

# The Fifth Crime Under International Criminal Law: Ecocide?

Jacqueline Hellman

**Abstract** Environmental crimes are a serious and growing international concern as they cause significant harm to the environment and human health. Establishing environmental offences as international crimes would be a way to end with impunity as no country, no company and no individual would easily be able to escape from international criminal justice. As environmental offences do not yet fall under the scope of crimes against humanity, a new “core crime”—ecocide—should be introduced into the Rome Statute of the International Criminal Court. This hypothetical scenario will have an important repercussion: individuals in a position of superior or command responsibility, such as CEOs, will be criminally liable if they carry out an activity that harms the environment.

## 1 Environmental Crimes Against Humanity?

Environmental crimes are a serious and growing international concern as they cause significant harm to the environment and human health. When environmental damages take place, governments are reluctant to adopt measures that will prevent those environmental disasters from happening again, as their strategy is designed, in most cases, to increase the GDP. In fact, powerful governments and companies will put pressure on authorities in order to protect their financial interests, forcing local people to accept minimal compensation. Furthermore, a hard lesson learned in environmental law enforcement is that individuals and companies traditionally have faced minor sanctions when committing crimes against the environment. Additionally, in some countries, which have recently established criminal sanctions

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J. Hellman (✉)  
Instituto de Empresa University, Madrid, Spain  
e-mail: [jhellman@faculty.ie.edu](mailto:jhellman@faculty.ie.edu)

for perpetrating environmental offenses and which emphasize criminal prosecution,<sup>1</sup> companies have decided that it is more advantageous to violate the law and support payment obligations rather than implementing appropriate measures to avoid ecological damages. They, indeed, prefer to absorb certain penalties as a cost of doing business, especially in not so powerful nations, where companies are bigger and stronger than governments. However, we have also seen cases where high fines have been imposed to important corporations regarding, for example, the massive oil spills provoked by Shell, the Anglo-Dutch multinational oil and gas company, in Nigeria.<sup>2</sup> This is a unique case where the company has strongly been condemned in its home country for environmental damage caused abroad. Thus, establishing environmental crimes as a crime against peace would be not only more effective, but it will also potentially have positive outcomes, as no country, no company and no individual in a leading position will be able to easily escape from international criminal justice. Having a solid international environmental regulation will mean that few individuals will adopt risky strategies that could lead them to face consequences under international law. In other words, having international norms instead of corporate or criminal domestic ones will assure that deliberate or intentional misconduct, noncompliance, falsification of information and records on this topic, etc., would be avoided.

Regarding the above, *is it possible to consider a crime against the environment to be an international crime? In other words, can it be catalogued as a crime against peace? Furthermore, does such criminal behaviour already fall within the scope of existing international crimes, in particular within the scope of crimes against humanity? Or should ecocide become a fifth crime, alongside with genocide, war crimes, crime of aggression and, of course, crimes against humanity?*

In order to answer to these questions, it is, first of all, crucial to highlight the meaning of “crime against humanity”. According to what it is stated in article 7 of the Rome Statute of the International Criminal Court, it is an act “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. An illustrative list is given in the abovementioned legal provision where you can find examples of illegal acts that can be recognized as crimes against humanity. Those are, among others, the following ones: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental

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<sup>1</sup> Brazil has established regulations in order to make environmental enforcement more effective. The Brazilian Federal Constitution establishes three kinds of liabilities for environmental violations: *administrative, civil and criminal*. The Brazilian environmental regulation is known as one of the most complete legislations in the world regarding this important topic.

<sup>2</sup> Shell was sentenced in the Netherlands to pay a bill of hundreds of millions dollars after accepting full liability for two massive oil spills occurred in Nigeria. Cf. <http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria> (12.2.2014).

Another recent environmental disaster took place in the United States of America. In April 2010, 200 million gallons of black crude oil were spilled into the Gulf of Mexico, affecting hundreds of miles of coastline and killing thousands of animals. The US Department of Justice settled federal criminal charges against British Petroleum, which had pleaded guilty to 14 federal charges.

rules of international law, etc. Accordingly, the existence of an attack addressed to civilian population is a key element. Furthermore, paragraph 2 of the aforementioned article clarifies what we should understand by this core element: “attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, *pursuant to or in furtherance of a State or organizational policy to commit such attack*”.

