



# **Criminalising 'Ecocide' at the International Criminal Court**

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Throughout the twentieth and twenty first centuries, untenable economic development and excessive depletion of environmental resources have devastated the relationship that humans share with the natural world. As knowledge and concern regarding environmental destruction has become ever more widespread, the criminalisation of ‘ecocide’ has increasingly been debated by academics, activists, politicians and legal professionals. In 2020, the ‘Stop Ecocide’ campaign convened a [panel of experts](#), tasked with drafting a definition of ecocide capable of being incorporated into the International Criminal Court’s mandate. In this briefing, we explore 1) the history of ecocide as a proposed international crime; 2) the current gap in accountability for crimes against the environment; 3) the potential benefits of ecocide’s criminalisation; and 4) the prospects for a future crime of ecocide.

## 1. A Brief History of ‘Ecocide’

When translated from its Greek and Latin predecessors, ‘ecocide’ simply means ‘[killing our home](#).’ The term has been used to describe pervasive, cataclysmic occurrences. Examples include the industrial pollution resulting from oil extraction in the [Alberta Tar Sands](#), the environmental degradation of the [Niger Delta](#) region, and the destruction caused by illegal [mining in Venezuela](#). Others have used alternative formulations to describe similar phenomena, such as ‘[geocide](#)’, defined as ‘intentional destruction, in whole or in part, of any portion of the global ecosystem’ or ‘[omnicide](#)’, defined as ‘the killing of everything.’ Some also point to the range of [ordinary acts](#) that form part of our everyday lives but which also have ecocidal implications, such as the release of micro plastics into the oceans, the emission of greenhouse gases and the disproportionate use of pesticides.

When arguing for the criminalisation of ecocide, [proponents](#) point to the long history of discussion surrounding the topic, suggesting that much of the background research that would uphold global legislation has already been carried out. The framing of environmental destruction as ‘ecocide’ first emerged in response to the environmental atrocities caused by the United States’ use of Agent Orange in the Vietnam War. The term has been attributed to Professor Arthur W Galston, who proposed a new international agreement to ban ecocide at the 1970 ‘[Conference on War and National Responsibility](#)’. Three years later, Professor Richard A. Falk, a leading expert on war crimes, drafted an [International Convention on the Crime of Ecocide](#), in recognition of the fact that the Convention on Genocide was ill equipped to address environmental crimes. This Convention outlined a range of acts that could constitute ecocide, including:

- a) Weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
- b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
- c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of the soil or to enhance the prospect of diseases dangerous to human beings, animals, or crops;
- d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;

- e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
- f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.

Although not adopted, the concept of ecocide continued to feature in the discussions of United Nations institutions throughout the [1970s](#) and [1980s](#), and extended into the 1990s, as the UN's International Law Commission (ILC) worked on its [Draft Code of Crimes Against Peace and Security of Mankind](#). This precursor to the International Criminal Court's (ICC) Rome Statute initially included an environmental crime in Article 26 which stated, 'an individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced.' Despite long discussions, by the time the Draft Code was voted upon by the Assembly in 1996, Article 26 had disappeared. Instead, the Code included a diluted down war crime of intentionally causing 'widespread, long-term and severe damage to the natural environment' within the specific context of an international armed conflict. This was the only crime against the environment to make it into the ICC's [Rome Statute](#). While the reasons for this dilution are not fully understood, one member of the ILC [opined](#) that certain states' possession of nuclear arms played a pivotal role in the decision to disregard a more robust crime against the environment.

While ecocide had not made it into the ICC's Rome Statute, debate over how international criminal law could best respond to environmental destruction continued. A particularly vocal voice in favour of criminalizing ecocide was that of [Polly Higgins](#),<sup>1</sup> a barrister and environmental lobbyist who in 2010 submitted a new proposal for a crime of ecocide to the ILC. Higgins defined [ecocide](#) as constituting:

*'the extensive destruction, damage to 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 severely diminished.'*

While Higgins passed away in 2019, her work has continued to inspire scholars and activists, as evidenced by the continuation of and growing support for the [Stop Ecocide](#) campaign.

