

Ecocide - a new crime under international law?¹

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Abstract

It is indisputable that ignorance, or lack of interest, as well as underestimation of the importance of environmental protection, has an impact not only on the quality of the environment but also poses a significant risk to human health, as well as all other organisms on Earth. It is for this reason that the issue of environmental protection is increasingly discussed, topical and desirable not only at the level of individual states but also within the international community. Taking into account the above, it is for this reason that the issue of environmental protection is increasingly discussed, topical and desirable not only at the level of individual states but also within the international community. Taking into account the above, the authors in the presented article deal with a critical assessment of the appropriateness of the proposal contained in the embedding of the special crime of ecocide originating from 2021 in the Rome Statute, including the formulation of appropriate de lege ferenda proposals.

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JEL Classification: K14, K33

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1. Introduction

The International Criminal Court (hereinafter referred to as the "ICC") and its Rome Statute can be seen as one of the most significant milestones in the development of international criminal law⁴, being the first international permanent criminal court. The Rome Statute has had a significant impact on the development of international criminal law and, given its global reach (currently 123 parties) and importance, it also has the potential to act as a means of prevention, where a state, in view of its reputation, must think twice about how it will act if, for example, its citizen is prosecuted or the person prosecuted is on its national territory. This is one of the factors why, on the face of it, the inclusion of the specific crime of ecocide in the Statute should be necessary and indispensable.

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⁴ Cryer, Robert et al. *An introduction to international criminal law and procedure*, New York: Cambridge University Press, 2010, p. 144.

The aim of the present article is to examine the justification for the inclusion of the specific crime of ecocide in the Rome Statute, as well as to point out the application problems that may arise in connection with the creation of the specific crime of ecocide in the application practice. The present paper is based on the hypothesis that the inclusion of a specific crime of ecocide in the Rome Statute is desirable and necessary, given the absence of a sufficient environmental dimension in the current crimes under the Rome Statute, in view of the ever-increasing need to protect the environment in order to preserve it for future generations.

The descriptive method as well as the method of explanation, synthesis, and analysis were used in writing this article.

2. The environmental dimension of current crimes under international law

As the Rome Statute states in Art. 5, the Court's jurisdiction is limited to the most serious crimes involving the international community as a whole. The Statute gives the Court jurisdiction over so-called crimes under international law, such as genocide, crimes against humanity, war crimes, and the crime of aggression.⁵ A 2016 document from the ICC Office of the Prosecutor (*Policy paper on case selection and prioritization*) states: "*The impact of individual crimes can be assessed, inter alia, in the light of [...] the economic and environmental damage caused to the communities concerned. In this context, the Office will pay particular attention to the prosecution of crimes referred to in the Rome Statute that is committed by means of, or that result in, inter alia, the devastation of the environment, the illegal exploitation of natural resources or the illegal expropriation of land.*"⁶

It follows that considerations had already started earlier in the ICC structures on the use of (already) existing crimes under international law. However, most of them are highly anthropocentric in nature, or there are other issues that raise questions as to whether the current state of affairs is sufficient to prosecute individuals responsible for serious environmental damage before the ICC, within the legal definitions of pre-existing crimes under international law.

2.1 Genocide

The first crime in the Statute is the **crime of genocide**. The Rome Statute defines it in Art. 6 whereby its basic building block is the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. The so-called Whitaker Report⁷ proposed extending genocide to environmental destruction. In the context

⁵ Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 333/2002 Coll. on the adoption of the Rome Statute of the International Criminal Court.

⁶ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, International Criminal Court, accessed August 19, 2022, <https://www.icc-cpi.int/news/policy-paper-preliminary-examinations>.

