

ELI Report on Ecocide

Quick Facts

Project Type: Model law

Procedure: Regular

Adopted: CD 2021/9

Project Period: 2021–2022

Events

An overview of past and upcoming events of this project is available [here](#).

Summary

ELI Report on Ecocide aims at contributing to inter-institutional negotiations in the EU. It provides an innovative definition of the crime of ecocide in peacetime. To facilitate legislative procedures, it also includes a Model Directive that is closely based on the EU's Proposal for a Directive on the protection of the environment through criminal law and a Model Decision, which can be used by EU institutions in the context of developing rules to protect environment through criminal law.

Background

The term 'ecocide' refers to the 'devastation and destruction of the environment to the detriment of life', but no legal definition between States has yet been agreed. This project promotes the discussion towards the criminalisation of ecocide.

The idea of ecocide was first proposed in the 1970s during the Vietnam War by biology professor Arthur W Galston, when he was protesting against the US military using the herbicide and defoliant chemical Agent Orange to destroy the foliage cover and crops of



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enemy troops. Since then, many civil society organisations and lawyers have supported the criminalisation of ecocide in international law.

In putting a proposal to the UN Law Commission designed to amend the Rome Statute of the International Criminal Court (ICC) to include 'ecocide' as a fifth crime against peace, the late Polly Higgins defined ecocide as 'the extensive damage to, destruction of 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 or will be severely diminished'.

The latest development is that Philippe Sands QC and Dior Fall Sow are co-chairing an Independent Expert Panel for the Legal Definition of Ecocide as a potential international crime.

At present ecocide is only considered a war crime under Article 8(2)(b)(iv) of the Rome Statute. However, no charges have ever been filed, possibly on account of the very high threshold of injury required under the article – there must be an intentional attack that causes 'widespread, long-term and severe damage to the environment which would be clearly excessive.' Corporate and State criminal responsibility is also excluded under the Rome Statute. Thus, corporations and States which cause water and air pollution or participate in illegal deforestation and cause oil spills, which would constitute a crime in times of war, in peacetime, cannot be prosecuted for their environmental damage.

The 2018 UN Report 'Gaps in international environmental law and environment-related instruments: towards a Global Pact for the Environment' (UN SG Report A/73/419) found the existing environmental law regime to be fragmented, piecemeal, unclear and reactive. With no single overarching legal framework or institution and largely voluntary and non-binding obligations, international environmental law cannot be used to prosecute ecocide. Although at least two environmental treaties – the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – require States to create domestic criminal laws on specific subjects, they are 'episodic and limited in scope', only applying within State boundaries, and do not extend to ecocide more generally.

The lack of national legislation goes hand-in-hand with a lack of harmonisation of the criteria for identifying the crime of ecocide. This is true both internationally and at the EU level.

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The project aims to enable the ELI as a promoter of law reform to participate in the debate on the definition of ecocide as a crime against humanity and offer constructive analysis and criticism of the proposal which will emerge from Sands and Sow's expert drafting panel and define the aspects characterising the crime of ecocide and the conditions for prosecution in the European framework.

In this way, this ELI study makes it possible to identify the elements of the crime of ecocide that may constitute the legal basis for the adoption of EU legislation. At the same time, the project helps raise awareness and muster support in Europe for bringing the crime of ecocide within the Rome Statute.

The project also supports the current political and legal actions aimed at imposing an EU-wide and trans-boundary duty of care in order to prevent the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s) by prohibiting any natural or legal person from committing or aiding and abetting ecocide, through the imposition of criminal sanctions.

Outcome

The principal innovative aspect of the Report is its definition of the crime of ecocide. The Report proposes that the objective element of a crime (*actus reus*) must consist in typified behaviour, ie: (1) behaviour which European Union law has identified as unlawful and dangerous for the environment; (2) which results or is likely to result in a severe damage, which is also long-term, or in a severe damage, which is also irreparable or irreversible.

This approach to the *actus reus* lends itself to incorporation in the proposed directive on the protection of the environment through criminal law, is compatible with the legal basis of Article 83(2) of the Treaty on the functioning of the European Union and does not raise the doubts about compatibility with the principle of legality which an unadulterated version of the definition proposed by the Independent Expert Panel chaired by Philippe Sands QC and Dior Fall Sow for inclusion in the Rome Statute might well have raised.

For the purpose of determining *mens rea*, a person has intent where, in relation to conduct, that person means to engage in that conduct, and, 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. The standard required equates to *dolus eventualis* or recklessness.

Lastly, it is made clear that the circumstances when an authorisation by a relevant public authority is unlawful and therefore ineffective include circumstances where the authorisation authorises conduct constituting the crime of ecocide or was obtained fraudulently, by coercion or through corruption. A person engaged in conduct which constitutes the crime of ecocide will not be relieved of criminal liability where the authorisation was unlawful. Moreover, 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.

In order to facilitate the legislative procedures, the ELI Report includes a Model Directive incorporating the above-mentioned innovations. It is closely based on the European Commission's proposal, with new Articles 3, 4, 5, 7 and 11, and new definitions inserted in Article 2.

The ELI Report also proposes to extend the powers of the European Public Prosecutor's Office to include offences of ecocide affecting more than one Member State or one of more Member States and one or more third countries. To that end, the Report also includes a Model European Council Decision.

Furthermore, the ELI Report contextualises the debate about the criminalisation of ecocide by providing an overview of other initiatives in the field, both at national and international levels. It also draws attention to the growing political support for recognising ecocide as a crime.