In the following section, we explore how the failure to include ecocide in the Rome Statute has impacted the capacity of the ICC to deliver accountability for crimes against the environment. To do so, we assess the applicability of the four existing international crimes to incidences of environmental destruction.

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<sup>1</sup> QUB School of Law students interviewed Polly Higgins at a very early stage in her campaign: <https://www.youtube.com/watch?v=JH7jjVgnGxY>.

## 2. The Gap in International Accountability

The Rome Statute specifies four crimes that currently fall under ICCs jurisdiction, namely: war crimes, genocide, crimes against humanity, and the crime of aggression. We will outline each in turn, examining their limitations as a means of prosecuting crimes against the environment.

### War Crimes

As noted above, only one of the four existing core crimes refers directly to the natural environment. Dubbed as the [first ecocentric war crime](#), Article 8(2)(b)(iv) prohibits:

*'intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the non-human environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'*

Commentators have flagged four key issues regarding the practicality of this Article. First, the Rome Statute does not define each element of the 'widespread, long-term and severe' requirement, and to date the ICC has not pursued any prosecutions under this Article. Therefore, no judicial findings have clarified the level of environmental harm that is necessary to trigger criminal liability. However, commentators have noted that the '[operative core](#)' of the Article imposes a triple and cumulative standard of 'widespread, long-term *and* severe' that must be met before environmental damage is prohibited.

Second, the reference to damage that is 'clearly excessive in relation to the concrete and direct overall military advantage anticipated' introduces an expansive proportionality test. The ICC's [Elements of Crimes](#) indicate that the balance between environmental damage and anticipated military advantage is subjective, determined on the basis of the information available to the perpetrator at the time of launching the attack. This adds another potential barrier to a successful prosecution, making it difficult to prove that the act was disproportionate.

Third, the *mens rea*, or mental element, of the offence, sets a high threshold for the prosecution to prove intent. It must be proven, beyond reasonable doubt, that the potential offender had the intent to commit the attack in the knowledge that it would cause 'widespread, long-term and severe damage.' Therefore, the prosecutor would have to prove that the accused *knew* the conduct would harm the environment.

Fourth, the Article is only applicable to crimes perpetrated in the context of an international armed conflict. As argued by [one commentator](#), the provision cannot therefore be applied, 'neatly and directly, to many of the worst assaults on the natural environment – whether degradation of forests, poisoning of rivers, or extinction of animal species,' most of which occur in peacetime.

These issues limit the usefulness of Article 8(2)(b)(iv) as a means of regulating and limiting the harm done to the environment during armed conflict. The limitations posed by the restrictive framing of the ICC's only eco-centric crime become more pronounced when understood in the context of the ICC's other core crimes.

### Genocide

The crime of genocide is inherently anthropocentric, involving as it does 'acts committed with the intent to destroy, in whole or in part, a national, racial or religious group.' There is some limited precedent for charging environmental destruction under the rubric of genocide, when that environmental destruction has been used as a means of 'deliberately inflicting on a group conditions of life calculated to bring about its physical destruction.' For example, in 2008 the ICC prosecution

[charged](#) Omar Al-Bashir with genocide under Article 6(c), noting the connection between genocide and the deliberate destruction of the environment by systematically destroying properties, vegetation and water sources and repeatedly destroying, polluting or poisoning communal wells or other communal water sources by the militia and Janjaweed in Darfur. However, environmental destruction must be seen through the lens of attacks against a group of people. Furthermore, the stringent *mens rea* requirement - that there is the intention to destroy, in whole or in part, a group of people - places a limitation on the use of genocide to prosecute environmental harm.

### **Crimes Against Humanity**

Article 7 of the Rome Statute prohibits crimes against humanity, which encompass a range of harmful acts committed as part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack.' While none of the acts listed in the [Elements of Crimes](#) explicitly mention the environment, it is theoretically possible that crimes against the environment could be prosecuted under this Article. For example, environmental destruction may be a means by which a population is forcibly transferred or subjected to 'conditions of life...calculated to bring about the destruction of part of the population.' However, the harm must be directed at a civilian population, and the framing of crimes against *humanity* has been [described](#) as 'anthropocentric, putting mankind centre stage.'

