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ENVIRONMENTAL CRIMES THROUGH THE PRISM OF THE CASE-LAW OF THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

Environmental protection is one of the challenges facing international community today and it is gaining particular importance for the International Criminal Court (hereinafter, ICC). According to the Policy Paper on Case Selection and Prioritisation published by the ICC Prosecutor in 2016, destruction of environment and inflicting environmental damage, as means of committing a crime, are new priorities for the Office of the Prosecutor. However, criminalisation of the destruction of environment internationally has not yet been studied comprehensively. It is debatable whether the ICC can be effective in prosecuting perpetrators responsible for the destruction of environment within the existing legal framework. The aim of this article is to explore the possibilities of the development of ICC case-law regarding destruction of environment and environmental damage through the analysis of the limitations imposed by the Rome Statute. The article, in particular, underlines jurisdictional limitations of the Rome Statute regarding criminalisation of the damage caused to the environment. The study also looks into the extent to which environmental protection interests can become relevant for the ongoing ICC investigation into the situation in Georgia.

1. INTRODUCTION

According to the founding document of the International Criminal Court (hereinafter, ICC), the Court's jurisdiction covers four main crimes: genocide, crime against humanity, war crime and, since 17 July 2018, crime of aggression. As of 21 January 2019, the ICC investigates 11 situations. Moreover, the Office of the Prosecutor (hereinafter, OTP) has 10 more situations under preliminary examination.[1] However, until now, environmental protection interests have been only superficially and indirectly reflected in the Court's case-law. For example, in the second arrest warrant against the Sudanese President Omar Al-Bashir, the Court considered that the contamination of wells and water pumps is a crime.[2] Accordingly, the boundaries of ICC jurisdiction regarding damage caused to the environment are not clear and the scholarly discussion about the theoretical possibility of prosecuting destruction of environment is a novelty.

20 years after the adoption of the Rome Statute and 16 years after the ICC started functioning, the OTP tries to interpret the jurisdictional grounds more widely and respond to the modern challenges facing the international community, such as international criminalisation of the damage to environment and consideration of environmental protection interests within criminal justice systems.[3] In September 2016, the Court Prosecutor issued a new Policy Paper on Case Selection and Prioritisation, which lays ground to the interpretation of the crimes foreseen by the Rome Statute through the prism of environmental protection.[4] Though the policy paper is not legally binding, it reveals the future plans of the Court and the priorities within the existing legal framework.

Present article aims to establish the relationship of the Rome Statue, in particular, war crimes and crimes against humanity given therein, with the environmental damage. The first part of the article will explore the historic and legal grounds for qualifying environmental damage as a crime under international criminal law. Afterwards, it will be established whether massive fires within Borjomi-Kharagauli National Park and oil spill near Poti Port during 2008 international armed conflict in Georgia fall within ICC jurisdiction. The study is concluded by the evaluation of the legal prospect of the development of the case-law on genocide, war crimes and crimes against humanity within environmental context.

1 Web-site of the International Criminal Court: https://www.icc-cpi.int/pages/situation.aspx [last accessed on 5.05.2019]

2 Second Decision on the Prosecution's Application for a Warrant of Arrest, *Al Bashir* (ICC-02/05-01/09-94), Pre-Trial Chamber I, 12 July 2010, § 36-38.

3 About the threats to international peace and security, emanating from crimes against environment, see C. Nellemann (ed.), *The Rise of Environmental Crime – A Growing Threat to Natural Resources, Peace, Development and Security* (2016), p. 7; 15; 39 and 77; according to the UN, the damage to the environment is declared as one of key challenges facing modern international community, see GA Res. 70/1, *Transforming our world: the 2030 Agenda for Sustainable Development,* 21 October 2015, § 31 and 55.

4 Policy Paper on Case Selection and Prioritisation, OTP, ICC, 15 September 2016, available at: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf, §41 [last accessed on 5.02.2019]

2. ENVIRONMENTAL DESTRUCTION AS A WAR CRIME

a) Historical context

The environmental damage following nuclear attacks on Hiroshima and Nagasaki in 1945 demonstrated that nuclear pollution can have impact on generations. Environmental pollution is linked to continuous risks, and the catastrophic damage to the environment can "shock the humanity" just as much as the four crimes established by the Rome Statute. While at the end of World War II humanity's concerns were focused on those who have fallen in the war, today the attention should also be paid to the generations who have suffered from ecological damage and deteriorating health. It is interesting to observe what kind of ecological damage can alarm the international community and prompt the request to criminalise such damage internationally.

