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Crime against the natural environment – ecocide – from the perspective of international law

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Abstract. Deep, human induced, environmental changes become a global danger for the whole population. A form of reaction to those dangers as well as possibility of reversing the risks can be a deeper insight into the legal instruments of environmental liability – including the criminal liability for environmental harm. While national legal systems seem to succeed in introducing instruments of criminal liability of environmental crimes, the international law seems not to follow this trend. It is even hard to specify what constitutes the environmental crime according to international law. The evolution of international law in this field has shown many and unsuccessful attempts to bring environmental crimes into the catalogues of crimes recognized by international law. The most promising fora for identification of international crimes against environment seems to be the International Criminal Court (ICC). Potential use of ICC for identification and effective realization of criminal liability of environmental damage has however its limits.

Keywords: ecocide, environmental protection, international law, environmental crime.

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INTRODUCTION

The growing influence of man on the natural environment takes the form that allows the classification of the geological epoch in which we live as the Anthropocene (Bińczyk, 2018). A characteristic feature of the Anthropocene is the fact that it is possible to observe active human interference in the process guiding the geological evolution of the planet (Angus, 2016, p. 53). In the era of man, man becomes a driving force on a planetary scale, interfering with the lithosphere, hydrosphere and atmosphere (Crutzen & Stoermer, 2000, p. 17). Unfortunately, this interference has a negative dimension - changes caused on a large scale by the actions of individuals result in the limitation of

universal access to basic ecosystem services on which the functioning of the present and future generations depends. In modern societies, there is a growing awareness that human arrogance, ignorance and greed combined with overpopulation, fueled by technological development, threaten the integrity of the biosphere - the thin layer of earth, water and air that is necessary for the biological conditions of human existence (Gray, 1996, p. 215).

The ability to interfere with the biosphere causes that significant changes, mostly of a destructive nature, are made by various categories of entities. They can be states as well as various other legal entities, and finally also individuals. Acts assessed from the point of view of ecological or environmental ethics as crimes against the environment are committed intentionally or not intentionally. They most often result from actions motivated by the desire for profit - most often as a result of the influence of industry, sometimes as a result of failure to observe precautionary rules, and finally, history knows cases where crimes of this type were committed as part of military operations within armed conflicts. The victims of this type of crime are, directly or indirectly, plants, animals and people. It is also worth emphasizing that the effects of actions assessed as crimes against the environment are felt both by modern generations and will be felt by future generations.

The main thesis of the article is the need for broader reflection of the gravity of crimes against the environment in international criminal law. In authors opinion the Anthropocene era, its risks and challenges it brings, creates a momentum for a deep reconsideration of functioning of legal system, prioritizing the need of preserving the planetary boundaries and limiting the anthropocentric impacts. The systemic analysis of existing legal framework for strengthening the role of criminal law in international protection of the environment is supplemented with dogmatic as well as historical analysis of developments of international criminal law in the field of environmental protection.

CRIMINOLOGICAL DETERMINANTS OF THE ECOCIDE CONCEPT DEVELOPMENT

The regularities presented above have become the basis for the development of green crimonology, which places crimes at the center of its research, which result in negative impacts on the environment, human and animal life, and even the entire planet (Higgins et. al., 2013, p. 251). The areas of interest of "green criminology" are industrial pollution, economic crime related to the environment, corruption crimes related to the natural environment, affecting the environment and illegal military activities during armed conflicts, crimes related to the storage of waste (including hazardous waste), crimes against biodiversity, air and water quality (Higgins et. al., 2013, p. 252). These activities have and are even able to determine the quality of the environment for both present and future generations, and even have transboundary effects (South, 2010).

One of the significant challenges facing the development of the ecocide concept is adapting the catalog of environmental crimes to the catalog of environmental damage. It is a difficult and demanding process. One of the reasons for this is that environmental damage can be divided into direct and indirect damage. The first ones result directly from the undertaken activity, which is aimed directly at committing an act that has a negative impact on the natural environment. The latter result indirectly and are the consequences of the deterioration in the availability of environmental goods and services resulting from the negative impact on the environment.

