

Environmental Criminal Offences: International, European and National law Perspective

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Summary: The article analyses the regulation of environmental criminal offences, including environmental crimes, in international, European, and national law. The author considers the relevant provisions of the law of armed conflict, international criminal and environmental law, which stipulate the responsibility of states for widespread, long-term, and severe damage to the environment, as well as the responsibility of private actors for transnational environmental crimes and war crimes against the environment. The article compares the provisions relating to environmental criminal offences of the Council of Europe Convention on the Protection of the Environment through Criminal Law and its new draft; old and new versions of the EU Directive on the Protection of the Environment through Criminal Law; the draft of the Convention and final version of the Directive. The author pays particular attention to the national legislation of different states in this field and considers the concept of ecocide in international, European, and national law.

Keywords: environmental criminal offence, environmental crime, ecocide, international law, European law, national law

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1. Introduction

In national law, criminal offences are divided into criminal misdemeanors and felonies (crimes). A criminal misdemeanor is an act, for the commission of which a punishment is provided in the form of a fine or another punishment not related to imprisonment. Crimes are punished by bigger fines and imprisonment. While the concept of ‘environmental offences’ is duly elaborated in European law, the concept of ‘environmental

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crimes' (or 'crimes against the environment') is defined at the level of doctrine rather than at the level of international or European law. For the purpose of this article, the term 'European law' will encompass the law of the Council of Europe and of the European Union. The scope of environmental offences, including environmental crimes, is usually defined in the national legislation of different states.

Environmental criminal offences are interpreted differently in national legal systems, European, and international law. Their qualification is carried out differently in peacetime and during armed conflicts. The environment can become a direct target, a weapon used to cause damage to another state, or can be an indirect victim as a result of committing other crimes. Some international legal instruments provide the mechanism for inter-state cooperation to fight transnational crimes against the environment; some international treaties call for international responsibility for war crimes against the environment; some European legal acts deal with environmental criminal offences; and some national legal acts establish criminal responsibility for ecocide.

International, European, and national law rarely define the notion of an 'environmental offence' or 'environmental crime' explicitly. The Council of Europe Convention on the Protection of the Environment through Criminal Law (1998) establishes environmental offences with the help of the listing system and indicates that they must be committed intentionally or with negligence. The European Union Directive 2024/1203 on the Protection of the Environment through Criminal Law uses the same approach: it lists the main environmental criminal offences which are committed intentionally or with serious negligence, where the conduct is unlawful. The treaties of international humanitarian law do not use the terms 'offences' or 'crimes', while the Rome Statute of the International Criminal Court (1998) defines the elements of environmental crime committed only during an armed conflict. Some scholars try to define the terms 'environmental crime' and 'ecocide'; while the definitions of the term 'environmental offence' practically are not found in the academic literature.

The aim of this article is to analyze the concept of environmental criminal offences, including environmental crimes, in international, European, and national law. Section 2 of the article will be dedicated to environmental criminal offences in international law, section 3 – to environmental criminal offences in European law, and section 4 – to environmental criminal offences in national law, including Ukraine.

2. Environmental criminal offences in International Law

In international law, there are treaties or customary legal rules that provide the basis for state responsibility for violations of international legal obligations concerning the protection of the environment in peacetime or during an armed conflict. These

rules do not call such violations as ‘crimes’ or ‘offences’. They may be found in the sources of international humanitarian law (law of armed conflicts), which mainly deals with ‘breaches’ or ‘violations’ of its rules. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977 (hereinafter – Protocol I) provides in Article 35(3) that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment¹. If a state breaches these obligations by action or inaction, it will bear international responsibility. A state will be responsible for violations of relevant rules of international humanitarian law, if the unlawful conduct is attributable to it under the law of state responsibility, including for violations committed by its own organs, by persons or entities that were empowered to exercise governmental authority, by persons or groups acting on its instructions, under its direction or control, and by private persons or groups which unlawful conduct it acknowledges and adopts as its own². Unfortunately, Article 85 of Protocol I doesn’t list violations of norms prohibiting the employment of methods or means of warfare that may cause widespread, long-term, and severe damage to the natural environment, among the ‘grave breaches’ of international humanitarian law.

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977 (hereinafter – the ENMOD Convention) provides in Article I that each State Party undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party³. A state employing the above-mentioned techniques during armed conflict and in peacetime will be held responsible. Although the Convention doesn’t call the violations of its provisions as ‘crimes’ or ‘offences’ against the environment, under Article IV, each State Party must take measures to prohibit and prevent any activity violating the provisions of the Convention anywhere under its jurisdiction or control by private persons and entities⁴. This means a state must criminalize such unlawful conduct in its national law.

Another field of regulation by international law is individual criminal responsibility. Individuals will be responsible for crimes against the environment, whether they act as representatives of states or in their own capacity. Here, we can distinguish

¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* dated 08.06.1977 [online]. Available at: https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc_002_0321.pdf

² HENCKAERTS, J.-M., DOSWALD-BECK, L. (eds.). *Customary International Humanitarian Law: Vol I Rules* Cambridge: Cambridge University Press, 2005, p. 530.

³ *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* dated 10.12.1976 [online]. Available at: https://treaties.un.org/doc/Treaties/1978/10/19781005%2000-39%20AM/Ch_XXVI_01p.pdf

⁴ Ibid.

international and transnational crimes against the environment. As for the first category, the Rome Statute of the International Criminal Court envisages individual criminal responsibility for war environmental crimes. Article 8(2)(b)(iv) of the Statute defines the category of ‘war crimes’, *inter alia*, as ‘serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, ... 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’⁵. Thus, individual criminal responsibility under the Statute may appear for crimes against the environment committed by private actors only during an international armed conflict. In 2016, the International Criminal Court issued the Policy Paper on Case Selection and Prioritisation, which encourages the Court to give particular consideration to prosecuting such international crimes, which are committed by means of, or that result in, the destruction of the environment, the illegal exploitation of natural resources, or the illegal dispossession of land⁶.

