

**A STALWART DELIBERATION ON ECOCIDE & THE AUSTRALIAN
BUSHFIRES OF JANUARY 2020*****SHAURYA DUTT¹**

“One touch of nature makes the whole world kin.” - William Shakespeare

PROLEGOMENON

The term ‘ecocide’, the extensive destruction of ecosystems, has been around since the 1970s when it was first recorded at the Conference on War and National Responsibility, Washington in February of that year. From the 1970s onwards many academics and legal scholars argued for the criminalization of ecocide and debated the elements required for such an international crime. During the 1970s, 80s and 90s making ecocide an international crime was also considered by the United Nations International Law Commission (ILC) for inclusion in the Code of Crimes Against the Peace and Security of Mankind (‘the Code’), which later became the Rome Statute,² and by the Sub-Commission on Prevention of Discrimination and Protection of Minorities for inclusion in the extension of the Convention on Genocide.³ A number of questions kept arising: Should ecocide be a crime in peacetime and wartime? Does the offender’s intent to commit the crime matter or are the consequences of extensive destruction of ecosystems severe enough to warrant ecocide being a crime of strict liability regardless of the offender’s intent?⁴ This research paper pieces together and examines the history of the Law of Ecocide, shedding a whole new light on a corner of history that would otherwise have remained buried. Perhaps one of the most interesting issues highlighted in this paper concerns the manner in which ecocide, a concept that was familiar and supported by many as one that should be enshrined in international law, was dropped by the ILC in 1996.

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² Rome Statute of the International Criminal Court 17 July 1998 (last amended 2010).

³ 1948 Convention on the Prevention and Punishment of the Crime of Genocide, see <http://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf> last accessed 16/07/12.

⁴ Strict Liability makes a person legally responsible for an offence regardless of his or her intention to commit it.

ECOCIDE: BECOMING AN ACADEMIC DEBATE

The term ecocide was used as early as 1970, when it was first recorded at the Conference on War and National Responsibility in Washington, where Professor Arthur W. Galston ‘proposed a new international agreement to ban ecocide’.⁵ The term itself became well-recognised and in 1972 at the United Nations (UN) Stockholm Conference on the Human Environment, Mr Olof Palme, then Prime Minister of Sweden, spoke explicitly in his opening speech of the Vietnam War as an ‘ecocide’.⁶ The Stockholm Conference focused international attention on environmental issues perhaps for the first time, especially in relation to environmental degradation and trans-boundary pollution. The latter concept was particularly important, as it highlighted the fact that pollution does not recognize political or geographical boundaries, but affects territories, countries, regions and people beyond its point of origin. Other Heads of State, including Ms Indira Gandhi from India and the leader of the Chinese delegation, Mr Tang Ke, also denounced the Vietnam War on human and environmental terms.⁷ There was no reference to ecocide in the official outcome document of the Stockholm conference. The Conference established the UN’s Environment Programme (UNEP) and thirty years later at the Rio+20 Earth Summit governments recognised the need to strengthen UNEP as the leading global environmental authority that sets the global environmental agenda. The potential for a law criminalising ecocide was also discussed in the unofficial events running parallel to the official UN Stockholm Conference, including at the ‘Folkets Forum’ – the People’s Summit – where a working group on the Law of Genocide and Ecocide was established.⁸ Although at this time ecocide was not legally defined, there was much academic debate over what would constitute the crime, in particular whether intent to commit destruction of ecosystems was a necessary element of the crime. John H.E. Fried, an educator, specialist in international law and member of the Lawyers’ Committee on Nuclear Policy, believed ecocide to denote ‘various measures of devastation and destruction which aim at damaging or destroying the ecology of geographic areas to the detriment of human life, animal

⁵ New York Times, 26 February 1970; quoted in Weisberg, Barry (1970), *Ecocide in Indochina*. Canfield Press, San Francisco

⁶ Björk, Tord (1996): *The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972*, Department of Political Science, University of Stockholm, <http://www.folkrorelser.org/johannesburg/stockholm72.pdf> p.15 last accessed 16/07/12.