Consequently, after reading with detail the abovementioned legal provision, can it be applied to environmental crimes? No, as these crimes do not constitute an attack but mainly refer to a large-scale destruction of the environment (*i.e.* mass deforestation or a large oil spill).<sup>3</sup> *Ergo*, article 7 could hardly be applied. However, exploring this article can lead us to a few important reflections not strictly related to the object of the present study but, nevertheless, useful when drafting a new international crime that may share similar features with other existing ones. For this reason, it is crucial to analyse the prior mentioned legal provision. In this sense, can we conclude that any systematic or widespread attack perpetrated against civilian population supported by a *State* or by an *organization* is a crime against humanity? Or should we think that any widespread or systematic attack committed against civilians has to be considered as a crime against humanity? For some, the commitment of a crime against humanity requires the presence of a State or organization policy that sponsors, in one way or another, the execution of such heinous behaviour. According to them, this allows us to distinguish between a common crime that does not fall within international jurisdiction and a crime against humanity. Therefore, an “attack”—which, as we have seen, is one of the most important requirements in order to accomplish the perpetration of this particular crime—cannot be the result of random acts performed by individuals acting in their own initiative; those acts have to be encouraged by a powerful State source in order to duly consider that an “attack” submitted to international regulation has taken place.<sup>4</sup> Others argue that only by identifying an attack against civilians we

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<sup>3</sup> According to the Environmental Investigation Agency, an international environmental crime “can be defined across five broad areas of offences which have been recognised by bodies such as the G8, Interpol, EU, UN Environment programme and the UN Interregional Crime and Justice Research Institute: illegal trade in wildlife in contravention to the 1973 Washington Convention on International Trade in Endangered Species of fauna and Flora; illegal trade in ozone-depleting substances in contravention to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; dumping and illegal transport of various kinds of hazardous waste in contravention of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal; illegal, unregulated and unreported fishing in contravention to controls imposed by various regional fisheries management organisations; illegal logging and trade in timber when timber is harvested, transported, bought or sold in violation of national laws”. See [http://www.unodc.org/documents/NGO/EIA\\_Ecocrime\\_report\\_0908\\_final\\_draft\\_low.pdf](http://www.unodc.org/documents/NGO/EIA_Ecocrime_report_0908_final_draft_low.pdf) (12.2.2014).

<sup>4</sup> Nevertheless, in the *Kupreškić case* the Court stated that crimes against humanity do not need the participation of the State although its toleration is vital. Regarding the organizational policy, the Court concluded that the accomplishment of this requirement would be duly fulfilled if in the commitment of such important crime any kind of entity—capable of committing acts of large-scale violence—is involved.

can say that an international crime covered by international regulation has been executed. Hence, the discussed illicit behaviour is subject to considerable controversy.<sup>5</sup> Therefore, by analysing the case law we can determine how the core elements of the discussed crime have to be interpreted.<sup>6</sup> Anyway, after realizing that the mentioned offence is not able to cover environmental violations we need to create one—*ex profeso*—in order to sanction the damage and destruction of the environment on the international level.

## 2 Ecocide as the Fifth Crime Under International Criminal Law?

Knowing that the commitment of environmental illicit behaviour may cause a long-term and severe damage to the environment, it seems necessary to negotiate, implement and enforce international environmental regulation in order to legally categorize them. Furthermore, as these deeds imperil the natural environment,

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<sup>5</sup> Article 7 of the Rome Statute refers to a policy requirement in order to identify crimes against humanity. However, paragraph 2 of the mentioned legal provision expressly talks about a State or an organization that has to be involved in its commitment. As Jalloh (2013), p. 409 has highlighted, this article “(...) reveals the schizophrenia of the definition that at once nods to both the mass crime and the predatory State rationales for the offense”. Hence, is the perpetration of an attack against civilians that leads to the commitment of a crime covered by international regulations? Or is it mandatory the participation of the State or organization in perpetrating or condoning the underlying heinous acts? The above mentioned author says that maybe the combination of the mentioned factors are relevant to consider that one illicit behaviour falls within the scope of article 7. See Jalloh (2013), p. 385.

