

## A New International Crime of Ecocide?

As part of an internship in the discipline of international criminal law, I came into contact with a topic of debate that seems to be of interest to many actors in academic circles - and beyond. The new international crime of ecocide. In this regard, in early 2021, I had the opportunity to interview two scholars immersed in the topic, Professor Emanuela Fronza, from the Department of Legal Sciences of the University of Bologna and Professor Adán Nieto Martín from the University of Castilla-La Mancha. They kindly answered my questions about the international crime of ecocide.

### PROFESSOR FRONZA

**1. The introduction of a new crime of ecocide is increasingly at the center of debate. Can you tell us more about this controversial topic?** Climate urgency, climate crisis, increases in average global temperatures, CO<sub>2</sub> and greenhouse gas emissions, depletion of ecological resources, and extension of urbanization to the detriment of wild areas. The expressions of ecological concerns continue to multiply, but they are all based on what science tells us about the state of the planet: we must intervene immediately. If not, the present dangers will damage our future irreversibly. They will make the Earth uninhabitable for human beings and other forms of life. It is not a question of if, but of when it will occur, if we do not change the way these crises are managed. That a clear emergency exists, cannot be disputed. What is unresolved and extremely complex, however, is the debate about the measures to be taken and their effectiveness.

Faced with this urgency, made more evident by the global pandemic, initiatives about what measures ought to be taken are burgeoning. Among them is the proposal for a new international crime of ecocide.



Ecocide comes from the Greek word “*oikos*”, meaning home, and the Latin verb *caedere*, to kill. Literally, it means the destruction of the common home of humans and other inhabitants of planet Earth. In this sense, “ecocide”, a word with powerful rhetorical resonance, evokes another term, “genocide”.

At present, however, the rhetorical force of the term is not accompanied by a precise legal definition. Highlighting this point is essential. On one hand, there are many types of conduct - even lawful ones - which significantly impact the environment, damaging and depleting available resources. Some of them are, however, already punishable under environmental criminal law. On the other hand, introducing a new international crime, namely “ecocide”, requires further necessary steps: to identify the conduct that could be considered criminally relevant and, subsequently, to determine which ones are serious enough to reach the threshold of severity typical of international crimes.

As far as the origins of ecocide are concerned, the concept first appeared in the mid-1970s in relation to the environmental damage caused by the use of Agent Orange during the Vietnam War. The ecological damage that was caused by its use generated great concern.

Currently, the call for a new crime of ecocide is at the core of a renewed interest in our planet’s ecological woes; as such, it is advocated by a number of civil society organisations (such as End Ecocide on Earth; End Ecocide Sweden; Global Alliance for the Rights of Nature; Earth Law Alliance; Stop Ecocide Foundation) and institutional initiatives. While the Rome Statute of the International Criminal Court (ICC) does not contain a specific provision on ecocide, moves are being made in the ICC framework to deal with such issues. In particular, the 2016 Policy Paper on Case Selection and Prioritization marked a step towards environmental concerns. That Policy Paper requires the Office of the Prosecutor of the International Criminal Court (OTP), which is responsible for analyzing those situations that could fall under the jurisdiction of the court, to select and prioritize the prosecution of crimes which involve damage to or destruction of the environment. It should be noted that the Paper – despite its limited impact – expresses the OTP’s intention to address these issues.

This fits well within a growing call for action, including the formulation of a specific international crime. Such an endeavour requires a careful justification as to why existing instruments are insufficient for resolving the challenges of the climate emergency. A significant problem in dealing with the climate crisis is that, at present, legal instruments for protecting the environment are numerous, fragmented and not rationally organized at international, regional and domestic levels. The seriousness and

systematic nature of the criminal phenomena and the insufficiency of the existing protection system call for a new international crime. The introduction of a separate offence would fill this gap, providing structure and universal protection, which could be implemented at national, regional and international levels.

**2. Do you consider Criminal Law as an instrument adequate to respond to the climate crisis?** First, if ecocide is to be prosecuted, it must be kept in mind that not every violation can fall under this crime, but only those environmental violations that are more serious and massive. An important consideration in order to correctly criminalize ecocide may be to distinguish this legal category from the one of the ecocrimes, as we have already done with the working group under the supervision of Laurent Neyret in 2015. In addition, the reflection on the criminalization of ecocide could also be an opportunity to rationalize the existing material. In this respect, I believe that criminal law can be used, but not solely by itself. Civil law and administrative law will also be needed.

