

NOT ALL ROADS LEAD TO ROME: QUESTIONING THE ENVIRONMENTAL PROTECTION UNDER THE ROME STATUTE

Bernhard Ruben Fritz Sumigar¹

Abstract

It is incontestable that armed conflict is not only bringing suffering to human being but also it causing depletion to the environment as its silent casualty. Moderation between International Environmental Law, International Humanitarian Law and International Criminal Law (ICL) is paramount to be observed for mitigating its impact of armed conflict to the environment. With respect to ICL, this Article will discuss about the environmental protection in times of armed conflicts under the Rome Statute of the International Criminal Court (Rome Statute). In time of international armed conflict, Article 8(2)(b)(iv) of the Rome Statute mandated the International Criminal Court to exercise jurisdiction over war crime of intentional attack that causing widespread, long-term and severe damage to the natural environment that clearly excessive in relation to the concrete and direct overall military advantage anticipated. Unfortunately, this provision along with its interpretation is vague. Whilst similar arrangement in times of non-international armed conflict is nowhere to be found in the Rome Statute. Consequently, this placed the environmental protection in limbo situation. To that end, this Article is present to offer numerous solutions for improving the environmental protection in times of armed conflict under the Rome Statute.

Intisari

Tidak dapat disangkal bahwa konflik bersenjata tidak hanya membawa penderitaan bagi manusia tetapi juga menyebabkan kerusakan lingkungan sebagai korbannya. Moderasi antara Hukum Lingkungan Internasional, Hukum Humaniter Internasional dan Hukum Pidana Internasional (HPI) sangat penting untuk diperhatikan untuk mengurangi dampak konflik bersenjata terhadap lingkungan. Sehubungan dengan HPI, Artikel ini akan membahas tentang perlindungan lingkungan pada saat terjadi konflik bersenjata berdasarkan Statuta Roma dari Mahkamah Pidana Internasional (Statuta Roma). Pada saat konflik bersenjata internasional, Pasal 8(2)(b)(iv) Statuta Roma mengamanatkan Mahkamah Pidana Internasional untuk menjalankan yurisdiksi atas kejahatan perang dari serangan yang disengaja yang menyebabkan kerusakan luas, jangka panjang dan parah terhadap lingkungan alam yang jelas berlebihan dalam kaitannya dengan keuntungan militer konkrit dan langsung secara keseluruhan yang diantisipasi. Sayangnya, ketentuan ini beserta penafsirannya tidak jelas. Sementara pengaturan serupa pada masa konflik bersenjata non-internasional tidak dapat ditemukan dalam Statuta Roma. Akibatnya, hal ini menempatkan perlindungan lingkungan dalam situasi in limbo. Untuk itu, Artikel ini hadir untuk menawarkan sejumlah solusi guna meningkatkan perlindungan lingkungan pada saat terjadi konflik bersenjata berdasarkan Statuta Roma.

Keywords: *Environmental protection, Rome Statute, armed conflict, international humanitarian law*

Kata Kunci: *Perlindungan lingkungan hidup, Statuta Roma, konflik bersenjata, hukum humaniter internasional*

* Master of Laws, International Law Institute, Kutafin Moscow State Law University (MSAL).

A. Introduction

It is incontestable that war or armed conflict is not only bringing suffering to men, women and children but also it causing depletion to the natural environment as its silent casualty. This is at least predated long before the Rome Statute of the International Criminal Court (“Rome Statute”) being formulated in July 1998. The intersection between armed conflict and environment in the late century is at a glance seen since World War II when the United States detonated two nuclear weapons in the Japanese cities of Hiroshima and Nagasaki. This deplorable situation has indeed negatively affected the environmental situation surrounding the areas of these cities.¹

Another precedent relating to the impact of armed conflict on the natural environment was seen during the set of the Vietnam War. At that time, the United States military conducted aerial sprays of more than 100,000 tons of toxic herbicides and defoliants or known as the “Agent Orange”.² They also involved in the “Roman Plough” program, where they used heavy bulldozers to clear forests and destroy the soil layer against the Vietnamese guerrillas.³ The consequences of such methods of warfare are still felt by civilians, as they live in contaminated areas, and the land can no longer be used for agricultural purposes.⁴ Furthermore, the Iraqi forces spilt a large quantity of oil into the Persian Gulf and set more than 600 Kuwaiti oilfields ablaze during the 1991 Gulf War marked the environmental destruction arose from the methods of warfare itself.⁵

In light of these situations, reasonable moderation between International Humanitarian Law (“IHL”) and International Environmental Law (“IEL”) is paramount. This is at least seen when 170 countries agreed to sign the Rio Declaration on Environment and Development (“Rio Declaration”) in 1992, which stipulated:

“Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary.”⁶

The International Court of Justice (“ICJ”) reaffirmed this approach on its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons* (“Nuclear Weapons”) in 1996. Given the recognition of the environment as a representation of the living space, the quality of life and the very health of human beings, including generations unborn,⁷ the ICJ therefore suggests:

“States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the

¹ Harwell, Christine C. “Experiences and Extrapolations from Hiroshima and Nagasaki” on M.A. Hartwell and T.C. Hutchinson (eds). (1985). *Environmental Consequences of Nuclear War Volume II: Ecological and Agricultural Effects*. London: John Wiley & Sons Ltd, p. 16.

² Braige, Morsi Naim. (2014). *Международно-правовая охрана окружающей среды в ситуациях вооруженных конфликтов (International Legal Protection of the Environment in Situations of Armed Conflicts)*. Dissertation, Kazan (Volga Region) Federal University, p. 172.