Customary rules of law of armed conflicts repeat the above-mentioned provisions of Protocol I and even expand their content. The International Committee of the Red Cross (hereinafter – ICRC), in its Study on Customary International Humanitarian Law (2005), codified some rules for protecting the environment during armed conflict. Rule 156 envisages that ‘serious violations of international humanitarian law constitute war crimes’⁷. Among serious violations of international humanitarian law committed during an international armed conflict, the Rule, unlike Protocol I, lists ‘launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct military advantage anticipated’⁸. The wording of this crime was borrowed from the Rome Statute, which was analyzed above. Guidelines on the Protection of the Natural Environment in Armed Conflict, updated by the ICRC in 2020, contain Rule 28, which obliges states to investigate war crimes that concern the natural environment, committed by their nationals or armed forces on their territory or over which they have jurisdiction, and prosecute the suspects⁹.

⁵ *Rome Statute of the International Criminal Court* dated 17.07.1998 [online]. Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>

⁶ International Criminal Court Office of the Prosecutor. *Policy Paper on Case Selection and Prioritisation* dated 15.09.2016 [online]. Available at: https://www.icc-cpi.int/sites/default/files/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

⁷ HENCKAERTS, J.-M., DOSWALD-BECK, L. (eds.). *Customary International Humanitarian Law: Vol I Rules* Cambridge: Cambridge University Press, 2005, p. 568.

⁸ *Ibid.*, p. 580.

⁹ *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, With Commentary* dated 2020 [online]. Available at: <https://www.icrc.org/sites/default/files>

At its twenty-second session, the UN International Law Commission proposed to include some international crimes of a state in Article 19 of Draft Articles on the Responsibility of States for Internationally Wrongful Acts, including ‘a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas’¹⁰. Nevertheless, this proposal wasn’t accepted: the final version of the Articles adopted in 2001 doesn’t contain the list of international crimes that a state may commit. A general view today is that an individual, not a state, commits a crime; the latter may be responsible only for violations of its international legal obligations.

Since international law provides the responsibility of states for violations (or breaches) of their international legal obligations as well as the responsibility of individuals for international crimes mainly with regard to international armed conflicts, many scholars and experts make different interpretations of other ‘core crimes’ to include the environmental element. For this purpose, they consider environmental crimes as an element or instrument for committing the crime of genocide under Article II(c) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). The Article enumerates the acts committed with intent to destroy a defined group, among which ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’¹¹ may be manifested in mass destruction of the environment indispensable for human survival. Besides, crimes against the environment may be considered within the crimes against humanity under Article 7 of the Rome Statute, like a widespread or systematic attack directed against any civilian population, namely, persecution against any identifiable group or collectivity ‘on other grounds’ (para. h) or ‘other inhumane acts’ of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health (para. k)¹². ‘Other grounds’ and ‘other inhumane acts’ may refer to the destruction of the human environment.

Concerning the second aspect of individual responsibility, some conventions deal with transnational crimes against the environment. Such crimes constitute the fourth largest in the world after drug trafficking, human trafficking, and smuggling.

/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf

¹⁰ *Draft articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries dated 2001 [online]. Available at: https://legal.un.org/ilc/texts/instruments/English/commentaries/I9_6_2001.pdf, p. 113.

¹¹ *Convention on the Prevention and Punishment of the Crime of Genocide* dated 09.12.1948 [online]. Available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

¹² *Rome Statute of the International Criminal Court* dated 17.07.1998 [online]. Available at: <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>

‘Environmental crimes’ are not mentioned in any international treaty protecting the environment during peacetime. This concept results from the rule-making activity of special bodies created within the framework of several environmental agreements, as well as UNEP and INTERPOL. Some of the listed conventions require states to criminalize certain acts in their domestic legislation. For example, Article 4(3) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) obliges parties to consider that illegal traffic in hazardous wastes or other wastes is criminal; Article VII(2) of the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter (1972) provides that each state shall take appropriate measures to prevent and punish conduct in contravention of the provisions of the Convention; Article VIII(1) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) refers to the obligations of states to penalize trade in, or possession of specimens in violation of its provisions; Article 7(2) of the Convention on the Physical Protection of Nuclear Materials (1980) proclaims that each state must make the offences described in this Convention punishable by appropriate penalties. INTERPOL and UNEP documents mention among transnational organized environmental crimes illegal logging, deforestation, and timber trading; poaching and trafficking of wild animals and plants; illegal, unreported, and unregulated fishing; illegal mining; illegal dumping of and disposal of waste; trafficking in hazardous waste, chemicals, ozone-depleting substances, etc.¹³ They define environmental crimes as ‘illegal activities harming the environment and aimed at benefitting individuals or groups, or companies from the exploitation of, damage to, trade or theft of natural resources, including serious crimes and transnational organized crime’¹⁴.

All the above-mentioned conventions perceive environmental crimes not as international core crimes, which result in criminal responsibility in international criminal tribunals, but as transnational criminal activity, which national criminal courts must prosecute. In order to help states combat the crimes more effectively, such conventions establish the traditional mechanisms for extradition, enforcement of judgments of their criminal courts, and cooperation in other legal matters.

