

UDC 341.4

DOI: 10.56215/naia-herald/3.2024.42

Damage to the environment as a sign of genocide

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■ **Abstract.** The actualisation of the problems of causing damage to the environment necessitates the determination of the grounds for international criminal liability for this act in the context of various international crimes, including genocide. The purpose of this study was to highlight the damage to the environment as a sign of the crime of genocide. The study was based on general scientific theoretical methods of scientific cognition, namely systemic, functional, and dogmatic methods, as well as methods of analysis, synthesis, and generalisation. Based on the consideration of the acts covered by the concept of genocide, the study found that damage to the environment in this context can be regarded as intentional creation of such conditions of existence for a national, ethnic, racial, or religious group which, by their qualitative characteristics, are aimed at the complete or partial physical destruction of this group, and the signs of such conditions are considered in the practice of the International Criminal Court, the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda. The study examined the tendency to perceive environmental damage as a sign of genocide in the context of genocide of indigenous peoples, and on this basis formulated the conclusion that it is not impossible to assess environmental damage as genocide outside the context of indigenous peoples' living conditions, since the Statute of the International Criminal Court and the Convention on the Prevention and Punishment of the Crime of Genocide define the characteristics of a social group that may be a victim differently – national, ethnic, racial, or religious groups. The study found that damage to the environment may simultaneously constitute a sign of both ecocide and genocide if the ecocide is aimed at the destruction of a national, ethnic, racial, or religious group. The study identified the signs under which damage to the environment can be qualified as a crime of genocide: 1) deliberate creation of such living conditions for a national, ethnic, racial, or religious group aimed at its physical elimination as a social group; 2) such conditions are created in the context of deliberate physical destruction of a social group (contextual element); 3) genocidal intent, i.e., intent to destroy in whole or in part a social group defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide. The practical significance of this study lies in the possibility of using its findings in the context of international justice, provided that the relevant acts are qualified as genocide, one of the ways of committing which is to cause damage to the environment

■ **Keywords:** crime; ecocide; environmental losses; genocidal intent; living conditions; social group; physical destruction

■ **Suggested Citation:**

Brynzanska, O. (2024). Damage to the environment as a sign of genocide. *Scientific Journal of the National Academy of Internal Affairs*, 29(3), 42-52. doi: 10.56215/naia-herald/3.2024.42.

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■ Received: 21.05.2024; Revised: 26.07.2024; Accepted: 27.08.2024



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■ Introduction

In modern world, the issue of international criminal liability for environmental damage is one of the most pressing. To a large extent, this is conditioned by the scale of damage caused both within armed conflicts and as a result of environmental crimes. Specifically, on 7 February 2024, the Office of the Prosecutor of the International Criminal Court (the ICC) launched public consultations on the development of a new policy on liability for environmental damage within the framework of the ICC mechanism (Office of the Prosecutor, 2024). Until 16 March 2024, states and other entities were to submit proposals to the Programme Document on environmental crimes that should be within the jurisdiction of the ICC. As of June 2024, sources of international criminal law consider causing damage to the environment mainly in two contexts: 1) in the context of a war crime, the elements of which are defined in sub-item "iv", Item "b" of Article 8 of the ICC Statute¹, namely, as "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"; 2) in the context of violations of the provisions of Part 3 of Article 35 and Article 55 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977², which prohibit the use of methods or means of warfare which cause or are likely to cause widespread or long-term and severe damage to the natural environment, the prohibition of reprisals related to environmental damage, and the obligation to protect the natural environment in the conduct of hostilities from widespread, long-term, and severe damage. This makes it expedient to investigate the environmental damage as a possible feature of other international crimes within the jurisdiction of the ICC, primarily the crime of genocide.

Despite a considerable number of scientific studies on genocide, little attention has been paid to its aspect of environmental damage in the professional literature. Ukrainian researchers D. Azarov *et al.* (2023) consider the damage to Ukraine's environment in the

course of Russian aggression as "the creation of living conditions deliberately calculated to bring about the complete or partial physical destruction of the national group – the Ukrainian people", virtually reproducing in their definition the wording of Item "c" of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide³. Therewith, damage to the environment is one of the factors that is destroying Ukraine's economic potential.