³ Kotlyarov, Ivan I. (ed). (2012). *Международное гуманитарное право (International Humanitarian Law)*. 3rd ed. Moscow: Unity, p. 126.

⁴ Kuvrychenkova, Tatiana V. (2016). “К вопросу охраны окружающей среды во время вооруженных конфликтов” (To the Question on the Protection of Natural Environment in Time of Armed Conflicts). *Vestnik TvGU. Series Law*, 2, p. 129.

⁵ Roberts, A. “Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War” on Richard J. Grunwald, et al. (eds). (1996). *Protection of the Environment during the Armed Conflict*. International Law Studies Vol. 69. Newport: Naval War College, p. 247.

⁶ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (vol.I) (1992) Principle 24.

⁷ *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion. I.C.J. Rep. 226 (1996) para. 29 [*Nuclear Weapons*].

*environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.”*⁸

Despite such moderation, the attack towards the natural environment after the Rome Statute being made is continued. For example, according to the 2001 report submitted to the Parliamentary Assembly of the Council of Europe, the NATO bombings during the 1999 Kosovo crisis caused severe damage to the country's natural environment. The damage is extended to several other southeast European countries.⁹ Meanwhile, in 2006 conflict between Israel and Lebanon, the Israeli Air Force bombings of the Lebanese El-Jiyeh power plant resulted in the release of about 15,000 tons of fuel oil into the Mediterranean Sea, leading to the contamination of 150 km of Lebanese and Syrian coastline.¹⁰

Unfortunately, none of these incidents has been brought to justice. The only available precedence relating to the environmental damage in time of war occurred when the Uganda People's Defence Forces ("UPDF") occupied the Ituri District in the Democratic Republic of the Congo ("DRC"). In the view of the ICJ, the UPDF's involvement in the looting, plundering and exploitation of Congolese natural resources, which according to DRC is amounted to "massive war damage", constitutes the violations of the *jus in bello* enshrined under Article 47 of the 1907 Hague Regulations.¹¹ For this reason, Uganda can be held accountable for its troops conducts in DRC's territory.

Another avenue to protect natural environment during armed conflict is also vanguarded by the International Criminal Law ("ICL"). Primarily, ICL governs international criminal liability of individuals who commits international crimes, including grave breaches of IHL. This preposition extends to those who committed environmental war crimes.

The attempt for ICL to penalize the environmental war criminals appeared during the creation of the International Criminal Court ("ICC"). Although 160 countries that were participating at the 1998 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC have provided a guarantee for environmental protection in time of armed conflict under Article 8(2)(b)(iv) of the Rome Statute, there is no single precedent up to this day that put an individual for committing environmental war crime under the said provision before the ICC.

Accordingly, this Article is intrigued to analyse whether Article 8(2)(b)(iv) of the Rome Statute is challenging to be enforced due to the inconsistencies of its interpretation under other rules of IHL governing the environmental protection in time of international armed conflict ("IAC"). Moreover, this Article also explores the failure of the Rome Statute drafters to regulate the environmental war crime committed during non-international armed conflict ("NIAC"), particularly noting to the facts that most of the current civil wars are fuelled from the exploitation of natural resources.¹²

A. Status Quo of Environmental Protection in Time of Armed Conflict under IEL and IHL

⁸ *Ibid*, para. 30.

⁹ Kurykin, S. (2001). *Environmental Impact of the War in Yugoslavia on South-East Europe*. Report of the Committee on the Environment, Regional Planning and Local Authorities. P.A.C.E. Doc. 8925, paras. 6-7, 57.

¹⁰ *Oil Slick on Lebanese Shore*. Report of the Secretary-General. U.N. Doc. A/62/343 (2007) para. 3.

¹¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. Judgment. I.C.J. Rep. 168 (2005) para. 250.

¹² Jensen, David and Halle, Silja (eds). (2009). *Protecting the Environment during the Armed Conflict: An Inventory and Analysis of International Law*. Nairobi: UNEP, p. 8 [Jensen/Halle].

Indeed, the malicious influence of individual acts that arose in international law in connection with armed conflicts has caused damage to the entire community.¹³ One of the harms that have caused by the armed conflicts is the depletion of natural resources, as well as the destruction of the natural environment itself.¹⁴

By virtue of this circumstance, Prof. Grigory Ivanovich Tunkin asserted that the formation of the international legal protection of environmental change has been and is taking place within the overall process of the progressive development of international law. In his view, the regulation of environmental activities of States was formed under the unquestionable influence of many universal international treaties that they either contain relevant environmental provisions or directly or indirectly, but they contribute to the improvement of the planetary environments.¹⁵

In that respect, IEL and IHL are several relevant branches of public international law governing the protection of the environment during an armed conflict situation.¹⁶

In IEL, Prof. Philippe Sands has enumerated certain international treaties relating to the protection of the environment in time of armed conflict. He observed that most of the environmental treaties are silent on this matter.¹⁷ For example, there are certain treaties that preclude civil liability for damage that occurs as a result of armed conflict.¹⁸ There are also treaties that allowing for the suspension of its operation in case of war or other hostilities,¹⁹ whilst other instruments strictly prohibit its applicability for military activities.²⁰

A contrario to the treaties as mentioned above, other international environmental treaties guaranteed the environmental protection at all times, including in time of armed conflict. That provision can be seen in the 1959 Antarctic Treaty and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.²¹

Meanwhile, from the perspective of IHL, the protection of the natural environment has been widely recognized in certain instruments. Numerous scholars pointed out that the narration on environmental protection during the war has implicitly existed in the 1868 St. Petersburg Declaration that renouncing the use of explosive projectiles under 400 grams weight and the

¹³ Kudryavtsev, Vladimir N. (1999). *Международное уголовное право: учебное пособие (International Criminal Law: Tutorial)*. Moscow: Nauka, p. 3.