⁷ Ibid

⁸ Ibid

life, and plant life'.⁹ It was recognised by others; however, that ecocide often occurs simply as a consequence of business rather than being a result of a predetermined, intended direct attack on the environment. Falk, in his draft (1973) Ecocide Convention, explicitly states at the outset that 'man has consciously and unconsciously inflicted irreparable damage to the environment in times of war and peace.'¹⁰ Westing stated that 'intent may not only be impossible to establish without admission but, I believe, it is essentially irrelevant.'¹¹

THE UN DISCUSSIONS

With much academic debate around the concept of ecocide and an increase in awareness amongst civil society as to the severe consequences of environmental damage, pressure mounted on governments to address the issue. But how? During the 1970s the idea of expanding the 1948 Convention on Genocide led to an extensive inquiry by the UN as to how it could be improved, including the possibility of criminalising ecocide alongside genocide. It is here that the institutional history of the Law of Ecocide within the UN begins. But before delving into this history it is important to first take a step further back in time to understand the concept - or rather misconception - of ecocide's more well known counterpart; genocide and the lessons to be learned from the process of its legal codification. The world represents only so much culture and intellectual vigour as are created by its component national groups. The destruction of a nation, therefore, results in the loss of its future contributions to the world. Moreover, such destruction offends our feelings of morality and justice in much the same way as does the criminal killing of a human being.¹²

ECOCIDE: A CRIME AGAINST HUMANITY?

As millions of workers and students filled city streets around the world last week, there was no shortage of bold and inventive protest signs. While many expressed broad concerns about the burning planet and an imperiled future, a number, like the CEO puppets, were unambiguous in their antagonism towards the fossil fuel industry and its political enablers. With the stakes of global heating intolerable, and the fanglessness of international climate agreements undeniable, it

⁹ Fried, John H.E. (1972): 'War by Ecocide'. In: Thee, Marek (ed.) (1973). Bulletin of Peace Proposals. 1973, Vol. 1. Universitetsforlaget, Oslo, Bergen, Tromsø.

¹⁰ Rome Statute of the International Criminal Court 17 July 1998 (last amended 2010).

¹¹ Westing, Arthur H. (1974): 'Proscription of Ecocide'. In: Science and Public Affairs, January 1974.

¹² Lemkin, R. (1944: 91).

is little wonder that activists are calling for the major perpetrators of environmental decimation to be seen as guilty parties in mass atrocity, on a par with war crimes and genocide. The demand that ecocide — the decimation of ecosystems, humanity and non-human life — be prosecutable by The International Criminal Court has found renewed force in a climate movement increasingly unafraid to name its enemies. The push to establish ecocide as an international crime aims to create criminal liability for chief executives and government ministers, while creating a legal duty of care for life on earth. Its strength, however, lies not in the practical or likely ability of The Hague — a profoundly flawed judicial body — to deliver climate justice. The demand that ecocide be recognized as a crime against humanity and non-human life is most powerful as a heuristic: a framework for insisting that environmental destruction has nameable guilty parties, perpetrators of mass atrocity, against whom climate struggle must be waged on numerous fronts.

Efforts around the recognition of ecocide, spearheaded for decades by environmentalist lawyers and advocates like the late British barrister Polly Higgins, reflect the desire to see environmental degradation formally recognized as the highest order of atrocity. Equally, appeals to the ICC suggest an understandable (if Sisyphean) scramble to find an authority, some authority, capable of holding the fossil fuel industry and its state partners accountable. “Despite the existence of many international agreements – codes of conduct, UN Resolutions, Treaties, Conventions, Protocols etc – the harm is escalating. Not one of these international agreements prohibits ecocide,” reads the mission statement of Ecological Defense Integrity, a U.K.-based non-profit, which aims to advance a law of ecocide at the ICC. “The power of ecocide crime is that it creates a legal duty of care that holds persons of ‘superior responsibility’ to account in a criminal court of law.” The ICC has jurisdiction over four categories of crime, collectively known as Crimes Against Peace, which are meant to constitute “the most serious crimes of concern to the international community as a whole.” Currently, these are: crimes of genocide, crimes against humanity, war crimes, and crimes of aggression (the latter, only added in 2017, narrowly covers military invasions and occupations in violation of the United Nations charter). Efforts to see ecocide recognized by the ICC are two-fold: either that ecocide be included under crimes against humanity, or established as its own separate Crime Against Peace. The strength of endowing ecocide with its own category would be that it covers the decimation of ecosystems, as well as the destruction of civilian populations, and thus recognizes the existential threat of climate

