EFFACE-ing the Future: The Time is Now

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The Problem

Ecocide

The destruction of the environment in ways that differentially, unequally and universally affect humans, eco-systems, and nonhuman species can be conceptualised criminologically as a specific type of crime. The concept of ecocide provides an example of this harm-defining process. Ecocide has been defined as 'the extensive 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' (Higgins, 2012: 3). Where this occurs as a result of human agency, then it is purported that a crime against humanity has occurred.

What is What?

Ecocide is NOT the same as **homicide**;

even though foreknowledge of consequences combined with anthropocentric causation imply preventable death

Ecocide is NOT the same as **suicide**;

even though the agents of harm are themselves included as victims of harm

Ecocide is NOT the same as **genocide**;

even though there are clear similarities in terms of disregard by perpetrators of the magnitude of the harm and disrespect of specific collectivities/victims

Why Ecocide, Why Now?

Ecocide describes an attempt to criminalise human activities that destroy and diminish the wellbeing and health of ecosystems and species within these, including humans.

Climate change and the gross exploitation of natural resources are leading to our general demise – hence increasing the need for just such a crime.

From an eco-justice perspective, ecocide involves transgressions that violate the principles and central constituent elements of environmental justice, ecological justice and species justice.

Eco-Justice and Victims

- ***Environment justice*** – environmental rights are seen as an extension of human or social rights so as to enhance the quality of human life, now and into the future: **the victim is human**
- ***Ecological justice*** – human beings are merely one component of complex ecosystems that should be preserved for their own sake: **the victim is specific environments**
- ***Species justice*** – animals have an intrinsic right to not suffer abuse, and plants the degradation of habitat to the extent that threatens biodiversity loss: **the victim is animals and plants**

Environmental Justice

Who is victimised and why:

Differential victimisation/Unequal victimisation

Universal victimisation

Examples:

Global warming

Bhopal, BP, Total

Responses:

Victim compensation

Civil penalties, Prosecution of companies

Activism:

Toxic Action Network, Environmental Justice groups

Ecological Justice

Which environments are destroyed and why:

Selective destruction

Selective protection

Examples:

Land clearance

National parks, Marine sanctuaries

Responses:

Conservation and Land Management

Banning of logging in old growth forests

Activism:

Earth First, Greenpeace, Sierra Club, FOE

Species Justice

Which species are threatened and why:

Non-valued species

Favoured species

Examples:

Factory farms

Laboratory animals

Responses:

Animal protection laws

Banning of cage production and live export trade

Activism:

Sea Shepherd, Animal Liberation, World Wildlife Fund

Climate Change

- Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased
- Each of the last three decades has been successively warmer at the Earth's surface than any preceding decade since 1850
- Ocean warming dominates the increase in energy stored in the climate system, accounting for more than 90% of the energy accumulated between 1971 and 2010
- Over the last two decades, the Greenland and Antarctic ice sheets have been losing mass, glaciers have continued to shrink almost worldwide, and Arctic sea ice and Northern Hemisphere spring snow cover have continued to decrease in extent
- The rate of sea level rise since the mid-19th century has been larger than the mean rate during the previous two millennia.

Effects of Global Warming

- 2015 was the warmest year on record, by the widest margin on record
- All sources in all countries reveal a steadily warming world, with every year since 2000 among the 20 hottest years
- There is presently a global redistribution of the planet's species, as species shift towards the poles to keep pace with the environment
- Changes in land, sea and air populations as temperatures change and migration patterns are transformed
- Those that don't move are dying – such as coral in Great Barrier Reef and the giant kelp forest in Tasmania
- Rapid change is also a factor – a 'marine heatwave' increases fish mortalities

The Colour of Crime

- ‘brown’ issues tend to be defined in terms of urban life and pollution (e.g., air quality);
- ‘green’ issues mainly relate to wilderness areas and conservation matters (e.g., logging practices); and
- ‘white’ issues refer to science laboratories and the impact of new technologies (e.g., genetically modified organisms).