¹⁴ Westing, Arthur H. (1980). *Warfare in a Fragile World: Military Impact on the Human Environment*. London: Taylor & Francis, pp. 192-194.

¹⁵ Tunkin, Grigory I. (ed). (1982). *Международное право: учебник (International Law: Textbook)*. Moscow: Yuridicheskaya Literatura, p. 478.

¹⁶ Vincze, Viola. (2017). "The Role of Customary Principles of International Humanitarian Law in Environmental Protection". *Pécs Journal of International and European Law*, 2(19), pp. 22-23 [Vincze].

¹⁷ Sands, Philippe. (2003). *Principles of International Environmental Law*. Cambridge: Cambridge University Press, pp. 309-310.

¹⁸ These treaties encompass, *inter alia*, the 1960 OECD Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention) (art.9); the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (art.4(2)(a)); the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (art.8(4)(b)).

¹⁹ The 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) (art.XIX(1)) and the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean (art.IV(2)) are several notable example of these environmental treaties.

²⁰ It was evinced in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) (art.VII(4)), the 1976 Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona Protocol) (Annex I), and the 1986 Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (Noumea Protocol) (art.10(2)).

²¹ See Antarctic Treaty. 402 U.N.T.S. 71. Dec. 1, 1959, art. I(1); Convention on the Law of the Non-Navigational Uses of International Watercourses. 2999 U.N.T.S. 52106. May 21, 1997, art. 29.

1899 Hague Declaration that prohibiting the use of projectiles that capable of dispersing asphyxiation or deleterious gases.²²

Given the essence of IHL is represented by the principle of humanity, thus Prof. Igor Pavlovich Blishchenko contended that the realization of Article 13 of the Fourth Geneva Convention 1949, which is intended to alleviate the sufferings caused by war, can be achieved through the protection of the natural environment, which is necessary for human survival.²³

The protection of the natural environment under IHL reaches its culmination under the 1977 First Additional Protocol to the Geneva Conventions 1949 (“AP-I”) and the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (“ENMOD Convention”).

In AP-I, Articles 35(3) and 55(1) firmly prohibits the use of methods or means of warfare that are intended or may be expected to cause, widespread, long-term and severe damage to the natural environment, which represent a customary law.²⁴ On the other hand, Article I of the ENMOD Convention stipulates the prohibition of the deliberate environmental modification techniques in order to inflict widespread, long-lasting or severe effects as a means of destruction, damage or injury to another State Party.²⁵ Nevertheless, the customary nature of the provision under the ENMOD Convention remains questionable.²⁶

From such legal construction, it can be understood that neither AP-I nor ENMOD Convention is duplicating to one another. Andronico O. Adede has identified the differences between these instruments, namely: first, AP-I is specifically designed to protect the natural environment against damages that could be inflicted on it by any weapon. Meanwhile, the ENMOD Convention is targeted to prevent the environmental modification techniques only, rather than the use of weapons at large. Secondly, AP-I applies only to an armed conflict situation, while the ENMOD Convention has a broader application as it encompasses all environmental modification techniques for military or any other hostile purposes.²⁷

The formulation of environmental protection under IHL is also manifested through its legal principles, which has been codified in Rules 43 and 44 of the the International Committee of the Red Cross’ (“ICRC”) Customary International Humanitarian Law, namely the principles of distinction, necessity, proportionality and precautionary.²⁸

Under the distinction principle, the warring parties are proscribed to attack the natural environment unless the combatants use it, thereby altering its status as the military objective. The clear example of this principle was reflected in Article 2(4) of the 1980 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons that stipulates:

“It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or

²² Vincze, *Op.Cit.*, p. 20; Kiss, Alexandre and Shelton, Dinah. (2007). *Guide to International Environmental Law*. Leiden: Martinus Nijhoff Publisher, p. 54.

²³ Blishchenko, Igor P. (1984). *Обычное оружие и международное право (Conventional Weapon and International Law)*. Moscow: Mezhdunarodniye Otnosheniya, p. 91.

²⁴ Henckaerts, Jean-Marie and Doswald-Beck, Louise. (2009). *Customary International Humanitarian Law (Volume I: Rules)*. Cambridge: ICRC, p. 152 [Henckaerts/Doswald-Beck].

²⁵ Article II of the ENMOD Convention defines the environmental modification techniques in question as any technique for changing through the deliberate manipulation of natural processes – the dynamics, composition or structure of the, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

²⁶ Henckaerts/Doswald-Beck, *Op.Cit.*, p. 155.

²⁷ Adede, Andronico O. (1994). “Protection of the Environment in Times of Armed Conflict: Reflections on the Existing and Future Treaty Law”. *Annual Survey of International & Comparative Law*, 1(1), p. 166.

