

ON THE EFFECTIVENESS OF RESTORATIVE JUSTICE IN THE ECOCIDE CRIME

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Abstract. This paper will review some concepts elaborated upon by restorative justice and reflect on how some of them can be put in with the context of the ecocide crime. It can be said that this crime, as the fifth most serious crime against global peace, is a new threat for a human's life. The crime of ecocide, especially its governmental and corporate types, severely damages and destroys the environment, and in addition to the threat it poses to environmental security, ecocide undermines the foundations of economic and social security. The author used a descriptive-analytical approach and library resources to study the process of invention of the concept of ecocide as well as its essence in restorative justice thought. The present study tries to show that restorative justice applied to ecocide crime is a justice that provides environmental revitalisation-reparation. This novel vision will attempt to provide judicial actors insights regarding the role played by restorative policies to restore or sustain ecological functioning in the promotion of human rights, survival of environment, and the diminishment of social suffering.

INTRODUCTION

Since the second half of 20th century, the issue of environment has found a universal dimension and has turned to be a permanent menace, a menace which seriously threatens whatever lives on planet. Nowadays, with the growth of the global warming issue and climate change, this menace has found a new dimension. This menace is going to make massive social changes in human life by force; a menace which puts natural and vital resources in danger. The crime of ecocide from the combination of the Greek word „oikos“ meaning ‘home, nature, and ecosystem’, and the Latin word „caedere“ meaning ‘to kill, to cut down, and to destroy’ to criminalize these destructive events (Kalkandelen, 2017, p. 334). It was as a result of the use of Agent Orange by the United States army in Vietnam that term emerged in the early 1970s: the use of such a powerful defoliant destroyed nearly 20 % of the Vietnamese forest. This has had disastrous health consequences for the population, such as cancer and serious birth defects, which are still present today. Ecocide is a burgeoning concept in the fields of criminal law and international criminal law. It can be defined as violating the environmental protective laws by legal people and more particularly, legal corporations.

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The main purpose of the imposition of sanctions against legal persons should be the restoration of the damage caused (Neyret, 2014, p.183). This search for restoration of damage, which is provided for in Article 8 of the Convention of the Council of Europe of 1998 on the protection of the environment through criminal law is one of the goals pursued by restorative justice. The need for an effective combat against ecocide can lead countries to adopt penal policy based upon the repressive tools. However, such a response should not be limited to tough penal and zero tolerance policies. In addition to these policies and measures, promoting reintegration and rehabilitation of the perpetrators for the purpose of preventing the recidivism seems to be important and necessary. Because of the inefficiency of the traditional criminal justice policies, and based on the lessons of criminological and victimological perspectives and doctrines, the restorative justice model in ecocide crimes seeks to repair the relationship between the perpetrator, the victim and society, to repair past harms and change relations, structures, practices, and institutions responsible for wrongs by making them more inclusive, fair, and less prone to generate harms in the future (Roderio, 2020, p. 1).

Rather, the appropriate criminal strategy for dealing with ecocide crimes is to design a combined criminal policy to use a combination of restorative and criminal measures, depending on the personality and status of the offenders. In this combined approach, in parallel, it is possible to apply restorative justice programs and punitive responses to ecocide at the same time (Strimelle, 2008, p.4). And in case of failure of the restorative response and „despairing of restorative justice“, the criminal process and the punitive response can be pursued. That's why, in recent years, the science of criminology (green criminology²) and criminal law, have paid specific attention towards environmental damages; damages which may put an end to civilization of human beings (Hamilton, 2021, p. 214). Restorative responses concerning environmental matters involves underlining the significance of the restoration of the interests adversely affected by the conduct of the offender. The primary question of this study is to seek whether current law order can identify restorative justice as an efficient instrument for reparation of the environment? In the first section of this study, the morphology of the fundamental concepts of the study, which is the crime of ecocide, will be worked upon. What is Ecocide? (1). Then the different victims of ecocide and their needs will be noted also, through analytic approach, the significance of application the restorative justice in ecocide crime and reparation the victims of ecocide will be tackled (2).