change to life on earth. Ecocide is a crime against humanity, but also non-human life. The moral grounds are clear for enumerating ecocide among the most serious international crimes. The latest alarming reports from the Intergovernmental Panel on Climate Change (IPCC) made clear that climate change could produce a death toll of hundreds of millions in coming decades. A 2012 report commissioned by 20 governments determined that already 400,000 annual deaths are attributable to climate change related events; that figure is expected to reach 6 million per year by 2030 without drastic shifts to global modes of production and fossil fuel reliance. And a fact that cannot be emphasized enough: Just 100 fossil fuel producers have been responsible for 71 percent of greenhouse gas emissions released in the last 30 years. When it comes to narratives about environmental degradation, the greatest lie of all is that people are not responsible. The second greatest lie is that people are equally responsible. Last year, the New York Times Magazine published an entire issue dedicated to one extended essay by novelist Nathaniel Rich. It was framed as a devastating and overdue exposure of how we could have prevented climate catastrophe in the 1980s, given available scientific understanding, but “we” did not. “All the facts were known, and nothing stood in our way,” wrote Rich. “Nothing that is, except ourselves.” Rich’s story conveniently ignores the ferocious capitalist hierarchies, which decimate natural resources for profit, while state militaries and police forces help quash environmentalist and indigenous resistance — just think of the militarized police assaults and swathes of criminal charges faced by the Water Protectors who took a stand at Standing Rock. “It’s hard to think of a problem more widely attributed to ‘abstract entities’ than global warming, allegedly the product of some unquenchable, ubiquitous human thirst for new stuff,” wrote Kate Aronoff in a recent, convincing Jacobin essay, which argued for trying fossil fuel executives for crimes against humanity, starting with with Rex Tillerson and other ExxonMobil executives, who knowingly covered up evidence of climate change devastation and reaped the profits. “We do all create demand for fossil fuels. But supply creates demand,” Aronoff wrote, adding, “In the case of the climate crisis, it’s the industry itself that is driving crimes against humanity, and states that are complicit in issuing everything from drilling and infrastructure permits to generous subsidies — \$20 billion per year in the United States alone.” Those of us with considerable carbon footprints (I include myself, a pretty regular transatlantic flyer) do not abscond our personal responsibility by naming and targeting the guiltiest parties to ecocide. We simply recognize that no climate justice will be possible without bringing down the powerful actors standing in the way of cutting

emissions and production. As Genevieve Guenther, founder and director of digital activist group End Climate Silence put it, “to think of climate change as something that we are doing, instead of something we are being prevented from undoing, perpetuates the very ideology of the fossil-fuel economy we’re trying to transform.” The threat of international criminal prosecution is thus meant to act as a deterrent and a threat to the most powerful drivers of ecocide, clearly delineating that there are nameable perpetrators to hold accountable. Whether the ICC would be willing or able to create material, deterring criminal justice consequences for fossil fuel executives and their in-pocket politicians is, however, another issue. The idea that ecocide be recognized as an international crime predates the formation of the ICC itself. Early drafts of the Rome Statute, the ICC’s founding document, originally included a law of ecocide. In the 1980s, the United Nations International Law Commission (ILC) considered the inclusion of environmental crime in the Draft Code of Crimes Against the Peace and Security of Mankind, which would later become the Rome Statute. Some versions of the Draft Code went as far as to assert that the crime of ecocide could be established without proving a perpetrator’s intent to create environmental damage. A U.N. representative from Austria stated in 1993, “Since perpetrators of this crime are usually acting out of a profit motive, intent should not be a condition for liability to punishment.” Yet, the article relating the the crime of environmental damage was removed from final Code adopted by the ILC in 1996. The Rome Statute’s inclusion of environmental concerns was limited to cover only intentional acts of environmental degradation perpetrated as crimes of war. Peacetime ecocide, enacted by corporations and governments, “was removed completely, and somewhat mysteriously, from the Code” noted a 2012 report from the University of London’s Human Rights Consortium, which detailed the history of ecocide law.

Legal norms and rights can and do take on political life through direct action, community consultation and protest. Even if the court’s signatories resist adopting ecocide as a crime, or as is likely, the court fails to prosecute, let alone convict, the world’s worst climate criminals, we can and must take justice into our own hands. Collective action — like last week’s mass climate strike, like voting for leaders pushing a Green New Deal, like fighting for our lives against capitalism — must be pursued with vigor. This is how we take the fight against ecocide to its perpetrators.

