything else, have to adapt. Positive law, written on more or less divinized and eternal codes, is a modern authoritarianism tradition that still reigns. Law has been being loosened, subjectified, made accessible to more citizens, more ductile when it comes to its susceptibility to take in the populations wishes, especially after the inter-war period and the creation, in the west, of human rights regimes (Moravesik, 2000) and of the social state (Commaille, 2018).

The law embedded in the pyramid of power has been progressively diluted in sociability networks, especially at the highest social levels, not always for the best reasons and with the best of results. Particularly regarding freedom of movement of capital, or rather, the lack of regulation of movement of capital, it was allowed that capital was transformed in mere electronic signals that make petty cash, the one people live with, part of a global speculation game in which only the banks win, by default of the system's own design. Law has mainly national headquarters and the dominant economic activities have global headquarters, out of reach from courts and citizens.

The conquests of citizenship by workers and women are historically recent. They were followed, not by chance, by the displacement of decision-making positions from the heart of states subject to popular scrutiny. For those old enough to remember the generation clash of the sixties, source of more civil and freedom claims especially for women, and regarding environmental issues, from which emerged the revolutions of mores, the announcement of a new clash of generations is simultaneously sad and hopeful news. News of the failure of the liberation conjured by the older generation (Sennett, 2006:1) and hope of a new era of social emancipation capable of learning from its predecessor.

Greta Thunberg is a 15-year-old Swedish student, that inspired a youth movement that summoned global school strikes for 15 March 2019 and for 24th May of 2019. Hope emerges that the new generations become "nature" (Brut, 2019) and defend themselves with it through disobedience. The young student demands, and rightly so, that the generations that proceeded her be held accountable for the planet's health condition, that will mostly affect new generations like her own's. In fact, had the Club of Rome's report (Meadows, Donella H.; Meadows, Dennis L.;

Randers, Jorgen; Beherens III, 1973), regarding the limits of growth, been taken seriously, it could have offered the generations that are now preparing themselves to hand over a traumatized Earth the possibility of delivering another society to the youngest. Not having done so, the best is really to help the new out of the old, with the utmost urgency.

Unfortunately, the west is living through a clear decline of democracy, at least from 2003 onward, when the war on Iraq was waged based on evident lies and against the will of the people. The astonishing idea of returning to a mythical and glorious starting point becomes a mantra, be it national borders, to the rightwing, be it the citizen's social state, to the leftwing (Kuhn, 2016).

Globalization started by failing in freedom of movement of people. It is definitively failing for the Earth. Markets' endless growth reveals itself incompatible with healthy environment. However, day-to-day inertia keeps most people and institutions doing what they have always done before, in the platonic hope that either some enlightened one takes care of all of this, or that there is a revolution carried out by collective intelligence, or both simultaneously, without anyone's life ceasing to be what it has been: a sacrifice to earn money in order to survive.

Does the law have anything to say in this regard? Is sociology of law able to identify in which way the legal institutions are preparing to adapt themselves to the new times announced by Greta Thunberg? Can the Law favor peace in times of war?

## 2. WHAT IS THE LAW?

Alian Supiot (2002) identifies one of the origins of law in the need to regulate the use of technical instruments created by mankind. The steering towards new behaviors that should be encouraged or forbidden, according to the potentialities of changes brought about by new technical instruments, may be established by customary or positive law. Consumer's rights legislation or the production of regulatory measurements of pollutive gas emissions in automobiles or factories are examples of this.

The law can be understood on the one hand as an instrument to feed the alliance between society and the state. Peasant societies kept warrior states, more or less protective, and orators, more or less motivating, that extracted peasant's surplus resources through the strength of authoritarianism. It was the time of social orders practically closed off from each other and of law applicable according to each person's social condition. The persistent modern claims for equality have extended between the French Revolution and up until the twentieth century, through feminist and worker's movements, until the Social State granted the right to citizenship to every national person, regardless of social condition and gender.