### **The Crime of Aggression**

Article 8 *bis* prohibits the crime of aggression, which is defined by the Rome Statute as the 'use of armed force by a State against the sovereign territorial integrity or political independence of another State.' Again, it is possible that attacks on the environment could qualify under this definition. Indeed, the [initial inquiry](#) into NATO's bombing campaign against Serbian military positions in 1999 examined aggression-related environmental harm, although no criminal case against followed. However, the focus is on state sovereignty and Article 8 *bis* is limited in its application to acts by one state against another state, meaning it cannot be used to address environmental destruction outside of inter-state conflict.

## **3. The Possible Benefits of a Crime of Ecocide**

### **A Crime of Ecocide?**

There have been signs that the ICC's Office of the Prosecutor is willing to use the crimes detailed above to prosecute environmental harm. Policy Papers released in [2013](#) and [2016](#) indicated that 'environmental damage,' 'the destruction of the environment' and 'illegal exploitation of land' could be relevant considerations when conducting preliminary examinations and selecting cases. However, no prosecutions have subsequently been brought, highlighting the limitations of the current legal framework and raising [doubts](#) over the Court's capacity to adequately address environmental harms.

It is arguable that the anthropocentric limitations of the existing crimes create a gap in accountability, presenting a major obstacle to the prosecution of perpetrators of environmental destruction. The addition of a crime of ecocide to the ICC's mandate might address this gap, introducing a crime which specifically centres crimes perpetrated against the environment. In the following section, we consider some of the potential benefits of introducing a crime of ecocide, including the expansion of accountability and deterrence, the possibilities offered by enhanced rights for nature at the ICC and the contribution such a crime might make to a broader paradigmatic shift in the way we think about the natural world.

## Accountability and Deterrence

The introduction of a crime of ecocide could enhance accountability for crimes perpetrated against the environment, potentially contributing to the deterrence of such crimes. The Stop Ecocide campaign are confident that ecocide's criminalisation will deter corporate leaders from engaging in business practices that could constitute crimes against the environment', [arguing](#) that:

*'No CEO or financier wants to be seen in the same way as a war criminal. A law of ecocide on the horizon will therefore signal the end of corporate immunity – and begin to redirect business and finance away from harmful practices.'*

There is reason to be cautious about this claim. The ICC has jurisdiction over individuals, not corporations, and while a company's reputation might temporarily be tarnished if its C-suite executives end up in the dock, David Whyte has [vividly illustrated](#) the ways in which corporations reinvent and distance themselves from crimes perpetrated in the name of profit.

The ICC will also be constrained by its jurisdictional powers: there are only limited circumstances in which the ICC can prosecute crimes perpetrated on the territories and by nationals of non-State Parties. As several powerful and large states, including the USA, China, Russia, and India are not [States Parties](#), this poses inevitable challenges. Further concerns may arise in relation to potentially incentivising the export and concentration of environmentally harmful practices to areas outside the ICC's jurisdiction. The complexity of the corporate structure of multinational corporations may create particular issues around jurisdiction and impunity.

Furthermore, the Court has experienced a number of State Parties [withdrawals](#) and threats of further withdrawals in recent years, presenting new limitations on its jurisdictional reach.

Nevertheless, it may be that the introduction of an international crime would deter some individuals from perpetrating ecocide. A [study](#) by Hyeran Jo and Beth A. Simmons noted the ways in which the ICC deterred both through the threat of punishment and through its influence on the broader social context in which crimes occur. Whether a similar deterrent effect would be observed in the case of ecocide, which represents a different kind of crime with a different kind of perpetrator, is of course hard to predict. However, it is notable that at a domestic level there is [evidence](#) that criminalisation can have a greater impact on harmful environmental behaviours than administrative and civil approaches.