N. Orlovska (2023), investigating the same topic, notes that in this case, environmental damage is a means of influencing the population, used to destroy it, but is not an independent act. P. Fris & V. Kheymych (2024), analysing environmental damage on the scale of ecocide, consider it as a factor in the commission of genocide aimed at causing harmful consequences that can be assessed as catastrophic for the environment. A. Turii (2024) also argues for a link between the crime of genocide and ecocide, which results in an environmental catastrophe that can be a means of genocide. The researcher substantiates his position based on the terminology of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention)⁴ and Article 6 of the ICC Statute⁵, which lists the intentional creation of living conditions for a group calculated to bring it to total or partial physical destruction as acts that may constitute genocide.

Referring to the works of researchers, it is necessary to note the tendency to perceive damage to the environment as a sign of genocide in the historical and cultural aspect, in the context of the genocide of indigenous peoples. Specifically, K. Reed (2023) considered the damage to the environment as part of the genocide of indigenous peoples by colonial powers, which lied in the depletion of natural resources, rendering it impossible for the indigenous population to continue inhabiting the territory. As a result, this led to the complete or partial destruction of these social groups.

M. Gillet (2017; 2022), analysed the ICC practice in the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir (International Criminal Court, 2021) and other situations where there was damage to the environment with the intent of complete or partial destruction of a national group, but which were not subject to the ICC's assessment (draining of swamps

¹ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. (1977, June). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.34_AP-I-EN.pdf.

³ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁴ Ibidem, 1948.

⁵ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

at the confluence of the Euphrates and Tigris rivers, Southern Iraq, which for several centuries had traditionally been the place of residence of one of the Arab peoples, “Arabs of the Marshlands”). According to the researcher, this practice, which included the destruction of ecosystems, settlements, and water sources, combined with the expulsion of the population or its forced relocation, can be equated with acts of genocide.

L. Wise (2021), exploring the relationship between environmental damage and the destruction of certain social groups, noted that environmental destruction can cause serious harm to members of a social group whose way of life, culture, and livelihoods are inextricably linked to their natural environment, the disappearance of which would constitute a “slow death” for a particular group. A. Dunlap (2021), denying the possibility of a separate legal assessment of ecocide, considers it a way of committing genocide if it is committed with the purpose of destroying a national, ethnic, racial, or religious group. The position “ecocide as an instrument of genocide” is also the main one in the study of the genocide of indigenous peoples by A. Koenning-Rutherford (2023). However, as can be noted from the foregoing, environmental damage in the context of genocide is mostly considered outside the traditional structure of an international crime, which includes its elements: *actus reus*, *mens rea*, and contextual element. Damage to the environment as a specific feature of the international crime of genocide must follow its general features, which are established based on the structure of the international crime.

Thus, the purpose of this study was to highlight the damage to the environment as a sign of genocide. This purpose was fulfilled by completing the following objectives: to analyse the provisions of the ICC Statute¹; to consider the practice of the ICC and international tribunals in the context of the possibility of understanding environmental damage in the context of genocide not only of indigenous peoples; to identify the key elements of the crime

of genocide committed by causing damage to the environment.

■ Materials and Methods

The conceptual framework for the study of environmental damage as a sign of genocide, which was used in the investigation of the ICC practice, is the concept of the international crime of genocide, the foundations of which are set out in the ICC Statute² and the Elements of Crimes³, as well as the Genocide Convention⁴. Within this conceptual framework, the study employed general scientific theoretical methods, since they allow for a comprehensive consideration of a legal phenomenon, highlighting its general features and establishing whether these features correspond to other legal phenomena which are conventionally considered in distinct contexts. Based on the systematic and functional methods, the study examined the elements of the international crime of genocide, specifically, the act constituting genocide, namely, the intentional creation for a group of people united on a national, ethnic, racial, or religious basis of such living conditions aimed at the gradual physical destruction of this group; the contextual feature, the feature of intent. The methods of analysis and synthesis became the basis for correlating ecocide and genocide. The dogmatic method was used to interpret the terms “genocide”, “ecocide”, “damage to the environment”. As a result of applying the generalisation method, the key conclusions of the study were formed. Using these methods in conjunction, the study established the signs that can qualify damage to the environment as a manifestation of genocide.

The following sources of international law were analysed to establish the signs of genocide: the ICC Statute⁵, Elements of Crimes⁶, the Genocide Convention⁷, since as of 2024, there are no other sources of international law that would regulate the issue of individual criminal liability for genocide. The study also examined the materials of the International Criminal Tribunal for the Former Yugoslavia (ICTY), namely the judgements in the cases of The Prosecutor v. Milomir Stakić⁸, The Prosecutor v. Vujadin

¹ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

² Ibidem, 1998.