Bourgeois nationalism's victory against proletariat internationalism, in both world wars, transformed the law (criminal and labor) into an instrument for the

urban integration of masses, who could no longer afford to live off agriculture, traumatized by wars and by land abandonment. During the cold war democracies, both bourgeoisie and proletariat, raced against each other to integrate within the same state the social classes that substituted old orders. At the same time, in practice, oligarchies, especially after the 1980s, organized an autonomous way of life in relation to national law and to the other population layers, which was named neoliberal capitalist globalization.

The law that integrated social classes in nations has shown itself powerless to stop the governments' environmental abuses, and incapable of integrating humanity, internationally, as the xenophobe political movements demonstrate, explicitly replicating the punitive speeches that cloaked and legitimized the Holocaust.

The double parting, of national and international law, of law applicable to the oligarchy and to the rest of society (Jakobs & Meliá, 2003), resulted of the rupture with the spirit of shared social management described as a positive sum game, the spirit that presided the Keynesian social state and that allowed the division of economic benefits between capital and labor. The Law's national borders prevent it from accompanying the globalization in more and more economic sectors and activities (Perkins, 2004; Varoufakis, 2015; Woodiwiss, 2005), that sustain corporate oligarchies.

Simultaneously, over time international law reinforced itself, namely around the UN and NGOs, whose surveillance role over private and public institutions' activity greatly increased. But deregulation inhibits the courts and state's action, ever more distant from having the capacity to legally intervene in techno-social options of economical exploration of the Earth and of human resources. Politics became, primarily, a way for the political class to share the gains of financial speculation (Osborne, 2008; Tuga, 2017). Magistrates, politicians and senior officials, as professionals, get promiscuously close to the people with which they started sharing power in order to benefit from growing income, while most citizens have lost or, at the very best, retained their income. Seemingly free and equal amongst themselves, the citizens, as a whole, have shown themselves unable to react to the diversion of funds that have made corruption a central issue in wealthier countries from the 1990s onward. Neither is the law able to effectively regulate the judicial institution's actions nor do social movements, through NGOs, see their claims succeed with enough radicality. The ecologist movement, in particular, has not been sufficiently useful in effectively protecting present generations from environmental risks.

There's eventually hopeful constitutional law, for example in Bolivia and Ecuador, that speaks of the need of creating earth law inspired in Andean indigenous cultural practices, people that have resisted to hundreds of years of genocide in the environment's defense, to which they belong (Acosta, 2013). However, it is legislation limited by those constitution's power instabilities and the

conceptual lake of definition and practices. This law milestone is used as a museologically institutionalize hope, without any practical progress.

Law translates desires and hopes into eventually useless norms. It is treated as a resource, as a fountain of rights to be updated and claimed. In its positive form, the law is contradictory to sociology from the outset because while the first focuses on the person demanding justice, sociology only considers relationships between more than one person, generally referring to many people.

When Alberto Acosta (2013) calls for anti-extractive policies, nor does earth law, even being constitutional referred in his country, nor does sociology apply. Both disciplines were conceived as if nature was unrelated to human interests. As if the environment could be handed over to God's platonic responsibility. God's representation, or usurpation as First owner, carried out by entrepreneurs with explorer spirit, with increasingly more invasive technologies at their disposal, without regulation.

The question is how it was possible for the law to escape the necessity of protecting the environment, of regulating technologies, over the last centuries? Is law a protection factor of nature and of the part of humanity that is committed to it, or conversely is law a combat tool against the part of humanity that beats in harmony with nature? Given the generational issue brought forth by underway youth movements, in what way can the law be either an instrument of destruction of the environment or one of harmonization between human life and the environment?

### 3. THE INERTIA OF LAW

*Ubi societas, ubi ius.* Wherever there is a society, there is law, so the saying goes. Law is relational and only arises when societies reach some organizing sophistication and literacy, in order to regulate politically critical aspects of human relationships. Law can be understood, simplistically, as the regulation of what is prohibited and what is allowed. All law students know that "the law is the system of coercive norms designed to govern human relationships within a given geopolitical system" (Silva, 2015).

In other words, the law is made up of a set of legal rules related to each other by institutional consensus principles - norms that seek to establish rules of behavior and which are enforced on their recipients in unequal manners.