²⁸ Henckaerts/Doswald-Beck, *Op.Cit.*, Rules 33-34.

camouflage combatants or other military objectives, or are themselves military objectives."²⁹

The importance of respecting the environment is also stemming from the necessity and proportionality principles.³⁰ The necessity principle assures the warring parties do not carry out wanton destruction causing serious environmental damage without the imperative military necessity.³¹ The proportionality principle confers to the balancing between the military advantage and the environmental destruction as its collateral damage. As per Article 51(5)(b) of the AP-I and paragraph 13(c) of the 1994 San Remo Manual, an attack is disproportional if the damage caused [to the environment] is excessive to the concrete and direct military advantage anticipated.

Another central principle on environmental protection during armed conflicts situation is the precautionary principle, which has been widely recognized in both IEL³² and IHL landscapes. The centrality of this principle lies on the obligation of the parties to the conflict to take all feasible precautions to avoid or at least to minimize, in their military operations, all acts liable to damage the environment.³³

B. Challenges for Environmental Protection in Time of Armed Conflict under the Rome Statute

In addition to the extensive legal regulation on environmental protection during armed conflict situation under IEL and IHL, ICL also provides legal protection for the natural environment during armed conflict situation by providing international criminal liability to those who committed environmental war crimes.

As one of the international criminal judicial institution, the founders of the ICC have envisioned the importance of environmental protection in time of armed conflict. This is at least evinced in Article 8(2)(b)(iv) of the Rome Statute that criminalises individuals who violates the laws and customs applicable in IAC in the form of:

*“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.”*³⁴

In light of this provision, this section will discuss certain legal challenges emanating from that provision. This question arose because, despite its existence under the ICC statutory provision, no individual has been charged under this Article for committing environmental war crime up to this day. This Article suspects that this situation was influenced by the lack of clarity for interpreting the criteria of “*widespread, long-term and severe damage*” laid down in that

²⁹ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. 19 I.L.M. 1523. Apr. 10, 1980, art. 2(4).

³⁰ *Nuclear Weapons*, para. 30.

³¹ Similar passage is found in paragraph 44 of the 1994 San Remo Manual on International Law Applicable to Armed Conflicts.

³² Preamble of the 1992 Convention on Biological Diversity and Principle 15 of the Rio Declaration are the clear example for IEL recognition of the precautionary principle.

³³ Vincze, *Op.Cit.*, p. 30.

³⁴ Rome Statute of the International Criminal Court. 2187 U.N.T.S. 3. July 17, 1998, art. 8(2)(b)(iv).

provision. Moreover, this Article contends that the drafter of the Rome Statute also failed to provide similar environmental protection in time of NIAC.

The Ambiguous Criteria under Article 8(2)(b)(iv) of the Rome Statute

According to Article 8(2)(b)(iv) of the Rome Statute, an individual that intentionally launched an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment, which would be excessive to the military advantages anticipated, may be charged on this basis.

Even though the Rome Statute provides little guidance to interpret its provisions, the ICC has provided other avenues to decipher the provisions under the Rome Statute. As per Article 21(1)(a) of the Rome Statute, such avenues can be pursued through the Elements of Crimes (“EOCs”).³⁵ The EOCs to Article 8(2)(b)(iv) of the Rome Statute has identified five fundamental elements, namely:

- 1) The perpetrator launched an attack.
- 2) The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
- 3) The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
- 4) The conduct took place in the context of and was associated with an international armed conflict.
- 5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Unfortunately, both the Rome Statute and the EOCs also failed to interpret the phrase “widespread, long-term and severe damage” to the natural environment and the element of “excessive” itself.³⁶ The existence of such a vague provision is indeed undermined the legality principle (*nullum crimen sine lege*) that requires crimes to be as specific and detailed as possible.³⁷

In order to resolve this obstacle, it can only be attained through other sources of law, as recognized by Article 21(1)(b)-(c) of the Rome Statute. The ICC has previously accepted this approach in *Al Bashir*, where the Pre-Trial Chamber I of the ICC concludes:

“(…) According to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the

³⁵ Article 9(1) of the Rome Statute rules that the EOCs shall assist the ICC in the interpretation and application of Articles 6, 7, 8 and 8 bis of the Rome Statute.

³⁶ Triffterer, Otto and Ambos, Kai (eds). (2016). *The Rome Statute of the International Criminal Court: A Commentary*. 3rd ed. München: C.H. Beck/Hart/Nomos, pp. 378-379 [Triffterer/Ambos].

³⁷ Cassese, Antonio et al. (eds). (2013). *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford University Press, p. 23.

*Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and 45 article 21(3) of the Statute.*³⁸

From this standpoint, Article 21 (1)(b) of the Rome Statute permits, where appropriate, the utilization of international treaties as one of its applicable law.³⁹ With this modality, certain international treaties to the very least could enlighten the meaning of “widespread, long-term and severe” criteria under the Rome Statute.

This article suggests that the definition of those criteria can be found in two treaties, which are AP-I and the ENMOD Convention. However, these instruments offer different approaches for interpreting those criteria.