Geographical Spaces

- local and regional ecologies (e.g., biotic and a-biotic characteristics)
- type of species (e.g., specific plant and animal species)
- topography and land form (e.g., mountains, valleys)
- flows and connections within and between areas (e.g., ocean currents, air currents, rivers and streams)
- climatic conditions (e.g., monsoonal rains, hours of sunlight)

Political Economic Spaces

- local and regional industries (e.g., agriculture, fishing, mining, tourism)
- role of local and transnational companies (e.g., business interests)
- role of local and national state viz regulation and governance (e.g., neoliberal policy, fiscal constraints)
- instrumental and intrinsic valuing of land, air, water, energy (e.g., commodification and profit, communal access and use)
- mechanisms for transference (e.g., technology, free trade zones, shipping)

Globalising Spaces

- integration of local, regional, national, international, transnational levels
- transnational drivers (e.g., systemic imperatives of global capitalism)
- transnational actors (e.g., corporations, World Trade Organisation)
- transnational activists (e.g., NGOs, governments in alliance)
- global networks (e.g., social networking, environmental law enforcement agencies)

The Response

Actions for Change

- Concepts such as human rights, ecological citizenship and the global commons can be developed in ways that assert the primacy of **'climate justice'** over narrow sectional interests
- There is a need for **strong action within civil society** to progress a more radical social change agenda
- Criminologists (among others) must insist upon the **protection of democratic spaces** within which popular struggles can occur

Networking

Horizontal – connections that bring together EPA, police, customs and other agency personnel

Vertical – connections that bring together national representatives from different parts of the world, including UN

- Interpol
- Europol
- International Network of Environmental Compliance and Enforcement [INECE]

Harmonisation

Cross-jurisdictional interventions to deal with cross-jurisdictional problems

- Legislation
- Standards
- Training
- Coordination
- Official and unofficial networks

Responding to Environmental Harm

Socio-Legal Approach

- Emphasis on use of criminal law as presently constituted.

Regulatory Approach

- Emphasis on social regulation, using many different means, as the key mechanism to prevent and curtail environmental harm.

Social Action Approach

- Emphasis on need for fundamental social change, and to challenge the hegemony of transnational capital and dominant nation-states in setting the environmental agenda.

Directions

- Targeting specific entities (e.g., compensation suits involving Ecuador vs Chevron) and particular industries (e.g., divestment and 'keep it in the ground' movements)

- Appeals to ecocide as reframing of carbon decisions [not 'economy' versus 'ecology', or 'jobs' versus 'environment'] – there are no winners, only losers

- Democratisation movements in support of the public interest (e.g., publicly owned and managed water in Bolivia versus privatisation), and against state-corporate abuse of the public interest (e.g., pollution of water in Flint, Michigan)

Law and Legal Reform

Short-Term

- Innovative application of existing laws

e.g., public interest, human rights

- Strengthen protocols within existing Conventions

e.g., transnational organised crime

Medium-Term

- Strengthen acknowledgement of victims' rights and interests

e.g., Environmental Victims Charter

- Legitimise NGO status vis-à-vis legal standing generally, and acting on behalf of environmental victims

e.g., "surrogate victims"

Long-Term

- Systematic criminalisation of environmental harm

e.g., education combined with urgency for action

- Establishment of new international convention on environmental crime

e.g., defining environmental crime, including ecocide

Environmental Law Enforcement

Short-Term

- Strengthen collaborative networks involving key environmental law enforcement agencies, NGOs and academics

e.g., regular meetings, workshops and conferences, sharing of information, provision of training sessions and training materials