The principles governing the norms emanating from the various sources of law govern their purposes and indicate that they are therefore not morally or axiologically neutral. It will always follow a priority of values. It allows decision making over contradictions over values.

That is how the law adapts itself to the concerns and priorities of society, reflecting the order of values and powers in charge, changing rules and the ways of interpreting and applying the law over the centuries.

A very important moral and axiological order in European law is Judaeo-Christian. The Christian religion has had a particular influence on the formation of international law, up until the peace of Westphalia (Baderin, 2009). This religion conceives man made in the image of God. The rest of life on earth were created solely and exclusively for human enjoyment and fulfillment. In fact, it seems that mankind (or part of it) followed the commandment written in the Old Testament that urged us to subdue the Earth and to dominate over all the animals on it (Genesis 1:28).

A profoundly anthropocentric mindset led society to consider itself outside Nature as if it were extraneous to it. Facing the climate change crisis, we experience selective anthropocentrism, given its focus limited to the present, not taking into account subsequent generations. As if society is not accountable for the well-being of the non-integrated part of humanity, namely the youngest and the unborn.

For more than 50 years, the scientific community has been warning of the effects of greenhouse gas emissions for the environment, without this seeming to have led to any real change in the legal and political sphere, nor to previous generations being sufficiently motivated to bring about this much-needed change. The most recent IPCC (Intergovernmental Panel on Climate Change report from October 2018) explores the (drastic) differences between average global warming of 1.5°C and 2.0°C. It does not seem to have generated any major reaction in either field, although it seems to be motivating a large-scale mobilization of younger generations, who feel differently the effects of these changes.

Dimitri D'Andrea (2013) believes that this inertia towards climate change, which has the consequence of widening the gap between those who make the decisions and those who suffer the worst consequences, is typical of complex systems. This structural trend must, therefore, be countered. On the other hand, and from a Hobbesian point of view, one should ponder part of the problem as resulting from the lack of motivation of previous generations, given that the threat of the climate crisis was an abstract risk, not imminent, with no direct repercussions on their existence, only scientifically identified, but politically neglected and minimized.

These and other factors have most likely contributed to the fact that the law has not yet been adapted to the needs of protecting Earth's and future generations' rights. The need to readjust the balance between economic and civil rights, such as property and profit, on the one hand, and the urgent need to conserve and protect ecosystems and the environment, and to guarantee the very dignity of the of future generations existence, on the other, has no obvious solution.

What is certain is that dealing with this threat - which is intrinsically linked to the very organization of capitalist society - will imply profound and systematic changes to the way we live in society and, consequently, to the rules of law that regulate it - including with respect to the institutions' purposes and principles, including those of the judicial system.

#### 4. EXISTING LEGAL MECHANISMS' INSUFFICIENCY

It is not true that environmental protection is completely omitted from international law and the internal orders of countries. However, it is safe to say - if not only through empirical observation - that the existing legislation and regulations are manifestly inadequate to prevent the climate and ecological catastrophe that science is predicting, the effects of which are already being felt.

The protection of nature to date is generally framed by human rights, for instance, the right to a healthy environment, to not having your land expropriated and the right to uncontaminated resources.

Current legislation radiates from the notion of the Earth as an inert thing. Nature as a collection of resources and things, over which human beings has the right to own and enjoy for the fair price and with very few effective limitations. As long as nature is viewed through the prism of ownership, how can law serve as a tool to safeguard it from exploitative human greed? In fact, the law has not even succeeded in guaranteeing the natural justice that it proposes: to protect the human rights of these and the next generations to enjoy basic natural resources: the right to a healthy environment, to a livable atmosphere, to drinking water.

Existing legislation and judicial mechanisms are simply not effective for these essential purposes, nor for the welfare of the human species.

For example, in international law called soft law, or law that gives recommendations but is not binding, such as the Paris Agreement, the determinations are merely indicative - besides being insufficient. If it is not complied with, it has no consequences for the acceding States, except symbolic consequences, in a materialistic world.

