

SUBSTITUTE TO BILL NO. 2,787/2019

Defines the crime of ecocide, inserting it as article 29 of Section I of Chapter V of Law No. 9,605/98, renumbering the others.

NATIONAL CONGRESS decides:

Art. 1. Section I of Chapter V of Law nº 9.605, of February 12th, 1998 (Environmental Crimes Law), shall henceforth take effect with the following wording.

"CHAPTER V CRIMES AGAINST THE ENVIRONMENT

Section I

Ecocide

Article 29. Performing illegal or wanton acts with the knowledge that they generate a substantial probability of serious and widespread or long-term damage to the environment.

- a. "Wanton" means reckless imprudence about damage that is clearly excessive in relation to the social and economic benefits anticipated in an activity;
- b. "Severe" means harm that entails very serious adverse change, disturbance, or damage to any element of the environment, including serious impacts to human life or natural, cultural, or economic resources;

- c. "Widespread" means damage that extends beyond a limited geographic area, crosses national boundaries or is suffered by an entire ecosystem or species or by a large number of human beings;
- d. "Long-term" means damage that is irreversible or cannot be repaired 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.

Penalty: from 5 to 14 years, fine, and reparation of environmental damage.

§ 1 The crime of ecocide is directed against the high-level political, financial and business leaders responsible for decisions that lead to the promotion, planning, financing, agency, contracting, management and execution of activities that fit into the hypothesis foreseen in the caput of this article.

§ 2 The crime of ecocide does not apply to indigenous and traditional populations who are pursuing their traditional lifestyles in the forest environment."

CHAPTER II FINAL DISPOSITIONS

Art. 2. This Law comes into effect 180 (one hundred and eighty) days after its official publication.

JUSTIFICATION

The objective of the present legislative proposal is to improve Law No. 9,605, of February 12, 1998, known as the Environmental Crimes Law, endowing it with a new crime – ecocide – which criminalizes the most serious cases of unlawful or wanton destruction of the natural environment. It is necessary to provide the Brazilian legal system with an instrument capable of curbing the growing and uncontrolled environmental degradation driven by illegal or unjustified extractive agro-industrial activities, especially in the Cerrado and Amazon regions, and which often leads to widespread or systematic violence against vulnerable people and

social groups that live and depend on forests and nature to live, especially the indigenous and traditional populations of these biomes.

As host to the largest section of the Amazon rainforest, Brazil has a unique position globally in terms of combatting climate change. The Amazon has the potential to be the world's greatest carbon sink; or, if it is damaged beyond repair, one of the world's largest emitters. Protecting the Legal Amazon may be a heavy burden for Brazil, but it is also an enormous opportunity on a historic scale – if Brazil succeeds, it will be seen by future generations everywhere as the State that contributed the most in fighting climate change. Adopting a new crime of ecocide announce that Brazil is determined to meet this challenge and to lead the global transition to a sustainable future.

Firstly, the question that arises is why create yet another hypothesis of crime, considering criminal law to be the *ultima ratio* of the legal system, its heaviest, most aggressive and intrusive hand? Why not, before this, explore other ways to improve and strengthen the administrative and inspection instances to curb environmental degradation? The answer is simple: Brazil's environmental protection system has proved insufficient to cope with the growing and unbridled environmental degradation driven by economic interests. We have seen devastating deforestation of the Amazon and Cerrado biomes, oil spills on our coasts, landslides in vulnerable communities in hillsides and slopes of large cities, usurpation and deforestation in preservation areas, and associated violence against indigenous and traditional peoples, among others.

As it stands, the elaborate Brazilian environmental protection system, with its bodies, laws and regulations – although detailed by world standards - are simply not capable of halting and preventing the volume, intensity and speed of the environmental destruction underway in the country. Therefore, a strengthening of the most intrusive arm of the legal system, criminal law, is justified and required.

Another important question that guides the definition of the crime of ecocide presented in this bill is the necessary alignment of criminal law with

the other branches of the legal system, especially environmental law and its guiding principles, notably article 225 of the Federal Constitution.

On the one hand, it is a matter of avoiding the problems verified in the years that the Environmental Crimes Law has been in effect and the little efficacy demonstrated by the many attempts to apply it. The problem is that this law is overly dependent on the administrative sphere, almost always referring to terms, principles, acts, decisions and regulations of the regulatory instance. This is far from ideal for a criminal law, which should be as precise and restrictive as possible, avoiding excessive openness to and dependence on other branches of the system.

