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## Ecocide: prosecuting the destruction of ecosystems

There are growing calls for ecocide to be recognised as an offence under the Rome Statute, which would mean individuals - including the heads of companies - could find themselves prosecuted by the International Criminal Court, says **Aidan Ellis**



Timed to coincide with the 75th anniversary of the Nuremberg trials, the Stop Ecocide Foundation recently announced a new campaign to criminalise Ecocide.

A panel of international lawyers has been appointed to craft a definition of the offence of Ecocide. Campaigners will then seek to amend the Rome Statute – the founding document of the International Criminal Court (ICC) – so that individuals could be prosecuted at the international level for committing Ecocide.

The idea to impose individual criminal responsibility for causing environmental damage dates back to the 1970s, when outrage over the use of Agent Orange, a herbicide, in Vietnam led to the proposal of a draft International Convention on the Crime of Ecocide.

In June 1972, during the first United Nations Conference on the Human Environment, the Swedish Prime Minister HE Mr Olof Palme explicitly referred to the term 'ecocide' in his opening statement, emphasising the need for urgent international attention.

The draft International Convention on the Crime of Ecocide was, however, never adopted. Similarly, although the International Law Commission included a crime of causing willful and severe damage to the environment in its 1991 Draft Code of Crimes against the Peace and Security of Mankind, by 1996 that offence had been removed from the draft and it was not included in the Rome Statute.

The result is that, although the Prosecutor of the ICC has said that she will give particular consideration to prosecuting war crimes or crimes against humanity which result in the destruction of the environment, there is currently no specific international crime of Ecocide.

Drafting the terms of a new crime, of course, poses certain technical challenges. However, the international panel of experts will be able to work from definitions suggested in previous drafts.

The proposed new offence is likely, for example, to require serious ecological damage (e.g. widespread or long-term damage to an ecosystem). Only such serious harm would be consistent with the ICC's mandate to prosecute those crimes which are serious enough to be of concern to the international community as a whole.

A new crime of Ecocide would have to be sufficiently serious that it would sit at the same table as the existing offences in the Rome Statute – genocide, aggression, crimes against humanity and war crimes.

Once the draft is complete, the States who are parties to the Rome Statute would need to amend the Statute to include the crime of Ecocide. Amendments to the Rome Statute are possible, but formal requirements must be satisfied. They must be proposed by a State Party to the Statute; adopted by a two-third majority vote at the Assembly of States Parties; and then only enter into force one year after being ratified by seven-eighths of the States Parties.

The crime of Ecocide counts a number of high profile supporters. Since December 2019, when Vanuatu called for serious discussion of the issue, European countries such as France and Belgium have offered diplomatic support to the campaign. In France, a draft bill creating a criminal offence for conduct causing severe damage to the environment foresees terms of imprisonment as well as financial penalties ranging from €375,000 to €4.5 million.

Growing calls for the adoption of similar legislation are being heard in various countries. Nonetheless, the procedural obstacles and the need to generate consensus means that it may take quite some time before an amendment to the Rome Statute is adopted. Considerable diplomatic efforts will be required to make progress on the issue.

If the Rome Statute is indeed amended, that would allow allegations of ecocide to be investigated at the international level. The ICC's jurisdiction provisions are labyrinthine

but, subject to certain exceptions in general terms, it has jurisdiction over crimes committed by nationals of or on the territory of those States who are parties to the Rome Statute.

Those States would also be likely to adopt national provisions mirroring any amendment to the Rome Statute, so as to enable national prosecutions for equivalent offences.

Investigations and prosecutions would be expected to take place on a national level first, with the ICC becoming involved as a court of last resort in the event that no national system proceeds with prosecutions.

As is well known, the ICC is not a universal Court and powerful States including the US, Russia, China and India are not parties to the Statute. As a result, their nationals could only be investigated where their actions caused Ecocide in a State Party.

**"Senior corporate figures could be tried for their role in their company causing grave damage to the environment"**

However, the inclusion of a new crime of Ecocide in the Rome Statute would mean that the 123 States Parties to the Statute would agree to range Ecocide among the most serious crimes for which impunity cannot be tolerated, which would be a historical step forward.

It is worth highlighting that only individuals – not corporations – may be tried before the ICC. Unless the intention is to further amend the Rome Statute in order to introduce corporate liability as well, corporations themselves could not be the target of prosecutions before the ICC.

Senior corporate figures could, however, be tried for their role in their company causing grave damage to the environment. CEOs are expected to be particularly concerned by prosecutions for ecocide, in particular in view of the fact that the Rome Statute provides a broad notion of command responsibility, which is not expressly limited to the context of a military hierarchy and could therefore apply to a corporate hierarchy.

The relevant provision makes a 'superior' responsible for crimes committed by subordinates, provided that he/she knew or disregarded information that crimes were being committed; the crimes were within his/her effective responsibility and control; and he/she failed to take reasonable and necessary measures to prevent the crime or to report it to the authorities for investigation and prosecution.

Naturally, the best way to avoid investigation and prosecution would be to carefully assess and document the risk of damage to the environment posed by any new projects so that no offence is committed. Robust internal reporting mechanisms and training to empower managers to prevent acts which could constitute Ecocide may be considered. Ultimately, depending on the form of any new offence, difficult questions may arise about the circumstances in which a manager would be expected to report potential crimes to the relevant national authorities in order to avoid incurring their own personal responsibility. Further assessment must be deferred until details of the draft crimes are published.

The crime of Ecocide has been discussed for fifty years. The new campaign to incorporate Ecocide into the Rome Statute faces familiar procedural obstacles and, even if successful, may be delayed for many years.

Nonetheless, five years after the Paris agreement, awareness of the climate crisis continues to grow. Public outrage in reaction to environmental scandals involving oil dumping or water polluting by large corporations is consistently growing, and States are likely to find it increasingly difficult to be seen to oppose effective environmental protection measures.

As a result, it would not be a surprise to see new criminal offences being created and companies will have to be prepared to respond to them as the detail is announced.

*Aidan Ellis is a barrister at [Temple Garden Chambers](#).*