³ Elements of Crimes. (2002, September). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

⁴ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁵ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

⁶ Elements of Crimes. (2002, September). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

⁷ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁸ Decision of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-97-24 “The Prosecutor v. Milomir Stakić”. (2001, July). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/IT-97-24/MRA1561R0000013780.tif>.

Popović *et al.*¹, The Prosecutor v. Radoslav Brđanin², The Prosecutor v. Tadić³, as well as the judgements of the International Criminal Tribunal for Rwanda (ICTR) in the cases of The Prosecutor v. Akayesu⁴, The Prosecutor v. Musema⁵, The Prosecutor v. Kayishema & Ruzindana⁶, which highlight the matters of general features of the destruction of social groups of people as genocide and the materials of the ICC practice regarding the situation in Sudan and in the case of the issuance of an international arrest warrant The Prosecutor v. Omar Hassan Ahmad Al Bashir (International Criminal Court, 2021), as this is the only case where the ICC considered the issue of environmental damage as a manifestation of genocide. The coverage and analysis of the situation in the Dafur region of Sudan was based on a report by Physicians for Human Rights (2006). The study of the above-mentioned acts of international law, decisions of international tribunals, and analytical reports helped to identify the general features of the crime of genocide and project them onto the damage to the environment, suggesting that such damage may be covered by one of the acts constituting the crime of genocide.

■ Results and Discussion

Damage to the environment in the context of genocide can be considered as “the deliberate creation of conditions of life for a national, ethnic, racial, or religious group calculated to bring it to total or partial physical destruction” in the terminology of Article 2 of the Genocide Convention⁷ and Article 6 of the ICC Statute⁸. Separate provisions on causing damage to the environment as a feature that supports the policy

of genocide are contained in the second arrest warrant for A. al-Bashir, the former president of Sudan, issued by the ICC⁹. As part of the unlawful persecution of the Fur, Masalit, and Zaghawa peoples in the Dafur region, Sudanese government forces destroyed wells and other water sources. The report by the international organisation Physicians for Human Rights (2006) states that there were at least three episodes of deliberate poisoning of wells and destruction of water pumping equipment during the long dry season in the specific climatic conditions of Dafur, which has limited natural water resources, resulting in deaths. Furthermore, victims reported repeated deliberate arson attacks on land and vegetation, committed with the intent of preventing them from farming. Representatives of the organisation also recorded images of the remains of burnt trees and fields with no signs of living vegetation, which resulted in forced relocation to the desert, where the group’s survival was difficult due to the lack of water and other means of subsistence. These forced living conditions were the result of the destruction of natural objects or the deliberate depletion of components of nature that are necessary for the survival of the victims.

Article 6 of the ICC Statute¹⁰ defines acts committed with intent to destroy in whole or in part any national, ethnic, racial, or religious group, including intentionally creating for such a group conditions of life calculated to bring it to total or partial physical destruction (Item “c”). The same provision is reproduced in Item “c” of Article 2 of the Genocide Convention¹¹. However, the Elements of Crimes¹² do not contain the above-mentioned form of genocide, but

¹ Judgement of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-05-88. “The Prosecutor v. Vujadin Popović et al”. (2010, June). Retrieved from <https://ucr.irmct.org/scasedocs/case/IT-05-88#eng>.

² Judgment of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-99-36 “Prosecutor v. Radoslav Brđanin”. (2004, September). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-99-36/JUD126R0000191299.tif>.

³ Sentence of International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-94-1 “The Prosecutor v. Duško Tadić, AC”. (1999, July). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-94-1-A/JUD62R0000067347.TIF>.

⁴ Judgment of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-04 “The Prosecutor v. Akayesu”. (1998, September). Retrieved from <https://ucr.irmct.org/scasedocs/case/ICTR-96-04#eng>.

⁵ Judgment and Sentence of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-13 “The Prosecutor v. Musema”. (2000, January). Retrieved from <https://ucr.irmct.org/scasedocs/case/ICTR-96-13#eng>.

⁶ Judgment (Reasons) of International Criminal Tribunal of Ruanda in the Case No. ICTR-95-01 “The Prosecutor v. Kayishema & Ruzindana”. (2001, June). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01/MS16634R0000621564.PDF>.

⁷ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December) Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁸ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

⁹ Decision of the International Criminal Court No. ICC-02/05-01/09-95 “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”. (2010, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF.