As regard to its terminology, both instruments also provide a distinguish definition, despite its identical terms. According to the Understanding to Article I of the ENMOD Convention, the “widespread” effect encompasses the affected area on the scale of several hundred square kilometres, while AP-I considers that term as the damage that may be less than several hundred square kilometres.⁴⁰

Furthermore, the Understanding to Article I of the ENMOD Convention also emphasized that the term “long-lasting” applies to damages that last for several months or approximately a season. In contrast, AP-I defined “long-term” damage as the damage that last for several decades.⁴¹

As per the Understanding to Article I of the ENMOD Convention, the definition of “severe” effect involves the damage that seriously or significantly disrupts or harms human life, natural and economic resources or other assets. However, this term is insufficiently defined by AP-I. Anthony Leibler argued that severe damage as the damage that is causing death, ill-health or loss of sustenance to thousands of people, at present or in the future.⁴²

Despite the above-mentioned interpretation, the ICRC argued that the threshold of widespread, long-term and severe damage to the natural environment set by Articles 35(3) and 55 of the AP-I is remain open for further interpretation.⁴³

The interpretation relating to the phrase “widespread, long-term and severe” damage to the natural environment has also reached the attention of the International Law Commission (“ILC”) in 1991. During the drafting process of Article 26 of the Draft Code of Crime Against the Peace and Security of Mankind, the ILC articulated the said phrase as:

“The extent or intensity of the damage, its persistence in time, and the size of the geographical area affected by the damage. It was explained in the Commission that the

³⁸ *Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”). ICC-02/05-01/09-3. (2009). Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 44.*

³⁹ *See Situation in Uganda, ICC-02/04-01/15 (2005), Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, para. 19.*

⁴⁰ Antoine, Philippe. (1992). “International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict”. *International Review of the Red Cross*, 32(291), p. 526.

⁴¹ Sandoz, Yves et al. (eds). (1987). *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: ICRC/Martinus Nijhoff Publishers, p. 416.

⁴² Leibler, Anthony. (1992). “Deliberate Wartime Environmental Damage: New Challenges for International Law”. *California Western International Law Journal*, 23(1), p. 111.

⁴³ Dörmann, Knut. (2004). *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: ICRC/Cambridge University Press, p. 175 [Dörmann].

word 'long-term' should be taken to mean the long-lasting nature of the effects and not the possibility that the damage would occur a long time afterwards."⁴⁴

Moreover, unlike AP-I and ENMOD Convention, Article 8(2)(b)(iv) of the Rome Statute provides a distinctive characteristic for charging environmental war criminal. This provision requires the perpetrators' conduct to be "clearly" excessive in relation to the concrete and direct "overall" military advantage anticipated (proportionality test).⁴⁵ In other words, if the environmental damages were not obviously excessive to a very substantial military advantage,⁴⁶ an individual would be freed from any criminal liability under this provision.

Previously, the evaluation for determining the excessiveness of collateral damage to the natural environment has been discussed in the Final Report of the Committee Established to Review the NATO Bombing Campaign. The Committee suggested that the determination of relative values must be that of the "reasonable military commander".⁴⁷

This threshold is difficult to be achieved by the Prosecutor to indict a military commander due to the lack of information⁴⁸ that indicating that commander, prior to the attack, quantifying and assessing any potential damages to the natural environment in the ordinary course of events. The ICRC even admitted that it is not easy for that commander to know in advance exactly what the scope and duration of some environmentally damaging acts will be.⁴⁹

The discrepancies from various sources in interpreting the "widespread, long-term and severe" threshold coupled with the additional element of proportionality test are indeed causing environmental protection in times of IAC under Article 8(2)(b)(iv) of the Rome Statute even more difficult to be defined and enforced by the ICC. Consequently, the absence of uniform interpretation of "widespread, long-term and severe" requirement under Article 8(2)(b)(iv) of the Rome Statute would unlikely result to the applicability of the *favour rei* principle⁵⁰ for every charge brought under this provision before the ICC due to the vagueness of Article 8(2)(b)(iv) of the Rome Statute in dealing with the environmental war criminals.

The Environmental Protection during the Armed Conflict of Non-International Character is not guaranteed under the Rome Statute

Although the existence of Article 8(2)(b)(iv) of the Rome Statute is imperfect, this provision is undoubtedly provided assurance that no one is immune for committing an environmental war crime in IAC situation. This assertion is built because the *chapeau* of Article 8(2)(b) of the Rome Statute is designed as a codification of the laws and customs applicable in IAC.⁵¹ Accordingly, Article 8(2)(b) (iv) of the Rome Statute is inapt to be applied for NIAC situation.

⁴⁴ Report of the International Law Commission on the Work of its Forty-Third Session (29 April-19 July 1991), U.N. Doc. A/46/10 (1991) p. 276.

⁴⁵ Triffterer/Ambos, *Op.Cit.*, p. 379. Phrase "concrete and direct 'overall' military advantage anticipated" under Article 8(2)(b)(iv) of the Rome Statute was nowhere to be found in AP-I and ENMOD Convention.

⁴⁶ See ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 (2000) paras. 21-22.

⁴⁷ *Ibid*, para. 50.

⁴⁸ Schabas, William A. (2014). *An Introduction to the International Criminal Court*. 4th ed. Cambridge: Cambridge University Press, p. 137.

⁴⁹ *Protection of the Environment in Times of Armed Conflict*, Report of the Secretary-General, U.N. Doc. A/47/328 (1992) paras. 20, 63.

⁵⁰ *Favor rei* principle is understood as "in favour of the Suspect". This principle has been encapsulated in Article 22(2) of the Rome Statute.

⁵¹ Triffterer/Ambos, *Op.Cit.*, p. 354; Dörmann, *Op.Cit.*, p. 128.