According to the report co-ordered by UNEP and INTERPOL published in 2016, grave ecological crimes threaten not only the environment, but also development, international peace and security.[5] Ecological crimes are manifold: destruction of forests, depreciating lands, illegal mining and trade in gold and other minerals, trade with endangered animals, illegal fishing, polluting environment with particularly hazardous waste, and illegal trade with particularly hazardous chemicals and so on. Following such acts, there is a dangerous trend of financing armed non-state actors and terrorist groups.[6] Nevertheless, the actions underlined above are mostly ecological crimes at the national level and criminalising them at international level would require much higher threshold for damage. Though contemporary international law does not offer universal definition of the "ecological crime", in 1996 the International Court of Justice defined the environment as:

> "The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[7]

The above definition of the environment is quite broad. However, it is arguable whether the legal definition of the environmental damage as an international crime is broad enough. The first indirect attempt to criminalise environmental destruction internationally was at Nuremberg Military Tribunal, within the case *List and Others* (the Hostages Trial), whereas General Lothar Rendulic was accused of "scorching the earth" in occupied Norway with the aim to contain the advance of Russia. The Military Tribunal acquitted General Rendulic, as his actions were considered as military necessity.[8] However, the Military Tribunal found General Jodl guilty of similar charge (alongside other

5 Nellemann, *supra* note 3, p. 7.

6 *Idem*. p. 7, 15 and 39.

7 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Report 226, International Court of Justice (ICJ), 8 July 1996, §29; *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 7, 25 September 1997, § 53.

8 Brady H. and Re D., "Environmental and Cultural Heritage Crimes: The Possibilities under the Rome Statute", in M. Bose et al. (eds.), *Justice without Borders: Essays in Honour of Wolfgang Schomburg* (Leiden, Boston, Brill Nijhoff, 2018): 103, p. 116.

charges) and sentenced him to the execution by hanging. His case can be considered as a precedent of international individual criminal responsibility for the environmental damage.[9]

Following the World War II, the issue of environmental protection during hostilities became relevant within the context of Vietnam War, whereas the US destruction of forests and harvest through widespread use of herbicides sparked negative reactions from the environmentalists. While assessing the above events, biologist Arthur Galston used the new term "ecocide", which he defined as intentional and permanent destruction of the environment.[10] In 1973 the international law expert Richard Falk offered to adopt a convention about the crime of ecocide, which would apply both during peacetime and armed conflict and would apply in the cases of partial or total destruction of human ecosystem as a result of intentional criminal act.[11] Unfortunately, at that time environmental law was only taking its first steps within the framework of international law (for example, 1972 Stockholm Declaration on the Human Environment) and the international community was not prepared to criminalise environmental damage internationally.[12]

In the UN Security Council Resolution 687 adopted in 1991, the Council found Iraqi Government liable for the environmental damage inflicted as a result of invasion of Kuwait and the UN Compensation Commission imposed Monterey sanctions over Sadam Hussein government for the ecological damage caused.[13] Before withdrawing from Kuwait, Iraqi army set fire to oil wells, which were burning for the entire year and produced thick, dark smoke. In addition to smoke and air pollution, Iraqi army intentionally spilt oil into the Persian Gulf to prevent naval attack from the Unites States Armed Forces.

The environmental damage within the context of the armed conflict became relevant again in 1999, during NATO bombing of oil refinery and chemical factory in the Serbian town of Pancevo. However, the International Criminal Tribunal for Former Yugoslavia has not proceeded with respective investigation and noted that there was no "widespread", "long-term" and "severe" damage to the environment.[14] Ecological damage was inflicted during 2006 Lebanon conflict as well, when during Israeli bombing of Lebanese strategic objectives (including Jiyeh Station), large amount of oil was spilt into the environment and the coastline.[15] This has not triggered any legal follow up. ICC has not yet assessed environmental damage (as an environmental crime) within the criminal law context at international level. Therefore, it is interesting to analyse international humanitarian law

9 Smith T., "Creating a Framework for the Prosecution of Environmental Crimes in International Criminal Law", *in* W. A. Schabas, Y. McDermott and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (New York, Routlege, Taylor & Francis Group, 2013): 45, p. 53.