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

¹¹ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

¹² Elements of Crimes. (2002, September). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

only indicate the general features of the act: 1) the perpetrator created such living conditions for one or more persons of a particular group that are calculated to bring about the total or partial destruction of the group; 2) “living conditions” may include, but do not necessarily constitute, deprivation of survival resources such as food, water, medical services, or expulsion from the home.

The issues related to the establishment of signs of living conditions calculated to bring the group to complete or partial physical destruction were investigated during the work of the ICTY and the ICTR. With these decisions, international tribunals have developed a practice of assessing living conditions designed to bring a group to complete or partial physical destruction, which are characterised as methods of slow physical destruction by which the perpetrator does not kill members of the group immediately. In Item 157 of the judgement in *Prosecutor v. Milomir Stakić*¹, the ICTY described as “living conditions calculated to bring the group to total or partial physical destruction” the use of methods including dietary restrictions; the failure to provide adequate medical care; systematic expulsion of group members from their homes; and generally creating circumstances likely to lead to a slow death, such as lack of adequate food, water, shelter, clothing, sanitation, or subjecting group members to excessive work or physical exertion. Therewith, the deliberate creation of living conditions for a group calculated to bring about its physical destruction in whole or in part according to sub-item (c) of Article 2 of the Genocide Convention² does not require proof of the result, i.e., the factual destruction of the group or part of it”. An analogous conclusion was reached by the ICTR in Item 502-4

of the judgement in *Prosecutor v. Akayesu*³ and in Items 108-109 of the judgement in *The Prosecutor v. Kayishema & Ruzindana*⁴. In addition, Item 505 of the judgement in *Prosecutor v. Akayesu*⁵ describes the conditions of life as “calculated to bring to physical destruction” – these are “methods of destruction by which the perpetrator does not kill the members of the group immediately but aims at their physical destruction”. A comparable conclusion was made by the ICTR in Item 157 of its judgement in the case of *The Prosecutor v. Musema*⁶, noting among the methods of destruction the denial of medical services and the creation of circumstances that would lead to a slow death, meaning the lack of access to adequate housing, clothing, and hygiene, and the organisation of work leading to physical exhaustion. In Items 691 and 692 of the judgement in *Prosecutor v. Radoslav Brđanin*⁷, the ICTY reiterated the above conclusions⁸.

In Items 814-817 of the judgement in *Prosecutor v. Vujadin Popović et al.*, which is chronologically later than the above decisions, the ICTY reiterated its findings in the *Prosecutor v. Radoslav Brđanin*⁹, adding that, in the absence of direct evidence that the “living conditions” in question were designed to bring about physical destruction, the Trial Chambers should focus on establishing the objective possibility of this. This involves an assessment of factors such as the nature of the conditions imposed, the length of time that members of the group were exposed to such conditions, and the vulnerability of the group. In addition, in Item 817 of the said judgement, the ICTY stated that “the *mens rea* standard for the intention to create conditions of life for a group calculated to bring about its physical destruction in whole or in part is specified by the adverb “intentionally”¹⁰.

¹ Decision of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-97-24 “The Prosecutor v. Milomir Stakić”. (2001, July). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/IT-97-24/MRA1561R0000013780.tif>.

² Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

³ Judgment of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-04 “The Prosecutor v. Akayesu”. (1998, September). Retrieved from <https://ucr.irmct.org/scasedocs/case/ICTR-96-04#eng>.

⁴ Judgment (Reasons) of International Criminal Tribunal of Ruanda in the Case No. ICTR-95-01 “The Prosecutor v. Kayishema & Ruzindana”. (2001, June). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01/MS16634R0000621564.PDF>.

⁵ Judgment of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-04 “The Prosecutor v. Akayesu”. (1998, September). Retrieved from <https://ucr.irmct.org/scasedocs/case/ICTR-96-04#eng>.

⁶ Judgment and Sentence of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-13 “The Prosecutor v. Musema”. (2000, January). Retrieved from <https://ucr.irmct.org/scasedocs/case/ICTR-96-13#eng>.

⁷ Judgment of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-99-36 “Prosecutor v. Radoslav Brđanin”. (2004, September). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-99-36/JUD126R0000191299.tif>.

⁸ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁹ Judgment of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-99-36 “Prosecutor v. Radoslav Brđanin”. (2004, September). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-99-36/JUD126R0000191299.tif>.

¹⁰ Judgement of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-05-88. “The Prosecutor v. Vujadin Popović et al”. (2010, June). Retrieved from <https://ucr.irmct.org/scasedocs/case/IT-05-88#eng>.