⁷ Its subject was, among other things, the demand to amend the Convention on the Prevention and Punishment of the Crime of Genocide (1948) in such a way as to include the destruction of the

of genocide, it was to be primarily adverse environmental changes of a permanent nature, whether as a result of nuclear explosions, chemical weapons, acid rain, or the destruction of rainforests, which, given the degree of severity, were capable of endangering the existence of entire populations, whether intentionally or negligently.^{8,9}

For the purposes of punishing environmentally attuned crimes, for example, the interesting fact here is the fact in paragraph (c), which speaks of genocide in the form of purposefully bringing about the living conditions of a group in such a way as to bring about its physical destruction in whole or in part (Rome Statute, art. 6(c)).¹⁰ Art. 6(c) is the most appropriate candidate for the prosecution of environmental crimes, as evidenced, for example, by the case of the prosecution of Sudanese President Omar al-Bashir before the ICC in 2008 for (among other things) the crime of genocide under Art. 6(c) of the Statute. The prosecution's charges made some connection between the genocide and the deliberate destruction of the environment by militias and Janjaweed groups through the systematic destruction of property, vegetation, and sources of drinking water, and the repeated destruction or pollution of local wells or other common water sources in Darfur.¹¹ Based on this case, it can be observed that it is very difficult to convict defendants in high positions before the ICC even without having to talk about environmental crimes. Russia, China, the African Union, and the Arab League have all spoken out against the prosecution of al-Bashir.¹²

Its purely anthropocentric nature plays against using the crime of genocide to prosecute individuals for environmental damage. Genocide is committed with the intent to destroy, at least in part, a national, ethnic, racial, or religious group, thus environmental damage cannot be prosecuted under this crime unless there was also an intent to destroy, in whole or in part, one of the listed groups. Environmental damage is therefore of secondary importance here. This is also why, for example,

environment. It was supposed to be a type of genocide. This was mainly due to the findings that some indigenous communities were victims of rainforest destruction, nuclear testing, etc. However, the proposal was ultimately not accepted. For this, see closer: Jankuv, Juraj, *Environmentalizácia medzinárodného práva verejného a jej vplyv na právo Európskej únie a právny poriadok Slovenskej republiky*, Prague: Leges, 2021, p. 274.

⁸ Tara Smith, *Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law*, „Companion to International Criminal Law: Critical Perspectives”, August 25, 2011, <https://ssrn.com/abstract=1957644>.

⁹ On this, see also Tim Lindgren, *Ecocide, genocide and the disregard of alternative life-systems*, „International Journal of Human Rights”, Volume 22, Issue 4, (2018), p. 525-549 or Michael J. Lynch, Averi Fegadel and Michael A. Long, *Green Criminology and State-Corporate Crime: The Ecocide-Genocide Nexus with Examples from Nigeria*, „Journal of Genocide Research”, Volume 23, Issue 2, (2020), p. 236-256.

¹⁰ Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 333/2002 Coll. on the adoption of the Rome Statute of the International Criminal Court.

¹¹ Killean, Rachel, *Prosecuting Environmental Crimes at the International Criminal Court - Is a Crime of Ecocide Necessary?*, INTLAWGRRRLS, accessed August 19, 2022, <https://ilg2.org/2021/06/30/prosecuting-environmental-crimes-at-the-international-criminal-court-is-a-crime-of-ecocide-necessary/>.

¹² Jankuv, Juraj, *op. cit.*, p. 272.

the Whitaker Report proposed to lower the subjective requirements, where genocidal intent would not be required, but negligence would suffice if the crime was environmental in nature.¹³

2.2 Crimes against humanity

In Art. 7 The Rome Statute defines **crimes against humanity**. Similarly, to genocide, crimes against humanity are anthropocentric in nature, and thus the focus is on the human or to be more accurate civilian population. The Statute considers a crime against humanity to be one of the acts enumerated in the article in question (murder, extermination, enslavement...) if committed as part of a systematic and widespread attack against a civilian population with knowledge of such an attack.¹⁴ Considering the individual definitions, in our opinion, the best for the purpose of punishing acts causing damage to the environment is Art. 7(b). Under (b) is so-called extermination, which the Statute defines as "*the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; [...]*".¹⁵

Of course, from a theoretical point of view, this may not be the only fact to which environmental damage could be linked. Some authors, for example, in the context of the aforementioned case of Omar al-Bashir, also draw attention to point (d) of Art. 7. The latter deals with the so-called deportation or forcible transfer of populations, by forcibly relocating them either by expulsion or other coercion without reasons permitted by international law.¹⁶ In the case of South Sudan, the water supplies or land of individual communities were targeted for eviction, allowing oil companies to 'move in' to the mineral-rich area.¹⁷ The prosecution of environmental damage here can be tied precisely to the "intentional bringing about of environmental damage", but that damage would have to be caused with the intention of destroying a part of the population as well.