- Establish environmental crime task forces to tackle specific types of environmental crime

e.g., key government agencies across relevant operational areas

Medium-Term

- Establish National Environmental Security Taskforces

e.g., permanent operational bodies at the national level

- Strengthen research and intervention capacity in non-government sectors

e.g., research institutes, Interpol internships, NGO exchanges

Long-Term

- Establishment of international eco-police, with dedicated specialist skills and capacities to investigate and prosecute environmental crime

e.g., international “green police” service

Courts and Adjudication

Short-Term

- Expansion of specialist environmental courts and tribunals

e.g., NSW Land and Environment Court

- Internationalisation of judicial training programmes

e.g., UK magistrates training

Medium-Term

- Special court of International Criminal Court

e.g., operationalisation of existing powers

- Systematic review of sanctions and remedies

e.g., restorative justice, reparative justice

Long-Term

- Establishment of International Environmental Court

e.g., equivalent status to International Criminal Court

- Integrated Eco-Justice System

e.g., protection of victim rights, global eco-policing, effective sanctions and remedies

Social Action

Short-Term

- Rhetorical and symbolic construction of climate change as "crime"

e.g., scientists speaking out

- Carbon emission protests and renewable energy advocacy

e.g., anti-coal marches and demonstrations

Medium-Term

- Collaboration with state environmental law enforcement agencies

e.g., participation in National Environmental Security Taskforces

- Further internationalisation of and collaboration across NGO activist networks

e.g., climate justice alliances

- **Long-Term**
- Establishment of permanent environmental justice people's tribunal

e.g., regular global events

- Ongoing critical intervention around state policies and international conventions