10 Eliana Teresa Cusato, "Beyond Symbolism: Problems and Prospects with Prosecuting Environmental Destruction before the ICC," *Juornal of International Criminal Justice* 15 (2017): 491, p. 494.

11 Hough P., "Defending Nature: The Evolution of the International Legal Restriction of Military Ecocide", in G.Z. Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence 2014* (Oxford, Oxford University Press, 2015): 137, p. 137-139.

12 UN GA Res. 2994 , *United Nations Conference on the Human Environment*, 15 December 1972

13 UN SC Res. 687, 8 April 1991; see also Hough, *supra* note 11, p. 147.

14 Hough, *supra* note 11, p. 148.

15 Oeter S., "Methods and Means of Combat", in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford, Oxford University Press, 2013): 121, p. 212.

for its qualification of war crimes within the environmental context and the prohibition of environmental damage during hostilities.

b) Limits of prohibition of environmental destruction within international humanitarian law

According to Article 25.3 of 1977 Additional Protocol I to 1949 Geneva Conventions, it is prohibited to employ methods and means of warfare which are intended, or maybe expected, to cause widespread, long-term and severe damage to the natural environment. According to Article 55 of Additional Protocol I it is prohibited to cause damage to the natural environment, to attack against natural environment by way of reprisals and thereby prejudice the health of the population. Rules 43, 44 and 45 of Customary International Humanitarian Law elaborated by the International Committee of the Red Cross further specify the environmental protection guarantees. Namely, according to the said Rules, it is prohibited to attack natural environment unless it is a military objective; however, the possibility of partly destructing the natural environment is also foreseen. The exception is allowed only in case of imperative military necessity and only if all feasible precautions are taken.[16] It should be noted that according to Rule 43, launching an attack against military objective which may be expected to cause incidental damage to the environment that would be excessive in relation to the concrete and direct military advantage anticipated is prohibited. However, when balancing the damage caused to the environment with the military advantage, the customary humanitarian law does not require apparent incompatibility of these two aims and contents itself with the requirement of proportionality of the damage caused.

1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), defines the latter as "any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space".[17] It is important to note that ENMOD foresees the three criteria of "widespread", "long-lasting" and "severe" effect alternatively and not cumulatively.[18] Accordingly, it creates different and more favourable conditions for protecting natural environment than the Additional Protocol I to Geneva Conventions. However, it is interesting to understand how each criterion of environmental impact is defined. UN Committee on Disarmament considers the damage "widespread" when it is spread across hundreds of square kilometres; the ecological damage is "long-lasting" if it lasts for several months or approximately one season; damage is "severe" if it causes serious detriment or degradation (loss) to

16 ob. ICRC, Customary IHL Database, Rules 43-45, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule43 [last accessed 5.02.2019].

17 Article 2, Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1977, 31 UST 333, 1108 UNTS 152.

18 *Idem*. Article 1.

human life, natural or economic resources.[19] According to *travaux préparatoires* of Additional Protocol I Relating the Protection of Victims of Armed Conflict, "long-term" damage to the environment is defined as the decades-long negative ecological effect.[20] Accordingly, the duration test under ENMOD established by the UN Committee on Disarmament considerably decreases the "longevity" criterion of the ecological damage foreseen under Additional Protocol I and requires not the negative ecological effect lasting for decades, but ecological degradation for several months or a season. Moreover, Additional Protocol I fails to define the criteria of "widespread" and "severe" damage. Therefore, it is possible to rely on the interpretation of these criteria offered by the UN Committee on Disarmament.