In light of the above, it can be assessed that even crimes against humanity do not provide an entirely ideal framework for prosecuting conduct that has resulted in serious harm to the environment. Nevertheless, they are a better candidate against the crime of genocide as they provide a broader scope and there is no genocidal intent present.

2.3 War crimes

The third crime under international law is regulated in Art. 8 of the Rome Statute, and we are talking here about the category of so-called **war crimes**. The

¹³ Tara Smith, *op. cit.*

¹⁴ For more detail see Art. 7 of the Rome Statute.

¹⁵ Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 333/2002 Coll. on the adoption of the Rome Statute of the International Criminal Court.

¹⁶ *Ibidem.*

¹⁷ Tara Smith, *op. cit.*

Rome Statute enumerates a number of different forms of war crimes, with the war crime listed in Art. 8, para. 2(b)(iv) that is the only crime under international law explicitly environmental in nature.¹⁸

At first glance, this may appear to be an ideal crime for the prosecution of acts with serious environmental consequences, but quite the opposite is true. To be committed, it requires the fulfillment of several specific elements, which significantly limits our possibilities in relation to the punishment of perpetrators responsible for environmental damage. In the first instance, it is limited to damage caused during an international armed conflict. However, most serious environmental damage has its origins in peacetime. The second limiting element is the requirement of culpability or the subjective aspect of the crime. Here, the Rome Statute requires a deliberate act or intentional initiation of an attack, even though the person concerned is aware that such an attack will cause widespread, long-term, and serious damage to the natural environment. Thus, environmental damage comes into consideration here only as a collateral consequence of an armed attack. Culpability in the form of intent is also usually the most difficult to prove. A third, no less important limitation here is the accumulation of up to three different consequences. Here, the Rome Statute envisages extensive, long-term, and serious damage to the natural environment. Such cumulative fulfillment of the listed conditions seems to be an unrealistic objective, at least in relation to proving that all three conditions are met. Equally unrealistic is the ability to prove that the person in question was aware of these consequences. At the same time, this is a person at a certain level of military command, i.e. a special subject, and therefore not every person can be prosecuted through this act. The fourth requirement in the "adverse" environmental case is that the person in question here must act with the knowledge that the harm in question is manifestly disproportionate to the specific and direct overall military advantage contemplated. It is questionable whether the perpetrator would have been able to compare the consequences of the expected military advantage with, for example, the long-term damage to the environment before the attack was carried out. By analogy, this can be related, for example, to the customary rule on environmental impact assessment in relation to the State's obligation. In this case, the person concerned also has an obligation to include environmental considerations in the proportionality assessment. However, it is difficult to imagine that the attack would have been preceded by adequate studies to assess the environmental impact of such an action.

¹⁸ "For this Statute, 'war crimes' means Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated"; see: Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 333/2002 Coll. on the adoption of the Rome Statute of the International Criminal Court.

At the same time, such modified obligations mean that environmental damage will only be considered in the criminal law framework if it is widespread, long-term, serious, and disproportionate to the military advantage.¹⁹

Given that this fact contains a number of limiting factors, there are ideas within the professional community to simplify the various criteria. As prof. Jankuv, a positive development for environmental protection could be the extension of the scope of this article to non-international conflicts. The idea of using Additional Protocol I to the Geneva Conventions also seems useful.²⁰ Unfortunately, Additional Protocol II, which deals with internal conflicts, does not contain provisions similar to those that will be cited below.²¹ This is Art. 35 and 55 of Additional Protocol I²², for which it would be advantageous if they were "elevated" to separate elements of war crimes. In a way, their conception was almost a direct response to the events that took place in Vietnam, where the use of various chemical compounds, such as (e.g. Agent Orange²³), had devastating effects on both the natural environment and the population as a whole.