Since international humanitarian law doesn’t recognize the use of methods or means of warfare that cause widespread, long-term, and severe damage to the environment as an international crime, and international criminal law establishes a very high

¹³ NELLEMAN, C., HENRIKSEN, R., RAXTER, P., ASH, N., MREMA, E. (eds.). *The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources. A UNEP Rapid Response Assessment*. UNEP and GRID-Arendal, Nairobi and Arendal, 2014; NELLEMAN, C., HENRIKSEN, R., KREILHUBER, A., STEWART, D., KOTSOVOU, M., RAXTER, P., MREMA, E., BARRAT, S. (eds.). *The Rise of Environmental Crime – A Growing Threat To Natural Resources Peace, Development And Security. A UNEP/INTERPOL Rapid Response Assessment*. UNEP and RHIPTO Rapid Response–Norwegian Center for Global Analyses, 2016.

¹⁴ Ibid.

threshold to trigger individual responsibility for war crimes against the environment, many experts and scholars justify the idea either to amend the Rome Statute or to adopt a new treaty in order to make the most serious environmental crime – ecocide – punishable under international law. Whatever form is chosen – the main point is that the crime of ecocide will be prosecuted if committed not only during an armed conflict but also in peacetime. The features that distinguish ecocide from other environmental crimes are: there must be an intention to cause harm and the knowledge about the harmful consequences; the damage caused must be widespread, long-term, and (or) severe; the unlawful actions must lead to environmental disaster or catastrophe. Some authors mention the possibility of applying the principle of universal jurisdiction to ecocide¹⁵.

The term ‘ecocide’ was coined during the Vietnam War, when the USA deployed some toxic chemicals to gain a military advantage that resulted in severe and long-lasting damage to the environment and health of the population. In scientific circles, this concept was first used in 1970 by an American biologist, Galston A., who called the international community to elaborate a legal instrument on ecocide¹⁶. Another scientist, Falk R., in 1973 called for the drafting of an International Convention on the Crime of Ecocide and a Draft Protocol on Environmental Warfare¹⁷. It is important to note that the founder of the term ‘genocide,’ Lemkin R., supported the view to criminalize ‘deliberate practices resulting in the destruction of the ecosphere as the earthly habitat of man and all other living beings, with further fatal consequences for the survival of the human species, its development, and societal and cultural achievements’¹⁸. Unfortunately, the final version of the Convention on the Prevention and Punishment of the Crime of Genocide didn’t include the environmental aspect in the elements of ‘the crime of crimes’.

In 2017, a foundation ‘Stop Ecocide International’ was created. The principal aim of its founders is to get recognition of ecocide as an international crime, in particular, to add it as a ‘fifth’ crime to the Rome Statute. The team elaborated a definition of ecocide: ‘unlawful or wanton acts committed with the knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts’¹⁹. They also drafted the definitions of

¹⁵ JOUBERT, S. Can Crimes of Ecocide Committed During the Conflict in Ukraine be Legally Punished? *International Journal of Law: ‘Law and World’*. 2023, vol. 9, issue 4, pp. 108–119.

¹⁶ CUSATO, E., JONES, E. The ‘imbroglio’ of ecocide: A political economic analysis. *Leiden Journal of International Law*. 2024, vol. 37, pp. 42–61.

¹⁷ Ibid.

¹⁸ NOWAK, E. From Genocide to Ecocide. Essentials of a New Category of International Crime against Humanity. *Undecidabilities and Law. The Coimbra Journal for Legal Studies*. 2022, no. 2, pp. 75–98.

¹⁹ Independent Expert Panel for the Legal Definition of Ecocide. *Commentary and Core Text* [online]. Available at: <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf>

the terms ‘wanton,’ ‘severe,’ ‘widespread,’ and ‘long-term’. Today, many states, in particular low-lying small island developing states, and international organizations, including the Council of Europe and the European Union, raise their voice in support of criminalizing ecocide in the Rome Statute.

3. Environmental criminal offences in the European law

In 1998, the Council of Europe adopted the Convention on the Protection of the Environment through Criminal Law (ETS No.172) (hereafter – ‘the Convention’ or ‘1998 Convention’), which became the first legally binding international instrument establishing the minimum standards for criminalizing environmental offences and preventing the phenomenon of ‘environmental dumping’ (the practice whereby criminals carry out their acts in states where environmental legislation is less strict, less controlled or not enforced)²⁰. Unfortunately, the Convention did not enter into force. In 2020, the Council of Europe entrusted to the Working Group on the Environment and Criminal Law, set up within the European Committee on Crime Problems, to elaborate a new instrument on the protection of the environment through criminal law in order to adapt it to current and future challenges²¹. The draft of the new Convention (hereinafter – ‘the Draft’ or ‘Draft Convention’) and the draft report thereto are available on the Council of Europe’s site. One of the main challenges faced by the Working Group was to reconcile different national approaches on the interdependency between administrative and criminal law on the issue of offences against the environment²². The problem is aggravated by the fact that in many states, offences against the environment are treated as administrative offences and do not fall within the framework of criminal law²³. The draft Convention and the draft explanatory report were forwarded to the Council of Europe Committee of Ministers for adoption. The new Convention is expected to be opened for signature in May 2025.

Both the Convention and the Draft use the term ‘offence’. Comparing the two documents, we may distinguish the following novel provisions introduced in the revised version. First, the Draft clearly points out that the Convention applies in

²⁰ European Committee on Crime Problems (CDPC). *Feasibility Study on the Protection of the Environment through Criminal Law* dated 15.06.2022 [online]. Available at: <https://rm.coe.int/cdpc-2021-9fin-draft-feasibility-study-on-the-protection-of-the-environ/1680a7f64d>, p. 6.