e.g., climate change mobilisations

Repairing the Harm

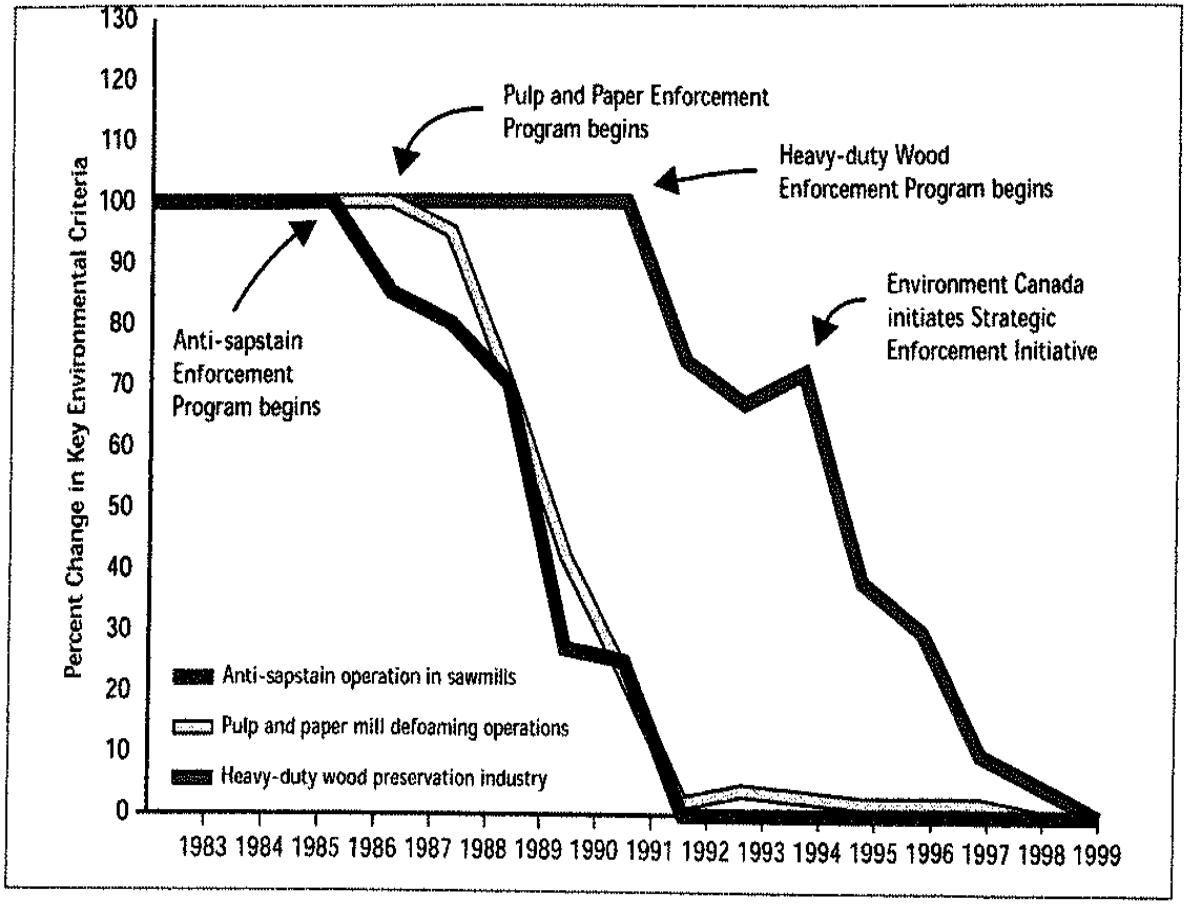
Non-Specialist Courts

- Environmental crime is not a “real” crime
- Devolving of environmental crimes to lower courts
- Poor judicial knowledge about environmental crimes
- Few case precedents due to low prosecution rates
- Placing a low ‘value’ on environmental crimes and harms
- Few well trained people on the ground

Use the ‘Big Stick’

- To be effective those in charge of regulation and enforcement must be willing to utilise the ‘big stick’ and to monitor compliance systematically and diligently. Consider for example, the impact of enforcement activities on compliance with the Canadian Environmental Protection Act and Canadian Fisheries Act amongst the anti-sapstain industry, pulp and paper industry, and the heavy-duty wood preservation industry.This study demonstrated that intensive enforcement is directly correlated with effective regulation and dramatic change in the harmful activity
- In this case, persistent and continuous inspections, accompanied by substantive operational powers (including use of criminal sanctions), led to rapid positive changes. In the instance of the federal Fraser River Action Plan, this strategy meant that discharges of acutely lethal effluent immediately fell off, and there was a 94 per cent reduction in effluent levels from 1991 to 1998.

Figure 1: Normalized Graphs of Responses by Three British Columbia Forest Sector Industries to Environmental Law Enforcement Programs



Source: Peter K. Krahn. *Enforcement vs. Voluntary Compliance: An Examination of the Strategic Enforcement Initiatives Implemented by the Pacific and Yukon Regional Office of Environment Canada. 1983 to 1998.* Regional Program Report 98-02. 9 March 1998.

Source: Commission for Environmental Cooperation, 2001.

Repairing Harm

Restorative Justice

- Victims and Offenders and Communities: mutual membership
- Duality of responsibility: exercising agency
- Giving and Forgiving: achieving redemption

Reparative Justice

- Perpetrators as distinctive: the non-human entity
- Dynamics of corporate criminality: chronic recidivism
- Punishment and Power: making things right

Orders aimed at restoration/ preventing a recurrence of the offence

- Clean up orders
- Compensation orders
- Investigation costs orders (order the offender to pay costs and expenses incurred during the investigation of an offence)
- Monetary benefits penalty orders (order the offender to pay a sum up to the amount of the monetary benefit derived from the offence)
- Environmental audit orders (order the offender to carry out a specified environmental audit of activities carried on by the offender)

Orders aimed at punishing or deterring offenders

- Fines/custodial sentence
- Environmental service orders (order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit)
- Publication orders (order the offender to publish details of the offence and the orders made by the court in, for example, a newspaper and/or in a company's Annual Report)

Williams [2007] NSWLEC 56

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to picking plants that were part of an Endangered Ecological Community [EEC], through the act of mass clearing and mulching 2.9 hectares. The clearing of the land related to preparing the way for subdivision consent by undermining the status of the area as worthy of conservation.
- The aggregate fine imposed by the court was **$330,000**, plus prosecutors costs of **$85,000**. The defendant was also ordered to undertake **400 hours of community service**. There are clear concerns here to express general and specific deterrence, and if 'time is money' the scale of the penalty is considerable.
- The reparative element lies in the fact that the penalty fine was to be paid into the National Parks and Wildlife Fund. It also is relevant that, rather than imprisonment, the court determined that the defendant was a suitable person for community service work (although, in this instance, the content of this was not specified, but subject to the control and authority of the Probation and Parole Service).