<sup>6</sup> It is useful to point out the *Kenya Decision of March 2010*, which was issued by the International Criminal Court Pre-Trial Chamber regarding the violence that occurred after the presidential elections of December 27, 2007. The facts alleged in Kenya were, summing up, that a political party enrolling a criminal organization attacked rival supporters with the connivance of the police. In this case, the dissent opinion stated that a “State like” organization has to be involved in the performance of a crime against humanity. *Judge Kaul’s*, the dissenter, clearly argued that the group involved in the commitment of a crime against humanity requires having State-like characteristics. Accordingly, not any organization can participate in the infliction of the mentioned crime; it is important to identify an important one that possesses State-like qualities. Under the same perspective, the drafters of the Rome Statute have declared that the organizational policy requirement was introduced in order to include different organs of the State (police, military, intelligence, etc.). Notwithstanding, the majority of the judges concluded that: “Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values”. Therefore, Jalloh points out “(...) this approach tends to view customary international law as evolving to allow the ICC’s [International Criminal Court] jurisdiction to cover an expanding category of mass crimes that perhaps could eventually include even purely private organizations”. As Kress (2010), p. 873 says, in this case one important question emerges: is the international regulation going forward to protect States and their population from internal and external risk coming from private persons?

human health, etc., creating supranational environmental norms must be a priority of the international community. Hence, it is perfectly appropriate the proposal made by Polly Higgins to the United Nations by which *a fifth crime should be created under International Criminal Law in order to duly pursue and sanction these situations: ecocide*.<sup>7</sup> As the Environmental Investigation Agency declares: “it is time for the international community to wake-up to the menace of environmental crime and show the necessary political will to tackle the criminal gangs plundering our planet for a quick profit”.<sup>8</sup>

Before discussing this proposal, it is important to highlight that a future international environment regulation, which should encompass ecocide, has to deal with several and important issues. First of all, environmental problems are mostly caused by strategies or activities carried out by private companies, rather than by actions of governments. In the light of the above, corporations usually put pressure on public authorities to protect their interests and—unfortunately—in many cases the former receive support from the latter, as they don’t want to harm their GDP levels. Second, in order to have a strong environmental regulation it is important to be aware that environmental problems typically exceed jurisdictional boundaries. This means that if only few States make the commitment of assuring the application of sanctions when identifying environmental crimes, these norms can be, to a certain extent, useless. Therefore, not only there is a need of gathering together in this new and *uncertain* path, but also there is a need of cooperation; this cooperation has to develop between countries, even between industrialized and developing countries despite the fact that questions of equity and capacity might arise. Third, we have to consider new technology, future needs, new scientific understanding of environmental problems, etc., as it leads us to the following idea: international environmental law will operate under conditions of uncertainty and, thus, it must be adaptable to changing needs or knowledge.<sup>9</sup> Finally, behaviour that is putting at risk the very survival of life is truly affecting future generations. Therefore, present and future interests have to be taken into account when prohibiting and prosecuting those activities. For this reason, environmental international regulation has to examine acts from the perspective of what repercussion those will have in the future for human population, natural environment, ecosystems, etc.—which, of course, is not easy to determine. However, all these *obstacles* or *impediments* should not be conquered by the darkness. On the contrary, they should be considered as spring elements, which have to be taken into account necessarily when

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<sup>7</sup> When talking about ecocide, Polly Higgins makes a division between ascertain and non-ascertainable crimes. The formers refer to crimes committed by individuals and, also, as a consequence of corporate activity, whereas the latters refer to catastrophic events that take place as a *force majeure* (floods, earthquake, tsunamis, etc.). From now onwards, the present contribution strictly refers to the first category of the discussed illicit behaviour.

<sup>8</sup> See *supra* footnote 3.

<sup>9</sup> Abbas declares the following: “environmental problems characteristically require expedition and flexible solutions, subject to current updating and amendments—to meet rapidly changing situation and scientific-technology progress”. Cf. Abbas (2012), p. 611.

trying to solve all these challenges, giving concrete form to a strong and powerful international environmental regulation.

Coming back to the previous proposal it is important to stress that a definition has been provided regarding the term of “ecocide”: *the mass damage, destruction to or loss of ecosystems 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*. This project calls for an amendment of the Rome Statute.<sup>10</sup> In October 2012, legal experts from around the world discussed several problems related with the existing environmental law, developing as well an action plan for the future<sup>11</sup> that may lead to the inclusion of environmental crimes under the scope of application of the Rome Statute. Indeed, ecocide has been recognized as a crime that concerns the international community and many countries are willing to finally include it within the above-mentioned international regulation. In this sense, it is important to highlight that ecocide was listed as a Crime Against Peace in the draft Code of Crimes Against the Peace and Security of Mankind (antecedent of the Rome Statute) although it was excluded from the final document.<sup>12</sup> Likewise, in many countries, domestic regulation has been adopted in order to protect the environment.<sup>13</sup> Hence, “maybe now is the time to include what has been missing all along. That crime is ecocide”.<sup>14</sup>

### 3 The Consequences of Having “Ecocide” as a Crime Against Peace

Introducing ecocide as a crime against peace will mean that individuals in a position of superior or command responsibility will be criminally liable if they carry out an activity covered by such a provision, disregarding knowledge or intent. Of course,

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<sup>10</sup> It is important to highlight that the Rome Statute—article 8.2.b (iv)—includes a crime that harms the environment during war time: “*Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or 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*”.