It is evident that although it is the only crime directly addressing also environmental damage, it is almost impossible to imagine its application in application practice. The need for the cumulative fulfillment of the above conditions makes this almost unworkable in reality. What could help in the application of this act is a proper specification and definition of the terms used in it. It is not clear from terms such as extensive, long-term, or severe what intensity of damage qualifies. Whether it is sufficient for the extent to be tens of square kilometers or even hundreds of square kilometers, whether a period of months or years, etc., are considered long-term.²⁴ This would be similar to, for example, the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (hereafter also referred to as "the Convention"), where guidelines were adopted at the Conference of the Committee on Disarmament precisely in relation to terms such as extensive, long-term and serious.²⁵ The Convention defines the terms in question in

¹⁹ Cryer, Robert et al., *op. cit.*, 2010, p. 299.

²⁰ Jankuv, Juraj, *op. cit.*, pp. 275-76.

²¹ Notification of the Federal Ministry of Foreign Affairs No. 168/1991 Coll. on the binding of the Czech and Slovak Federative Republic by Additional Protocols I and II to the Geneva Conventions of 12 August 1949, adopted at Geneva on 8 June 1977, and relating to the Protection of Victims of International Armed Conflicts and Conflicts not of an International Character.

²² Art. 35, para. 3 provides: "*The use of methods or means of warfare which are intended to cause, or may be expected to cause, widespread, long-term and serious damage to the environment shall be prohibited.*" Subsequently, Art. 55 states: „*1. When conducting military actions, care must be taken to protect the environment from widespread, long-term and severe damage. This protection includes the prohibition of the use of methods or means of warfare which are intended to cause such damage to the environment or which may be expected to cause such damage as to endanger the health or survival of the population. 2. Attacks against the environment on grounds of repression are prohibited.*"

²³ Tara Smith, *op. cit.*

²⁴ *Ibidem.*

²⁵ Karen Hulme, *Armed Conflict, Wanton Ecological Devastation and Scorched Earth Policies: How the 1990-91 Gulf Conflict Revealed the Inadequacies of the Current Laws to Ensure Effective*

its interpretative annex ("*understandings*").²⁶ Regarding the definition of the war crime mentioned above, part of the expert community is of the opinion that in the case of long-term damage, the time interval should be in the range of decades. Regarding the extent of the damage, some experts are of the opinion that to meet this condition, the damage needs to be caused over hundreds of square kilometers.²⁷ At the same time, the definitions set out in the Convention cannot be applied, since the Convention in its understanding related to Art. 1 states: "*It is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement.*"²⁸

The fulfillment of individual crimes related to an armed conflict waged by conventional means and weapons is almost unrealistic. Moreover, a number of States Parties or experts are of the view that Additional Protocol I apply exclusively to conventional warfare. This too makes it difficult to answer the question of whether these provisions are customary or not. In conjunction with the above, we can observe here a counterargument to their customary nature, represented by the attitude of the US, France, and the UK, for example. Their *opinio juris* consists of the view that these provisions do not prohibit the use of nuclear weapons.²⁹ Notwithstanding the procedure described above, it is still unlikely that the above facts would be exploitable. The need to reduce the necessity of meeting so many cumulative conditions is more than certain.

2.4 Crime of aggression

The final crime that the International Criminal Court is empowered to prosecute is the crime of **aggression**. For a long time, the crime of aggression did not contain a legal definition, and thus the court had only formal jurisdiction to prosecute the commission of the crime of aggression (this changed based on Resolution 2010 RC/Res.6). Currently, the crime of aggression is defined in Art. 8 *bis* and means the planning, preparation, initiation or execution of an act of aggression by a person who is in a position in which he or she can effectively control

Protection and Preservation of the Natural Environment, „Journal of Armed Conflict Law”, Volume 2, Issue 1, (1997), p. 67.

²⁶ The Convention defines these terms as follows: "Extensive": Encompassing an area of hundreds of square kilometers; "Long-term": Lasting several months, or a period of approximately one year; "Severe": involving serious or significant disruption or damage to human life, natural and economic resources, or other property. See: Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976. Understandings, *IHL Database*, accessed November 20, 2022, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A951B510E9491F56C12563CD0051FC40>.

²⁷ Silja Voenekey and Rudiger Wolfrum, *Environment, Protection in Armed Conflict*, SSRN, accessed April 10, 2019, <https://ssrn.com/abstract=3369593>.

²⁸ Decree of the Minister of Foreign Affairs No. 77/1980 Coll. on the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques.

