

## PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW. FINAL RECOMMENDATIONS

*By Jose Luis de la Cuesta \**

Organised by the International Association of Penal Law (AIDP) in collaboration with the Romanian Association of Penal Sciences, the Legal Research Institute of the Romanian Academy of Sciences and the Ecological University of Bucharest, the Second AIDP World Conference on The Protection of the Environment through Criminal Law was held in Bucharest (May 18-20, 2016).

This was not the first time that the protection of the environment through criminal law was addressed by AIDP. On the contrary, following its tradition of tackling the new major social challenges and including them amongst its priority scientific concerns, AIDP had previously produced several documents and recommendations on the issue. In this sense, on the occasion of the Twelfth International Congress of Penal Law (Hamburg, 16 – 22 September 1979), Section II studied “The Protection of Environment through Penal Law”; and Section I of the Fifteenth International Congress of Penal Law (Rio de Janeiro, 4 – 10 September 1994) worked on “Crimes against the Environment – General Part”. AIDP also presented several proposals in this field to the UN Congress held in Bahia (Brazil) in 2010.

The fact that environmental criminality is becoming more and more relevant, having already reached the fourth position amongst international illicit activities (after drug trafficking, counterfeiting, and human trafficking), together with the important developments that have taken place since the origins of environmental criminal law in the 1970s, reinforced the idea of organising an international activity in this field again in this decade.

Recent international efforts<sup>831</sup> also supported this decision, as they show that the protection of the environment is becoming a part of the human rights protection for which States have positive duties, not only concerning the elaboration of an effective domestic legal system to protect the environment through criminal law but also concerning the contribution to the criminal law protection of the environment at an international level.

There are still countries that rely on broad (vague) definitions and that have not introduced in their legal systems complementary sanctions and adequate elements to assure a proper

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\* Honorary President AIDP. Director of the Basque Institute of Criminology (University of the Basque Country, Spain)(GICCAS IT-585-13).

<sup>831</sup> See f.i. the agreement of the UN Commission on Crime Prevention and Criminal Justice in April 2013 regarding the consideration of illegal wildlife trade as a ‘serious crime’ (Article 2b).

environmental enforcement. However, most policy makers are increasingly conscious of the challenges to be met. They are also aware of the limits of the criminal justice system in addressing environmental crime since the criminal protection of the environment finds itself in the midst of a gradual effort, where criminal law stands as a final solution that must be adequate and proportional to the gravity of the attack against the protected interest and to the culpability of offenders as well.

The extended implementation deficit shown by most criminological studies is also to be taken into account in order to promote ways of investigation and prosecution that assure a certain success. In this sense, promoting regular scientific quantitative analyses and the establishment of good effective and harmonised systems of data collection on inspections, monitoring and the remedies applied are crucial in order to get a clearer picture of the (flows of) environmental crimes and to assure a better environmental criminal policy.

The main recommendations that resulted from the contributions and academic debates in the World Conference can be summarized as follows:

### **A multi-tiered enforcement approach**

1. The ideal enforcement scheme regarding environmental violations should combine the following in a multi-tiered approach:
  - a. administrative enforcement for violations that are less serious and do not require judicial oversight.
  - b. civil enforcement where the law is too complex for punitive enforcement or where injunctive relief is necessary; and
  - c. criminal enforcement for the most serious violations.
2. The legislative system aiming at the protection of the environment through criminal law should combine different provisions aiming at:
  - a. criminalizing the (abstract and concrete) endangerment of ecological values in violation of administrative obligations; simple disobedience of administrative rules should not however constitute a criminal offence in the absence of any potential or at least hypothetical endangerment;
  - b. as well as punishing, as an independent crime, the production of harmful results, irrespective of the violation of administrative obligations.
3. A multi-tiered enforcement approach to protect the environment would be enriched by evidence-based empirical studies from other related disciplines that tackle environmental crime such as environmental sciences and (green) criminology.

## Protection of the environment through criminal Law at the domestic level

### *Environmental offences*

4. Environmental crimes should receive a prominent place in the legislative framework, recognizing the importance of the protection of ecological values through criminal law either in the penal code or in a special environmental statute.
5. The legal definition of environmental crime should balance the need to encompass environmental endangerment and harm in a sufficient manner with the need to respect general principles of criminal law such as the legality and more specifically the *lex certa* principle.
6. In many legal systems, there are not significant distinctions between the acts that could result in criminal enforcement and those that could result in civil or administrative enforcement. It would be preferable that legislations provide greater clarity on which violations are criminal.

In this sense, where prosecutorial discretion is admitted, ensuring that criminal law is reserved for the most serious violations could be achieved by requiring that one or more of the following factors are present to warrant criminal enforcement: (a) significant environmental or public health danger or harm; (b) deceptive or misleading conduct; (c) operating in a clandestine way, i.e. fully outside the regulatory system; and/or (d) repetitive or continuous violations.

The use of these specific factors as a matter of prosecutorial discretion or to distinguish at the legislative level criminal and administrative infractions would be optimal.

7. In any case, the more serious and concrete the danger and harm to the environment and/or human health resulting from environmental crime, the less influence administrative law should have as a condition for criminal liability.

### *Sanctions*

8. A “toolbox” of effective penalties for environmental crime should be made available, including civil and administrative sanctions (not only fines).
9. These penalties should be dissuasive and proportionate, and they should guarantee that mutual legal assistance treaties and extradition can be applied to serious violations of the environment.
10. Complementary sanctions aiming at the restoration of harm done in the past and the prevention of future harm should be envisaged in legislation and applied in practice as well.