The increase in ecological awareness of societies, the development of green criminology, as well as the development of relevant standards of national law following these changes led to the identification of crimes against the environment, and created a framework for the implementation of criminal liability in the area of environmental protection (Berat, 1993, p. 327-348). It complements, supports and strengthens the mechanisms of implementing legal responsibility in environmental protection, which is implemented both in terms of civil, legal and administrative and criminal liability (Radecki, 2002). Criminal liability for environmental crimes is now a universally applicable standard in domestic national orders. However, he struggles to make his way in international law. War crimes are the only area in which crimes against the environment have received adequate attention and responses from the international community (Gillet, 2017, p. 225).

The complexity of methods of implementing legal responsibility in environmental protection presented above has not yet been fully reflected in international law. While state liability for damages is gaining popularity and importance, undoubtedly, the development of criminal liability mechanisms in this area is insufficient. This is despite the fact that the issues of ecocide in international environmental law began to be dealt with in principle with the beginning of the development of modern international environmental law.

THE CONCEPT OF CRIMES AGAINST THE NATURAL ENVIRONMENT IN INTERNATIONAL LAW

Crimes against the natural environment have not received a universal, legal definition in international law. This is mainly due to the fact that ecocide is a new, proposed institution of international law, which has not yet been fully reflected in the norms of positive law. However, this does not mean that such a definition cannot be reconstructed. The projects and proposals of legal solutions that appear in the discussion on the introduction to the catalog of international crimes, including crimes against the natural environment, will certainly be helpful in this task. The work and effort of representatives of the doctrine of international environmental law, which has been presenting various proposals in this regard for 50 years, is also important.

The concept of crimes against the natural environment has a strong foundation in the principles of international law (Gray, 1996). Most of the concepts of ecocide are based on several criteria that characterize crimes of this type. Namely, these are crimes involving serious, permanent or extensive environmental damage, causing cross-border effects, which are additionally wasteful, insofar as the social costs of such activities are disproportionately high in relation to the potential benefits (Gray, 1996, p. 216).

Responsibility for the crime of ecocide must take into account the standards that have been functioning for years in international environmental law, such as the principle of prevention, the precautionary approach to environmental protection, or the polluter pays principle (Nyka, 2017). There is an ongoing discussion in the doctrine as to whether the basis of liability in the case of crimes against the natural environment should be guilt or whether it can be carried out on a strict basis. The first solution, undoubtedly more conservative, may be associated with a number of evidence problems, in particular in a situation where the impact on the environment often takes place in an area where science is unable to provide unambiguous answers to all questions and dispel any doubts. It is also difficult to ignore the fact that the crimes listed in the catalog of art. 5 of the Statute of the International Criminal Court, and in particular war crimes - the only crimes covered by this Court's jurisdiction so far that may have an environmental dimension - require an appropriate degree of deliberation (Killean, 2021). On the other hand, the nature of the ecocide crime, related to its commission, a high level of organization of an entity capable of influencing the environment on an appropriate scale and with an appropriate intensity evokes the analogy to corporate liability under national law, which is carried out on the basis of risk (Killean, 2021). It is also worth pointing out that the risk liability for activities consisting in a negative impact on elements of the environment or property has been adopted in international law in regimes regulating, for example, liability for space damage or liability for damage related to the transport of hazardous substances at sea (Greene, 2019, p. 3).

A specific summary of the achievements of the doctrine in the field of attempts to define crimes against the environment may be the definition presented to the UN International Law Commission in April 2010. In this proposal, ecocide was defined as "extensive weakening, destruction or loss of the ecosystem of a given territory, whether as a result of human activity or other causes, which led to the possibility of the peaceful use of a given territory being severely diminished" (Greene, 2019). Commenting on her proposal, Polly Higgins extended this definition by stating that the ecocide crime includes acts and omissions in both hostilities and peacetime (Higgins et. al., 2013, p. 257). Thus, extending the scope of application of this concept, also beyond hostilities.