²¹ *Ibid.*, pp. 4, 7.

²² *Ibid.*, p. 8.

²³ Europol. *Environmental crime in the era of climate change: Threat Assessment 2022* [online]. Available at: https://www.europol.europa.eu/cms/sites/default/files/documents/Environmental%20Crime%20in%20the%20Age%20of%20Climate%20Change%20-%20Public%20report_5.pdf, p. 6.

times of peace and in situations of armed conflict, wartime, or occupation²⁴. It is a very important input into understanding the interplay between the principles of international humanitarian and international environmental law. Very few environmental treaties have a similar provision on their application in times of war. Second, the Draft has an expanded set of states' obligations, namely, obligations concerning integrated policies and data collection (Chapter II encourages states to adopt and implement comprehensive policies in order to ensure an effective response to offences established in accordance with the Convention, including the adoption of legislation and the establishment of relevant bodies; establish national strategies to prevent and combat the offences; allocate appropriate financial and human resources for the prevention and combatting the offences; train professionals; collect necessary data and conduct research in this field); and obligations concerning prevention (Chapter III demands from states to take the necessary legislative or other measures for the prevention of the commission of any offence established in accordance with the Convention by any natural or legal person; cooperate with civil society and non-governmental organisations; undertake awareness-raising activities, etc.)²⁵. Third, Chapter IV 'Substantive criminal law' of the Draft corresponds to Section II 'Measures to be taken at national level' of the Convention. These provisions oblige states to take appropriate measures to establish as criminal offences under their domestic law certain acts committed 'intentionally' or 'with negligence' (the Convention) and 'unlawfully and intentionally' (the Draft). Both the 1998 Convention and the Draft enshrine offences related to the discharge, emission or introduction of a quantity of materials/substances or ionizing radiation into air, soil or water; radioactive material or substances, of which the manufacture, production, processing, handling, use, holding, storage, transport, import, export or disposal causes or is likely to cause damage to the environment or human health; the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to the environment or human health; the unlawful operation or closure of a plant/installation concerning a dangerous activity/substances; unlawful killing, destruction, taking, possession of and trading in protected wild fauna or flora²⁶. The

²⁴ Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV). *Draft Convention on the Protection of the Environment through Criminal Law* dated 17.05.2023 [online]. Available at: <https://rm.coe.int/pc-env-2023-04-eng-draft-convention-on-the-protection-of-the-environme/1680acbd44>

²⁵ Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV). *Draft Explanatory Report to the Convention on the Protection of the Environment through Criminal Law* dated 09.10.2024 [online]. Available at: <https://rm.coe.int/pc-env-2024-04rev02-eng-draft-explanatory-report-convention-on-the-pro/1680b1efb2>

²⁶ *Convention on the Protection of the Environment through Criminal Law* dated 04.11.1998 [online]. Available at: <https://rm.coe.int/168007f3f4>; Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV). *Draft Convention on the Protection of the Environment through Criminal Law* dated 17.05.2023 [online]. Available at: <https://rm.coe.int/pc-env-2023-04-eng-draft-convention-on-the-protection-of-the-environme/1680acbd44>

Draft adds some new environmental criminal offences: the placing on the market, in breach of a prohibition or another requirement aimed at protecting the environment, of a product; unlawful manufacture, placing or making available on the market, import, export or use of regulated chemical substances, offences related to mercury, ozone-depleting substances, fluorinated greenhouse gases; unlawful recycling of ships and ship-source discharges of polluting substances; unlawful abstraction of surface water or groundwater; trade in unlawfully harvested timber; unlawful mining; unlawful deterioration of habitats within a protected site; offences related to invasive alien species, etc.²⁷ Other differences between the 1998 Convention and the Draft concern the following questions: the basis for criminal jurisdiction as well as sanctions for natural and legal persons are broadened in the Draft; the Draft contains the aggravating circumstances, detailed rules on investigation, prosecution, procedural law and measures for protection.

The Draft in the 2023 version contained the crime of ecocide, which was defined as any action covered by the scope of the offences established in accordance with this Convention when such action results in and is committed with the knowledge that there was a substantial likelihood that it could result in severe and widespread, or severe and long-term, or severe and irreversible damage to human health or to the environment²⁸. Unfortunately, it was removed from the version adopted in 2024 and replaced by ‘particularly serious offence’. The draft explanatory report to the Convention recognizes the fact that such particularly serious offences can encompass conduct comparable to ‘ecocide’, which is already covered by the law of certain states, and which is being discussed in international fora²⁹. Article 31 obliges parties to establish as a particularly serious offence any of the conducts listed in other offences established in accordance with the Convention when it surpasses the constituent elements of the original offence according to the following criteria: a. when committed intentionally, b. when such an offence causes destruction; or irreversible, widespread and substantial damage; or long-lasting, widespread and substantial damage to an ecosystem of considerable size or environmental value, or to a habitat within a protected site, or to the quality of air, soil or water³⁰. Although the Council of Europe Parliamentary Assembly called for the recognition of ecocide

²⁷ Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV). *Draft Convention on the Protection of the Environment through Criminal Law* dated 17.05.2023 [online]. Available at: <https://rm.coe.int/pc-env-2023-04-eng-draft-convention-on-the-protection-of-the-environme/1680acbd44>

²⁸ Ibid.

²⁹ Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV). *Draft Explanatory Report to the Convention on the Protection of the Environment through Criminal Law* dated 09.10.2024 [online]. Available at: <https://rm.coe.int/pc-env-2024-04rev02-eng-draft-explanatory-report-convention-on-the-pro/1680b1efb2>, p. 25.

