

# ecocide

The report of the European Law Institute

# The European Law Institute

The European Law Institute (ELI) is an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective. As such, its work covers all branches of the law: substantive and procedural; private and public.

# Project Team and reporters

- 15 strong project team
- Co-reporter Professor Fausto Pocar

# A crime at time of war

- Article 8(2)(b)(iv) of the Rome Statute and Article 35(3) of the first Additional Protocol to the Geneva Conventions of 8 June 1977 consider ecocide, namely the intentional launch of an attack in the knowledge that it will cause '*widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*', a war crime. This characterisation is the only one in force and does not cover the described conduct where the offence is not committed in a context of war

# Past proposals

- A draft Article I of the 'Study on the question of the prevention and punishment of the crime of genocide' by the United Nations (UN) Economic and Social Council (ECOSOC) Sub-Commission on Prevention of Discrimination and Protection of Minorities proposed including ecocide among the crimes of *genocide* prohibited by international law 'in time of peace or in time of war'. A third characterisation, still under public international law, consisted in defining ecocide '*a crime against humanity*' and was put forward by the UN International Law Commission in a draft Article 26 of the Code of Crimes Against the Peace and Security of Mankind.
- Olaf Palme
- Richard A Falk
- Mark Allan Gray
- Professor Laurent Neyret
- Polly Higgins
- And others

# The Proposal of the Independent Panel

Addition of a preambular paragraph 2 bis

Concerned that the environment is daily threatened by severe destruction and deterioration, gravely endangering natural and human systems worldwide,

Addition to Article 5(1)

- (e) The crime of ecocide.

Addition of Article 8 ter

- **Article 8 ter Ecocide**

1. For the purpose of this Statute, “ecocide” means **unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.**

2. For the purpose of paragraph 1:

- a. “Wanton” means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
- b. “Severe” means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;
- c. “Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
- d. “Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
- e. “Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.

# Why

- First, the planet is facing a *'ghastly future of mass extinction, declining health and climate-disruption upheavals'* that threaten human survival because of ignorance and inaction. *'The scale of the threats to the biosphere and all its lifeforms – including humanity – is in fact so great that it is difficult to grasp for even well-informed experts'*. Culpable behaviour by human beings is, in many cases, directly or indirectly responsible for this.
- Many scientists believe that the world is on the brink of the sixth mass extinction. According to Professor Georgina Mace, head of the Centre for Biodiversity and Environmental Research at University College London, the threat is so severe that biodiversity loss needs to be addressed on a global scale in a similar way to climate change.
- Mace goes on to observe that *'Extinction rates ... are probably 100-1,000 times higher than in pre-human times.'* If you look at *the abundance of life rather than numbers of species*, for *'vertebrates (birds, fish, amphibians, reptiles, mammals) there is a fairly good estimate that more than 50% of the vertebrate abundance has been lost in the past 50 years. The information for invertebrates and plants is less good, but there is some evidence to suggest insects are declining just as quickly, if not more so. One recent paper showed the mass of insects is falling by 2.5% a year.*
- *The diversity of life on Earth is the defining feature of our planet – we don't know of any other planets that have life on them. We developed and evolved with other species here, and their diversity allows us to thrive. So, it's very reckless to assume that we can do without them and that we don't have some responsibility for all those other species.*
- *Then there are some of the benefits of biodiversity that we largely take for granted. These are things like primary production, which is the way plants convert energy from the sun and is the basis for all life on Earth. Wild species break down organic material back into nutrients, so it can be recycled and used again. The water cycle also relies heavily on living organisms.*
- *Finally, there is a utilitarian view about the value of nature to us. It provides us with goods and services like pollinating crops, or timber production or novel drugs from tropical plants. If we lose pollinators that are specially adapted to a particular plant, even if we have more widespread invasive pollinators coming in, they may not be able to pollinate that plant.<sup>7</sup>*

# ELI supports the drive to have ecocide recognised as an international crime

- We therefore support the drive to have ecocide recognised as an international crime and included in the Rome Statute of the International Criminal Court. We take appreciative note of the amendments to the Rome Statute proposed by the Independent Expert Panel for the Legal Definition of Ecocide in June 2021, but recognise that it may be some considerable time before these efforts bear fruit. In the meantime, recognition of ecocide as a crime at the level of the European Union could serve as an international precedent, along with the legislation of those States around the world which also recognise the crime of ecocide. It would also give a strong signal both to embolden legislators around the world and to deter wrongdoers..