The norm of [universal jurisdiction](#) offers further opportunities here: State Parties to the ICC who ratify the crime of ecocide might choose to pursue prosecutions in their own legal systems. This potentially expands accountability, as universal jurisdiction allows for the prosecution of individuals regardless of where they are from or where they perpetrated the crime. This expansive jurisdiction is tied to the idea that some international law obligations cannot be deviated from, and some international norms are owed to the entire world. As such, its use in the context of ecocide might have additional normative value. This is certainly the stance of the Stop Ecocide campaign, who [argue](#) that 'the more countries ratify the crime, the more the big polluters will find their room to operate shrinking...and the more appealing it will become to work in harmony with nature.' Yet, political and economic barriers to universal jurisdiction should not be underestimated. As argued by [Frédéric Mégret](#), states may be unwilling to discourage corporate investment and place themselves at a perceived economic disadvantage by enforcing criminal penalties domestically.

## Rights of Nature

The criminalisation of ecocide at the ICC may also open doors to enhanced rights of nature. This concept came to prominence in 1972 following an influential [article](#) by Christopher Stone, 'Should Trees Have Standing – Toward legal rights for natural objects,' which drew attention to the absence of any legal recognition of the intrinsic rights of nature. This was followed up by Roderick Nash's [work](#) on 'The Rights of Nature,' which inserted demands for a recognition of nature's rights within a critical history of the extension of rights to slaves, women and other groups.

Examples of granting rights to nature can now be found around the world. For example, in 2008 [Ecuador](#) became the first country to introduce constitutional recognition of rights for nature, with the close collaboration with Thomas Linzey<sup>2</sup> formerly of the US-based Community Environmental Legal Defense Fund (CELDF). In 2006, Linzey had worked with community groups resisting uncontrolled toxic dumping in the Pennsylvania municipality of Tamaqua, resulting in the first ever [local bylaw](#) recognizing the rights of nature to exist, thrive and evolve. In 2010, Bolivia, which has also enshrined rights of nature in its constitution, hosted the People's Conference on Climate Change and the Rights of Mother Earth, which launched the draft *Universal Declaration of the Rights of Mother Earth* ('Pachamama'). The [Declaration](#) affirms that to guarantee human rights it is also 'necessary to recognise and defend the rights of Mother Earth and all beings in her and that there are existing cultures, practices and laws that do so.' Going beyond the recognition of rights for nature, other jurisdictions have granted nature legal personhood. For example, in 2014 [New Zealand](#) recognised the legal personhood of the Te Urewera, a body of land formerly classified as a national park, and in February 2021 the Magpie River was granted legal personhood in the Quebec Côte-Nord region of [Canada](#).

In the context of this growing recognition of the rights of nature, it is possible that the inclusion of a crime of ecocide in the ICC's Rome Statute might open up new and novel possibilities for the rights of nature. The ICC allows for '[victims](#)' to participate in its proceedings and submit claims for reparations. The Court currently defines victims as individual persons who have suffered harm as a result of one of the ICC crimes, and organisations or institutions when their property dedicated to certain purposes (religion, education, art, science or charitable and humanitarian purposes, or historic monuments or hospitals) is harmed as a result of one of the ICC crimes. If ecocide were introduced and framed in an ecocentric way (focusing on harms against the environment in their own right) rather than an anthropocentric way (ecocide through the lens of human harm), then it is possible to imagine an expansion of victimhood to encompass ecosystems. Such a scenario would open up opportunities for the concerns of nature to be asserted by a legal representative and for reparations to be sought on behalf of the ecosystem itself.

## Access to Reparations and Assistance

Even in the absence of procedural and reparative rights for nature in its own right, the introduction of ecocide at the ICC would create opportunities for measures of environmental repair. Under [Article 75](#) of the Rome Statute, the ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. It may also order that the award for reparations be made through the Court's [Trust Fund for Victims](#) (TFV). The TFV is an independent, non-judicial institution that operates within the Rome Statute system and which can use funds made available by voluntary contributions to complement any money or property collected from the convicted person. In addition to facilitating

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<sup>2</sup> Linzey, with his close colleague, Mari Margil, has now established the Center for Democratic and Environmental Rights.

the delivery of [reparations](#), the TFV may also provide [assistance](#) in the form of physical and psychological rehabilitation and material support to victims who have suffered harm as a result of a crime within the Court's jurisdiction, providing those crimes are linked to a situation under investigation.