Thus, the ICTY and ICTR have developed a solid practice of interpreting this form of genocide, which is characterised by the deliberate and purposeful creation of such conditions of existence for a national, ethnic, racial, or religious group that are aimed at its physical destruction.

The broad meaning of the term “conditions of life calculated to bring a group to full or partial physical destruction”, the list of which is virtually inexhaustible due to geographical, historical, and political factors, suggests that harm to the environment aimed at the physical destruction of a particular social group may also be covered by the creation of living conditions characterised by the said purpose (Azarov *et al.*, 2023)

The understanding of damage to the environment as a sign of genocide in the context of the genocide of indigenous peoples is acceptable, although the affiliation of a national group with indigenous peoples is not a mandatory feature of a group defined in Article 6 of the ICC Statute¹ or Article 2 of the Genocide Convention². For rural areas, local production, or subsistence farming carried out by particular social groups in certain areas, “ecology is a vital constitutive dimension of culture and identity” (Wise, 2021). In retrospect, this situation has repeatedly occurred in countries with colonial experience or, for instance, in the United States. The movement of settlers across the North American continent has led to the use of violent measures against indigenous peoples aimed at destroying their traditional living conditions. Specifically, these were massive bison shootings organised to destroy economic resources and starvation, to force indigenous peoples to leave certain territories; “gold fevers”, in which precious stones or precious metals were obtained by mining methods that led to the depletion of natural resources, rendering further living in the area impossible. The elimination of traditional living conditions has resulted in the complete or partial destruction of indigenous peoples (Reed, 2023).

Another example of the destruction of the environment to destroy a social group of people is S. Hussein’s policy of draining the swamps in Southern Iraq. In 1991, in response to an assassination attempt, S. Hussein ordered the draining of the marshes locat-

ed at the confluence of the Euphrates and Tigris rivers (Southern Iraq), which for several centuries had traditionally been the home of one of the Arab peoples – the Marsh Arabs, whose traditional way of life depended on the flora and fauna of the marshes (Gillet, 2022).

However, the assessment of environmental damage as genocide outside the context of indigenous peoples’ living conditions is not impossible, and can be achieved by applying an “environmentally friendly” interpretation to the Genocide Convention³ and Article 6 of the ICC Statute⁴, based on an “evolutionary approach” to provide a legal basis for punishing environmental damage (Aida *et al.*, 2023). The disadvantage of this statement of the above authors is the impossibility to establish what exactly is the “environmentally friendly approach” to the interpretation of international law, since this approach cannot be attributed either to the principles of interpretation of international treaties or to its types and methods.

The indication of the “evolutionary approach” as the basis for the interpretation of “environmentally friendly” suggests that it can be interpreted in the context of *lex ferenda* argumentation – that is, a rule of law that, evolving, should be formed in the future, as opposed to a rule of law currently in force (*lex lata*). There are cases where the UN International Law Commission has used such arguments in its activities in the context of the application of environmental protection norms during armed conflicts (Park, 2018). Specifically, when assessing those certain provisions of written international law on armed conflict relating to the protection of the environment are likely to be inconsistent with customary international law, the UN International Law Commission should consider the extent to which the final outcome will contribute to the development of the *lex ferenda* (Park, 2018).

It should also be considered that, unlike the Genocide Convention⁵, which does not contain provisions on its interpretation, except that disputes over its interpretation are referred to the International Court of Justice, the ICC Statute⁶, namely Articles 9 and 10 Elements of crimes⁷, Article 21 “Applicable law”, Article 22 “*Nullum crimen sine lege*”, Article 30

¹ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

² Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

³ *Ibidem*, 1948.

⁴ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

⁵ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁶ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

⁷ Elements of Crimes. (2002, September). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

“Mental element”, Article 75 “Reparations to victims”, Article 119 “Settlement of disputes” contain provisions on the specific features of its interpretation. Specifically, Part 2 of Article 22 of the ICC Statute establishes a strictly literal interpretation of the elements of the crime and prohibits analogy. In case of ambiguity, the rule of interpretation applies in favour of the suspect, accused, or convicted person. However, according to Part 3 of Article 22 of the ICC Statute, the provisions of this article shall not affect the characterisation of any conduct as criminal under international law independently of the ICC Statute¹. This does not refute the possibility of applying the “environmentally friendly” interpretation exclusively within the prescriptions of those acts defined as genocide in Article 6 of the ICC Statute² and Article 2 of the Genocide Convention³ using the types and methods of interpretation used in previous decisions.

