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# ECOCIDE SENTENCING GUIDELINES

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The following principles emerge as relevant when sentencing in cases of ecocide:-

1. The environment in which we live is a precious heritage, and it is incumbent on the present generation (including the courts) to play a part in preserving it for the future. This may be put more simply as: 'Please leave this planet as you would wish to find it'. [Costing the Earth.]

2. All sentencing for environmental offences and especially the offence of ecocide must strive to promote good environmental governance. It must actively promote effective, participative and collaborative systems of governance at all levels in society – engaging people's creativity, energy, and diversity to ensure that all activity which potentially affects the environment is designed in such a way that the well-being of the planet comes before profit.

3. Sentencing must promote, disseminate and enforce the three fundamental principles which underpin environmental protection:

- (i) The Preventative Principle,
- (ii) The Precautionary Principle, and the
- (iii) The Polluter Pays Principle.

- (i) **The Preventative Principle** requires that the prevention of harm should be the primary aim when taking decisions or implementing action that may have adverse environmental effects. It is consistent with the statutory sentencing purpose of reducing crime. Environmental sentencing may be regarded as having a deterrent effect.
- (ii) **The Precautionary Principle** is found in Principle 15 of the Rio Declaration 1992 and provides that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation
- (iii) **The Polluter Pays Principle** recognizes the inherent right to life of human and non-human beings. Where pollution has been caused, the polluter has the burden to pay for all costs required, not only to remediate but also to prevent further pollution. Parliament has imposed on CEOs [people in positions of superior responsibility] and companies a heavy burden to do everything possible to ensure that they do not cause pollution.

4. Ecocide is an offence of strict liability precisely because Parliament regards the causing of damage, destruction to or loss of ecosystems on an extensive scale to be so undesirable as to merit the imposition of criminal punishment irrespective of an individual's and/or the company's knowledge, state of mind, belief or intention.

5. The onus is on CEOs and companies to conduct continuing environmental impact assessments looking not only at the likelihood of events occurring that might lead to extensive ecocide, but also at the extent of the damage, or possible damage, if such events do occur. When the level of consequence requires it, fail-safe systems must be put in place.

6. The purposes of sentencing are set out in section 142(1) of the Criminal Justice Act 2003, as amended, in respect of environmental offences as follows:-

‘Any court dealing with an offender in respect of an ecocide offence must have regard to the following for purposes of sentencing:-

- (d) the making of reparation by offenders to persons affected by their offences;
- (e) the protection of people and the planet come first, before profit;
- (f) the punishment of the offender who holds a position of superior responsibility;
- (g) the reform and rehabilitation of companies and those holding positions of superior responsibility to ensure prevention of ecocide;
- (h) the prevention of ecocide by means of deterrence.

Section 143(1) and (2) of the same Act, as amended, provide that:-

- (1) In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence, and the size, extent and duration of the harm that the offence caused, was intended to cause or might foreseeably have caused.
- (2) In considering the seriousness of an offence committed by an offender who has one or more previous cautions and/or convictions, the court must treat each previous caution and/or conviction as an aggravating feature if the court considers that it can reasonably be so treated having regard, in particular, to:-
  - (a) the nature of the offence to which the conviction relates and its relevance to the current offence,
  - (b) the time that has elapsed since the conviction.’

**7. Punishment, Deterrence And Reparation** are all particularly important purposes of sentence in cases of ecocide.

**8. Punishment** speaks for itself and in conventional terms represents the gravest imposition of incarceration as a public expression and message of deterrence. It further represents an expression of public disquiet that a person in a position of superior responsibility has permitted ecocide on a scale that impinges upon the future well-being of all life.

**9. Deterrence.** The purpose of deterrence includes:-

- (1) making clear that the overall penalty for a breach of the law is always likely to be much more costly than any expense that should have been incurred in avoiding the breach in the first place or that can be passed on to customers as cost outlay;
- (2) the need for the overall penalty to be such as to bring the necessary message home to the particular defendant (whether individual and/or corporate) before the Court, in order to deter future breaches – whether by that defendant, or by other potential offenders; and
- (3) the need for equal deterrence of all potential offenders, whether wealthy or of limited means – not least because the wealthiest potential offenders are likely, via the scale of their operations, to have the greatest potential to cause the most serious damage.

**10. Reparation.** The purpose of reparation is to make amends, offer expiation, and make right a wrong or injury. Reparation includes, but is not solely confined to, restorative justice provisions.

**11. Seriousness** should ordinarily be assessed first by asking:-

- (1) How foreseeable was the ecocide? The more foreseeable it was, the graver usually will be the offence.
- (2) How far short of the applicable standard did the defendant fall?
- (3) How common in this organisation is the kind of breach which led to the environmental pollution/damage? How widespread was the non-compliance? Was it isolated in extent or indicative of a systematic departure from good practice across the defendant's operations?

- (4) How far up the organization does the breach go and the degree of culpability within the command structure of the company? Usually, the higher up the responsibility for the breach, the more serious the offence.