See the following articles: art. 29, *"kill, chase, hunt, catch, use wild fauna specimens, native or in migratory routes, without the proper permission, license or authorization from the competent authority, or in disagreement with that obtained"*; art. 38, *"destroy or damage a forest considered of permanent preservation, even if in formation, or use it in violation of the protection rules"*; art. Art. 40, *"cause direct or indirect damage to Conservation Units and to the areas dealt with in Art. 27 of Decree No. 99.274, dated June 6, 1990, regardless of their location"*; Art. 44, *"extract from public domain forests or forests considered of permanent preservation, without prior authorization, stone, sand, lime or any type of minerals"*; Art. 51, *"sell chainsaws or use them in forests and other forms of vegetation, without a license or registration from the competent authority"*.

From these excerpts, it can be observed that environmental criminal law, in addition to being unclear and not enough comprehensive, is extremely dependent on the administrative instance, and lacks the necessary clarity and independence to intervene with the necessary force to curb the most serious and relevant types of environmental degradation.

On the other hand, there is always the need to guarantee a fluent dialogue between the administrative and criminal instances, especially with regard to assessing the impact of environmental damage. As it is being proposed, the crime of ecocide seeks precisely this balance between endowing Brazilian

criminal law with a sufficiently strong norm, independent and applicable to the most serious cases of unlawful or wanton environmental destruction, and at the same time maintaining an opening for interchange with the other branches of law, from administrative to environmental.

In terms of the definition of the crime of ecocide, we can look to the developments at the international level. In recent years a movement of National States, political parties, social organizations, jurists, intellectuals, activists and opinion makers has been gaining momentum around the formulation of the crime of ecocide and its inclusion as the (so-called) fifth international crime in the Rome Statute, prosecutable before the International Criminal Court - ICC, along with genocide, war crimes, crimes against humanity, and the crime of aggression. Brazil is a State party to the ICC.

In 2020, the Independent Expert Panel for the Legal Definition of Ecocide was established. It consisted of 12 lawyers from around the world with expertise in international criminal law, environmental law, and climate law. The Panel's mandate was to develop a legal definition of ecocide as an international crime that could be proposed (by one or more states) as an amendment to the Rome Statute.

The definition was published in June 2021 and reads: *“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.”*

It quickly became the most widely accepted definition and has been used as a basis and reference for proposals for national ecocide laws (e.g., by the Green Party in Belgium), and regional proposals (e.g., the Green Party of the European Parliament has suggested amendments to the forthcoming European Union Environmental Crime Directive).

The present bill adopts as reference the Expert Panel's definition adjusting it to the classic form adopted by Brazilian criminal law, also taking into consideration the interdependent web of laws and principles that make up our legal system.

The Expert Panel's definition was based on precedents found in international treaties and customary law, as well as the practice of international courts and tribunals, especially the ICC. These include:

1. Use of the terms "widespread", "long-term" and "serious" to describe the prohibited damage;
2. A proportionality test ("clearly excessive in relation to the concrete and direct overall military advantage envisaged"); and
3. Liability for creation of a danger, rather than requirement for materialization of harm.

The Expert Panel definition proposes two thresholds for prohibited conduct to ensure that only very serious harm is captured and to leave space for legitimate developments even if harmful:

- (i) Relative to the consequences: there must be a substantial probability that the conduct (which includes an act or omission) will cause severe and either widespread or long-term damage to the environment.
- (ii) Relative to the type of conduct: the acts must be unlawful or wanton. This Panel's definition of wanton is based on the principles of environmental law, which balance social and economic benefits with environmental damages through the concept of sustainable development.

The two requirements ensure that activities that are lawful, socially beneficial, and operated in a responsible manner, but nevertheless cause

(severe and either widespread or long-term) damage to the environment, do not fall within the definition. This is important because states should be given space and permission to develop, but in a responsible way. This is what is called sustainable development.

With these two requirements, the prosecution would need to prove a substantial likelihood that a particular activity will cause serious and either widespread or long-term harm through acts or omissions that are illegal or wanton.

Mens rea (mental element).

The crime of ecocide requires the presence of 'intent' regarding the conduct and 'knowledge' regarding the consequences. The Expert Panel decided described this as "with the knowledge that there is a substantial likelihood" of the damage.

In Brazilian criminal law, it is clearly equivalent to our *dolus eventualis* ("dolo eventual").

Crime of Endangerment.