³⁰ Ibid., pp. 25–26.

in a number of its resolutions and recommendations³¹, this crime was not included in the final version of the Convention.

In 2008, Directive 2008/99/EC of the European Parliament and of the Council on the Protection of the Environment through Criminal Law was adopted. The document failed to achieve some of its main goals, and the European Commission's assessment revealed that it did not have much effect in practice³². The main problem was that the number of environmental crimes that were successfully investigated and sentenced remained very low. Besides, sanctions were insufficient, and reliable data for effective implementation was lacking. In 2024, a revised directive – Directive 2024/1203 of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and replacing Directives 2008/99/EC and 2009/123/EC – was adopted within the context of the European Green Deal. Environmental offences have become one of the top priorities in the EU environmental policy.

Directive 2024/1203 introduced an up-to-date list of environmental offences that must be criminalized in the national legislation of the EU Member States. Both directives criminalize offences related to unlawful management of materials or ionizing radiation, waste, nuclear materials or other hazardous radioactive substances, ozone-depleting substances, operation of a dangerous plant/installation, unlawful use of protected wild fauna or flora species, and protected habitats³³. Among the new offences, which were established by Directive 2024/1203 compared to Directive 2008/99/EC, are: pollution caused by ships (though this offence was envisaged in Directive 2009/123/EC), unlawful ship recycling, the placing of harmful products on the market, serious breaches of the EU chemicals, mercury and plant protection legislation, execution of projects without development consent, the depletion of water resources, illegal timber trade, introduction of invasive species, management of fluorinated greenhouse gases³⁴. Some of the unlawful acts were not criminalized, namely illegal, unreported, and unregulated fishing, which is regulated under another piece of EU legislation. Scholars underline that Directive 2024/1203 drew a clearer

³¹ Council of Europe Parliamentary Assembly Resolution 2477 (2023) 'Environmental impact of armed conflicts'; Council of Europe Parliamentary Assembly Recommendation 2246 (2023) 'Environmental impact of armed conflicts'.

³² LUNDH, Ch. O. The Revised EU Environmental Crime Directive Changes and Challenges in EU Environmental Criminal Law with Examples from Sweden. *Eucrim: European Law Forum: Prevention, Investigation, Prosecution*. 2024, no. 2, pp. 164–172.

³³ Directive 2008/99/EC of the European Parliament and of the Council on the Protection of the Environment through Criminal Law dated 19.11.2008 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2008/99/oj/eng>; Directive 2024/1203 of the European Parliament and of the Council on the Protection of the Environment through Criminal Law dated 11.04.2024 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2024/1203/oj/eng>

³⁴ Directive 2024/1203 of the European Parliament and of the Council on the Protection of the Environment through Criminal Law dated 11.04.2024 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2024/1203/oj/eng>

distinction between intentional conduct and conduct due to gross negligence³⁵. The new Directive defined the types and levels of penalties for natural and legal persons in a more concrete way; it set up limitation periods for different types of criminal offences; introduced the provisions on the qualified criminal offences, aggravating and mitigating circumstances; obliged states to allocate resources, raise awareness, organize trainings; inserted provisions on the jurisdiction of states in criminal matters.

Directive 2008/99/EC only obliged states to ensure that the environmental offences are punishable by effective, proportionate, and dissuasive criminal penalties³⁶. Directive 2024/1203 in Article 5 provides very concrete penalties for natural persons, such as criminal penalties (imprisonment), accessory criminal or non-criminal penalties or measures which may include: an obligation to restore the environment, or pay compensation for the damage caused; fines; exclusion from access to public funding; disqualification from holding a leading position within a legal person; withdrawal of permits and authorizations; temporary bans on running for public office, etc³⁷. While Directive 2008/99/EC contained brief and indefinite provisions concerning sanctions for legal persons, Directive 2024/1203 specified them. Some criminal and non-criminal sanctions are the same as for natural persons (fines, an obligation to reinstate the damaged environment, compensate for the damage caused, exclusion from access to public funding, withdrawal of permits and authorizations). In addition, companies could face penalties such as exclusion from entitlement to public benefits or aid; exclusion from entitlement to public benefits or aid; placing under judicial supervision; judicial winding-up; closure of establishments used for committing the offence; an obligation to establish due diligence schemes for enhancing compliance with environmental standards, etc. (Article 7)³⁸.

Although the European Parliament called on the EU and its Member States to promote the recognition of ecocide as an international crime under the Rome Statute³⁹, called on the Member States to introduce a crime of ecocide in their national law⁴⁰ and the early draft of the revised Directive contained the substantial provisions on ecocide⁴¹, – the term ‘ecocide’ appeared only once in a recital of the preamble of

³⁵ NAVRATILOVA, J. T. Europeanisation of Environmental Protection through Criminal Law. *Jus Novum*. 2024, vol. 18, no. 3, pp. 1–17.

³⁶ *Directive 2008/99/EC of the European Parliament and of the Council on the Protection of the Environment through Criminal Law* dated 19.11.2008 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2008/99/oj/eng>

³⁷ *Directive 2024/1203 of the European Parliament and of the Council on the Protection of the Environment through Criminal Law* dated 11.04.2024 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2024/1203/oj/eng>

³⁸ *Ibid.*

³⁹ European Parliament resolution of 20 January 2021 on human rights and democracy in the world and the European Union's policy on the matter – annual report 2019.

⁴⁰ Report A9-0087/2023 on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC.