1. DEFINITION OF THE ECOCIDE

The idea of criminalization of ecocide as an international crime was raised in the 1970s for the first time. However, this green idea did not become an international criminal norm because of the opposition of some powerful governments, the resistance of large business enterprises, and preponderance of economic development discourse over environmental law discourse. This resulted in the impunity of ecocide perpetrators all around the world and in the continuation of the gradual

² Green criminology is a school of criminal justice that arose at the turn of the 21st century. The disciplines' core tenant is that environmentally damaging activities are responsible for causing extensive social harm in contemporary societies.

destruction of the earth and its vital resources. In order to put an end to this environmental impunity, it is imperative that the international community criminalize ecocide crime (in peacetime) as the most severe and most serious environmental crime and practice the restorative programs for repairing the environment damages. A common criminal policy should be adopted against it in order to prevent the occurrence of ecocide and to end the non-restoration of the victims and the impunity of the perpetrators. In 1990, Vietnam legislator established the definition of the crime of ecocide in its criminal code, according to which ecocide constitutes a crime against humanity when it results in the destruction of the natural environment, both in times of peace and in times of war.

By the way, it seems that the first disciplined definition of the crime of ecocide was made by Richard A. Falk and ecocide's treaty draft was prepared by his innovation. According to article 2 of draft convention against ecocide, ecocide has been defined. "In the present Convention, ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem:

- a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
- b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
- c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops;
- d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
- e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
- f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives" (Falk, 1973, p. 21).

The legal idea of international criminalization of ecocide failed at the time, but after fifty years, the result of green legal thought can be clearly observed in the legal definition of ecocide given by the „Independent Expert Panel for the Legal Definition of Ecocide“ on June 22, 2021, which provided a new and ecological definition of this crime for criminalization as the Fifth International Crime and included in the Statute of the International Criminal Court (1998); This definition marks the paradigm shift in the sphere of international criminal law and the transition from a anthropocentric to an eco-centric perspective. According to this definition:

„Article 8. 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."

Undoubtedly, the most tangible negative outcome of ecocide on societies and their sustainable development is its environmental outcome, since ecocide firstly is a crime against environment and nature, and destroys ecosystems. Therefore, ecocide threatens environmental safety or the safety of global ecology. According to what was mentioned, massive environmental damages, such as climate change, global warming, contamination of water, pouring of soil, pollution, decreasing the biodiversity of flora and fauna, inappropriate waste disposal especially dangerous and poisonous waste, are outcomes of ecocide or in another interpretation are the result of oppressive exploitation of planet earth (Mehra, et al., 2019, p. 12). Therefore, according to the commonplace definition of ecocide, which most of it includes severe, massive, and long-term damage to environment, we can estimate that if ecocide occurred, how much of environments and ecosystems would destruct (imagine the destruction of the forests of Vietnam due to the rampant of Orange Agent). A prominent example of ecocide, is "forest ecocide" or deforestation which mostly occurs in tropical regions and rainforests. Unpleasant phenomenon of deforestation threatens human health and leads to the destruction of environment, gradual destruction of natural resources, and animal and plants extinction. Ecocide can be divided into five different categories: air pollution, water pollution, deforestation, the spoiling of the land, and crimes against non-human species.

2. TOWARDS THE RESTORATIVE JUSTICE IN ECOCIDE CRIME

This part focuses on restorative Justice's ability to provide a platform for conceptualizing and achieving environmental reparation in post-ecocide time. However, the special nature of these crimes, which have high benefits and low risk, has made it impossible for recourse to criminal law to significantly reduce the rate of these crimes. Indeed, criminal justice alone is not able to respond effectively to such crimes. In fact, the restorative justice approach can have advantages over environmental crimes³ and ecocide.

2.1. The Victims of Ecocide

In order to apply restorative justice to the treatment of environmental crimes, it should be remembered that it is essential to first define the potential victims insofar as they must be at the

3 Despite different regulations in different countries, environmental crime usually includes behaviors such as the illegal taking or trading of non-human species (flora and fauna), pollution offences, and the transportation of banned or toxic substances (radioactive or hazardous material). Human and non-humans (like animals, plants and bio-systems) can be the victims, article 13 of the EU Lisbon Treaty recognizes animals as sentient beings (Varona, 2020, p. 667).