As proposed, the crime of ecocide resembles in many aspects other crimes of endangerment existing in our legal system, such as the crime of reckless or wanton management of a financial institution. In this order of crimes of endangerment, the presence of injury or concrete danger of damage to a certain legal value does not seem to constitute the true focus of the norm. In this new forward-looking criminal law, the protection of supra-individual legal values, which have emerged as side effects of the enormous technological progress of recent times, anticipates the incidence of the rule to moments before the damage, in order to avoid that the conduct comes too close to values that are more essential, comprehensive and relevant than those traditionally protected by classic criminal law, as is the case of the "environment". In what is conventionally called the "risk society", it is necessary to avoid the mere endangering of legal values such as the environment, genetic security and the soundness of the financial system, since the damage caused by injuries to these kinds of goods can reach an exponentially higher

number of people, unimaginable for conventional criminal law. To punish *a posteriori* conducts potentially harmful to these values, as the classical penalist would propose, does not seem to make sense, because they simply cannot be even threatened. What are at stake is human life as we know it, and the planet as it is. The mere identification of risk can already mean the impossibility of rescuing the legal good, which may decay into uncontrolled and irreversible entropy. In this apocalyptic context, in which the crisis of the administrative instances of control and prevention is very evident, the most intrusive arm of the legal system, criminal law, is the one endowed with the dissuasive role that is up to the dangers that lie ahead.

In this sense, culpability in the proposed crime of ecocide is linked to the creation of a dangerous situation, not to a particular harmful result. Here the criminal offense is to perform acts with the knowledge of the substantial probability that they will cause serious and widespread or long-term harm to the environment.

Therefore, ecocide presents itself as a crime of endangerment and not of material result.

'Severe and widespread or long-term'

These or similar terms have been used in several international instruments. The ENMOD Convention uses the disjunctive 'severe, widespread or long term'. The 1977 First Additional Protocol to the Geneva Conventions ('API') and the Rome Statute employ the conjunctive formulation - "severe, widespread and long-term".

The Expert Panel proposed a midpoint between the two disjunctive and conjunctive, to ensure that the environmental damage encompassed by ecocide is always 'severe', but may be widespread or long-term.

'Severe'

The Expert Panel's definition of "severe" was taken from ENMOD, as interpreted by the Disarmament Committee as "serious or significant

disruption or damage to human life, natural and economic resources, or other property." To better protect the cultural value of elements of the environment, the term 'other property' was replaced by 'cultural' resources. In addition, "the Earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space" is understood by reference to "any element of the environment".

The crime of ecocide clearly addresses the most relevant and large-scale types of environmental degradation, not encompassed by other rules and regulations in our legal system.

'Widespread'

Building on the high standard set by ENMOD and API, which requires a "wide" reference to an area of several hundred or thousands of square kilometers, the Expert Panel suggested that the term "widespread" should require damage that extends "beyond a delimited geographic area." This requirement can also be satisfied if the damage crosses state borders, reflecting the principle of environmental and international law of cross-border damage.

'Long-term'

According to the Expert Panel, the term "long-term" should refer to damage that is irreversible or cannot be repaired naturally within a reasonable period. Such a reasonable period will depend on the circumstances of a particular case.

'Illegal or wanton'

The term 'illegal' comprises acts harmful to the environment that are prohibited by national and international laws. We refer here to the necessary relationship between the crime of ecocide and other branches of law, notably environmental law. And here, in respect for the principle of unicity of the legal system, there can be no contradiction.

For example, only what the environmental inspection agencies (Ibama and ICMBio) recognize as severe environmental degradation can be ecocide. If there has been previous licensing, only in case the conditions imposed for the undertaking were not sufficiently met. Or if the licensing process is poisoned with some vice, fraud, or irregularity.

This dialog and interrelation between environmental and criminal law is necessary and fundamental. The term "illegal" in the crime of ecocide will begin in the administrative sphere of the environmental agencies with the violation of their normative instructions and will progress through environmental law with the violation of their laws, decrees and regulations, before entering criminal law as a violation of an even more serious norm. In all these steps, it will be violating article 225 of the Federal Constitution.

'Wanton' (*temerário*)

The term is found in the Rome Statute, for example in article 8(2)(a)(iv). It means intentional or reckless disregard of the prohibited consequences. In this case, it means intentional or reckless disregard for likely harm to the environment. Relevant lack of care. In turn, this damage must be clearly excessive in relation to the social and economic benefits anticipated in a given activity. The proportionality element of the definition reflects environmental law principles (i.e. sustainable development) and is included in article 8(2)(a)(iv) and article 8(2)(b)(iv) of the Rome Statute.

It finds a parallel in Brazilian criminal law, precisely in the crime of 'reckless management of a financial institution' (art. 4 of Law 7.492/86, which defines crimes against the national financial system).

'Acts'

Isolated or cumulative acts or omissions.