INTERNATIONAL LAW COMMISSION ON ECOCIDE

In the 1980s the UN's International Law Commission (ILC) considered the inclusion of an environmental crime within the Draft Code of Crimes against the Peace and Security of Mankind ('the Code').¹³ This document eventually became the Rome Statute of the International Criminal Court, adopted in 1998 and entered into force on 1 July 2002. As of July 2012 there are 121 state parties to this internationally legally-binding statute.¹⁴ It now codifies four named international crimes – genocide, war crimes, crimes against humanity, and acts of aggression. The ILC is mandated to promote the progressive development of international law and its codification.¹⁵ From the very outset of the United Nations, the ILC had been assigned by the General Assembly in 1947 to formulate 'the principles of international law recognized in the charter of the Nuremberg Tribunal and in the judgment of the Tribunal' and to 'prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the [aforementioned] principles'.¹⁶ The Code was on the agenda of the ILC from 1949–57 and 1982–96. The gap in time arose out of difficulties in defining the Crime of Aggression and, as a result, the General Assembly postponed the drafting of the Code. The Code was revisited between 1982 and 1996; in 1982 Mr. Doudou Thiam was appointed as the Special Rapporteur on the topic. His work picked up at the last adoption of the Code by the ILC in 1954.¹⁷ The exclusion of a crime addressing damage to the environment during peacetime was sudden. Documentation as to why this occurred is less well-recorded. Our research has thrown up one comment by the Special Rapporteur of the Code, Mr Thiam of Senegal, who stated in his 13th report 58 that the removal was due to comments of a few governments from 1993.

¹³ Draft Code of Offences Against the Peace and Security of Mankind until 1987; see: General Assembly resolution 42/151 of 7 December 1987.

¹⁴ http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtds_g_no=XVIII-10&chapter=18&lang=en last accessed 16/07/12.

¹⁵ Statute of the International Law Commission, 1947. Adopted by General Assembly resolution 174 (II) of 21 November 1947, amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

¹⁶ General Assembly resolution 177 (II) of 21 November 1947.

¹⁷ Yearbook of the ILC, 1954, Vol. II, pp.151–2.

THE AUSTRALIAN BUSHFIRES

The largest and the biggest continent of the globe is facing a havoc in present epoch, cause is fire or to say FIRE! Isn't it alarming that home to the iconic flora and fauna of the world is heading towards destruction. The fauna is unique there because the natural predators are not found there so these were blooming at a handsome pace. This is not the first time that these fires broke up in Australia, but this time - it is so concerning because of the way it is spreading to almost all the states of Australia. No state is untouched from these fires, among all; The New South Wales has suffered the most. According to the data from the authorities nearly 18 Million acres of the land has been burnt till now and still it is counting. These fires has erupted mainly due to the drought and dehydrated atmosphere and to add more destruction, extreme heat is the accomplice. If we look upon the statistics of the previous fires, this time 15 years of record has been put down. Among the most suffered species of fauna is Koalas, which are the key species of Australia's jungles.

Summer in Australia use to be something people yearned for: long, lazy days spent by the beach or pool, backyard barbecues, and games of cricket with family and friends. But recent summers have become a time of fear: Schools and workplaces are closed because of catastrophic fire danger. Campgrounds have been closed for the summer, and entire towns have been urged to evacuate ahead of "Code Red" fire weather. Welcome to our new climate. The fires raging across the southern half of the Australian continent this year have so far burned through more than 5 million hectares. To put that in context, the catastrophic 2018 fire season in California saw nearly 740,000 hectares burned. The Australian fire season began this year in late August. Fires have so far claimed nine lives, including two fire-fighters, and destroyed around 1,000 homes. It is too early to tell what the toll on our wildlife has been, but early estimates suggest that around 500 million animals have died so far, including 30 percent of the koala population in their main habitat. And this is all before we have even reached New Year, when the fire season typically peaks in Australia.

The ongoing bushfires (wildfires) have confirmed researchers' warnings several years ago about increasing bushfires due to climate change in Australia. Bushfires in Australia have been promoted by both a decrease in rainfall and an increase in extremely hot temperatures (figure). According to the Australian Bureau of Meteorology, the Southern Downs (QLD) and Northern

Tablelands (NSW) have had the record for lowest rainfall from January to August. Lack of rainfall makes vegetation very dry and flammable. Australia has warmed by more than 1°C since 1910. The warming climate in Australia has been accompanied by heatwaves characterised by increased frequency of occurrence, duration, and maximum temperatures. In 2019, both states entered the bushfire season after a year of hot temperatures and low rainfall, putting many districts under high risk of bushfires. A similar situation occurred in the 2009 Black Saturday fires in Victoria, when Melbourne reached a record-breaking high temperature (46.4°C) following a long drought.