In other words, criminal law can perform the function of «giving a name», but only to the most serious violations of the “common home” of humanity. With regard to the crime of ecocide, it may answer the purpose of conferring a denomination to serious phenomena and making people aware of the climate crisis.

As stated by the chairwoman of the Monsanto Tribunal *Françoise Tulkens*, “[t]his offence still does not exist and in order for that to happen, it first has to be *precisely* defined”. However, the introduction of a new criminal offence of ecocide requires the *precise* description of its constitutive elements.

The path to a new crime demands awareness that, for the codification of a vaguely defined legal concept into a criminal offence, it is not sufficient for it to be anchored to a narrative/symbolic/pedagogical function. The outcome of such a complex law-making process is uncertain.

A key question in our discussion concerns a fundamental choice, that of whether international criminal law or economic criminal law should drive the introduction of a crime of ecocide. The question then arises whether the latter could not be located at the intersection of the two disciplines. In this case, would it require a simple evolution of international criminal law or a real integration of new notions within it? In the latter case, which discipline of law should cover the center and which the periphery: classical international criminal law or economic criminal law?

A commitment not only from civil society and governments, but also from international criminal lawyers is needed. Only political will along with the required legal

technical knowledge, and combined with imagination, can develop thinking about how to respond to the climate crisis.

It may be that the conclusion is that it is either not suitable, useful or necessary to introduce a new international crime. It could be that legal measures and mechanisms already exist, even outside criminal law, such as in administrative law or civil law. It seems important to not assume a binary logic in dealing with this. Rather, different steps can mark the resolution of this complex process. To this regard, harmonization, a constructively collaborative dialogue between national judges and cooperation between institutions might actually foster paths of universalization towards the achievement of a definition of ecocide to be agreed on.

Ultimately, if the crime of ecocide is to be introduced, a *precise* definition of its constitutive elements has to be found and adopted. The definitions of its component parts (namely of the contextual element) should be consistent with general principles of criminal law.

In conclusion, I hope that the debate will continue, that it will be conducted responsibly to avoid trivializing the category of international crimes and that it will be accompanied by a multi-level discussion: international, regional and national. With the eventual creation of an *ad hoc* Committee, composed of representatives from the academic, judicial and corporate worlds. In particular, the involvement of multinational companies in the process is essential, so that they can be socialized to the message that this indictment does not mean *criminalizing* them but making them *responsible*.

The debate on the need for a crime of ecocide will also be an opportunity to reflect on how to legally translate the need to protect a new universal common good, the common home of humanity. Furthermore, it will promote the acknowledgment of the interdependence between human beings and nature. The protection of nature, in this sense, is necessary for the human being.

Indeed, establishing a new pact for humanity's common home is a challenging, crucial target, which is not to be addressed by criminal law alone. To conclude, if ecocide is to become an international crime, thus signaling awareness of and an assumption of responsibility vis-a-vis the climate and health crisis, its contours will have to be carefully defined in accordance with the functions and limits proper of criminal law. We better hurry, before it is too late.

## PROFESSOR MARTIN

**3. The instance of criminalization of ecocide presents the criminal law sphere with some challenging issues. Among them is the question of identifying the appropriate sanctions for this new crime. What can you tell us about this?** The criminalization of ecocide as an international crime presents many legal and technical questions regarding its characterization, but in my opinion, the debate about ecocide should contribute to opening up a meaningful reflection on the shaping of criminal policy in international criminal law. The iconography on which international criminal law is based remains Nuremberg. A framework of discussion that was characterized by a retributive view of criminal law and an identification of international criminal law with warfare contexts, in which the perpetrators were mainly state agents.

Ecocide poses the challenge of building an international criminal law for peacetime, in which the main actors can also be multinational companies, and in which the victims, together with the reparation of the harm suffered, must enjoy the major role. This change of perspective, and of interpretation of what international criminal law should be, seems to me to be more important than the criminalization of ecocide itself. Perhaps, for instance, some cases of very serious harms to the environment could be considered under the existing case law pertaining to crimes against humanity, in which results such as the damage to a certain community lifestyle, forced transfers and the submission of a population to conditions that endanger its life or its health, are already contemplated.