Furthermore, we should take into consideration 1980 Convention on Prohibitions on the Use of Certain Conventional Weapons and the conventions prohibiting chemical, biological or nuclear weapons, which ban weapons of mass destruction.[21] In principle, the prohibition of weapons of mass destruction implies the ban on causing environmental damage through the use of such weapons. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice established that the use of nuclear weapons violates the principles of international law and humanitarian law. Nevertheless, the Court was not prepared to declare nuclear weapons completely illegal and upheld the exception of self-defence, when the very survival of the state is at stake.[22] In his Dissenting Opinion Judge Weeramantry explicitly underlined that the use or threat of use of nuclear weapons is illegal under any circumstances within contemporary international law. As the judge known for his environmental considerations, he characterized the negative effect of nuclear weapons as the disaster causing "nuclear winter", which should by no means be tolerated as an exception under international law.[23] Based on the above, it is interesting to understand which of the standards prohibiting environmental destruction have been reflected in the Rome Statute and which qualifying factors define individual criminal responsibility for the environmental damage internationally.

c) Standard of individual criminal responsibility for environmental damage under the Rome Statute

According to Article 8 of the Rome Statute, ICC "shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". According to the Statute, war crimes mean "grave breaches of the Geneva Conventions of 12 August 1949", "serious violations of the laws and customs applicable in international

19 Oeter, *supra* note 15, p. 127-128.

20 Cusato, *supra* note 10, p. 496.

21 Oeter, *supra* note 15, p. 212.

22 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *supra* note 7, § 103-105.

23 Dissenting Opinion of Judge Weeramantry in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 226, International Court of Justice (ICJ), 8 July 1996, p. 294-295 and 331.

armed conflict", when respective actions prohibited by the Rome Statute are committed. Article 8 (2)(b)(iv) of the Statute prohibits "intentionally launching an attack", "when such attack will cause […] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[24] First of all, the Rome Statute repeats the same standard of environmental damage prohibition as given in Additional Protocol I to Geneva Conventions, adding the elements of proportionality and intent, which further complicate the task of establishing individual criminal responsibility for the environmental damage caused.

Moreover, the ICC can establish individual criminal responsibility for severe damage to the environment only in case of international armed conflict as the Rome Statute does not criminalise environmental damage in the context of non-international armed conflict. In addition, there should be a direct intent from the perpetrator and the knowledge that the attack will cause "widespread", "long-term" and "severe" damage to the environment. Similarly to Additional Protocol I to 1949 Geneva Conventions, the Rome Statute requires that the above three elements of damage are found cumulatively, thus, rejecting more progressive alternative standard under ENMOD. Furthermore, neither Rome Statute, nor its preparatory works, nor "the Elements of Crime" provide guidance as to how the three elements of ecological damage should be interpreted by the Court. Considering the similarity between Article 8 (2)(b)(iv) of the Rome Statute with the definition of environmental damage under Additional Protocol I to 1949 Geneva Conventions, we should assume that the ICC will interpret ecological damage similarly to Additional Protocol I.[25] Therefore, for the ICC, the criterion of "long-term" damage would mean continuous ecological damage lasting for decades and the criterion of the ecological damage lasting for several months is not relevant. The interpretation of the remaining two criteria ("widespread" and "severe" damage) is not contested as they are interpreted in the same manner both under ENMOD and Additional Protocol I.

Professor Steven Freeland holds opposing view from the author of this article and invites ICC judges to take into account environmental protection considerations, distance themselves from political aspects and interpret environmental damage in light of the criterion of "long-lasting damage" under ENMOD. Professor Freeland thinks that, within the established framework, the Rome Statute does not restrict judges from broadly interpreting vague notions that leave room for unclarity.[26] Accordingly, it is advisable that the Court clearly interprets the three criteria of environmental damage and forms uniform approach to the subject. Until then, scholarly opinions might continue to differ.

The Rome Statute excludes criminalisation of unintentional environmental damage and explicitly requires the element of intent. Namely, the material elements should be accompanied by "intent and knowledge".[27] Even more so, the intent should be direct. In *Lubanga* case the Pre-Trial Chamber

24 Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

25 For the rules of interpretation of an agreement see Article 31(3)(c), Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

26 See Steven Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (Cambridge, Intersenntia, 2015), p. 209.

27 Article 30, Rome Statute, *supra* note 25.

I of ICC excluded the concept of unintentional crime (*dolus eventualis*) from the remit of Article 30 (2)(b) of the Rome Statute and found that in order to establish individual criminal responsibility the intent of at least the 2nd degree should be present (*dolus directus*).[28]