In the time of NIAC, there is no identical provision as what was written in Article 8(2)(b)(iv) of the Rome Statute. Articles 8(2)(c) and (e) of the Rome State are silent in penalizing the perpetrators that causing environmental degradation during the NIAC situation. However, historical record noted that similar provision in Article 8(2)(b)(iv) of the Rome Statute has been inserted for NIAC under Article 8(2)(d) of the Draft Statute, but later being dropped by the drafters during the Rome Conference without any significant debate of the issue.⁵²

In the view of Carl E. Bruch, the decision of the drafters of the Rome Statute to omit environmental war crime in NIAC context must be seen as a step back from the ENMOD Convention that is designed to both IAC and NIAC situation, as long as it provides its transnational impact to its member States.⁵³

On the contrary to the legal framework for environmental protection in time of NIAC under the Rome Statute, there are at least 18 civil wars around the world that was instigated by the exploitation of natural resources,⁵⁴ such as, in Angola, Nigeria and Sudan.⁵⁵

As illustrated *infra*, there are also certain examples where NIAC can cause environmental degradation. During the Rwanda civil war, poaching of the endangered mountain gorillas and land mining the national parks, such as the Parc National des Volcans and the Parc National de l'Akagera, have become common practices.⁵⁶

Likewise, the internal armed conflict between the government forces and the rebels in Colombia marked with the Colombian guerrilla groups' strategy to destroy the oil pipelines and spill millions of barrels of oil into the Catatumbo River basin.⁵⁷

Another example of how NIAC can negatively affect the natural environment was found in Cambodia. From 1985 to 1989, the Government of the People's Republic of Kampuchea deploying K5 Plan or known as the "Bamboo Curtain" in order to prevent the Khmer Rouge guerrilla for re-infiltrating Cambodia by means of trenches, barbed wire fences and minefields.⁵⁸ As a result, this military tactic failed to deter the Khmer Rouge.⁵⁹ Instead, such measure caused acute deforestation and transformed hundreds of thousands of hectares of it into minefields in forms of dry deciduous forest or savannah.⁶⁰

In light of these circumstances, the inability of the Rome Statute in providing a guarantee for environmental protection in time of NIAC will indeed defeat the purpose of establishment of the ICC to put an end to impunity for the perpetrators of environmental war crimes, as these culprits cannot be tried before the ICC due to the lack of legal provision under the Rome Statute itself.

⁵² Lawrence, Jessica C. and Heller, Kevin J. (2007). "The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime". *Georgetown International Environmental Law Review*, 20(1) fn. 130 [Lawrence/Heller].

⁵³ Bruch, Carl E. (2001). "The Environmental Law of War: All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict". *Vermont Law Review*, 25(695) p. 703.

⁵⁴ Jensen/Halle, *Op.Cit.*, p. 8.

⁵⁵ See Gonzalez, Adrian. (2010). "Petroleum and its Impact on Three Wars in Africa: Angola, Nigeria and Sudan". *Journal of Peace, Conflict and Development*, 16.

⁵⁶ Drumb, Mark A. (1998). "Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes". *Fordham International Law Journal*, 22(1) p. 145 [Drumb].

⁵⁷ Sánchez-Triana, Ernesto et al. (eds). (2007). *Environmental Priorities and Poverty Reduction: A Country Environmental Analysis for Colombia*. Washington D.C.: World Bank, p. 374.

⁵⁸ Deth, Sok Udom. (2009). *The People's Republic of Kampuchea 1979-1989: A Draconian Savior?*. Thesis, Ohio University, p. 110; Slocumb, Margaret. (2001). "The K5 Gamble: National Defence and Nation Building under the People's Republic of Kampuchea". *Journal of Southeast Asian Studies*, 32(2), p. 198.

⁵⁹ Crochet, Soizick. (1997). *Le Cambodge*. Paris: Karthala, Chap. 4.

⁶⁰ Kim, Sophanarith et al. (2005). "Causes of Historical Deforestation and Forest Degradation in Cambodia". *Journal of Forest Planning*, 11(1), p. 27.

C. Solutions

Given the above-mentioned challenges for the environmental protection in times of IAC and NIAC under the Rome Statute (*vide* Section C), the author proposed numerous solutions to mitigate those challenges, as enunciated *infra*.

As regards to the provision of Article 8(2)(b)(iv) of the Rome Statute, the high threshold of “*widespread, long-term and severe*” damage to the natural environment in time of IAC is necessary to be modified. The Assembly of the State Parties (“ASP”) needs to amend the EOCs⁶¹ by providing additional footnote that describes the meaning of such phrase. Should the ASP faced with the difficulties to translate those criteria; the ICC may, to the very least, play an important role to interpret the “*widespread, long-term and severe*” threshold under Article 8(2)(b)(iv) of the Rome Statute towards any case law brought before it under this charge.

Notwithstanding to the ASP and the ICC’s ability to translate that threshold, the most progressive approach for ensuring the environmental protection in time of IAC has been articulated by Mark Drumbl, Jessica C. Lawrence and Kevin J. Heller, which suggested for lowering that threshold by omitting phrase “*widespread, long-term, and severe damage*” into a broad category of “*damage*”, thereby avoiding the potential anthropocentrism of an AP-I based requirement.⁶² The author is strongly supporting this suggestion to be presented during the discussion for the amendment of the Rome Statute before the ASP.

With respect to the issue of proportionality test under Article 8(2)(b)(iv) of the Rome Statute, the author suggests the ASP to remove the words “*overall*” and “*clearly*” from the construction of proportional test under the said provision. With such omission, it is expected for Article 8(2)(b)(iv) of the Rome Statute to be applied to any intentional attack that would cause damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated.