According to the proposal, the perpetrator of the crime will be the "superior" who has committed a crime against the natural environment as part of managing the state, economic entity or any other entity. Therefore, we are talking here about the liability of natural persons responsible for managing collective entities, and not about the liability of collective entities themselves, which under international law may be exercised, but within the framework of types of international liability other than criminal.

EVOLUTION OF INTERNATIONAL RESPONSIBILITY FOR CRIMES AGAINST THE NATURAL ENVIRONMENT

The first attempts to introduce international criminal law instruments to protect the environment can be dated back to the early 1980s. The International Law Commission, already in 1980, during the work on the Draft Articles on the Responsibility of States, in Article 19 proposed the penalisation of the ecocide crime based on the norms of international law. The activities covered by this type of liability were related to acts of serious breach of the norms of international law, essential for the protection and preservation of the natural environment (Kenig-Witkowska, 2011, p. 149). As a subject of special protection of international criminal law in the field of environmental protection, the 1980 draft indicated the atmosphere and the seas[1]. This idea gave rise to much controversy and state resistance, and was quickly abandoned. As a consequence, the final proposal of the Draft Articles on the liability of the state in the event of a serious breach of international law, adopted by the International Law Commission in 2001, does not contain criminal law norms, and liability in accordance with the assumptions of this draft is implemented on general principles, in particular, relying on art. 40 and 41 of the Project. Under appropriate conditions, the articles on state liability may apply in the field of environmental protection, although, obviously, this liability will not be of a criminal law nature (Sands et al., 2012, p. 726). One of the main arguments against adopting Art. 19 was the fact that Art. 19 referred to the responsibility of the individual, while the proposal of the Draft Articles on State Responsibility, as the name suggests, referred to the international responsibility of the state (Sands et al., 2012).

Another initiative of the International Law Commission concerning criminal liability in the protection of the environment was the Draft Code of Crimes against the peace and security of humanity adopted in 1996. In one of the first versions of the 1991 draft code, among the 12 types of crimes, Art. 20 g of a crime is committed by a person who uses methods or means of combat that are aimed or likely to cause extensive, long-term and severe damage to the environment[2]. It is worth emphasizing that the authors of the draft clearly drew inspiration from the contents of the First Additional Protocol to the Geneva Convention of 1949[3], and the Convention on the Prohibition of Using Technical Environmental Impact Measures of 1977 (ENMOD Convention).[4]. Importantly, in the draft code of 1991 there was Art. 26, which provided for responsibility for crimes against the natural environment both in armed conflicts and in times of peace. A person who intentionally causes or supervises the commission of extensive, long-term and significant damage to the natural environment was punishable (Sands et. al., 2012). The Working Group preparing the draft of the code back in 1996 postulated the introduction of crimes against the environment or as a form of a modal crime under Art. 22 (war crimes), or as crimes against humanity under Art. 21, or as an autonomous crime under Art. 26 (Greene, 2019, p. 16). Unfortunately, in 1996, while preparing another version of the draft, it was decided to remove Art. 26. It should also be emphasized that the work of the International Law Commission on the Code of Crimes against the Peace and Security of the People was the basis for the preparation of the Statute of the International Criminal Court.

[1] Yearbook of International Law Commission (1980) part. 2, p. 30.
[2] UN Doc. A/51/10 (1996).
[3] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, retrieved from: https://www.refworld.org/docid/3ae6b36b4.html.
[4] United Nations, Treaty Series , vol. 1108, p. 151.

Another model of introducing criminal liability into international environmental law was presented by the Council of Europe. In 1998, the Committee of Ministers of the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law. The ambitious document assumed the criminalization by domestic law of intentional (Art. 2) or negligent (Art. 3) crimes against the environment, which, in accordance with Art. 2 convention on:

a) The discharge, emission or injection of an amount of ionizing substances or radiation into air, water or water in an amount that
   I. causes death or serious injury to people
   II. presents a significant risk of death or serious injury to people
b) illegal dumping, emission or introduction of the amount of substances or ionizing radiation into the air, soil or water, which may cause long-term deterioration, death or significant damage to people, or significantly damage monuments or other protected objects, property, animals and plants.
c) illegal dumping, processing, storage, transport, export or import of hazardous waste which causes or may cause death, serious harm to people, or significantly deteriorates the quality of air, soil, animals or plants.
d) illegal operation of an establishment carrying out hazardous activities which causes or may cause death or serious harm to persons or significantly deteriorates the quality of air, soil, water, plants or animals
e) the unlawful production, processing, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or may cause death or substantial damage to any person or significant damage to the quality of air, soil, water, animals, or plants.