⁴¹ *Ibid.*

the adopted Directive, namely, ‘qualified criminal offences can encompass conduct comparable to ‘ecocide’, which is already covered by the law of certain Member States and which is being discussed in international fora’⁴². Article 3(3) further explains that criminal offences constitute qualified criminal offences if such conduct causes: (a) the destruction of, or widespread and substantial damage which is either irreversible or long-lasting to, an ecosystem of considerable size or environmental value or habitat within a protected site, or (b) widespread and substantial damage which is either irreversible or long-lasting to the quality of air, soil or water⁴³. Notwithstanding the above-mentioned initiatives of the EU bodies and social demand for the criminalization of the crime of ecocide, Directive 2024/1203 omitted this point.

In 2023, the Council adopted a decision authorizing the European Commission to participate in negotiations concerning drafting a new Council of Europe Convention on the Protection of the Environment through Criminal Law. This measure was necessary to protect the integrity of the EU law, ensure consistency between the rules of international law and Union law, and the uniform and consistent application of EU common rules⁴⁴. The 1998 Convention has significantly influenced the elaboration and adoption of Directive 2008/99/EC. The work on drafting new versions of the Convention and Directive has started in parallel. And now, Directive 2024/1203 influences the process of elaboration of a new version of the 1998 Convention due to the involvement of the EU. The Directive and Convention mutually reinforce and strengthen each other in their objectives to increase the level of environmental protection⁴⁵.

Comparing Directive 2024/1203 and the Draft Convention, we should underline the following differences. First, the definition of environmental criminal offences: the Directive stipulates that Member States shall ensure that conduct listed in paragraphs 2 and 3 of Article 3, where it is intentional, and conduct referred to in paragraph 4 of this Article, where it is carried out with at least serious negligence, constitutes a criminal offence where that conduct is unlawful⁴⁶; Draft Convention in a number of its articles obliges Parties to establish as a criminal offence under their domestic law, when committed unlawfully and intentionally, certain acts. Thus, the Draft Convention doesn’t consider the negligency in criminalizing environmental offences. Second,

⁴² *Directive 2024/1203 of the European Parliament and of the Council on the Protection of the Environment through Criminal Law* dated 11.04.2024 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2024/1203/oj/eng>

⁴³ *Ibid.*

⁴⁴ *Council Decision (EU) 2023/2170 authorising the European Commission to participate, on behalf of the European Union, in negotiations on a Council of Europe Convention superseding and replacing the 1998 Convention on the Protection of the Environment through Criminal Law (ETS No. 172)* dated 28.09.2023 [online]. Available at: <https://eur-lex.europa.eu/eli/dec/2023/2170/oj/eng>

⁴⁵ *Ibid.*

⁴⁶ *Directive 2024/1203 of the European Parliament and of the Council on the Protection of the Environment through Criminal Law* dated 11.04.2024 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2024/1203/oj/eng>

the scope of the environmental criminal offences: Directive and the Draft Convention in general unified main offences; nevertheless, the former enshrines an additional one – placing or making available on the Union market or the export from the Union market of relevant commodities or relevant products associated with deforestation or forest degradation, while the Draft Convention has some offences which are not envisaged in Directive, like offences related to trade in unlawfully harvested timber, unlawful fishing, and unlawful mining. Third, the list of sanctions (penalties): the Directive has a more extensive and wide-ranging list of such sanctions for natural persons, while the Draft Convention just obliges Parties to take the necessary legislative and other measures to ensure that the offences, when committed by natural persons, are punishable by effective, proportionate and dissuasive sanctions⁴⁷. Fourth, the Directive introduced the provisions on the qualified criminal offences, aggravating and mitigating circumstances, while the Draft Convention contains only the list of aggravating circumstances, which differ from those enshrined in the Directive. Fifth, the jurisdiction of states in criminal matters: both Directive and the Draft Convention refer to the principles of territoriality (when the crime is committed on the territory of a state or on board a ship or aircraft), active personality (when the crime is committed by a state's national), and passive personality (when the crime is committed against a state's national). The Directive has more grounds for the execution of criminal jurisdiction of a state: when the damage, which is one of the constituent elements of the offence, occurred on its territory; the offender is a habitual resident in its territory; the offence is committed for the benefit of a legal person established in its territory; the offence is committed against one of its habitual residents; the offence has created a severe risk for the environment on its territory⁴⁸. Lastly, the Draft Convention has more detailed rules on prevention, investigation, prosecution, and procedural law, as well as measures for protection.

Since the Draft Convention and Directive 2024/1203 oblige states to establish such criminal sanctions for natural persons as imprisonment and fines, it means that, in fact, both documents equate environmental offences with environmental crimes, because they suppose the application of the most stringent criminal penalties. For the offences which may cause irreversible, widespread, long-term, and severe damage to the natural environment, the Convention and Directive provide for the toughest sanctions; for other environmental offences which may constitute transnational environmental crimes and which demand interstate cooperation in criminal matters, less stringent penalties are envisaged.

⁴⁷ Committee of Experts on the Protection of the Environment through Criminal Law (PC-ENV). *Draft Convention on the Protection of the Environment through Criminal Law* dated 17.05.2023 [online]. Available at: <https://rm.coe.int/pc-env-2023-04-eng-draft-convention-on-the-protection-of-the-environme/1680acbd44>

⁴⁸ *Directive 2024/1203 of the European Parliament and of the Council on the Protection of the Environment through Criminal Law* dated 11.04.2024 [online]. Available at: <https://eur-lex.europa.eu/eli/dir/2024/1203/oj/eng>

4. Environmental criminal offences in national law

Although modern international humanitarian law (Protocol I and ENMOD Convention) doesn't call violations of rules protecting the environment during wartime as 'crimes' or 'offences', states often criminalize such acts in their national legislation. States adopt special provisions on war crimes, including the crime of intentionally launching an attack in the knowledge that such an attack will cause widespread, long-term, and severe damage to the natural environment, in their criminal codes to implement the relevant provisions of the Rome Statute.