²⁹ Rule 45. Causing Serious Damage to the Natural Environment, *IHL Database*, accessed November 19, 2022, https://ihl-data-bases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45.

or direct the political or military activities of a State. Such an act constitutes, by its nature, gravity, and scope, a serious violation of the UN Charter.³⁰ The criminalization of environmental damage within the concept of this crime is only hypothetical, as the Statute defines an act of aggression as the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or otherwise in violation of the Charter of the United Nations. Subsequently, the Statute also lists examples of individual acts of aggression. Taking these cases into account, this crime rather focuses on the state establishment, sovereignty and sovereignty of the state, or their threat to another state using armed force,³¹ therefore, any environmental damage (of course, up to a certain level of severity) caused during the attack would first be subsumed under a different offense, e.g., the aforementioned Art. 8, para. 2(b)(iv).

In view of the above, we can clearly assess that the criminalization of environmental damage of a serious nature under one of the above-mentioned crimes under international law is not effective in cases where environmental damage is considered to be the primary object of interest that has been endangered or damaged by the crime in question. Most of these crimes are of a highly anthropocentric (humanitarian-related) nature, are overwhelmingly committed in times of armed conflict (in some cases a mandatory requirement), where the potential prosecution for environmental damage is secondary and cannot be the basis for prosecution by the International Criminal Court (ICC). Many of the most serious environmental interventions are carried out in peacetime, their intention is not to affect humans (in general), and often these activities are not carried out on an illegal basis. Therefore, there is a very limited framework within which to consider the use of pre-existing crimes under international law to prosecute such serious environmental interference. Prosecution of individuals or legal entities in peacetime, such as environmental industrial accidents due to individual omissions or even deliberate actions, is therefore currently impossible to prosecute at the level of international criminal law.³² We can mention here, for example, the deforestation of the Amazon Forest³³ or the island of Borneo, the Deepwater Horizon disaster, the years of oil production in the Niger Delta, and many others. In general, environmental damage outside armed conflict cannot be sanctioned in any way, as even crimes of genocide or crimes against humanity are overwhelmingly committed during armed conflict.

3. Proposal for a legal definition of ecocide and its critical assessment

In June 2021, the Independent Expert Panel of 12 lawyers specializing in international criminal and environmental law produced a draft legal definition of

³⁰ Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 333/2002 Coll. on the adoption of the Rome Statute of the International Criminal Court.

³¹ *Ibidem*.

³² Jankuv, Juraj, *op. cit.*, p. 273.

³³ On this, see also Bryan P. Galligan, *Re-theorizing the genocide-ecocide nexus: Raphael Lemkin and ecocide in the Amazon*, „International Journal of Human Rights” Volume 26, Issue 6, (2022): 1004-1031.

ecocide.³⁴ The Independent Panel of Experts views ecocide as illegal and arbitrary acts committed with the knowledge of a substantial likelihood of serious and either widespread or long-term damage to the environment as a result of such acts.³⁵ In doing so, the Independent Panel of Experts attributes the following meaning to the following terms contained in this definition:

- a) "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
- b) "Severe" means damage which involves very serious adverse changes, disruption, or harm to any element of the environment, including grave impacts on human life or natural, cultural, or economic resources;
- c) "Widespread" means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
- d) "Long-term" means damage which is irreversible or which cannot be redressed 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.³⁶

This proposed definition by the Independent Panel of Experts has attracted a rather large wave of criticism from both the professionals and the public for several reasons, which we will try to elaborate on in the following subsections of this chapter.

3.1 Compliance with the principle of *nullum crimen sine lege*

The first problem is the use of the term "knowingly/knowledge" itself, in the interpretation of which the Panel departed from its legal definition in Art. 30(3) of the Statute as follows: "*For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly. "Knowledge" and "knowingly" are interpreted identically.*" Departing from the legal definition, the Panel justified its overly narrow conception by substituting for it the words "*knowing that there is a substantial likelihood [...]*" that a particular situation will occur.³⁷ It is not clear to the authors why the drafters used the word "knowingly" in the definition, only to then state in their interpretation that they also meant

³⁴ In this context, it should be noted that efforts to enshrine the crime of ecocide as a new transnational crime have been present before, with 2012 as an example. This year, a citizens' initiative was launched within the European Union to draw up a European directive on ecocide. However, this initiative did not obtain the necessary number of one million signatures required to oblige the European Commission to deal with the proposal, although the European Parliament did discuss the substance of the proposal in committee.