When considering ecocide as a potential “tool of genocide” (Orlovska, 2023; Turii, 2024), it should be considered that in such circumstances, ecocide is an act against a social group, not the environment (Koenning-Rutherford, 2023). Moreover, causing damage to the environment is not the purpose in this case, and environmental damage forms an integral part of the overall damage (Malko & Nikolaenko, 2022). Environmental damage is not limited to air, water, and land pollution, but also includes human health and safety (Polukarov *et al.*, 2024). Damage to the environment poses potential risks to the life and health of a social group, including the adverse impact of pollutants, damaged infrastructure and industrial facilities, shortages of clean water, etc. (Harada *et al.*, 2022; Nikolaychuk, 2023). Therefore, in this context, ecocide can be a factor contributing to genocide, i.e., evidence of genocidal intent (Fris & Khemych, 2024). Ecocide can also be considered a form of genocide, being a structural phenomenon that destroys the relationship between humans and nature, i.e., both the ecosystem itself and the human presence in that ecosystem (Lindgren, 2018). Therewith, the term “ecocide” itself is not universal in international legal doctrine, which makes it controversial to characterise the feature of genocide through the term “ecocide” (Dunlap, 2021).

Referring to the origin of the word “ecocide”, this term was used to denote a collection of various

activities that cause devastation and destruction aimed at destroying the ecosystems of certain territories by harming human, animal, and plant life, and therefore, “ecocidal actions can lead to genocidal consequences”, destroying both a certain social group of people and the environment as a “separate victim” (Misko Moribe *et al.*, 2023). Agreeing with this, the term “ecocide” is broader in its meaning than “instrument of genocide”, although, admittedly, the damage to the environment on a scale that can be considered as ecocide may be aimed at the destruction of social groups defined in Article 2 of the Genocide Convention⁴, and therefore it is possible to consider ecocide as a sign of genocidal intent. However, it is necessary to consider the updated ICC policy on liability for environmental damage, which is investigating the possibility of supplementing the ICC Statute with provisions on international environmental crimes committed through the use of the environment or resulting in environmental damage (Office of the Prosecutor, 2024). These acts account for ecocide. Therefore, in the context of committing both genocide and other international crimes prescribed in the ICC Statute⁵, it is more correct to use the phrase “damage to the environment” instead of the term “ecocide”.

The characterisation of damage to the environment as genocide in the form of deliberate creation of living conditions for such a group, calculated to bring it to full or partial physical destruction, should include the identification of the characteristics of their elements: the act (*actus reus*), guilt (*mens rea*), and a contextual element between which and the act there must be a connection (nexus) (Klamberg *et al.*, 2023).

The literature periodically identifies only two constitutive elements of genocide: an act as an objective feature (*actus reus*) and guilt in the form of special intent (*dolus specialis*) (Mrazek, 2023) or as a subjective feature (*mens rea*) (Gagro, 2021). However, referring to the Elements of Crimes⁶, it can be stated that the description of each form of genocide is accompanied by a common feature – the act takes place in the context of a clear pattern of comparable behaviour directed against this group, or an act that may actually cause such destruction. In addition, in the decision in the case of the arrest warrant for Omar Hassan Ahmad Al Bashir, the First Pre-Trial Chamber of the ICC, analysing the arguments of the

¹ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

² Ibidem, 1998.

³ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁴ Ibidem, 1948.

⁵ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

⁶ Elements of Crimes. (2002, September). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

ICC Prosecutor on the presence of a contextual element in the actions of the accused, which consisted of committing acts under Items “a”, “b”, and “c” of Article 6 of the ICC Statute¹ in the “context of a clear pattern of similar conduct directed against each target group”, stated that the contextual element occurs when “the conduct in question poses a concrete threat to the existence of the target group or part of it”². However, this position is debatable, since “the context of a clear pattern of similar behaviour directed against each target group” is based on the correlation between group and individual intent to commit genocide, since the crime of genocide cannot be individual, singular. Overall, the distinction between collective and individual intent to commit genocide was established in the ICTY decision in *The Prosecutor v. Radislav Krstic*³, which stated that the scale of genocide implies its preparation by several persons whose motives may be different, but the purpose stays common. In case of collective intent in the commission of genocide, it must be manifested not only in the intentions but also in the actions of the perpetrators. Thus, in this judgement, the International Tribunal factually refused to assess genocidal intent as collective.