Concerning other environmental offences and crimes, it should be noted that the Council of Europe Member States didn't gain much experience in implementing the provisions of the 1998 Convention. States neither signed nor ratified the Convention, usually because they awaited the reactions of other Member States and expected to get some example of how to implement its provisions into national laws. On the other hand, the EU Member States didn't have a need to join the Council of Europe instrument because of their obligations to transpose Directive 99/2008/EC, which was a priority for them⁴⁹. Some states observed that the Convention envisaged an autonomous criminal law, without reference to compliance with administrative regulations, that was not feasible for them⁵⁰.

There are differences between states concerning whether a violation of environmental law is deemed an administrative or criminal offence. Vervaele J. and van Uhm D. observe that countries that criminalize environmental offences consider them mostly as regulatory offences (*malum prohibitum*), which means that coercive measures are limited and sanctions are low; nevertheless, some countries include them in their criminal codes as *malum in se*⁵¹. For example, Ukrainian Law on the Protection of Natural Environment (1991) stipulates in Article 68 that violation of the legislation of Ukraine on environmental protection entails disciplinary, administrative, civil and criminal responsibility⁵². Administrative responsibility for violations of environmental legislation (in other words, for administrative offences in the sphere of nature protection and use of natural resources) is provided for in the Code of Ukraine on Administrative Offences (1984) and implies the application of administrative penalties such as: issuing a warning; imposing a fine; paid seizure of an object that became an instrument of commission or a direct object of an administrative offense; confiscation

⁴⁹ European Committee on Crime Problems (CDPC). *Feasibility Study on the Protection of the Environment through Criminal Law* dated 15.06.2022 [online]. Available at: <https://rm.coe.int/cdpc-2021-9fin-draft-feasibility-study-on-the-protection-of-the-environ/1680a7ff64d>, pp. 21–56.

⁵⁰ Ibid., pp. 21–56.

⁵¹ VERVAELE, J. A. E., DAAN, P. VAN UHM. *Criminal Justice and Environmental Crime: how to tackle organized crime and ecocide?* [online]. Available at: <https://www.penal.org/en/criminal-justice-and-environmental-crime-how-tackle-organized-crime-and-ecocide>

⁵² Law of Ukraine "On the Protection of the Natural Environment" dated 25.06.1991 [online]. Available at: <https://zakon.rada.gov.ua/laws/show/1264-12#Text>

of an object that became an instrument of commission or a direct object of an administrative offense or money received as a result of committing an administrative offense; deprivation of the special right to engage in activities related to the use of natural objects and resources; involvement in corrective labor; application of administrative arrest⁵³. Criminal responsibility for environmental offences (in other words, for environmental criminal misdemeanors and crimes) is provided for in the Criminal Code of Ukraine (2001) and implies the application of such penalties for the most dangerous criminal offences in the field of use of natural resources and environmental protection: imprisonment and deprivation of the right to hold certain positions or engage in certain activities⁵⁴.

Several states included the crime of ecocide in the criminal codes, namely, post-Soviet countries (Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Ukraine), as well as Belgium, France, and Vietnam. Most definitions of ecocide given in the criminal codes of the above-mentioned states refer to environmental disaster or catastrophe, but the problem is that these terms are not defined in their national legislation. The Criminal Code of Vietnam refers to ecocide as a crime against humanity; the criminal codes of Kazakhstan and Tajikistan – a crime against the peace and security of mankind. The Criminal Code of Ukraine perceives ecocide as a crime against peace, the safety of humankind, and international legal order and defines ecocide in Article 441 as ‘mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster’⁵⁵. Since 2001, when the crime was included in the Code, there has been no practical possibility of its application, proper interpretation, and enforcement⁵⁶. The envisaged elements of the crime need further clarification, verification, and detailing. For example, the term ‘environmental disaster’ is not defined in the Code or any other legislative act of Ukraine. Article 441 describes ecocide, paying more attention to the consequences of the crime than to how it was committed⁵⁷. Besides, the correlation between ecocide and war crimes (including crimes against the environment) is not clearly defined. During the Russian-Ukrainian armed conflict, a number of crimes were committed, for which criminal proceedings were initiated simultaneously under Article 441 (‘ecocide’) and Article 438 (‘violation of the laws and customs of war’) of the Criminal Code of Ukraine. Ukraine is currently investigating about 250 war crimes against the environment committed by Russian troops since the beginning of

⁵³ *Code of Ukraine on Administrative Offences* dated 07.12.1984 [online]. Available at: <https://zakon.rada.gov.ua/laws/show/80731-10#Text>

⁵⁴ *Criminal Code of Ukraine* dated 05.04.2001 [online]. Available at: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>

⁵⁵ *Ibid.*

⁵⁶ BARAN, S., KRAVCHENKO, O., MELEN-ZABRAMNA, O., SHUMYLO-TAPIOLA, O. *The environment is a silent victim of war. How long will this last?* Lviv: Company “Manuscript”, 2024, p. 30.

⁵⁷ *Ibid.*, p. 31.

the full-scale invasion, among which 14 have been classified as ecocide, including the breaching of the Kakhovka hydroelectric power station, which led to enormous environmental damage. Experts qualify this crime as a war crime under Article 8(2)(b)(iv) of the Rome Statute⁵⁸, which may become the first environmental case faced by the International Criminal Court.