# ELI Proposals

- **PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**
- **on establishing minimum rules for the crime of ecocide**

# Actus reus and mens rea

## Article 3

### ***Ecocide***

***Member States shall ensure that the offence of ecocide as defined in this Article is punishable as a crime.***

***(2) For the purposes of paragraph 1, ecocide means any conduct as defined in paragraph 4 or 5, committed with intent, which may cause, or substantially contribute to causing, severe and long- term damage or severe and irreparable or irreversible damage to an ecosystem or ecosystems in the natural environment.***

***(3) For the purposes of paragraph 2, a person has intent where:***

***(a) in relation to conduct, that person means to engage in that conduct; and***

***(b) in relation to a consequence, that person means to cause the consequence or is aware, or could not be unaware, of the substantial likelihood that it may occur.***

***(4) Any conduct: (a) infringing Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy of protecting the environment as set out in the Treaty on the Functioning of the European Union; or (b) infringing a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State which gives effect to such Union legislation under which Member States are required to ensure that it constitutes a criminal offence under domestic law shall be qualified as ecocide under domestic law if the conditions set forth in paragraphs 2 and 3 are met.***

***(5) Paragraph 4 does not prevent Member States from identifying additional conduct likely to cause damage to the environment and to qualify it as ecocide if the conditions set forth in paragraphs 2 and 3 are met.***

# Authorisations

## Article 4

### *Authorisations*

*(1) The circumstances when an authorisation by a relevant public authority is unlawful and therefore ineffective include circumstances where the authorisation:*

*(a) authorises conduct which constitutes the crime of ecocide under Article 3; or*

*(b) was obtained fraudulently, by coercion or through corruption.*

*(2) A person engaging in conduct which constitutes the crime of ecocide under Article 3 will not be relieved of criminal liability where the authorisation was unlawful.*

*(3) Where an authorisation is lawful but the holder of the authorisation does not comply with all specific obligations of that authorisation or with other relevant obligations not covered by the authorisation, the holder of the authorisation can still be liable for the crime of ecocide under Article 3.*

# Expert evidence

## Article 5

### *Expert evidence*

*Member States shall ensure that in proceedings brought for the offence of ecocide, independent expert evidence is heard. The judge may order the hearing of experts of his/her own motion.*

# EPPO

- **Model Proposal for a European Council Decision Making it Possible for the European Public Prosecutor's Office to Investigate, Prosecute and Bring to Judgment the Perpetrators of, and Accomplices in, Offences Constituting the Crime of Ecocide**
- According to Interpol, environmental crime is the world's third most lucrative criminal business after drugs and counterfeit goods, ahead of human trafficking. The rising global scarcity of natural resources attracts transnational criminal organisations which rapidly shift from 'traditional' criminal activities to the illegal trade in natural resources. For example, organised crime syndicates diversify into the lucrative business of tropical timber, endangered species, waste and natural minerals and metals alongside their traditional activities. Moreover, ecocide is often associated with money laundering, human trafficking and the murder of indigenous peoples.

# Enacting terms

## Article 1

Article 86 of the Treaty on the Functioning of the European Union (TFEU) is amended as follows:

(1) In paragraph 1, the first subparagraph is replaced by the following:

'1. In order to combat **ecocide**, terrorism and crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.'

(2) Paragraph 2 is replaced by the following:

'2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, **offences constituting ecocide affecting more than one Member State or one or more Member States and one or more third countries**, offences of terrorism affecting more than one Member State and offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences. **As far as the crime of ecocide is concerned, the European Public Prosecutor's Office may act on information adduced by representatives of the general public and of indigenous communities and non-governmental organisations (NGOs).**'

# Procedure to amend the Environmental Crime Directive

1. European Commission's proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC<sup>4</sup>
2. European Parliament's amendments
3. Position of the Council
4. Existing and proposed legislation in France, Belgium
5. Chances of amending the Rome Statute
6. Criminal liability of corporations
7. Conclusion