Meanwhile for the context of NIAC, the author recommends the ASP to provide a parallel provision of Article 8(2)(b)(iv) of the Rome Statute in the NIAC section of Article 8(2)(c) or 8(2)(e) of the Rome Statute. This suggestion is reasonable since the *travaux preparatoire* to Article 8(2)(b)(iv) of the Rome Statute do not indicate the drafters’ clear objection to extend the application of that provision in NIAC situation.⁶³ Thus, opening a discussion for this particular topic in the future is critical to mitigate and further prevent the impacts of civil wars and other forms of NIAC to the detrimental of the natural environment itself.

D. Conclusion

The narration between armed conflict and its impact on the natural environment is no longer become a new subject in modern society. Rachel Carson has previously testified it at the C.B.S. Reports program entitled “The Silent Spring of Rachel Carson” on April 3, 1963, where she stated “*But man is a part of nature, and his war against nature is inevitably a war against himself.*”⁶⁴

⁶¹ The rules relating to the amendment of the Rome Statute and the EOCs must comply with the mechanism established in Articles 9(2)-(3) and 121 of the Rome Statute.

⁶² Drumbl, *Op.Cit.*, p. 129; Lawrence/Heller, *Op.Cit.*, p. 33.

⁶³ Lawrence/Heller, *Op.Cit.*, p. 37.

⁶⁴ See Carson, Rachel. “In Memoriam – Rachel Carson”. <<http://www.rachelcarson.org/mRachelCarson.aspx>> (accessed May 20, 2020).

To that end, an intersection between numerous branches of international law (such as IEL, IHL and ICL) must be proportionately observed for ensuring the protection of the natural environment during armed conflicts. However, this Article found the imbalance between these instruments, thereby contributing to the weak of current protection of natural environment *per se*.

One of its primary challenges lies in the failure of the Rome Statute to provide clear guidance as to how the ICC can prosecute the environmental war criminals. Despite its existence, the vagueness of Article 8(2)(b)(iv) of the Rome Statute to define the war crime of intentional attack that causing a widespread, long-term and severe effects to the natural environment, creating a complicated difficulty for the Office of the Prosecutor of the ICC (“OTP”) to bring charges against the perpetrators on that basis.

Furthermore, the weaknesses of the Rome Statute also found in the construction of Articles 8(2)(c) and 8(2)(e) of the Rome Statute that does not provide similar provision in Article 8(2)(b)(iv) of the Rome Statute for the context of war crime committed in non-international character. This condition is definitely creating a leeway for the environmental war criminals to escape from criminal liability due to the absence of a particular provision in NIAC situation.

Ideally, we should seek more profound solutions to these difficulties. Employing the ASP to amend the Rome Statute and its EOCs, on the one hand, must be seemed as the appropriate strategy to clarify the environmental protection in time of armed conflicts [both IAC and NIAC] under the Rome Statute. On the other hand, consistently with the principle of *iura novit curia*,⁶⁵ the important role of the ICC to interpret the “*widespread, long-term and severe*” threshold under Article 8(2)(b)(iv) of the Rome Statute is equally crucial for environmental protection. By virtue of these recommendations, it is expected that the Rome Statute can effectively play its role in ensuring the penalization for the environmental war criminals in the future.

⁶⁵ The principle *iura novit curia* is a legal maxim that means the court, *in casu* ICC, alone is responsible for determining which and how law applies to a particular case.

BIBLIOGRAPHY

Books & Monographs

Blishchenko, Igor P. (1984). *Обычное оружие и международное право (Conventional Weapon and International Law)*. Moscow: Mezhdunarodniye Otnosheniya. (in Russ).

Cassese, Antonio et al. (eds). (2013). *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford University Press.

Crochet, Soizick. (1997). *Le Cambodge*. Paris: Karthala.

Dörmann, Knut. (2004). *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: ICRC/Cambridge University Press.

Harwell, Christine C. "Experiences and Extrapolations from Hiroshima and Nagasaki" on M.A. Hartwell and T.C. Hutchinson (eds). (1985). *Environmental Consequences of Nuclear War Volume II: Ecological and Agricultural Effects*. London: John Wiley & Sons Ltd.

Henckaerts, Jean-Marie and Doswald-Beck, Louise. (2009). *Customary International Humanitarian Law (Volume I: Rules)*. Cambridge: ICRC.

Jensen, David and Halle, Silja (eds). (2009). *Protecting the Environment during the Armed Conflict: An Inventory and Analysis of International Law*. Nairobi: UNEP.

Kotlyarov, Ivan I. (ed). (2012). *Международное гуманитарное право (International Humanitarian Law)*. 3rd ed. Moscow: Unity. (in Russ).

Kiss, Alexandre and Shelton, Dinah. (2007). *Guide to International Environmental Law*. Leiden: Martinus Nijhoff Publisher.

Kudryavtsev, Vladimir N. (1999). *Международное уголовное право: учебное пособие (International Criminal Law: Tutorial)*. Moscow: Nauka. (in Russ).

Roberts, A. "Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War" on Richard J. Grunwald, et al. (eds). (1996). *Protection of the Environment during the Armed Conflict. International Law Studies Vol. 69*. Newport: Naval War College.