³⁵ Independent Expert Panel, "Legal Definition and Commentary 2021," *Ecocide Law*, accessed November 11, 2022, <https://ecocide.law.com/legal-definition-and-commentary-2021/>.

³⁶ *Ibidem*.

³⁷ *Ibidem*.

negligence itself. This procedure is unnecessarily confusing and there are views within the professional community as to whether this procedure constitutes a weakening of the principle of *nullum crimen sine lege* (i.e. no crime without law). The anchoring of the principle of *nullum crimen sine lege* in the Rome Statute, as well as in a number of other international legal documents, such as the International Covenant on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Universal Declaration of Human Rights and national constitutions, undoubtedly testifies to the fact that this principle should be seen as a fundamental principle determining the legality of criminal law not only at the national but also at the international level. Taking into account the different attributes of this principle, i.e., *nullum crimen sine lege scripta*, *nullum crimen sine lege certa*, *nullum crimen sine lege stricta*, and *nullum crimen sine lege praevia*, we think that the proposal could affect the attribute *nullum crimen sine lege certa*, expressing the prohibition of the vagueness of the law. Since the conduct prohibited by criminal law (in the case of omission offenses, commanded) must be expressed in the criminal law norm in a clear, precise, intelligible, sufficiently definite, and detailed manner, so that the perpetrator does not doubt as to when and under what conditions his conduct becomes punishable by criminal law.³⁸ Both theory and application practice clearly show that a violation of the principle of legality may undoubtedly lead to a weakening of the principle of legal certainty, which is one of the fundamental pillars of the rule of law. In this regard, however, the authors think that a certain vagueness of terms is necessary for international law, as a vaguer definition will give prosecutors and judges at the International Criminal Court a freer hand in determining the individual parameters of the fulfillment of the elements of ecocide.³⁹ Vagueness is not uncommon in international sources of law, especially international treaties. This results, for example, from the multitude of actors and parties involved in the drafting of the content of a particular contract, where the final form of the content of the contract is also based to a large extent on compromises. Moreover, a certain degree of vagueness can be overcome through interpretation, where, in the context of interpreting a legal provision, the judge assigns meaning to the existing text of the legal provision (legal norm), possibly to the very limit of semantics.⁴⁰ In our view, the objection that the attribute of certainty has been infringed does not hold water, since that objection is based on the use of a purely grammatical interpretation, without taking into account other types of interpretation, in particular teleological interpretation.⁴¹ However, interpretation is not to be

³⁸ *Ibidem*.

³⁹ Avidam Kent and Cherie Leman-Richardson, *An International Crime of Ecocide: Prospects and Difficulties*, „Trends Research & Advisory”, May 5, 2022, <https://trendsresearch.org/insight/10-05-2022/>.

⁴⁰ Ruling of the Constitutional Court of the Slovak Republic, Case No. II. ÚS 46/2015, published in the Collection of Findings and Resolutions under No. 32/2015.

⁴¹ A similar approach can also be noted, for example, in domestic case law. The Constitutional Court of the Slovak Republic stated in its ruling No. III. ÚS 341/2007, as follows: *"The court (...) is not bound by the literal wording of a statutory provision absolutely. It may, and even must, derogate from it (...) where the purpose of the law, systematic coherence or the requirement of a*

confused with judicial lawmaking by analogy, which is used when there are legislative gaps. The question of the admissibility of the analogy is dealt with in Art. 22 para. 2 of the Statute, which states: "*The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.*"⁴² It is clear from the cited provision that the admissibility of an analogy is excluded and that, where there is a possibility of several types of interpretation, care must always be taken to apply the interpretation, which is more favorable to the offender, by the principle of *in dubio pro reo*.