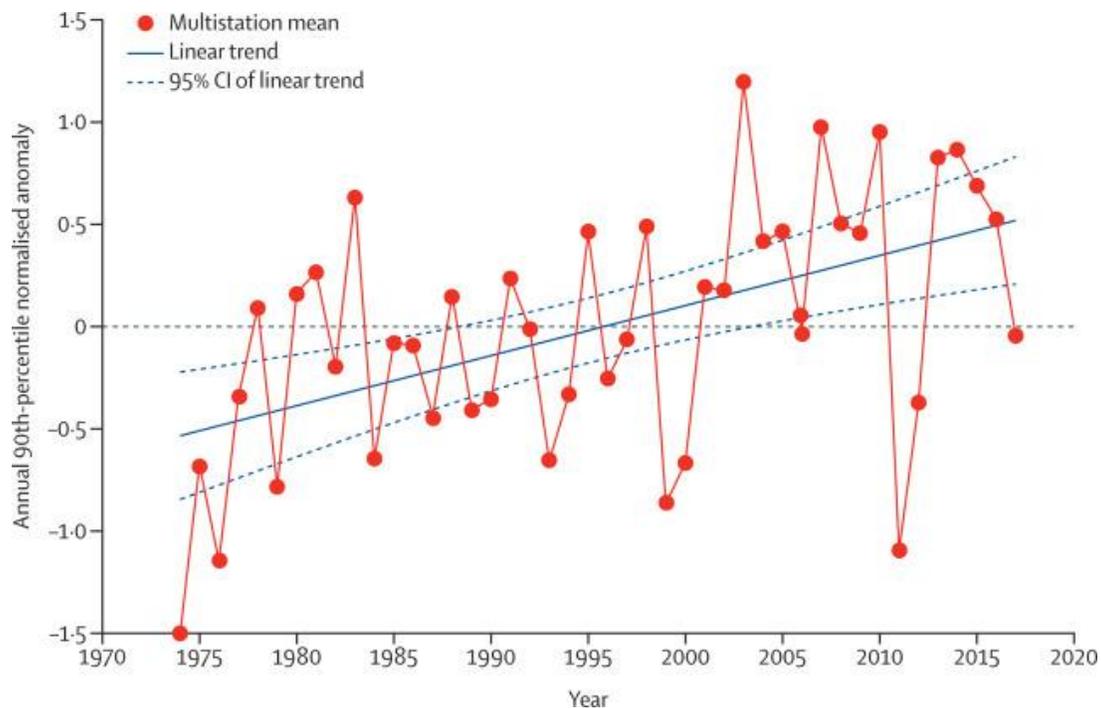


Figure - Time series of 90th percentile annual anomaly of the McArthur Forest Fire Danger Index (July–June) at 39 stations in Australia (1973–2017).

Bushfires can be catastrophic to lives. The ongoing bushfires in New South Wales have destroyed about 700 homes and untold wildlife, including seriously threatening koala populations due to habitat loss. It has been estimated that major Australian bushfires during 1967–2013 resulted in over 8000 direct injuries and 433 direct fatalities, costing approximately Australian \$4.7 billion. However, this estimate did not consider indirect costs, which mainly come from adverse health effects of bushfire smoke. According to the US Environmental Protection Agency, the indirect effects of air pollution from wild land fires on excess premature

deaths and morbidity in the USA during 2008–12 had an estimated cost of US\$513 billion. The best documented hazardous components of bushfire smoke are PM₁₀ and PM_{2.5}. Because of the bushfire, in most areas of Sydney, 24-h average PM_{2.5} concentrations this December have exceeded 100 µg/m³ (and could reach 500 µg/m³), which is four-times higher than the WHO guideline value of 25 µg/m³). By comparison, the daily average PM_{2.5} concentration before the bushfire was around 20 µg/m³. Such an increase in daily PM_{2.5} concentration is estimated to induce an increase of at least 5.6% in daily all-cause mortality, 4.5% in cardiovascular mortality, and 6.1% in respiratory mortality, according to our global study from 2011, which included Sydney.⁶ These estimates are close to a previous observation on the effects of bushfire events between 1997 and 2004, in Sydney.