center of the restorative processes: the existence of an identifiable victim is the first of the essential ingredients for a fully restorative process to achieve its objectives (Zehr, 2012, p. 61). For this purpose, five categories of victims can be distinguished, some of which are divided into several sub-categories, and specifies that the nature of the victims depends on the nature and effects of the ecocide. The victims vary depending on whether it is, for example, air pollution, water pollution, deforestation, the spoiling of the land, and crimes against non-human species, etc. The first category is the category of „specific individuals“. It encompasses five sub-categories including indigenous peoples, people whose life or health is affected, people whose property is affected, and people whose „amenity options“ are affected (inability to appreciating a particular landscape, place or site). Ecocide offenses can affect each of these victims in a distinct way. The second category refers to “classes of people”. It refers to economically disadvantaged social groups. They are the social classes that can be found in a district, a city or a region more exposed than others to a certain pollution: „the damage caused by the commission of an ecocide can be to a „class of people“, such as residents of a particular area severely polluted by industrial works. The third category is the „community member“. It encompasses government and the community of citizens as they may be considered victims of ecocide damages that affect common natural resources, public property, common heritage, or the environment. Unlike the first category and the second category, the victims of the third category are not necessarily direct victims of a particular harm. The fourth category is the category of “future generations”. The victim status of future generations is taken into account in several cases: when the damage causes effects that accumulate over time; when the damage is “chronic, deferred or cumulative”; when the severity of the damage is such that it results in the loss of “non-renewable or irreplaceable” natural resources. Or when the repair of the ecocide damage caused by the offense is a long-term one and this involves “transferring the burden and cost of remediation to future generations. The fifth and last category concerns “the environment” (plants, animals, microorganisms, Inanimate objects and natural elements and inanimate elements of the ecosystem such as water, air, soil, non-human species, etc). In a logic of restorative justice, all victims must be able to participate in the justice process and take part in “victim-offender mediation” or the others restorative programs. The value of these processes is to involve victims, perpetrators and the community in a participatory approach to sentencing and restoring links (Engone Elloué, 2018, p. 254).

In cases where environmental crime affects natural persons, these may individually participate in restorative processes. When the damage affects groups of people, they could all participate individually, or they simply appoint representatives. If the damage affects the community, future generations or the non-human environment and biota, it is possible that a “surrogate victim” represents them. This surrogate victim may be a governmental or non-governmental organization (Brisman, South, 2018, p 66). Also, some NGO can represent the environment in the restorative programs. Regarding the terms of compensation for damage, they do not include measures of imprisonment. There are several restorative measures: apologies, compensation or compensation for harm, community service work, corrective measures that may influence the future behavior of the offender. Restorative justice empowers the victims of crime by giving them a voice and an active participatory role in rela-

tion to the harm caused to them by the offender's crime and the restoration or reparation of that harm or other restorative outcomes. The restorative process and outcome can lead to vindication for victims. Effective restorative outcomes can also lead to healing of the harm done to the victims (Preston, 2011, p. 20).

2.2. Application of the Restorative Justice in Ecocide

According to the Economic and Social Council of the United Nations, "restorative justice means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate all together actively in the resolution of matters arising from the crime, generally with the help of a facilitator". So that criminal sanctions become restorative sanctions to repair the damages of environment. It would also be appropriate, to protect the environment, public health and, more broadly, the planet, to grant civil society the right to issue a warning, coupled with the resulting protection. According to the Martin Wright, restorative justice seeks to balance the concerns of the victim and the community with the need to integrate the offender into society (Wright, 2010, p. 1). It seeks to assist the recovery of the victim and enable parties with a stake in the justice process to participate fruitfully in it (Ibidem). A process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. So, application of restorative justice to cover environmental crime, that criminal sanctions become corrective sanctions to repair the interest affected in the past and protect the interest concerned for the future (Cario, 2017, p. 325).

Restorative justice is only possible with the consent of the offender of the crime. This implies that the offender or a company (legal person) that caused a serious damage to the environment voluntarily accepts to pay compensation for all damages. Restorative mechanisms balance the competing goals of ending hostilities, promoting social stability, increasing democracy, moderating punitive justice to perpetrators and make them responsible, providing reparations to victims, establishing the rule of law, memorialising the past and seeking the truth (Deymié, 2018, p. 82). As such, restorative justice aspires to provide victims, perpetrators, and society as a whole with opportunities to change their relationship with past wrongs. The need for reparation of environment by restorative programs is commonly justified on various grounds: as a material and moral corrective by assisting victims; as a means of rehabilitation; as a means of providing aid and support of environment (apologise and help prevent recidivist). In ecocide crime repairing the harms done to victims can serve all of these functions. In fact, apology for past injustice with the compensation and payment meaningfully assist the victims affected by ecocide to rebuilding their lives. Even if the impacted habitat cannot be restored, restorative efforts could focus on preserving comparable habitats in other regions or provide special legal status to the flora and fauna that once inhabited the area. Such restorative measures could help ensure that these ecosystems and species do not go extinct or disappear.