It should be emphasized that the Convention in art. 4 also identifies the second catalog of acts. This time, these are acts that may be committed not only intentionally, but as a consequence of carelessness. In relation to them, the Convention allows the domestic law implementing its provisions to identify them not only as crimes, as acts listed in the catalog contained in Art. 2, but also as misdemeanors or as acts subject to administrative liability. Among these acts, the convention mentions:

a) illegal discharge, emission or introduction of a significant amount of a substance or ionizing radiation into air, soil and water
b) illegal noise emissions
c) illegal disposal, processing, storage, transportation, export or import of waste
d) illegal operation of the establishment
e) illicit manufacture, processing, use, transport, export or import of nuclear materials, other radioactive substances or hazardous chemicals
f) illegally causing changes to the natural components of a national park, nature reserve, water protection area or other protected areas
g) illegal possession, seizure, damage, killing or trade in protected species of flora and fauna.

The above-mentioned catalog of acts, according to the intention of the authors of the convention, was not to constitute the basis for the international prosecution of perpetrators of crimes against the environment, but to introduce certain basic standards of environmental protection with the use of criminal law instruments into the legal orders of the member states of the Council of Europe. It turned out, however, that the above-mentioned attempt to introduce some standardization to the catalog of crimes and offenses against the environment in the Council of Europe member states was not appreciated by these states. Suffice it to say that the art. 13 sec. 3 the strongly liberal requirement of just three ratifications for the entry into force of the Convention has not been met. Among the basic allegations against the convention there were comments referring to the excessive interference of the act, which determined not only the material scope, but also the type of legal responsibility for the acts mentioned in it, and even sanctions (Sands et. al., 2012, p. 727). Moreover, it is impossible to disagree with the opinions indicating that even states having provisions in their legal systems postulated by the Convention could be reluctant to adopt the

norms resulting from it, due to the need to change the already adopted and efficiently functioning norms of domestic law (Kenig-Witkowska, 2011, p. 151).

A CRIME AGAINST THE ENVIRONMENT IN THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The establishment of the International Criminal Court clearly demonstrated the determination of its supporters to end impunity for perpetrators and guarantee justice for victims of certain types of crimes around the world (Moffet, 2014, p. 43). In practice, the Tribunal operates in a relatively narrow area of criminal offenses, which does not seem to recognize the impact that the crimes listed in the Rome Statute defining its substantive jurisdiction may have on the natural environment, and consequently also on individuals dependent on this environment (Killean, 2021, p. 324). It is impossible not to notice, however, that over 80% of the armed conflicts that took place after World War II took place in areas with special natural values, being places of rare habitats, extremely valuable species of plants and animals (Hanson, 2009).

As can be seen, the problem of crimes against the environment is still a legislative challenge, at least when it comes to the norms of international law. Attempts to directly introduce the ecocide crime into the content of the Rome Statute have so far been unsuccessful. This does not mean, however, that the International Criminal Court and its institutions do not react to the problem of environmental crimes at all. Some authors even claim that the enforcement of criminal liability for environmental crimes within the current jurisdiction of the Court is possible and appropriate, and there is no legal justification for which this could not be the case (Freeland, 2005, p. 133). Even the Tribunal itself seems to be able to actually support such attempts to interpret the content of the ICJ Statute in a pro-environmental manner. In 2013, the Office of the Prosecutor published Policy Paper on Preliminary Examinations. In this document, environmental damage was explicitly mentioned as a factor subject to investigation by the Prosecutor's Office as part of the preliminary examination preceding the formal investigation.