However, from the authors' point of view, the use of a more expansive interpretation of the term "knowingly" is in itself satisfactory in terms of content, since the Rome Statute requires, given the seriousness of the offenses, a higher level of knowledge on the part of the perpetrator relating to the objective aspect of the offense, i.e., that the perpetrator's actions will cause specific consequences. This is a significantly higher level of "certainty" than is the case with knowledge of a significant probability of a consequence. Moreover, the commentary on the definition itself indicates that the term "knowingly" is not only associated with intentional acts, but also with negligent acts (conscious negligence). Such a cover-up of actual intent, namely the extension of the subjective element to include conscious negligence, may stem from the fact that in drafting the Rome Statute, the Contracting Parties were opposed to the inclusion of negligence in the subjective element given the gravity of these acts.⁴³

3.2 Other problematic areas in terms of practical implementation

The definition of the term "wanton" also appears problematic. Indeed, the proposed definition of ecocide requires knowledge or awareness of a significant likelihood of serious and either extensive or long-term damage to the environment. Taking into account the interpretation of the term 'arbitrarily', the perpetrator must be aware not only of the existence of a substantial likelihood of serious and either extensive or long-term damage to the environment but also that such damage would be grossly disproportionate to the anticipated social and economic benefits.⁴⁴ The authors believe that evidence to prove the perpetrator's knowledge of these facts would, taking into account the above, be considerably complicated, if not unrealistic.

constitutionally consistent interpretation of laws and other generally binding legal provisions so requires for compelling reasons."

⁴² Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 333/2002 Coll. on the adoption of the Rome Statute of the International Criminal Court.

⁴³ Kevin Jon Heller, *The Crime of Ecocide in Action*, OpinioJuris, accessed November 11, 2022, <http://opiniojuris.org/2021/06/28/the-crime-of-ecocide-in-action/>.

⁴⁴ Juraj Panigaj, *Environmental Protection from the Perspective of the Rome Statute of the International Criminal Court*, in „Spring School of Doctoral Students of UPJŠ 2022. Proceedings of the 8. Volume”, Košice: Pavol Jozef Šafárik University in Košice. ŠafárikPress Publishing House, 2022, p. 79.

The condition that the elements of ecocide will only be fulfilled if the damage exceeds the expected economic and social benefits, referring to the principle of sustainable development, also seems problematic. The Panel states that it was aware that socially and economically beneficial activities such as development in housing or transport infrastructure can also cause serious and either widespread or long-term damage to the environment, and hence the proportionality test between the harms and benefits mentioned here needs to be carried out.⁴⁵ In our view, this reasoning cannot be accepted as it would, in practical terms, constitute a degradation of environmental protection as a priority interest protected by the crime of ecocide, provided that the benefits of the unlawful acts outweigh the damage to the environment. Severe impacts on human life or natural, cultural, or economic resources cannot be outweighed by social or economic benefits. We, therefore, recommend that the proportionality test be deleted, not least given the difficulty of determining the timeframe within which the proportionality test should be carried out. Indeed, the estimation of environmental damage is often associated with probability rather than certainty, as the ICJ itself noted in the *Gabčíkovo-Nagymáros* decision: "*The Court is aware that vigilance and prevention are essential in the field of environmental protection because of the often irreversible nature of environmental damage and the related limitations in the very mechanism of reparation for this type of damage. Throughout the ages, mankind has constantly interfered with nature for economic and other reasons. In the past, this has often been done without any consideration of the consequences of such interventions. [...]*."⁴⁶

While the mere enshrinement of a new crime in international law, where the primary object of protection will be the environment, seems to be a major step forward, many experts also point to other related obstacles. The first issue is the question of the *ratione personae* of the ICC. In this respect, the jurisdiction of the ICC is based on the concept of individual responsibility for crimes committed as defined in the Statute, i.e., it applies only to individuals (natural persons) and not to legal persons (for example corporations). At the same time, the ICC exercises its jurisdiction over nationals of States Parties to the Statute.⁴⁷ Since not every state in the international community is a party to the Statute, but (only) 123 states, the jurisdiction of the ICC will not include citizens of more than one state, such as Russia, the US, China, etc. (there is an exemption mentioned in Art. 12). Yet these countries have long been ranked among the most polluting. In 2015, for example, China was the top greenhouse gas producer, with the US in second place and the

⁴⁵ *Ibidem*.

⁴⁶ Case concerning the *Gabčíkovo-Nagymaros* project, *Hungary v. Slovakia* (1997). I. C. J. Reports, 25 September 1997, 78.