If we place international criminal law within the framework of corporate crime, one of the most important debates concerns the introduction of legal persons' criminal liability. This should be linked to compliance programs and human rights due diligence obligations. At this moment, a draft of a directive about due diligence is being discussed at the EU. In some countries, such as France, there are already laws that oblige parent companies to monitor respect for human rights and the environment in their subsidiaries or in the supply chain. A similar piece of legislation is currently being discussed in Germany. In the last week, a large French supermarket was sued for its involvement in the devastation of the Amazon region and other large textile companies, such as Zara, have also been prosecuted for using slave labor for using cotton that had been produced in China by the Uighurs. Therefore, I believe that the time has come to discuss the introduction of the criminal liability of legal persons into international criminal law, a discussion which, as is well known, dates back to Nuremberg. At the moment, moreover, there is an increasingly widespread model in comparative law for

establishing this liability. It is a model similar to the Italian model established in Legislative Decree 231.

What we lack at the moment are new sanctions, a new system of punishment. To fine a multinational company for committing a crime against humanity, genocide or, in the future, ecocide, seems to me a ridiculous idea. Criminal sanctions must have the expressive potential of being socially perceived as genuine punishment. The fine also has other no less important problems. It would seem absurd if, for instance, Italy imposed a fine on a large Italian company for a crime of ecocide committed in Brazil or Ecuador, and if the funds coming from that fine went to the Italian Treasury. The same would happen, for example, with the seized funds, if the company had obtained some kind of profit from the crime.

**And what could these sanctions be?** I have been proposing formulas, such as an equity fine or capital fine, for a long time. This is a penalty that is already used in countries like Australia. An equity fine consists of reducing the capital of the company, depreciating the value of the shares, and then issuing new shares for the same value. Then, the latter could be managed by the victims, empowering them within the entity. In this way, they would be able to influence the management of the company, and use the benefits of these shares for projects addressing the devastated community etc.

However, there are other possible sanctions. Think, for example, of a “traditional” fine, the amount of which is used to build a trust fund administered by victims, and that functions as a “spin off” for reparations. Similarly, we can think of a model of intervention penalty, in which victims, for instance, become part of the monitoring body.

To conclude, what I want to emphasize is that the debate on the crime of ecocide must focus also on developing an appropriate system of penalties, especially for legal persons, and on the reparation of the harm. As far as I can see, efforts have focused on the definition of the crime, which represents only a small part of the problem.

**4. What role could restorative justice play, taking into consideration the characteristics of the victims and perpetrators of these violations?** Restorative justice plays a very marginal role in the current criminal justice system; it is almost an “exotic” element. My view is that it will gradually become more important in the future. Then, as it evolves, from being almost an alternative solution to criminal law, as is still conceived today, it may become one of its constituent components. At this point, it would be possible to proceed to reshape elements of the criminal justice system from its base. The “traditional” criminal law approach to the whole social conflict generated by a case of very serious environmental pollution, reduces the problem to very specific elements; those that serve to establish the *fattispecie*. It neglects the other elements that

make up the conflict generated by the crime. The social damage produced by a crime is much more complex than the damage to a legal good. In a similar way, it is illusory to think that the world would be much better for everyone by imposing a 10-year prison sentence on the perpetrators of an environmental catastrophe.

Therefore, restorative justice may be, in my opinion, a more effective way to deal with corporate macro-crime cases. Corporate victims in many cases need the company that caused the damage to continue to invest and provide jobs in the area. In addition, the company itself will need to reacquire its legitimacy in the social context in which it operates, if it intends to pursue economic activities in the region that has been devastated by its past wrongdoings. In other words, the company needs to be seen in a positive light to continue developing its activities. Actually, restorative justice in these cases could be interpreted as a special manifestation of corporate social responsibility. Today it is often said that the purpose of corporate social responsibility consists precisely in managing the legitimacy of the company.

The problem is how to combine corporate restorative justice with the criminal justice system. A proposal to be discussed would be the confirmation of what I have called *restorative deferred prosecution agreements*. Well known in the United States, but by now also in some EU countries, this type of agreement is a system of probation for the legal person, who must comply with a series of conditions imposed by the prosecutor. The proposal is that this tool be used to enable companies and victims, on a voluntary basis, to participate in restorative processes, under the direction of a mediator. The European directive about the protection of the victims, recognizes the right of restorative justice to all of them. There is no reason to exclude victims of corporate activities, who have a degree of helplessness and, therefore, a need for rights, at least as great, if not greater, than the victims of other traditional crimes.

Valeria Luz Puleo  
MSc Candidate in International Relations  
University of Bologna

*A NEW INTERNATIONAL CRIME OF ECOCIDE?*