Analysis of the content of the statute, and in particular the fact that in art. 8 (2) (b) (iv) that deals with war crimes includes in the definition of a war crime "other serious violations of the laws and customs of international law applicable to armed conflicts of an international nature", including "intentional conduct of an attack with the awareness that an attack this will result in the accidental loss of life or injury to civilians, or damage to civil facilities, or extensive, long-term and serious damage to the environment, which would be clearly excessive in relation to a specific, direct and total military benefit expected.

The doctrine also examined other crimes within the jurisdiction of the Court as a potential source of accountability in the framework of ecocide crimes, even though they did not directly refer to the environment (Killean, 2021, p. 330). And so, in the case of crimes against humanity, the relationship between the right to life and its environmental conditions can be reflected, especially in the doctrine of human rights (Crook & Short, 2014, p. 313). We can talk about at least three categories of crimes: genocide, crimes against humanity, and crimes of aggression. First, the crime of genocide committed by deliberately creating for a group living conditions calculated to cause its total or partial physical destruction (art. 6 point c). Importantly, this line of reasoning seems to be strongly supported by the position of the ICC Prosecutor, who clearly emphasized the existence of the above link in the Darfur case[5]. Secondly, a crime against humanity committed through deportation or forcible displacement of people, which may be the result of a widespread or systematic and deliberate attack against the civilian population aimed at the environmental conditions of life of individuals and communities (Article 7 (d)). Third, persecution by deliberate and severe, contrary to international law, depriving any group or community of fundamental rights because of their

[5] ICC Pre-Trial Chamber, Situation in Darfur, The Sudan, 'Public Redacted Version of Prosecution's Application under Article 58 Filed on 14 July 2008, Case No. ICC-02/05-157, 12 September 2008, para. 200.

identity (Art.7 (h)). And finally, fourthly, the relationship between a crime against humanity and an environmental crime may arise in the case of identifying other inhuman acts of a similar nature deliberately causing great suffering or serious damage to the body or mental or physical health (Article 7 (k)). In relation to the crime of aggression, the destruction of the environment as a result of armed attacks can be considered as "use of armed force by a state against the souvereginity, territorial integrity or political independence of another state". In this case, persons in positions to effectively control or direct the political or military action of a state are subject to criminal liability (Politi, 2012, p. 285).

CONCLUSIONS

In the Anthropocene the requirement of employing the criminal law instruments into the system of warranties of environmental protection seems to be the natural consequence of the state of environmental emergency we experience. While national legal systems use criminal liability for crimes against the environment as a supplementary measure of ensuring effectiveness of environmental regulation, international criminal law seems to ignore the existence of the problem. This is paradox especially in the situation in which international criminal law was created as the reaction to the gravest violations of basic human rights. Similar effects to international crimes identified by international law can be often achieved by devastation of natural environment.

International law gives solid grounds for identification of a crime of ecocide. Attempts of identifying of ecocide as the international crime go along with the development of international criminal law. However still, even despite the numerous attempts of creating an independent international legal instruments for combating ecocide or including ecocide as a crime in already existing legal instruments it remains more in the sphere of moral responsibility than legal liability.

International Criminal Court seems to be the most obvious fora for adjudicating international crimes. In the majority of the opinions, based on literally meaning of it's statue ecocide remains beyond the scope of crimes adjudicated by this judicial institution. One small exception here can be made for warcrimes connected with relation to the environment. More proactive approach to the interpretation of the text of the ICC statue allows however to see the possibilities of wider identification of crimes against environment as international crimes simple by more eco-friendly interpretation of the text of this document. History shows that sometimes judicial activism even in international courts may supplement the ineffectiveness of political processes of creation of new legal instruments. Entering the Anthropocene seems to be a good moment for such kind of actions.

Any discussion on the broadening of potential scope of the use of ICC statue in the context of ecocide has to however include one important fact – the limitations which stems from the fundamental characteristics of the criminal law in general. Here the principle of *nullum crimen sine lege* forces us to limit the scope of potential proactive interpretation of the ICC statue in the sphere of environmental protection. This brings us back to the discussion on the needed reform of this legal act in a way which would supplement the missing environmental aspects of international criminal liability.

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