Fish and Orogen Pty Ltd [2010] NSWLEC 144

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to by act or omission causing damage to the habitat, not being critical habitat, of a threatened species knowing the land concerned was habitat of that kind, through the act of felling vegetation and habitat of the koala.
- The company Orogen was **fined $10,000** and Fish the sum of **$5,000**, plus **prosecutors costs** and both were subjected to an **Environmental Service Order**, and a **Publication Order**. In this instance, the defendants submitted that there was adverse impact on professional reputation and their professional embarrassment resulting from the offence, and this constituted *extra-curial punishment*.
- The reparative element lies in orders to conduct substantial parts of a *Koala habitat mapping project* (as spelled out in a submitted exhibit put forward by the defendants). The Targetted Koala Habitat Utilisation Assessment Project cost $17,400 to prepare, and was accepted by the court as the basis for a work order.

Reprobation – Publication order

- *Environmental consultant convicted of causing damage to koala habitat at Taylors Beach, Port Stephens*
- *Orogen Pty Ltd and its director Anthony Fish have been convicted in the Land and Environment Court of causing damage to habitat of threatened species, namely the Koala, knowing that the land concerned was habitat of that kind. Orogen and Mr Fish provided a developer with advice on what vegetation could be lawfully cleared on a property but failed to advise that damaging the habitat of the Koala was unlawful under the National Parks andWildlife Act. Both Orogen and Mr Fish were aware that the property contained habitat of the Koala and Koala movement corridors.Vegetation containing Koala habitat was subsequently cleared.The offences occurred at a proposed development site at 60 Port Stephens Drive, Taylors Beach, at the intersection of Sky Close.*
- *Orogen and Mr Fish both pleaded guilty. Orogen and Mr Fish were fined a total of $15,000.The company was also ordered to pay the prosecutor's costs and investigation expenses.*
- *This advertisement was placed by order of the Land and Environment Court and paid for by Orogen Pty Ltd and Mr Fish.*

Harbour Hardwoods Sales Pty Ltd [2012] NSWLEC 52

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to picked plants of an endangered species and damage vegetation on in in land reserved under the Act, and involved logging operations for a log haulage route in which 13 Newry Golden Wattle were killed and 8 damaged.
- The defendant was fined **$45,000** on one offence and **$40,000** on another, and ordered to pay **prosecutor's costs of $26,000**. A **publication order** was issued for the Coffs Harbour Advocate and the Bellinger Courier Sun. There was also imposition of **environmental service orders** to the effect that the defendant was ordered to design and erect strainer posts and a gate in a specific location with the sign saying 'Trail closed for Rehabilitation'. The defendant was also ordered to plan and carry out works for the mitigation and/or prevention of soil erosion in Jaaningga Nature Reserve caused by the defendant's clearing.

Rinaldo (Nino) Lani [2012] NSWLEC 115

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to by act or omission causing damage to the habitat, not being critical habitat, of a threatened species knowing the land concerned was habitat of that kind, through the act of clearing habitat of the squirrel glider.
- The defendant was **fined $20,000**, ordered to pay **75% of prosecutor's costs**, and subject to a **publication order**. The need for specific deterrence was generated by the defendant's conduct that indicated an attitude of disregard towards the system of environment protection legislation and planning control. In the words of the court [56], 'they need to be taught a lesson which will, hopefully, discourage them from like conduct in the future'.
- There were two reparative elements in this case. First, the penalty fine was to be paid into the National Parks and Wildlife Fund for the *specific purpose* of mapping and study of the squirrel glider populations in Booti Booti National Park and any Crown land or council controlled land in the Foster area along with the study of the connectivity of these areas within the urban landscape of the Foster area.