'Environment'

As criminal law requires a greater level of clarity and specificity, 'environment' should be defined in a more precise and up-to-date manner, in line with the evolution of science and human understanding of the concept. The definition here is based on scientific recognition of the systemic interactions that constitute 'environment'.

'Ecocide'

The word ecocide combines the Greek 'oikos', meaning home (and later habitat/environment), with 'cide', meaning to kill.

Ecocide adapted to Brazilian Criminal Law.

In its ideal form, the crime of ecocide should only address the most serious cases of unlawful or unjustified environmental destruction or degradation. Essentially, ecocide aims to restrain unlawful or unjustified activities that will likely cause massive harm, whether it be mass pollution, deforestation, or other types of destruction. Within that 'most serious' category, it should be as comprehensive as possible, differentiating itself from the other more specific crimes against the environment foreseen in Law No. 9,605/98.

Ecocide is a crime that clearly aims to curb major types of environmental degradations, and to criminalize high-level leaders and key decision-makers. It is independent of the presence of potential harm to the human species. Deliberately, the article understands the environment as a direct subject of rights, independent of the species that inhabit it, including ours.

It should also be simple and objective to ensure its legal effectiveness. The more simple, comprehensive and objective, the more direct, intelligible and applicable it will be by the competent authorities. As proposed, the crime of ecocide is more encompassing than any other criminal offense found in the Environmental Crimes Law, but at the same time it cannot be confused with any of them, which is important to avoid the incidence of the principle of specialty, which

imposes the preferential application of one of the lesser crimes of the Environmental Crimes Law to cases that, due to their comprehensiveness and seriousness, will actually fit only into the ecocide.

In terms of the definition:

- As presented, ecocide is a crime of endangerment and not of damage or material result. It is characterized by the commission of acts with awareness of the substantial probability that they will cause serious and widespread or long-term damage to the environment. Therefore, it is a crime of generation of danger, and not of result, because the objective is precisely to avoid damage that will always be very serious and irreversible. Thus, it connects more to the principle of prevention in environmental law than with that of precaution, because the harmful result must be, to some extent, known or quantifiable by science.
- It is a crime characterized by *dolus eventualis* (wanton = intending or in reckless disregard of prohibited consequences).
- The definition includes 'wanton' as an alternative to 'unlawful.' That means that even if the acts are lawful, they may still fall under ecocide if they are wanton. Wanton enables prosecutors to investigate unjustified acts of environmental destruction, where the harm clearly outweighs to social and economic benefits. In specific words, after a certain level of gravity, the activity that is beneficial to the community but excessively harmful to the environment will no longer be justified for economic reasons, for example, the need for economic development of a certain region or country. Ecocide must take care to make room for sustainable development, and at the same time ensure that the environment, from a certain point on, takes precedence over other equally relevant values.

Ecocide should not be confused with other crimes that already exist in the Brazilian system, especially those foreseen in the Environmental Crimes Law (Law nº 9.605/98). These, it is known today, are insufficient to restrain the growing and unbridled environmental devastation underway in the country. Because

they are very specific and not very comprehensive. Because the penalties imposed are very small and disproportionate in relation to the damage and dangers they are intended to curb, admit a series of procedural benefits (criminal transaction, conditional suspension, sursis, etc.) and deprive the rule of its symbolic and dissuasive role.

The offense aims at criminalizing individuals, in the classic form of criminal law, without prejudice to the possible concomitant and subsidiary criminalization of legal entities, as foreseen and admitted by the Environmental Crimes Law.

The penalty should be high in order to ensure the dissuasive function of the criminal type. Ideally, the minimum sentence should be five (5) years to avoid the incidence of procedural benefits such as plea bargain or sursis.

There are references in our legal system to crimes comparable in seriousness with minimum and maximum penalties similar to those proposed for ecocide (e.g. reckless and fraudulent management of financial institutions, drug trafficking, money laundering, etc.).

Those responsible.

The responsibility for these acts and activities should not fall on the most vulnerable citizens, because they stem from decisions made at high levels, by high leaders of the business, financial and political world.

For this reason, the crime of ecocide aims to curb the practice of acts planned and decided by people who are at the top of the chains of command in politics, in the financial and corporate world, in the agro-economic sector, etc. Especially in an unequal country like Brazil, where the criminal law is historically twisted to criminalize the most vulnerable.

On the other hand, we must therefore prevent the crime of ecocide from being instrumentalized against certain more vulnerable and unprotected social groups, such as the peoples who historically live in harmony with

the environment and are usually the first victims of environmental degradation (indigenous, traditional populations of the Amazon, etc).