- Sánchez-Triana, Ernesto et al. (eds). (2007). *Environmental Priorities and Poverty Reduction: A Country Environmental Analysis for Colombia*. Washington D.C.: World Bank.
- Sandoz, Yves et al. (eds). (1987). *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: ICRC/Martinus Nijhoff Publishers.
- Sands, Philippe. (2003). *Principles of International Environmental Law*. Cambridge: Cambridge University Press.
- Schabas, William A. (2014). *An Introduction to the International Criminal Court*. 4th ed. Cambridge: Cambridge University Press.
- Triffterer, Otto and Ambos, Kai (eds). (2016). *The Rome Statute of the International Criminal Court: A Commentary*. 3rd ed. München: C.H. Beck/Hart/Nomos.
- Tunkin, Grigory I. (ed). (1982). *Международное право: учебник (International Law: Textbook)*. Moscow: Yuridicheskaya Literatura. (in Russ).
- Westing, Arthur H. (1980). *Warfare in a Fragile World: Military Impact on the Human Environment*. London: Taylor & Francis.

Journals

- Adede, Andronico O. (1994). "Protection of the Environment in Times of Armed Conflict: Reflections on the Existing and Future Treaty Law". *Annual Survey of International & Comparative Law*, 1(1).
- Antoine, Philippe. (1992). "International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict". *International Review of the Red Cross*, 32(291).
- Bruch, Carl E. (2001). "The Environmental Law of War: All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict". *Vermont Law Review*, 25(695).

- Drumbl, Mark A. (1998). "Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes". *Fordham International Law Journal*, 22(1).
- Gonzalez, Adrian. (2010). "Petroleum and its Impact on Three Wars in Africa: Angola, Nigeria and Sudan". *Journal of Peace, Conflict and Development*, 16.
- Kim, Sophanarith et al. (2005). "Causes of Historical Deforestation and Forest Degradation in Cambodia". *Journal of Forest Planning*, 11(1).
- Kuvrychenkova, Tatiana V. (2016). "К вопросу охраны окружающей среды во время вооруженных конфликтов" (To the Question on the Protection of Natural Environment in Time of Armed Conflicts). *Vestnik TvGU. Series Law*, 2. (in Russ).
- Lawrence, Jessica C. and Heller, Kevin J. (2007). "The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime". *Georgetown International Environmental Law Review*, 20(1).
- Leibler, Anthony. (1992). "Deliberate Wartime Environmental Damage: New Challenges for International Law". *California Western International Law Journal*, 23(1).
- Slocumb, Margaret. (2001). "The K5 Gamble: National Defence and Nation Building under the People's Republic of Kampuchea". *Journal of Southeast Asian Studies*, 32(2).
- Vincze, Viola. (2017). "The Role of Customary Principles of International Humanitarian Law in Environmental Protection". *Pécs Journal of International and European Law*, 2(19).

Legislations

Antarctic Treaty. 402 U.N.T.S. 71. Dec. 1, 1959.

Convention on Biological Diversity. 1760 U.N.T.S. 69. June 5, 1992.

Convention on the Law of the Non-Navigational Uses of International Watercourses. 2999 U.N.T.S. 52106. May 21, 1997.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention). 1046 U.N.T.S. 120. Dec. 29, 1972.

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention). 1108 U.N.T.S. 151. Dec. 10, 1976.

Convention on the Regulation of Antarctic Mineral Resource Activities. 27 I.L.M. 868. June 2, 1988.

ICC. Elements of Crimes. I.C.C. Doc. RC/11. 2011.

International Convention for the High Seas Fisheries of the North Pacific Ocean. 205 U.N.T.S. 65. May 9, 1952.

International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL). 327 U.N.T.S. 3. May 12, 1954.

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. 11 I.L.M. 284. Dec. 18, 1971.

OECD Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention). 956 U.N.T.S. 251. July 29, 1960.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). 1125 U.N.T.S. 3. June 8, 1977.

Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona Protocol). 1102 U.N.T.S. 92. Feb. 16, 1976.

Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (Noumea Protocol). 26 I.L.M. 65. Nov. 25, 1986.

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. 19 I.L.M. 1523. Apr. 10, 1980.

Rome Statute of the International Criminal Court. 2187 U.N.T.S. 3. July 17, 1998.

Jurisprudences

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). Judgment. I.C.J. Rep. 168 (2005).

Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion. I.C.J. Rep. 226 (1996).

Prosecutor v. Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”). ICC-02/05-01/09-3. (2009).
Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.

Situation in Uganda. ICC-02/04-01/15. (2005). Decision on the Prosecutor’s Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification.

Miscellaneous

Braige, Morsi Naim. (2014). *Международно-правовая охрана окружающей среды в ситуациях вооруженных конфликтов (International Legal Protection of the Environment in Situations of Armed Conflicts)*. Dissertation, Kazan (Volga Region) Federal University. (in Russ).

Carson, Rachel. “In Memoriam – Rachel Carson”. <<http://www.rachelcarson.org/mRachelCarson.aspx>> (accessed May 20, 2020).

Deth, Sok Udom. (2009). *The People’s Republic of Kampuchea 1979-1989: A Draconian Savior?*. Thesis, Ohio University.

ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 (2000).

Kurykin, S. (2001). *Environmental Impact of the War in Yugoslavia on South-East Europe*. Report of the Committee on the Environment, Regional Planning and Local Authorities. P.A.C.E. Doc. 8925.

Oil Slick on Lebanese Shore. Report of the Secretary-General. U.N. Doc. A/62/343 (2007).

Protection of the Environment in Times of Armed Conflict, Report of the Secretary-General, U.N. Doc. A/47/328 (1992).

Report of the International Law Commission on the Work of its Forty-Third Session (29 April-19 July 1991), U.N. Doc. A/46/10 (1991).

Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (vol.I) (1992).

San Remo Manual on International Law Applicable to Armed Conflicts. June 12, 1994.