It is true that the bulk of environmental legislation is the product of various national legal systems, within the branches of civil and administrative law. But these rules are also highly inadequate and disrespected. They do not guarantee the protection of ecosystems and the environment. The purpose of these legal areas is generally that of regulating private situations or citizens' interactions with the State, without safeguarding the availability of means of deterrence necessary to achieve the desired effect. Big, profit-oriented companies – profit to which they are entitled and are even legally obliged to seek - simply provide funds in their budgets be allocated to possible penalties in order to save investment or expenditure on environmental protection. They calculate, as if it were rational, the difference between protective expenditure and the state fine. They conclude accordingly, precisely because the legislation allows the offender to benefit. Consider the situation in the Amazon, where successive fines on companies that fail to comply with state rules do not prevent illegal deforestation from progressing. Moreover, the people who run the companies can comfortably hide behind fictitious personalities.



There are those who place all their hopes for environmental protection on judicial effectiveness and real compensation for the damage already irreversible under international criminal law, governed by the Rome Statute of 2002 and applied by the International Criminal Court (ICC). Firstly, because it is only criminal law that adequately protects essential legal interests, such as life. On the other hand, environmental damage has a number of unique characteristics which necessarily require a global, international approach in order to be avoided.

The Rome Statute (RS) provides for four types of crimes which are called crimes against peace: Genocide, Crimes against humanity, War crimes and Crimes of aggression. Only natural persons can be tried by the ICC and the Statute only applies to citizens from or facts that occurred in one of the 123 acceding States.

Environmental crimes are not specifically provided for in the Rome Statute. Although extensive, lasting and serious damage to the environment caused by an attack that is clearly excessive in relation to the military advantage obtained, may constitute a war crime (Article 8 (iv) RS).

In addition, environmental damage caused in times of peace can be framed as a crime against humanity in the light of the legal definition under article 7 of the RS, when it results in the murder or forcible transfer of a population and "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

In this regard it is worth mentioning that the Policy Paper On Case Selection and Prioritization of the Office of the Prosecutor of the ICC in 2016, considered environmental destruction conducts as constituting a serious crime under international law, on par with illegal exploitation of resources and land grabbing, deeming the pursuit of these and other crimes as one of the Court's priorities.

The ICC's scope of action in the field of environmental damage is therefore very limited, considering that the Rome Statute is only enforceable after there have been human loss consequences and all the legal provisions have been deemed fulfilled.

## 5. ECOCIDE AND EARTH LAW

However, currents of thought arise within the law that challenges this logic. An emerging body of laws, commonly referred to as Earth Law, starts from the jurisprudential principle of *primum non nocere* (first do no harm) extending it beyond the scope of human life, recognizing that the earth has natural limits and, as such, we must protect it by passing laws that ensure nature's and ecosystems' rights and decent lives for future generations. This set of laws seeks to rebalance the scale and place the protection rights of communities and nature above the exploitation rights of companies.

The attribution of rights to nature and ecosystems, such as rivers, lands, oceans and coasts, has been met with strong resistance from the legal community, a resistance, in fact, that is felt whenever it is intended to attribute legal personality or rights to new entities. This was the case with regard to the granting of rights to

slaves, children or women, who were considered things under the law and did not have the possibility of being represented in court. The most common argument among academics against the granting of rights to nature and ecosystems is related to the very concept of "right", which is always intertwined with that of duty: only an entity that can also be the holder of the corresponding duties is liable to hold rights. However, this is a technical and superficial argument. One can argue, from the outset, that a child has rights under current legislation and can be represented in court, even though he or she is not himself or herself responsible.

