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FINDINGS OF THE INDEPENDENT EXPERT PANEL FOR THE LEGAL DEFINITION OF ECOCIDE IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT



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Military actions caused by Russian aggression on the territory of Ukraine once again prove the importance of studies related to ecocide. The ambiguous composition of the criminal offense provided for in Article 441 of the Criminal Code of Ukraine entitled "Ecocide" necessitates the study of international experience and current positions of scientists.

For example, according to Article 161 of the Criminal Code of Kazakhstan, ecocide is defined as the mass destruction of flora and fauna, poisoning of the atmosphere, land or water resources, as well as implementation of other actions that have caused or may cause an environmental disaster and is punishable by imprisonment for a term of ten to fifteen years.

Georgian criminal law states: "Ecocide, i.e. pollution of the atmosphere, soil, water resources, mass destruction of fauna or flora, or any other actions that could lead to an environmental disaster, is punishable by imprisonment for a term of twelve to twenty years. The same act committed during armed conflicts is punishable by imprisonment for a term of fourteen to twenty years or life imprisonment".

Moldovan legislation also provides for criminal liability for committing ecocide. Article 136 of the criminal law of Moldova specifies that deliberate mass destruction of flora and fauna, poisoning of the atmosphere or water resources, as well as committing other actions that may cause or have caused an environmental disaster, are punishable by imprisonment for a term of 10 to 15 years.

We see that even in those states where ecocide is established as a criminal offense, its definition is not specific and quite similar to the Ukrainian one.

A way out of such an ambiguous situation could be the definition of ecocide as a crime at the international level.

However, there are a number of difficulties with defining the composition of international offense "Ecocide". In order to further eliminate them, in 2021, an Independent Expert Panel was organized for the legal definition of ecocide (hereinafter - the Panel).

It is the hope of the Panel that the proposed definition might serve as the basis of consideration for an amendment to the Rome Statute of the International Criminal Court (ICC). The Statute addresses crimes that are deemed to be of international interest and relevance, and the time has come to extend the protections for serious environmental harm, already recognised to be a matter of international concern.

The inclusion of ecocide in the Rome Statute would add a new crime to international criminal law. This would be the first to be adopted since 1945. Researchers initiated discussion of inclusion of ecocide to the Rome Statute because of severe damage caused to the environment during armed conflict, whilst reflecting the fact that today, most severe environmental damage occurs during times of peace, a situation that currently falls outside the jurisdiction of the ICC.

Based on the results of the Panel's work, the following proposal was formed:

"To supplement the Rome Statute with Article 8 of the following content:

1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and

either widespread or long-term damage to the environment being caused by those acts.

2. For the purpose of paragraph 1:

- 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.

The proposed definition creates two thresholds for prohibited conduct: first, there must exist a substantial likelihood that the conduct will cause severe and either widespread or long-term damage to the environment. The second threshold requires proof that the acts are unlawful or wanton. This additional threshold draws upon environmental law principles, which balance social and economic benefits with environmental harms through the concept of sustainable development.

The subjective side of the crimes provided for by the Statute, according to Art. 30 of the Rome Statute, is that in relation to the consequences, the person had an intention in which the person wanted to cause such a result or was aware that such a consequence would occur in the ordinary course of events. For ecocide, the presence of indirect intent is important, which should require the perpetrator to be aware of a significant probability of serious and/or widespread or long-term damage. The Panel points out that culpability for the crime of ecocide attaches to the creation of a dangerous situation, rather than to a particular outcome. It is the commission of acts with knowledge of the substantial likelihood that they will cause severe and either widespread or long-term damage that is criminalised. The crime of ecocide is thus formulated as a crime of endangerment rather than of material result. This is the case with a number of crimes in the Rome Statute, notably Article 8(2)(b)(iv), the war crime of intentionally 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 overall military advantage anticipated. A similar construction appears in the other 'attack' war crimes, Articles 8(2)(b)(i)-(iii). Another example is provided by the crime of Genocide. Under Article 6 of the Rome Statute there is no requirement that the protected group be actually destroyed, in whole or in part. The crime consists in carrying out actions intended to reach that goal.

Endangerment is also key to Articles 35(3) and 55(1) API, which prohibit the use of 'methods or means of warfare which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.

The intention of the lawyers is to recognize as ecocide even creation of a dangerous situation, and not only a special result. Therefore, the commission of acts with the awareness of a significant probability of causing serious and/or widespread or long-term harm is criminalized.

It should be noted that the Panel recommends a new preambular paragraph in the Rome Statute to introduce the concern for environmental harm and its link to natural and human systems

Conclusions

We see that the scientific community has already made certain progress on the way to establishing ecocide as an international crime. Such consolidation would contribute to the solution of a number of existing problems with international regulation of the sphere of environmental protection. We hope that the world community understands this issue and that the Panel's proposals will be put into practice as soon as possible.