<sup>11</sup> This study will be done by the United Nations Environment Programme and the United Nations Interregional Crime and Justice Research Institute, which considers that environmental crime is “a serious and growing danger for development, global stability and international security”, as well as “an emerging form of transnational organized crime requiring more in-depth analysis and better-coordinated responses at national, regional and international levels”. See <http://www.unicri.it/topics/environmental/> (12.2.2014).

<sup>12</sup> Only three countries are on record as having opposed to the inclusion of environmental crimes under international regulation: The Netherlands, United Kingdom and the United States of America.

<sup>13</sup> Among other countries, Vietnam in the decade of the 1990s introduced the crimes of ecocide, Ukraine in 2001, as well as the Republic of Moldova 1 year later.

<sup>14</sup> See Human Rights Consortium, School of Advanced Study, University of London 2012.

including the abovementioned illicit behaviour will mainly affect industries, which are usually blamed for widespread damage to the environment like fossil fuels, mining, agriculture, chemicals and forestry. In other words, embracing such crime under the applicative scope of the Rome Statute will primarily concern companies. Hence, this could mean that CEOs, directors, partners or any other person having superior responsibility in a corporation could be held responsible for ecological damages perpetrated under his/her authority<sup>15</sup>; they could be held accountable for not preventing or encouraging ecocide, without the necessity to prove *mens rea*.<sup>16</sup> Furthermore, drafting and approving international law on ecocide would affect also heads of States. Also, it has to be pointed out that accepting ecocide as an international crime will lead not only to the prohibition of causing environmental damage, but also to the appearance of an obligation related with the protection of the environment. This obligation would have to be followed by companies and governments in order to assist individuals that have suffered or are at risk of ecocide. Taking into account what has been previously said, the international community should consider ecocide as a crime against peace as soon as possible.

However, negative arguments have also been raised. Mainly, opponents think that this could potentially criminalize the whole humanity. Additionally, this measure is feared to encourage anti development. On the contrary, supporters of criminalizing ecocide claim that more than ever we need to have strong environmental regulation with the goal of stopping the flow of destruction of the ecosystems, to halt environmental mass damage, etc. Only then, CEOs, heads of States and heads of financial institutions will assume a preventive legal duty of care, especially if we take into account the legal doctrine of superior responsibility. Like Polly Higgins argues, it is “no longer ... acceptable to pursue profit without consequence”.<sup>17</sup>

Criminalizing ecocide is related with the protection and the defence of human rights; therefore, it is linked with human beings and not with corporations. In this way, the Rome Statute of the International Criminal Court has to be amended in order to prevent ecological damages and to provide a legal mechanism for the people to ask for relief, obtain remedy and to improve their life quality. This last statement is related with the Preamble of the Charter of the United Nations that declares the following: “We the peoples of the United Nations determined (. . .) to

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<sup>15</sup> This can be linked with another important doctrine: the *vicarious liability*. According to this doctrine, employers can be held accountable for negligent acts or omissions caused by their employees within their employment tasks or functions.

<sup>16</sup> It can be useful to take a look to the Ecocide Act—proposed by Polly Higgins—which is a clear example of how the Rome Statute can govern all these issues: <http://eradicatingecocide.com/overview/ecocide-act/> (12.2.2014).

The preamble of the Ecocide Act declares that: All Heads of state, Ministers, CEO’s, Directors and any person(s) who exercise rights, implicit or explicit, over a given territory have an explicit responsibility under the principle of superior responsibility that applies to the whole of this Act.

<sup>17</sup> See <http://www.guardian.co.uk/environment/damian-carrington-blog/2011/sep/29/ecocide-oil-criminal-court/> (12.2.2014).

promote social progress and better standards of life in larger freedom.” Thus, *why should we waste more time for the international criminalization of ecocide?* Despite the fact that corporate criminal liability at the national level is a useful tool, neither this nor administrative sanctions systems are dissuasive enough in order to deterrence companies to commit environmental crimes as they are happening today. Furthermore, the protection of the environment affect us all, hence, international norms—which embrace universal and core values—are needed.

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