Perhaps the necessary work is to redefine what rights are: The rights enshrined in constitutions are seen as the fruit of collective will, but they cannot be said to be conscious collective choices. Certain constitutional rights, such as the right to property, are crystallized and beyond the reach of the state and collective will, creating a tension between democracy and rights. This tension is striking when it comes to the problem of protecting ecosystems and the environment. We therefore have a vision of rights as unchanging assets, a limit to democracy, which neither States nor other individuals can overcome, reflecting the sense of fear of the other and of collective will, which is seen as a threat to the autonomy of each one. However, this individualistic thinking fails to consider that our humanity is not understandable without the network of relationships to which it belongs - either with other individuals or with the environment around us. What assures autonomy in truth is not the separation from others and nature, but our relations with them. There are those who argue that we should structure these relationships so that they not only incite the autonomy of citizens, transforming these interdependencies into a central part of the definition of law in order to enrich collective life, in addition to guaranteeing individual autonomy. This would involve opening up the definition of "right" to democratic dialogue from a relational point of view, rather than the current situation in which invoking rights ends debates and does not start conversations. We cannot ignore the fact that private rights always have social - and in some cases environmental - consequences, something especially obvious when it comes to property rights. We should reconsider the framing of the right to property as a constitutional right, alongside the right to life, freedom, privacy and political participation (Nedelsky, 1993).

In any event, the fact is that at the moment, the legal conjecture allows an aberrant situation: attribution of rights to fictitious entities such as companies, which can exercise them through litigation, but does not effectively recognize nature as an entity subject to rights and that can, therefore, be represented in Court.

To defend nature's rights is to state that a legal transition is necessary on how human interaction with the rest of Nature is understood. It should be conceptualized as a relationship of interdependence and not one of ownership. A relationship in which there is, on our part, a duty of care, even of trusteeship, similar to that envisioned in family law, in which the supreme interest of the child

is the ultimate criterion for assessing the legality and morality of a decision or action.

Ecocide is at the heart of this legal construct. The information herein is heavily based in the internationally recognized work of British barrister Polly Higgins (2010, 2012) who died on 21 April 2019 and who drafted a comprehensive act to establish Ecocide as a crime.

Proposed definition:

Acts or omissions committed in times of peace or conflict by any senior person within the course of State, corporate or any other entity's activity which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished.

To date, 10 countries<sup>3</sup> have recognized ecocide as a crime in their national legislation. However, nature, the whole Earth, is a living organism. Attacks on ecosystems and the environment are not contained or prevented in isolation in each nation-state. Ecocide challenges the agreed spatial boundaries to execute and punish crime.

It also challenges time limits, echoing through the decades. The fruits of the actions (and omissions) of several previous generations are now beginning to be harvested.

It is on this path that various legal experts and citizens' movements have been trying to promote an addendum to the Rome Statute to enshrine an international condemnation of a fifth type of crime against peace, the crime of Ecocide, in order to sanction and, if possible, prevent conducts that fall within its legal scope.

Polly Higgins has repeatedly stated that ecocide is the missing crime of our times, considering it inseparable from other crimes against peace: ecocide leads to the depletion of resources, which invariably leads to conflict and war, which in turn leads to more depletion of resources, starting a vicious cycle. Ecocide, according to the proposed definition, may have natural causes (namely, floods or earthquakes) or be brought about by human action. The distinction is important, because the amendment proposed by this activist covers both cases, establishing a duty of assistance and international solidarity for when the former takes place.

The definition also foresees, as an element of the crime, the action that jeopardizes the peaceful enjoyment by the inhabitants of the ecosystem in question. In other words, it does not restrict law protection to the enjoyment by the human being. Its open protection to all life and to the environmental conditions that allow

<sup>3</sup> Georgia, Ukraine, Armenia, Vietnam, Belarus, Kazakhstan, Kyrgyzstan, Republic of Moldova, Russian Federation and Tajikistan.

for it, whether they are indigenous people or any animals - from birds, fish to insects - and plants or other organisms that inhabit the affected area, thus safeguarding the numerous cases of collapse of ecosystems not inhabited by humans.

The proposed crime of Ecocide is also a crime of strict liability, which means that it does not require the verification of the subjective element of intent or willful misconduct, but only the verification of the legal type. Because ecocide is a crime in which immorality often does not lie in the action or omission of the perpetrator, but rather in its consequence, the seriousness of which justifies a conviction *per se*. The legal definition not demanding a criminal state of mind will allow the prosecution of corporations and other legal entity's created Ecocide. An advantage of this objectivity is the deterrent element - the proposed legal definition, by focusing on the consequence of the conduct rather than on the means used or intention, creates a benchmark, a criterion of care, the respect or disrespect of which will be a factor in its application. Removing any possibility of arguing for the absence of malice, the focus of avoiding possible criminal responsibility is necessarily on preventing the verification of environmental damage, transferring the mere legal protection of the owners to that of the many who will suffer from climate change and destruction of the planet. Without strict liability, ecocide legislation is ineffective (Higgins, 2010).