A novel of restorative justice conferencing occurred in 2011 during a mock trial for the fictitious crime of 'ecocide'. A restorative justice conference was held following conviction in a mock 'ecocide' trial held in the Supreme Court of England and Wales. The trial was conducted based on evidence of

true events and publicly available documents before a real judge. An independent jury convicted the two offenders of ecocide (Hamilton, 2021, p. 113). A few months after conviction a restorative justice conference was held in which one of the offenders participated, the other offender electing not to participate (Ibidem). Participating in the restorative justice conference was also: an oil company chief sustainability officer; spokesperson for the birds damaged by the ecocide; spokesperson for future generations; spokesperson for wider humanity; spokesperson for the Earth; and representative of the indigenous people living in the area affected (Ibidem). The NGOs or associations representing the claims of victims are also can participate in the program, they possess to bring and contrast evidence. Innovative solutions were proposed during the restorative justice conference including: restoring the tar sands area (promoting biodiversity and proper ecosystem functioning), at the company's cost (i.e., returning victims to the state they would have been in had the wrongs never occurred); funding a university chair to research the law of ecocide; and setting up a working group to investigate funding alternative energy sources such as solar (Ibidem, p.113).

An environmental benefit of such measures is providing victims with things that money just cannot buy, such as access to ancestral lands, projects to repair the damaged ecosystem and restore the habitat at least, close as possible to its prior functioning before transferring it back to the rightful owners. The innovative solutions were only made possible through the dialogue restorative justice programs. The sentencing judge can take the restorative justice programs into account as a mitigating factor and hand down a suspending sentence which would allow the fulfilment of the commitments made during the restorative programs. Also, it would be efficient to establish the compensation fund for the environment and public health. This fund could be financed by monetary fines imposed in cases of ecocide; monies paid by companies in compensation for any irreversible damage caused to the environment. In the future, the fund may finance projects for the protection of the environment, human health and more broadly, the safety of the planet (Neyret, 2016, p. 128).

CONCLUSIONS

According to the Rome Statute there are four core international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. However, there is another widespread crime which deserves the same amount of attention: the crime of ecocide. The offenders must be held accountable under international law and ecocide should be adopted as an International Crime (the maintenance, preservation, and restoration of ecological). In October 2016, a citizen's tribunal took place in The Hague to debate ecocide \ in relation to the Monsanto herbicides and, even without binding normative status, the decision of this tribunal concluded that: [with the need to] clearly assert the protection of the environment and establish the crime of ecocide, it seems that Monsanto knew how its products would be used and had information on the consequences for human health and the environment. The Tribunal is of the view that, would the crime of Ecocide be added in international law, the reported facts could fall within the jurisdiction of the International Criminal Court. Just as the extermination of human groups is a crime against humanity and criminalized as „genocide“ un-

der international law, the destruction of natural ecosystem(s) is a crime against humanity and must be criminalized under ecocide by the United Nations in the form of a new international treaty : to guarantee the right to a good environment and development of a coherent and effective criminal policy against ecocide in four local, national, regional, and international levels to protect the planet from severe, widespread, or long-term ecological harms.

Ecocide as the most important and most severe kind of environmental damage will receive great attention. Indeed, criminal justice alone is not able to respond effectively to such crimes. The results of restorative programs in ecocide are to repair by issuing a public apology or by means of an assistance program providing aid to the affected population or a visit of the site that was affected by the damage, the funding of measures aimed at repairing local damages, with the participation of all those parties having been affected by the crime (such as planting a tree or cleaning up green spaces, to commemorate the injustice of ecocide). Restorative justice applied to ecocide crime is a justice that provides reparation which requires taking into account all the adverse effects that the conduct in question has had on the community concerned. Article 6 of Ecocide Convention mentioned that States Parties should adopt such measures as may be necessary to impose effective, proportionate and dissuasive sanctions on the natural and legal persons convicted for the crime of ecocide and ensure restoration of damage to the environment and compensation for victims. So, restorative justice includes 'correction' ('correcting the harm done') or 'restoration' ('restoring the status quo'): is that returning things to their prior condition (such as habitat preservation, environmental restoration, and ecological sustainability).

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