Repair Your Harm

- *(5) Within three weeks of the date of these orders, the defendant, pursuant to section 200(1)(d) of the National Parks and Wildlife Act, shall retain consultants with the following expertise, being consultants acceptable to the prosecutor:*

  (a) a bush regenerator;

  (b) an ecologist; and

  (c) an expert with special knowledge of the threatened species squirrel glider (Petaurus norfolcensis).
- *(6) Within 11 weeks of the date of these orders, the defendant shall prepare a remediation plan for Area B in the map annexed to these orders relating to the land at lot 22, deposited plan 843479 located near Southern Parkway, Foster, to include the following:*

  (a) regeneration of cleared vegetation;

  (b) a timeframe for all actions proposed as part of the remediation plan implementation; and

  (c) any other actions the consultants deem to be required to remediate the site.
- *(7) Within 12 weeks of the date of these orders the defendant shall provide the remediation plan as produced in accordance with Order (6) above to the prosecutor.*
- *(8) No later than 20 weeks after the date of these orders the defendant shall cause the consultants to carry out all works required by the remediation plan and in accordance with the time frame under the remediation plan.*
- *(9) The defendant shall provide copies to the prosecutor of all retainers and instructions given to the consultants at the same time as they are given to the consultants.*
- *(10) In the event that any or all of the consultants are unable to continue to act pursuant to these orders, they may be replaced by the defendant engaging a replacement consultant acceptable to the prosecutor.*
- *(11) Schedule 7 to the Uniform Civil Procedure Rules 2005 is directed to apply to the performance of the duties of the consultants as if they are parties' single expert witness in these proceedings.*
- *(12) Notwithstanding Order (11) above, the defendant shall pay the professional fees, costs and expenses of the consultants.*

Vaccount Pty Ltd t/as Tableland Timbers [2011] NSWLEC 202

- The defendant was convicted of offences in violation of the *National Parks and Wildlife Act 1974 (NSW)*. This pertained to the unlawful harvest of trees in a national park, and involved the felling of 503 trees.
- The defendant was **fined $73,000**, and ordered to pay prosecutor's costs and disbursements of **$47,100** and prosecutor's investigation costs to the amount of **$2,900**. The defendant was ordered to pay a *specific recipient*, the Northern Rivers Catchment Management Authority, the fine amount to be used for general environmental purposes. Notably, all future public references by Vaccount Pty Ltd t/as Timberlands Timbers to the payment above shall be accompanied by the following passage:
- **"The contribution by Vaccount Pty Ltd, trading as Timberland Timbers, to the Northern Rivers Catchment Management Authority is part of a penalty imposed on it by the Land and Environment Court of NSW after it was convicted of damaging reserve land, being an offence against s 156A of the *National Parks and Wildlife Act 1974*".**

Summary

- **Scale** of fine in particular instances
- To what **purpose** the fine is put:
  - General environmental fund
  - Specific environmental projects
- **Publication** orders and reprobation
- **Community service** oriented at offender punishment
- **Environmental service orders** oriented toward
  - Specific environmental projects reparation
  - Specific types of environmental remediation

Reparative Justice

Reparative justice, with an emphasis on repairing harm within a generally more punitive context, is more appropriate and effective in dealing with corporate crime than traditional sanctioning responses. Repairing harm should not be conflated with 'restorative justice' *per se*. This is important, since 'repairing harm' can be *imposed* upon offenders (especially corporate offenders) without necessarily involving consensual agreement and/or 'conferencing' methods of negotiation. Company personnel, including senior managers, change. But to change company practices, especially those that pertain to the economic profit margin, requires regulatory and enforcement systems that penalise and sanction in ways that are tailored to the size and activities of the corporation.

The End?

The Thylacine is extinct – because of us.

The Tasmanian Devil is under threat – because of us.

The world is heating up.

Our children are at risk.

The task ahead is clear.


PREVENT
THE
DESTRUCTION
OF OUR PLANET
END ECOCIDE!