In addition to its fatal effects, bushfire smoke has also been related to increased risks of hospitalisation and emergency department visits due to respiratory diseases such as asthma, chronic obstructive pulmonary disease, and respiratory infections. Increasing evidence also suggests bushfire smoke might increase cardiovascular morbidity, psychological disorders, adverse birth outcomes, and eye irritation. However, our knowledge about the health effects of bushfire smoke is still insufficient. The long-term and lasting effects of bushfire smoke and which subgroups are most vulnerable to bushfire smoke remain largely unknown. It has been suggested that PM₁₀ generated from bushfires might have different health effects compared with PM₁₀ from urban background sources (eg, traffic emissions). Therefore, more studies are required to focus on air pollutants from bushfires.

Unfortunately, there is no effective way to reduce the effects of bushfire smoke on human health, although wearing facemasks and staying indoors are commonly recommended, and many people consider facemasks the best protection. However, facemasks might be not effective or sometimes provide a false sense of security. Their effectiveness depends on their filtration capacity: fine particles can still get through them if capacity is low. Additionally, individual wearing behaviour and characteristics (eg, facial hair, or duration and frequency of wearing a facemask) also affect the efficiency of the facemask. Importantly, wearing a facemask can be uncomfortable in very hot weather when bushfires happen. Even if facemasks could protect adults, it is still questionable whether they could protect children, older individuals, pregnant women, and those with chronic diseases, as these groups often cannot tolerate the inconvenience and discomfort of

wearing a mask. Staying indoors might provide some protection against bushfire smoke, but this depends on building quality and ventilation. In general, most residential houses are not equipped with air purifiers or air conditioning systems with high-efficiency filters. Hence, outdoor pollutants can still penetrate into houses, if they are in bad conditions or equipped with air conditioning systems without air filters. Therefore, indoor and outdoor concentrations of fine particles are often very close. Climate change will continue to exacerbate catastrophic bushfire conditions. It has been estimated that days with high-to-extreme risk of fire will increase by 15–70% by 2050, and by more than 100% by 2100, compared with 2010. Although, some politicians claim that climate action is too expensive, the increasing intensity and frequency of bushfires clearly indicate that the price of climate inaction is even higher. Unfortunately, the Australian Government has not engaged well in climate action over the past decade. Australia is on the track to meet less than half of its carbon emission reduction targets, which are to reduce emissions by 26–28% relative to 2005, by 2030, and achieve net zero emissions by 2050. Without immediate and efficient climate action, catastrophic bushfires will become a common disaster and might destroy the future of Australia and possibly of humanity.

“It’s not a question of whether climate change has caused these fires. Fires start for natural reasons — or for human cause reasons. What we’re seeing is a worsening of the conditions that make the fires in Australia unprecedentedly bad,” says Gleick¹⁸. “All of these factors — record heat, unprecedented drought, lack of rain — all contribute to drying out the fuel that makes these fires worse. What we have are fires that might have occurred anyway, but the extent, the severity, the intensity of these fires is far worse than it otherwise would have been without the fingerprints of climate change.” Rahmstorf¹⁹ also says that climate scientists believe wildfire conditions are worsening because climate change affects the water cycle, which in turn “leads to less rainfall in already dry parts of the world, and more rainfall in the already wet parts of the world.”

¹⁸ James Gleick (/gli:k/; born August 1, 1954) is an American author and historian of science whose work has chronicled the cultural impact of modern technology.

¹⁹ Stefan Rahmstorf (born 22 February 1960) is a German oceanographer and climatologist. Since 2000, he has been a Professor of Physics of the Oceans at Potsdam University. He received his Ph. D. in oceanography from Victoria University of Wellington (1990).

Australia is especially vulnerable to climate change because the continent is already hot and dry; a large swathe of the country is facing increased risk of drought, says Rahmstorf. Gleick says that the bushfires can have a ripple effect both on the local landscape and on the global climate. Fires can cause “ember storms,” which can lead to additional fires when embers from smaller fires are picked up by the wind. Fires also add carbon dioxide — a greenhouse gas — into the atmosphere, which can in turn amplify climate change, Gleick says. “Climate change is making these disasters worse, and these disasters are making climate change worse,” says Gleick. “We’ve only seen a tiny fraction of the climate change that we’re going to see in the coming years and the coming decades. If we’re seeing these disasters with a 1 degree warming of the planet so far, and we know that we’re headed for a 1.5 or 2 or 3 degree warming, we can only imagine how bad these disasters are going to get.”