⁴⁷ In case the crime is committed in the territory of a Party to the Statute by a person who is not a national of that State but is a foreigner, the jurisdiction of the ICC extends to that person, irrespective of his or her nationality.

European Union in third place.⁴⁸ To this day, China is hailed as "the world's biggest polluter".⁴⁹ Experts also see an obvious problem in the ICC's understaffing, i.e. insufficient staff capacity, and the question arises whether a more appropriate approach would be to create a new, exclusively environmentally-focused international judicial authority. In the opinion of the authors, this is an issue that requires a separate and deeper investigation, which is no longer possible to include in the scope of this article. Nevertheless, we would argue that enshrining ecocide in the Rome Statute is a much more appropriate approach. This claim is based on the fact that, although there was a special chamber of the International Court of Justice focused on environmental protection in the past, no case has been brought before this body during its entire existence (1993 to 2003).

4. Conclusion

The need for proper and quality environmental protection cannot be delayed. The majority of the international community agrees on this (at least it is presented that way). This statement reflects the actions and activities of the UN International Law Commission, which in May 2022, after almost a decade of efforts, submitted to the General Assembly draft principles (articles) relating to the protection of the environment in relation to armed conflict.⁵⁰ As for the punishment of perpetrators under the jurisdiction of the International Criminal Court for environmental damage, this issue, in the authors' view, will not be resolved in the foreseeable future.⁵¹ Nevertheless, we can conclude that the hypothesis of the need and necessity to include a specific crime of ecocide in the Rome Statute (given the absence of an environmental dimension in the current crimes under the Rome Statute) has been verified.⁵²

At several points in the present article, the authors comment on the proposed legal definition of the crime of ecocide as not very satisfactory, as the authors of the proposed definition have failed to break away from the anthropocentric considerations inherent within the definition. In December 2022, 21. Assembly of the Parties to the Rome Statute took place. No space was dedicated to ecocide in the official/main program. In addition to the main panel, however, space was created for

⁴⁸ For this, see closer: European Parliament. "Which Countries and Sectors Emit the Most Emissions (infographic)," accessed November 15, 2022, <https://www.europarl.europa.eu/news/sk/headlines/society/20180301STO98928/ktore-krajiny-a-odvetvia-vypus-taju-najviac-emisii-infografika>.

⁴⁹ Chloé Farand and Megan Darby, *China will aim for carbon neutrality by 2060, Xi Jinping says*, EURACTIV, September 23, 2020, <https://www.euractiv.com/section/energy/news/china-will-aim-for-carbon-neutrality-by-2060-xi-jinping-says/>.

⁵⁰ Draft principles on protection of the environment in relation to armed Conflicts (A/CN.4/L.968). International Law Commission. 20 May 2022.

⁵¹ A similar view is shared by, e.g., Lora Arenal, *The Legal Regulation of Crimes against Environment in International Law: Challenges to Define Ecocide as an International Crime*, „Anuario Iberoamericano de Derecho Internacional Penal”, Volume 9, (2021).

⁵² This view is also held by most of the professional community, for which see, for example, Darryl Robinson, *Ecocide-Puzzles and Possibilities*, „Journal of International Criminal Justice”, Volume 20, Issue 2, (2022), p. 313-347.

other discussion topics, where, under the auspices of the State of Vanuatu and other entities, participants addressed the relevance of ecocide as an additional crime under international law.⁵³ However, once again, this remained only on the level of discussions, because, none of the Parties gave an official proposal for an amendment within the specified time limit (at the latest 3 months before the Assembly).⁵⁴ That's why the ecocide proposal in the form of an amendment may come up for consideration this year when the Assembly meets again in December 2023.

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⁵³ "ASP 21 Side event: Global crisis and the potential of the ICC: Relevance of ecocide as the fifth crime" *PILPG: A Global Pro Bono Law Firm*, December 7, 2022, <https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2022/12/7/asp21-side-event-global-crisis-and-the-potential-of-the-icc-relevance-of-ecocide-as-the-fifth-crime>

⁵⁴ Kate Mackintosh and Lisa Oldring, *Watch This Space: Momentum Toward an International Crime of Ecocide*, „Just Security”, December 5, 2022, <https://www.justsecurity.org/84367/watch-this-space-momentum-toward-an-international-crime-of-ecocide/>

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