

Protecting the planet after Rio – the need for a crime of ecocide

Polly Higgins, Damien Short and Nigel South propose a way forward to deal with climate change and environmental deterioration



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In March 2012 the Organisation for Economic Co-operation and Development (OECD) issued a stark warning; carbon dioxide emissions from energy use are expected to grow by 70 percent in the next 38 years because of our dependence on fossil fuels. As a result, by 2100 the global average temperature will have increased between 3 and 6 degrees Celsius, in turn causing melting ice, rising sea levels and an increase in major storms. The

burden on Small Island States is quite literally unquantifiable (Ghina, 2003). Risk of injury or harm to human and non-human life is real and immediate. A wide range of human activities imperil the planet, our environment and other species. The World Wildlife Fund estimates that there has been a 30 per cent decline in wildlife since 1970. Problems of climate change and environmental damage may be approaching a tipping point according to the International Energy Agency, a scenario described in dramatic terms by one NASA climate scientist predicting drought, floods, economic crises and rising food prices – ‘If this sounds apocalyptic, it is’ says Hansen (2012).

Following the failures of Copenhagen and Rio there is a need for positive developments and new solutions to crimes and harms

affecting the environment. These need to be responded to through both informal and formal means of resolution and restoration, underpinned by an internationally applicable legal framework. Criminology has often played a crucial role in ensuring law is appropriate to its time and that entitlement to rights and justice is fair and comprehensive. It does so by questioning the ‘taken for granted’ nature of definitions and

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classifications of crime, deviance and harm, offering alternative proposals about where concern and regulation should be directed (Passas and Goodwin, 2004). A ‘green criminology’,

concerned with the creation of effective systems for the administration of environmental justice, might therefore support a proposal to introduce into international law new measures to address contemporary ecocidal trends (South, 2010).

‘Ecocide’

Higgins (2010; 2012) has campaigned for the introduction of a crime of Ecocide as a fifth international ‘Crime against Peace’ under a proposed amendment to the Rome Statute, the treaty that established the International Criminal Court and in force from 1 July 2002. As of 1 February 2012,

120 states are party to the statute. Among other things, the statute establishes the functions, jurisdiction and structure of the ICC but limits it to being able to investigate and prosecute only the core international crimes – known as the four crimes against peace (genocide, crimes against humanity, war crimes and the crime of aggression) where states are unable or unwilling to do so themselves. The proposal to add a crime of Ecocide starts with defining it in the following way: ‘Ecocide is 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 severely diminished’.

The case for making Ecocide the 5th international Crime against Peace is that this would create a pre-emptive, preventative and post-operative crime. Ecocide is preventative because it becomes a ‘think before you act’ law; action can be taken before the damage is done. In responding to damage after the event, restorative justice can be proffered as an alternative to imprisonment.

A law of Ecocide: 1. imposes an international and trans-boundary duty of care on any person or persons exercising a position of superior responsibility, without exemption, in either private or public capacity to prevent the risk of and/or

actual extensive damage to or destruction of or loss of ecosystem(s); 2. closes the gap between words and action; 3. imposes an international and trans-boundary duty of care on CEOs and directors of a business and/or any person who exercises rights over a given territory to ensure ecocide does not occur and creates a law with criminal sanctions when their actions, or the actions of others, create a risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s). Ecocide is a crime against peace because the risk of and/or actual extensive damage to or destruction of or loss of ecosystem(s) leads to: breaches against humanity, nature and future generations; heightened risk of conflict; diminution in the quality of life of all inhabitants of a given territory and of territories further afield; diminution in the health and well being of inhabitants, arising out of or leading to catastrophic disaster, food poverty, water pollution and shortages, and unnatural climate change.

What needs to be done?

An institutional framework for sustainable development and international environmental governance does not yet exist. To be fully effective three crucial steps are required: close the door to existing subsidies to dangerous industrial-related activity; prohibit activity that gives rise to mass damage and destruction; open the door to subsidies to innovation in another direction. A law of Ecocide closes the door to the carbon majors, industries that cause carbon dioxide emissions. The outcome will be a green economy and a new dominant economic paradigm.

This proposal is timely and clearly responds to the indicators of environmental harms described above as well as resonating with similar or related statements or proposals made in the past. But is the prospect of realising a law of ecocide simply too fanciful and naive? The answer would seem to be 'no' because enactment of such a proposal has been under serious consideration on several past

occasions. What is little known is that there has been over ten years of concerted debate, discussion and research concerning a law of Ecocide. In fact, a drafted Ecocide Convention already exists. Documents recently brought to light in the report *Ecocide is the Missing 5th Crime Against Peace* (Gauger et al., 2012) demonstrate that Ecocide was a 'crime' very much at the forefront of work in the relevant international policy circles between 1972 and 1996. For over a decade Ecocide was included as a Crime against Peace in extensive discussions and drafting undertaken by the United Nations until it was finally removed from the text that became known as the Rome Statute, which codified the Crimes against Peace.

A law of Ecocide would recognise that human-caused environmental destruction perpetrated outside of war-time is not usually a crime of clear intent. Of the ten countries that have already included Ecocide in their criminal penal codes, not one of them sets out a test of intent. Instead an international law of Ecocide should be a crime of strict liability for without it a legal loophole looms large – one which many corporations would exercise. Quite simply businesses would not have to be accountable; mass damage and destruction would be treated as collateral damage and the defence that 'we had no intent' would be heard time and again. Companies are unlikely to explicitly intend to commit ecocide: it is all too often a by-product of placing profit first and considering consequences later.

Our world has normalised the daily ecocide caused by business practices that are escalating at such a rate that melting ice in the arctic is a threat to life in small island states that are part of completely different continents across the world. Human-caused climate change has not been looked at through the lens of law. When we do that, a different perspective emerges and we see that we can literally change the rules. Two rules are proposed under one law of ecocide: 1. prohibit mass

damage, destruction or loss of ecosystems and 2. impose a legal duty of care upon persons in positions of superior responsibility.

Kill our planet and we kill ourselves: instead put in place a value system based on the health and well-being of all life and we will end the era of ecocide. When we prohibit activities that are damaging and destructive and hold to account in a criminal court of law those who make the decisions that cause ecocide, suddenly the rules that govern business change. This is a law that examines consequences – no longer can we make money out of activities that cause ecocide. Instead, protection of the interests of the wider Earth community becomes the over-riding consideration. The Earth's right to life is protected. ■

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