If ecocide were to be incorporated into the Rome Statute, this might open up avenues for reparations and measures of assistance which specifically address environmental harms. As noted by Special Rapporteur for environmental protection [Marja Lehto](#): the ICC's reparation 'principles and procedures would seem to allow for such measures.' These might include, for example, orders for restoration of any harm to the environment and payment of related costs and expenses; compensation to individuals or communities for the loss of natural resources; the creation of community development funds designed to enable eco-tourism developments, access to clean water and food security; and symbolic measures, such as apologies, acceptances of responsibility and acknowledgments of suffering. As one of us has explored [elsewhere](#), reparations for environmental destruction bring a range of complexities – it is not easy to restore a lost environment or quantify such a harm. However, these are complexities which have been engaged with by other courts and reparative bodies, such as the [International Court of Justice](#), the [Inter-American Court of Human Rights](#), and the [International Center for Settlement of Investment Disputes](#), meaning there is at least guidance available.

### **Furthering a Paradigm Shift**

The final potential benefit we wish to highlight is the ways in which criminalisation of ecocide extends our understanding of the scale and scope of the 'ecological crisis.' The term 'ecocide' invokes an understanding that it is the integrity of whole socio-ecological systems of practice, culture and knowledge that require respect and protection. The revival of the concept of ecocide can be understood as part of an eco- or bio-centric turn in Western law and jurisprudence<sup>3</sup>. This eco-centric turn reflects a [paradigmatic shift](#) or radical re-framing of deep patterns of human understanding that has begun to work through the social sciences and humanities prompted by the unprecedented challenges of the climate and ecological emergencies.

In his formative [work](#) establishing the principles of 'Earth Jurisprudence', Thomas Berry observed that most of the world's jurisprudence does not recognise that the 'universe is a communion of subjects, not a collection of objects.' This statement points to a fundamental critique of a dominant Western tradition that has serviced the global enclosure of nature and socio-ecological relationships within the dominant paradigms of human control, ownership and property. [Mattei and Capra](#) have traced the rise of our 'owner-centric' idea of Western jurisprudence. They link this to historical, philosophical and scientific traditions of thought that enshrine a vision of human domination over nature, separating the human as 'owner' from nature as object.

The renewed attempt to codify an international crime of 'ecocide' can be understood as part of the challenge to the West's claims to universality in its narratives of 'development,' 'modernity,' and jurisprudence, and the emergence of what Arturo Escobar has named, '[the pluriverse](#)'. This discourse invokes an overturning of a regional European reading of the world – writ large as 'universalism' – that emerged in Europe since the Renaissance and consolidated towards the end of the eighteenth century. A deeply embedded attitude associated with European modernity is 'anthropocentrism' and the accompanying societal and institutional habit of pitting humanity against

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<sup>3</sup> The first institution dedicated to Earth jurisprudence was established in Florida in 2006 as a joint project of the law faculties of the Catholic Universities of Barry and St Thomas, inspired by the work of Thomas Berry.



nature. This maps onto a series of fundamental dualisms such as the divides between subject and object, mind versus body, masculine versus feminine, civilized versus 'barbarian'. It is these classic ideological categories that have served to legitimise the devastation of the natural world (and which help explain the intersectional networks of opposition that map on to struggles over gender (patriarchy), race and civilizational/indigenous rights (coloniality) and emancipation (post-growth/anti-capitalist forms of political economy).

Demands for a law of ecocide may begin to extend (or recover) our very understanding of the nature of violence. Such an approach leans towards a recognition and codification of the kind of systemic structural and cultural violence associated with industrial modes of organisation, [articulated](#) by the peace scholar, Johan Galtung. Indeed, Lindgren [believes](#) that the radical provision of a law against ecocide could present a significant step towards the decolonisation of international law. Doing so may enable the restoration of an integral and holistic understanding of peace-as-wellbeing ('buen viver') as the maintenance of socio-ecological system integrity, including care and protection for place-based cultures and local knowledge systems embedded in an ethos of care and interbeing.