In 2024, Belgium became the first European country to legally recognize ecocide as both a national and an international crime in its new Criminal Code, which will enter into force in 2026⁵⁹. The crime of ecocide is defined as ‘the deliberate commission, by act or omission, of an unlawful act causing serious, widespread and long-term damage to the environment with the knowledge that such act is causing such damage, and insofar as this act constitutes a breach of federal legislation or an international instrument that is binding on the federal authority or insofar as the act cannot be located in Belgium’⁶⁰. Thus, the scope of this crime is limited to areas falling within federal jurisdiction, namely the North Sea and nuclear waste management. Under Belgian law, ecocide may be committed by natural and legal persons.

The French Climate and Resilience Bill of 2021 introduced the notion of ecocide, however, it is limited by the scope: ecocide is recognized as an offence (*délit*), which is considered less severe in the hierarchy of possible misconduct⁶¹. Ecocide refers to situations where pollution offences are committed deliberately and lead to serious and lasting effects on health, fauna, and flora⁶². In general, the crime of ecocide lacks legal standing in France.

In several EU Member States, some environmental offences envisaged in Directive 2024/1203 are regulated as administrative ones and some – as criminal⁶³. Many states encounter difficulties in implementing provisions of the Directive on the material elements of environmental offences, qualified criminal offences, liability, and penalties for legal persons⁶⁴. States will have to harmonize rules on the terms of imprisonment and the sum of fines applicable for such offences⁶⁵.

The legal landscape of different states on this issue is rather fragmented. The representatives of many countries call for the criminalization of ecocide on an international scale, e. g., within the Rome Statute, but at the same time, they do not do this within their national legislation. Nevertheless, there are a lot of attempts to present draft laws

⁵⁸ ANDRUSEVYCH, A., KOROTKYI, T., MARUSHEVSKYI, G., MEDVEDIEVA, M., POLEVYI, M., TROPIN, Z., HENDEL, N. *Analytical Report “Preliminary Environmental and Legal Analysis the breach of the Kakhovka dam and its impacts”*. Kyiv, 2024. 180 p.

⁵⁹ *The Environmental Crime Directive: A Game-Changer for Ecosystem Protection?* [online]. Available at: <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2024/06/the-environmental-crime-directive-a-game-changer-for-ecosystem-protection.pdf>, p. 5.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, p. 7.

⁶² *Ibid.*, p. 7.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

criminalizing ecocide before national parliaments. The latest formal proposal to amend the Rome Statute was made in September 2024 by Vanuatu, with co-sponsorship from Fiji and Samoa, which presented their vision to the Working Group on Amendments of the International Criminal Court⁶⁶.

5. Conclusions

Environmental criminal offences do not have a unified definition in national legislation or international and European law. In international law, treaties pertaining to the law of armed conflicts and relevant customary legal rules provide the basis for state responsibility for violations of international legal obligations concerning the prohibition to cause widespread, long-lasting, or severe environmental damage. These rules do not refer to ‘crimes’ or ‘offences’, because only natural and legal persons may be held criminally responsible for their commitment. Nevertheless, states are obliged to investigate war crimes against the environment committed by their nationals or armed forces on their territory or over which they have jurisdiction and prosecute the suspects. It means states must adopt relevant provisions on environmental war crimes in their national legislation.

Environmental criminal offences may be committed by private persons in the form of a separate war crime or may be recognized as a tool to perform other international crimes (like aggression, crimes against humanity, war crimes, and genocide). Also, some treaties regulate the criminal responsibility of private persons for transnational crimes against the environment, which are prosecuted by national criminal courts.

At the European level, environmental criminal offences were clearly defined in the Council of Europe Convention on the Protection of the Environment through Criminal Law, its new Draft as well as in the EU Directive 2024/1203 on the Protection of the Environment through Criminal Law. Comparing these acts, we may conclude that the Draft and the Directive are harmonized and govern the issue more extensively than their predecessors. The documents refer to environmental offences as crimes and provide the most stringent penalties for their commission.

The provisions of treaties of international humanitarian and criminal law on violations or breaches of their rules protecting the environment are usually implemented in the national criminal legislation of states (as war crimes), while provisions of environmental treaties dealing with transnational crimes against the environment, as well as the Council of Europe Convention and the EU Directive – in national criminal, administrative or civil legislation of states (as environmental offences). One of the

⁶⁶ *Vanuatu's Statement at the Twenty-Third Session of the Assembly of States Parties to the Rome Statute*, General Debate dated 03.12.2024 [online]. Available at: https://asp.icc-cpi.int/sites/default/files/asp_docs/ASP23-GD-VUT-3-12-ENG.pdf

main problems for effectively implementing the European legal acts lies within the differences between administrative and criminal law.

The crime of ecocide could have been enshrined in treaty law or the EU legislation, but due to the resistance of some powerful states, the lack of political will and international consensus, the crime of intentionally causing severe, widespread, and long-term environmental damage was included in international law only as war crime. Meanwhile, some states criminalized ecocide in their national legislation. Ecocide is characterized by such features: intention to cause harm and the knowledge about the consequences; the damage caused must be widespread, long-term, and (or) severe; the unlawful actions lead to environmental disaster or catastrophe; the crime may be committed during armed conflict and in peacetime. The international community decided to elaborate on the crime of genocide, and the question arises why it is not possible to do the same with the most serious crimes against the environment. Especially in situations when the ground is ready: environmental crimes committed by the Russian Federation in Ukraine during armed conflict between the two states amount to ecocide and must be punished in an appropriate way.

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