A predictability criterion shall apply. It will suffice, therefore, to demonstrate that the agents knew (or should have known) that it would be possible for their decisions to result in Ecocide - and it is also defined that the Paris Agreement of 4 November 2016 is considered as an established premise of prior knowledge by any other person with hierarchical responsibility within the State or of a corporation or any entity, finally giving some use to this legal document.

The jurist also argues that the principle of international criminal law known as hierarchical responsibility should apply: the higher the position, the greater the responsibility that falls upon the person filling it, so that any crime committed under that person's authority will be directly attributable to s/he. This principle applies to war crimes, in which those who hold the decision-making power are held responsible for crimes committed by forces in their command, that they had or should have had knowledge of, including decisions made by their subordinates. The principle applies even where when the crime is not intentionally committed but is merely collateral damage to otherwise legal action. By analogy, the crime of Ecocide is attributable to corporate directors who, in the pursuit of profit and through legal means, cause damage and environmental destruction. Thus, the same people who have the power to prevent climate disasters would be responsible for them, both at the State and at the corporate levels.

Ecocide creates a global duty of care, focused on the people in charge of state and business, who should not only ensure that climate and ecosystem ecocide does not occur within their territories, but that will also be invested in the duty of prior

assistance during and after the occurrence of natural cause; also entities that should ensure that ecocide does not occur in territories over which they have rights and responsibilities. The duty of care also applies to the financial sector, which should ensure that it does not finance ecocide.

Finally, Ecocide creates a duty of guardianship, and the proposal suggests that the United Nations Guardianship Council, which has been closed since 1994, be reopened to assist territories which have been affected by ecocide or are at risk of ecocide, and which as a result are unable to govern themselves.

## 6. DEVELOPMENTS

Ecocide has been discussed on the international law stage since the 1970s. At the 1972 United Nations Conference on the Human Environment in Stockholm, Swedish Prime Minister Olof Palme stated that:

[...] progress continues and world production increases, but we become increasingly aware that our natural resources are limited [...]. The immense destruction brought about by indiscriminate bombardment, by the large-scale use of excavators and herbicides, is an affront, sometimes described as ecocide, which requires urgent international attention (Interprt, 2019).

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Despite this warning, to date, there is no legal protection for Earth Law, nor an international legal Ecocide provision.

However, in the last decade, there has been some progress in this direction. In 2010, Polly Higgins proposed to the UN the adoption of the ecocide law. There was a European Citizens Initiative in 2013 based on its proposal, the "Ecocide Directive" which, despite not having collected the required number of signatures, generated a global movement ("End ecocide on earth") that still exists today, fighting for the consecration of Ecocide in the various legal systems.

In 2017 the "Life Mission" was launched which contributes to give visibility to the proposed law of Ecocide. This mission aims to establish an independent fund to be used to assist island developing countries that have the political will to propose Ecocide as an international crime, but do not have the monetary and legal resources to do so.

The most recent development occurred in December 2018, when an independent preliminary investigation was launched by Polly Higgins and her legal team, the principal suspects being Royal Dutch Shell and Shell Netherlands CEOs, Ben van Beurden and Marjan van Loon, and the Dutch Minister for the Economy and Climate Policy Eric Wiebes, following the disclosure of several pieces of evidence suggesting that Shell, the world's largest emitter of greenhouse gases knew for over 30 years and through its own scientists, of the consequences of its activities on the planet. And that Shell not only continued with the same business model but also launched a major misinformation campaign intending to mislead

the public and cast doubt over the effects of greenhouse gas emissions and the use of fossil fuels on climate change.