Having outlined some of the potential benefits of a new crime of ecocide, our final section considers the prospects of its introduction as the fifth core crime in the ICC's Statute.

#### **4. What are the Prospects for a Future Crime of Ecocide?**

Political support for a crime of ecocide has steadily grown in recent years. In [2019](#) the Republic of Vanuatu and the Republic of Maldives took the lead in publicly demonstrating their support for a crime of ecocide. The two Small Island States called on their fellow States Parties to undertake serious discussion around the concept of ecocide in light of the climate emergency and the existential threat it poses. Subsequently, support for a crime of ecocide has grown, with Belgium subsequently [stating](#) its intention to consider the possibility of introducing a crime of ecocide to the Rome Statute. Discussions around ecocide have also taken place within domestic jurisdictions. It has been debated by the Belgian and Swedish parliaments, and in France a Citizen's Convention on Climate recently [voted](#) in favour of creating an ecocide crime in France. Although the domestic ecocide bill has been [substantially weakened](#) throughout the legislative process, President Macron has also discussed the potential for an [international crime](#). Thus, advocacy for the creation of the crime of ecocide is growing, as is its political traction. This has been reflected in the publicity given to the Stop Ecocide campaign's [expert panel](#), who are paying careful consideration to the definition of ecocide at the time of writing.

Even if the political will is there, the route to amending the Rome Statute is [not straightforward](#) and consists of multiple steps. An amendment can be proposed by any the Statute's 123 States Parties, in accordance with [Article 121](#) of the Rome Statute. If a majority of those voting agree to it, then this amendment will go through rounds of negotiation. It can then be adopted by the Assembly of State Parties following an at least two-thirds majority vote. Although each States vote carries equal weight, achieving at least 82 votes in favour of such an amendment is likely to be a significant challenge. It is also worth noting that even once a new crime is approved, State Parties can then choose not to ratify the amendment, limiting the ICC's ability to exercise jurisdiction over ecocide committed by that State Party's nationals or on its territory. Depending on how many countries and which countries chose that approach, this could substantially limit the scope of a new crime of ecocide. States who are not party to the Rome Statute are similarly [exempted](#) from crimes adopted by amendment, further limiting the crime's scope. Thus, there is a need for significant political will

and public support if an international crime of ecocide is to be an effective tool against environmental destruction.

We want to include by noting that the Republic of Ireland can play a potentially important role in advocating for an international crime of ecocide. As a State Party to the Rome Statute, Ireland can show its support for the crime's introduction, and indeed even propose such an addition itself. Moreover, although a small nation, Ireland has a voice within the European Union, and additionally finds itself empowered internationally having recently [taken a seat](#) on the United Nations Security Council. The Security Council holds the strongest [enforcement powers](#) within the UN, and has in recent years put more focus on the relationship between the environment through meetings such as the February 2021 [High-level Open Debate on Climate and Security](#). There, it was recognised that the atrocities and security issues inflicted through environmental harm and global warming fall within the purview of the Security Council. Furthermore, with environmental concerns once again rising to the top of the international agenda in the United States following the new Administration's [re-joining of the Paris Accord](#), there appears to be a heightened political consensus on the need to tackle the environmental crisis. Building on this momentum may bring the campaign to introduce a crime of ecocide greater chances of success.

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## Environmental Justice Network Ireland

The Environmental Justice Network Ireland was established in June 2019. EJNI is an all-island network which seeks to build collaboration between groups and individuals involved in the delivery or pursuit of env justice. Its goal is to connect academics, lawyers, NGOs, decisionmakers and community activists and in doing so help equip people with the knowledge and tools they need to enhance the quality of environmental justice on the island of Ireland.

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EJNI works closely with academics from a range of different institutions. The student working paper series involves students collaborating with supervising academics to produce analysis of emerging ideas relating to environmental justice, broadly defined. To contact the authors of this working paper please email Dr Peter Doran, QUB School of Law @ [p.f.doran@qub.ac.uk](mailto:p.f.doran@qub.ac.uk). For more information on EJNI, visit our website: [www.ejni.net](http://www.ejni.net) or email [admin@ejni.net](mailto:admin@ejni.net)