The contextual element of genocide is that it is committed within the framework of a specific state policy, and therefore this element should be assessed in the light of the doctrine of “common criminal plan”, according to which the perpetrators of a crime are held to the same degree of responsibility if the crime had a common purpose (Carvalho, 2023). Three alternative elements of a “common criminal plan” were formulated by the ICTY Appeals Chamber in the *Prosecutor v. Tadić* judgement⁴: 1) a common plan within the framework of a single intent, whereby a person does not have to personally commit certain criminal acts, it is sufficient to commit only a certain aspect of them within the framework of a

single purpose; 2) a systemic common plan applicable to indictments alleging crimes committed by members of military or administrative units: a) the existence of an organised system of ill-treatment of detainees and repeated crimes; b) the accused is aware of the nature of the system; c) the accused must take an active part in ensuring the functioning of the system; 3) the so-called “extended” common plan, wherein the crimes are generally united by a single plan, but when one or more criminals commit actions that, albeit not established by the common plan, were a natural and foreseeable consequence of achieving this common purpose.

This approach is reasonable because it does not contradict Item “c” of Article 6 of the ICC Statute⁵ and the Genocide Convention⁶, Article 2 of which states that the acts referred to in Article 2 of this Convention constitute genocide if they are committed with intent to destroy, to a greater or lesser extent, a clearly defined social group based on national, ethnic, racial, or religious grounds, while the commission of such acts by only one person, even if the purpose is stated, is an individual crime committed for reasons of hatred, which is clearly insufficient to constitute an attempt to destroy an entire social group. This approach is also consistent with the description of the elements of genocide in the *Elements of Crime*⁷, one of which is the commission of an act in the context of a clear pattern of similar behaviour. Such behaviour can be the deliberate result of both state policy (e.g., genocides in Rwanda and Iraq) and the policy of a particular political organisation or military administration (former Yugoslavia). The practice of international tribunals and the ICC shows a high threshold for proving the intent to commit genocide, which suggests that genocide is a crime comprising criminal acts united by a single intent, as defined in Item “c” of Article 6 of the ICC Statute⁸ and the Genocide Convention⁹ – the total or partial destruction

¹ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

² Decision of the International Criminal Court No. ICC-02/05-01/09-95 “Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir”. (2010, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF.

³ Judgment of International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-98-33-A “The Prosecutor v. Radislav Krstic”. (April, 2004). Retrieved from <https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>.

⁴ Sentence of International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-94-1 “The Prosecutor v. Duško Tadić, AC”. (1999, July). Retrieved from <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-94-1-A/JUD62R0000067347.TIF>.

⁵ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

⁶ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

⁷ Elements of Crimes. (2002, September). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

⁸ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

⁹ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

of a national, ethnic, racial, or religious group, the implementation of which is ensured by certain state or collective resources.

Considering the above, damage to the environment may qualify as a manifestation of genocide if the following features are present:

1) an act defined in Item “c” of Article 6 of the ICC Statute¹ and Article 2 of the Genocide Convention², i.e., the intentional creation of living conditions for a particular national, ethnic, racial, or religious group calculated to bring it to total or partial physical destruction. Such conditions include anthropogenic impacts on various components of the ecosystem (burning or pollution of land, forests, destruction of flora and fauna, destruction of water bodies or other natural features of the area, etc.), which result in the impossibility of the established order of life in these conditions or a substantial complication of survival (*actus reus*);

2) contextual element – if the creation of such conditions is carried out “in the context of a clear pattern of such behaviour”, i.e., within a certain plan or state policy, the implementation of which poses a real threat to the existence of the content of which is part of its implementation;

3) special intent, the exhaustive features of which are defined in Item “c” of Article 6 of the ICC Statute³ and Article 2 of the Genocide Convention, i.e., to destroy in whole or in part any national, ethnic, racial, or religious group⁴ (*mens rea* as genocidal intent).

Considering the signs of causing damage to the environment, factoring in the contextual element, which covers the commission of an act in the context of a pattern of behaviour that implements the intent to destroy a national, ethnic, racial, or religious group in whole or in part, taking into account the variety of ways in which acts covered by the crime of genocide can be committed, it can be argued that such means can also include causing damage to the environment.