## Enforcement and prosecution

11. "Smart" enforcement tools, based, *inter alia*, on *ex ante* risk assessment and *ex post* evidence-based targeting, should be used to increase the effectiveness of enforcement efforts.
12. The establishment of databases on environmental offences and law enforcement performances would be very useful in order to ensure the predictability of the criminal repression of environmental offenses. Therefore, enforcement authorities should be obliged to collect and publish data adequately on the number (and quality) of inspections, violations and prosecutions as well as on the number of imposed remedies for environmental crime.
13. In addition to criminal, civil and administrative enforcement by the government, private citizens or environmental groups should be authorized to seek civil penalties, remedies and injunctive relief if the government fails to act to address environmental violations.
14. Citizens' lawsuits should be equally allowed under environmental laws to pursue those violations that the government does not address.
15. NGOs working in the field of environmental protection should be authorised to promote legal action in front of the court, with rights and obligations equivalent to those laid down in national criminal procedural laws for injured parties.
16. Expert evidence is crucial in prosecuting and sanctioning environmental crimes. The high technical and factual complexity of this expertise has an impact upon its costs. High costs on gathering evidence acts as a deterrent in launching criminal proceedings. In overcoming this barrier, agreements with specialized agencies or scientific institutions should be promoted. Increasing the involvement of NGOs in criminal proceedings may also contribute to the gathering of evidence.
17. Reliability of expert evidence is a major problem in the assessment of evidence in every criminal procedure. However, due to the high technical complexity of environmental crimes, this problem is intensified. General criteria /guidelines on assessing environmental evidence would be useful.
18. The establishment of judicial bodies, as well as investigation and prosecution units, specialized in the repression of environmental crime, in addition to the existing specialists empowered to carry out examination and apply administrative sanctions and also to refer the matter to the prosecution when they find criminal deeds, is to be particularly recommended.
19. The use of special investigation techniques is needed for the investigation of environmental crimes within organized crime structures. The assessment of the proportionality test for granting the use of special investigation techniques should not be exclusively based on the statutory penalty provided for the environmental crime.

20. Criminal prosecution should not disregard the reparative aspect of the environmental criminal response.

### **Individuals and legal entities**

21. Both, corporations and individuals should be held accountable for criminal violations of environmental laws in an independent and autonomous way.

Prosecuting corporations is necessary to address the corporate culture and organisational defects that give rise to violations and to ensure that corporate management will be involved in addressing criminal misconduct by the company.

Prosecuting individuals is necessary to address individual misconduct and to provide the strongest deterrent to prevent future misconduct, including the possibility of imprisonment in the most serious cases.

22. Prosecutors should file criminal charges against individual corporate officers whenever possible under the governing law and, to the extent supported by evidence, at the highest possible levels within the corporation. The adoption of the responsible corporate officer doctrine is recommended. Such doctrine provides that corporate officials have a duty to act to prevent violations if they know that they are taking place and that they have the ability, based on their position within the corporation, to prevent further violations.
23. Corporations should be liable for criminal prosecution for the acts (a) of their employees or agents; (b) committed within the scope of the employment or agency; and (c) committed for the benefit of the corporation. Where companies voluntarily disclose violations and/or cooperate during criminal investigations, they should generally receive leniency but not exoneration for their crimes.

### **Jurisdiction**

24. States should extend their territorial jurisdiction on the basis of the effect theory at least for certain environmental offences (such as e.g. ship pollution or trans-border radiation).
25. In order to prevent and tackle delocalization by the corporation concerned to regions where lower environmental standards apply, it is recommended that States prescribe and, where opportune, enforce extraterritorial jurisdiction for environmental offences committed for the benefit of multinational enterprises that have their head office (or a relevant establishment effectively contributing to the global goals of the multinational enterprise) on their territory.
26. States should expect corporations under their jurisdiction to introduce transparent compliance mechanisms to prevent environmental offences being committed by subcontractors or suppliers in their production and supply chain, even if the latter are

located abroad, and they should prescribe and enforce jurisdiction upon them for environmental offences committed by the latter.

27. It is recommended that States consider introducing, in compliance with WTO law, import bans or restrictions for goods, products or supplies that have been produced outside their territory in violation of environmental standards or norms applicable in their territory.

### **Recommendations at the international level**

28. Due to the international dimension of environmental crimes and harms, it is recommended that States connect international judicial cooperation in criminal matters with environmental protection by giving competence to the existing authorities (or by creating specialized judicial units), involving in their strategies the civil society (specialized NGOs, reliable business actors) and assuring the respect for the rights of suspects and victims in the international judicial cooperation mechanisms.
29. For these purposes it would be very useful to achieve a complete evaluation of the existing international instruments in order to define already existing obligations of the Member States of these conventions; it is also recommended to take stock of national legislations concerning penal law provisions on the protection of environment in order to prepare a model legislation which ensures a minimum standard of prosecution of criminal acts in this field and to prevent the existence of safe havens impeding an effective prosecution of the most serious crimes against the environment.
30. It is recommended that States and the international community elaborate a Suppression Treaty about serious violations to ecosystems and criminal justice in order to ensure the punishment of the most serious attacks against the environment that should be considered international crimes.
31. The international community and states should develop a pro-active criminal policy strategy in order to increase intelligence-led policing related to potential serious violations of ecosystems.
32. Incrimination of environmental war crimes in non-international armed conflicts and introducing universal jurisdiction on environmental war crimes are to be recommended.
33. Prosecution of ecocides by the ICC should equally be strengthened.