## 12. Sentence of Imprisonment.

- (1) If a court concludes the custody threshold has been crossed after taking into account the seriousness factors set out above, then the period of custody is determined by the category into which the convicted person falls, as assessed by his culpability, namely:-
  - (i) Ecocide by dangerous industrial activity – the entry point is 4 years.
  - (ii) Ecocide by reckless knowledge by an objective standard – the entry point 10 years.
  - (iii) Ecocide by intent – the entry point is 12 years or more.
- (2) The entry points for custody can be reduced or increased depending on the balance of competing aggravating and mitigating feature examples within a case as set out below.

## 13. Factors which, if present, are likely to **Aggravate** the offence (the list is not exhaustive):-

- (1) loss of human life;
- (2) extensive mortality among wildlife;
- (3) likely extinction of particular species of wildlife (and/or listed on the International Union for Conservation of Nature Red List of Threatened Species as critically endangered, endangered or vulnerable);
- (4) if there is limited prospect of repairing or undoing environmental damage caused;
- (5) failure to heed warnings or advice, whether from officials such as the Inspectorate, NGO's and/pressure groups or by employees or other persons, or to respond appropriately to 'near misses' arising in similar circumstances;
- (6) cost-cutting at the expense of environmental damage/pollution. The skimping of proper precautions to make or

- save money, or to gain a competitive advantage;
- (7) deliberate failure to obtain or comply with relevant licences, at least where the process of licensing involves some degree of control, assessment or observation by independent authorities;
  - (8) a particularly vulnerable environment where wildlife and fauna are affected, especially where a protected species or a site designated for nature conservation was affected;
  - (9) Other lawful activities were prevented or significantly interfered with;
  - (10) Any previous convictions for environmental or environmental related offences.

**14.** Conversely, the following factors, which are similarly non-exhaustive, are likely, if present, to afford **Mitigation**:-

- (1) a good record of compliance with the law;
- (2) a prompt acceptance of responsibility and timely admission of guilt, and a plea of guilty at an early opportunity;
- (3) a high level of co-operation with the investigation, beyond that which is to be expected;
- (4) genuine efforts to remedy the defect;
- (5) a good environmental awareness and promotion record;
- (6) a responsible attitude to the environment and risks of pollution and damage such as the commissioning of expert advice or the consultation with employees or others affected by the organisation's activities.
- (7) Commission of an ecocide offence may in some cases be established solely by the unauthorized act of an employee. In such a case the responsibility of the organisation and person in position of superior responsibility must be assessed, for example, for inadequate supervision or training. There may be some cases where there is very little culpability in the organisation itself.
- (8) It will generally be appropriate to require the prosecution to set out in writing the facts of the case relied upon and any aggravating or mitigating features which it identifies. The

defence will be required similarly to set out in writing any points on which it differs. If sentence is to proceed upon agreed facts, they should be set out in writing.

- (9) In assessing the financial consequences of a fine, the court should consider (inter alia) the following factors:
- (a) the effect on the employment of the innocent may be relevant;
  - (b) whether the fine will have the effect of putting the defendant out of business will be relevant; in the worst cases this will be an acceptable consequence.
  - (c) the effect on a public organisation such as a local authority or hospital trust; ‘The Judge has to consider how any financial penalty will be paid. If a very substantial financial penalty will inhibit the proper performance by a statutory body of the public function that it has been set up to perform, that is not something to be disregarded.’ The same considerations will be likely to apply to non-statutory bodies or charities if providing public services.
  - (d) the liability to pay civil compensation will ordinarily not be relevant; normally this will be provided by insurance or the resources of the defendant will be large enough to meet it from its own resources;
  - (e) the cost of meeting any remedial order will not ordinarily be relevant, except to the overall financial position of the defendant; such an order requires no more than should already have been done.

Any adverse impact upon share price will not be relevant; nor that the prices charged by the defendant company might in consequence be raised.

**15. Publicity Orders** are to be made at each Sentencing. The object is deterrence and punishment. They may require publication in a specified manner of:

- (a) the fact of conviction;
- (b) the terms of any restorative justice, remedial and/or

- commercial prohibit order(s);
  - (c) the amount of any fine;
  - (d) specified particulars of the offence.
- (1) The order should normally specify the place where public announcement is to be made, and consideration should be given to indicating the size of any notice or advertisement required. It should ordinarily contain a provision designed to ensure that the conviction becomes known to shareholders in the case of companies and local people in the case of public bodies. Consideration should be given to requiring a statement on the defendant's website. A newspaper announcement may be unnecessary if the proceedings are certain to receive news coverage in any event, but if an order requires publication in a newspaper it should specify the paper, the form of announcement to be made and the number of insertions required.
  - (2) The prosecution should provide the court in advance of the sentencing hearing, and should serve on the defendant, a draft of the form of order suggested and the judge should personally endorse the final form of the order.
  - (3) Consideration should be given to stipulating in the order that any comment placed by the defendant alongside the required announcement should be separated from it and clearly identified as such.