■ Conclusions

In summary, damage to the environment may constitute genocide in the form of deliberate creation of living conditions designed to bring a national, ethnic, racial, or religious group to full or partial physical destruction. In this case, the purpose of the

impact on the environment is the complete or partial destruction of a social group of people, while the damage caused is a method of such destruction or is a characteristic of genocidal intent. Considering that environmental damage is a method of destroying a national, ethnic, racial, or religious group whose way of life is inextricably linked to a particular area whose natural resources have been damaged, environmental damage as a way of deliberately creating living conditions aimed at the destruction of a particular social group is mostly considered in the context of genocide against indigenous peoples. Therewith, this does not exclude the possibility of assessing environmental damage as genocide against a national, ethnic, racial, or religious group that does not belong to indigenous peoples.

A series of studies use the term “ecocide” when defining signs of environmental damage, which is considered an “instrument of genocide”. However, considering the legal uncertainty of ecocide, the existence of different approaches to its content, as well as the updated ICC policy on liability for environmental damage, which aims to supplement the ICC Statute with norms on international environmental crimes, the use of the wording “environmental damage” instead of the term “ecocide” is more meaningful. Damage to the environment may qualify as a crime of genocide if there is a combination of the elements of genocide defined in Item “c” of Article 6 of the ICC Statute, Article 6 of the Elements of Crime, and Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, and the damage to the environment must be caused by the intent to destroy a social group defined in the above international legal instruments.

Prospects for further research include the investigation of cases of environmental damage as a manifestation of other serious international crimes, namely in the context of war crimes and crimes against humanity.

■ Acknowledgements

None.

■ Conflict of Interest

The author of this study declares no conflict of interest.

¹ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

² Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

³ Rome Statute of International Criminal Court. (1998, July). Retrieved from <https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf>.

⁴ Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

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Заподіяння шкоди навколишньому природному середовищу як ознака геноциду

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■ **Анотація.** Актуалізація проблем заподіяння шкоди навколишньому природному середовищу зумовлює потребу у визначенні підстав міжнародної кримінальної відповідальності за це діяння в контексті різних міжнародних злочинів, серед яких і геноцид. Метою статті було висвітлення заподіяння шкоди навколишньому природному середовищу як ознаки злочину геноциду. Дослідження ґрунтується на загальнонаукових теоретичних методах наукового пізнання, а саме системному, функціональному й догматичному методах, а також методах аналізу, синтезу та узагальнення. На підставі розгляду діянь, охоплених поняттям геноциду, встановлено, що заподіяння шкоди навколишньому природному середовищу в цьому контексті можна розглядати як умисне створення для національної, етнічної, расової чи релігійної групи таких умов існування, які за своїми якісними характеристиками мають на меті повне або часткове фізичне знищення цієї групи, причому ознаки таких умов вбачаються з практики Міжнародного кримінального суду, Міжнародного трибуналу щодо колишньої Югославії та Міжнародного трибуналу щодо Руанди. Досліджено тенденцію до сприйняття заподіяння шкоди навколишньому природному середовищу як ознаки геноциду в контексті геноциду корінних народів, на підставі чого сформульовано висновок, що оцінювання заподіяння шкоди навколишньому природному середовищу як геноциду поза контекстом умов життя корінних народів не є неможливим, оскільки в Статуті Міжнародного кримінального суду та Конвенції про запобігання злочину геноциду і покарання за нього ознаки соціальної групи, яка може бути потерпілою, визначено в інший спосіб – це національна, етнічна, расова чи релігійна групи. Встановлено, що заподіяння шкоди навколишньому природному середовищу може одночасно становити ознаку як екоциду, так і геноциду в тому разі, якщо екоцид спрямований на знищення національної, етнічної, расової чи релігійної групи. Визначено ознаки, за яких заподіяння шкоди навколишньому природному середовищу можна кваліфікувати як злочин геноциду: 1) цілеспрямоване створення для національної, етнічної, расової чи релігійної групи таких умов життя, що спрямовані на її фізичну ліквідацію як соціальної групи; 2) створення таких умов здійснюють у контексті цілеспрямованого фізичного знищення соціальної групи (контекстуальний елемент); 3) наявний геноцидний намір, тобто умисел знищити повністю або частково соціальну групу, визначену ст. 2 Конвенції про запобігання злочину геноциду і покарання за нього. Практичне значення дослідження полягає в можливості використання його висновків у контексті міжнародного правосуддя за умови кваліфікації відповідних діянь як геноциду, одним із способів вчинення якого є заподіяння шкоди навколишньому природному середовищу

■ **Ключові слова:** злочин; екоцид; екологічні втрати; геноцидальний намір; умови життя; соціальна група; фізичне знищення