This preliminary investigation follows the same criteria as investigations carried out by the ICC and will be used to request its intervention. Its purpose is twofold: to determine whether the legal requirements for the crime of ecocide are met and to justify the need to enshrine it in the Rome Statute. If the conditions for the application of international criminal law are met and the proposed ecocide provision is met, the acceding states will be challenged to adopt this amendment. Given the activists' unexpected death, this investigation will be carried out by her legal team.

The ecocide crime proposal, and all its legal construction, are intended to provide effective protection for the environment and the rights of future generations in the face of the complete ineffectiveness of the rules and legal mechanisms currently in force, attacking their weak spots, thus creating a binding and dissuasive provision, to hold the main agents causing damage to ecosystems and the environment liable - the highest corporate, financial and state officials. Such a conviction will even include crimes committed in peacetime and will introduce a holistic view of the inviolability of life, complementing the existing repertoire of crimes against peace.

The power of law to change society by preventing attacks on ecosystems and the planet, but also by encouraging the adoption of renewable energies, should not be underestimated. The criminalization of slavery, for example, was preceded by hundreds of international agreements that never succeeded in eradicating it (Higgins, 2012).

However, how can we change the law and use its full potential to combat the consequences of the destructive activities of states and corporations without the impulse of social movements and the exercise of mass pressure in this direction? This pressure seems to be becoming stronger in today's generations, who have grown up hearing about the climate change that will one day make the planet uninhabitable for our species and, at the same time, witnessing the inertia and the ever more obvious hypocrisy of the dominant political, military and industrial system.

## 7. CONCLUSION: MORAL OF THE STORY

The law can have a pioneering and directive role when it imposes upon all rules supported by the majority. It may, also, have a resistance and alienation role when it serves as inertia towards more adaptive social movements. Marcuse (1991) and Habermas (1987) have pointed out how appearances (such as economic growth and using legal authority for regulating life) bring with them, contradictory civil and political impotence.

The 1960's generation rebelled in order to achieve the democratization of the consumerist north American way of life to all classes and to all the world; what

many call the development in freedom. For the generation raised in the midst of the 2008 financial crisis, it is clear their predecessors' despise for the Earth and its so-called human resources. Despise for earth conservation and dignified living conditions. What right, ask the later, does the eldest have to hand over the Earth in this state, while simultaneously accusing of political inertia the youngest? What morals inspire the destruction of the Earth in the economy's name? What moral politics will be required to transform the law and society, integrated into nature's dynamics?

Is the law a useful instrument for the generations that now announce their will to rebel? What does law's history show regarding criminal legislation's capacity for effective prevention of crimes and in criminal's containment? Hasn't the narrowing of law to the service of states' interests and economic growth been co-responsible for augmenting instrumental reasoning's irrationality, for deregulating capitalism? Is there anyone to be held accountable for the isolation of science and journalism from the pursuit of truth, namely from acknowledging the value of ecological reports regarding the risks we face, produced over half a century ago, for the creation of a world of tolerated lies, be it commercial, political, military or nationalistic ones, to cover the known truth? Where were those that dominated the public space, political and communication systems, and education also, before the fake news era was declared open by Trump? Are not they co-responsible for what is happening?

The current law has served and continues to serve to balance and maintain the powers of the day, acting prudently. Certainly, in its mission it gives answers to transforming and revolutionary desires, generally disarming them and retracting their impulses. At the same time, the exploitation of the Earth and its human resources has been and is treated as a political and property right to be protected. In other words, the pondering and breaking of impulses that work in the sense of protecting private property do not work, it works backward when it comes to protecting the Earth and human resources. Human resources have never been so abundant and, on the contrary, natural resources that have never been so scarce due to the expansion of the Western lifestyle.

Hope lies in the action of the new generation being more successful from an environmental point of view that the environmental movements and parties created in the 1960s. Social action geared towards legal purposes, such as imposing international recognition of the existence and consequent condemnation of ecocide crimes, is part of the creation of mobilizations and hopes, even if their eventual success if it happens, may prove insufficient. To tackle a problem such as tackling the consequences of climate change and stopping its causes, all contributions are useful and only the whole of them can eventually achieve satisfactory results.

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