The Rome Statute increases the threshold for criminalising environmental damage in the course of armed conflict established by the rules and customs of international humanitarian law, by introducing proportionality principle to the assessment of environmental damage. Namely, Article 8 (2)(b)(iv) of the Rome Statute explicitly requires that the damage to the natural environment is clearly excessive in relation to the anticipated military advantage.[29] Therefore, if the clear excess of the environmental damage vis-a-vis military advantage is debatable, the Court will not be able to establish individual criminal responsibility. For example, if the belligerent party decides to bomb the military naval ship of the adversary and foresees the inevitable possibility of large oil spill into the sea as a result of such bombardment, the damage caused to the environment as result of such attack will not be considered clearly excessive in relation to the military advantage. Contrary to this, clear inconsistency will arise between the anticipated military advantage and the damage to the natural environment if the perpetrator of the attack had knowledge that there were only few soldiers on the adversary's ship and based on technical characteristics, the ship would not be able to play decisive role during hostilities, while the oil spill would cause the destruction of large amount of sea mammals and fish.

Moreover, the "Elements of Crime" – the main complementary document for the interpretation and application of the crimes under the Rome Statute – specify that the alleged perpetrator should balance the military advantage against the environmental damage based on the information available to them when undertaking an action.[30]

To conclude, the environmental destruction standard established by the Rome Statute is more liberal to the alleged perpetrators than the prohibition foreseen under Additional Protocol I to 1949 Geneva Conventions, customary international humanitarian law or the prohibition extended to the contracting states of Environmental Modification Convention (ENMOD).

The ICC can elaborate on the environmental destruction as a war crime within the context of the investigation into 2008 international armed conflict in Georgia. It is interesting to discuss whether the ecological damage inflicted upon Georgia as a result of armed hostilities carried out by the Russian Federation meets a very high threshold established under war crimes provision (Article 8 (2)(b)(iv)) of the Rome Statute.

28 Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012, § 1011-1012.

29 Antonio Cassese, *International Criminal Law* (Oxford, Oxford University Press, 2003), p. 60; Elements of Crimes of the International Criminal Court 2002, UN Doc. PCNICC/2000/1/Add.2 (2000), p. 19.

30 See Elements of Crimes of the International Criminal Court, *supra* note 30, Article 8(2)(b)(iv), definition given in note 37 below

d) Ecological damage inflicted upon Georgia in 2008 as a war crime

On 15 August 2008, after the termination of active hostilities and after signing a ceasefire agreement, the Russian Federation launched an attack in Borjomi gorge, causing fire in Borjomi-Kharagauli National Park. It took 5 days to extinguish the fire. As a result, 250 hectares of forest was destroyed completely (including endemic species) and the fire ravaged 950 hectares. The World Bank, the World Wildlife Fund and other environmental organisations expressed concern regarding such ecological damage, while international organisations called upon the investigation into the environmental damage as a result of the war.[31] Furthermore, during the armed conflict, the Russian Federation armed forces sank Georgian military vessels near port of Poti. As a result, up to 50 tons of oil was spilled into the Black Sea and the flora and fauna of Kolkheti National Park were damaged.[32]

Nevertheless, the need of respective investigation was never mentioned in either ICC Prosecutor's request for an investigation into the situation in Georgia or, respectively, in 27 January 2016 decision of ICC Pre-Trial Chamber I about authorising such investigation.[33] First of all, oil contamination of Poti Port aquatory and Kolkheti National Park cannot be regarded as a war crime under Article 8 (2)(b)(iv) of the Rome Statute, as the "long-term damage" criterion required by Additional Protocol I to 1949 Geneva Conventions is not met. Moreover, bombing of Georgian military vessels in the port vicinity satisfied the criterion of military necessity and the environmental damage in this case is collateral, which in itself is not a crime under the Rome Statute.

Furthermore, when it comes to 15 August attack against Borjomi-Kharagauli National Park, it should at least be further investigated. It is possible that the intent to destroy environment can be found, which is key for the ICC to qualify an action as a war crime under Article 8(2)(b)(iv) of the Rome Statute. Moreover, the damage to the natural environment was "widespread" (endemic flora and fauna were destroyed across hundreds of hectares), it was also "long-term" (the damaged forest and endemic species will take over 10 years to recover) and "severe" (the recreational area was devastated, smoke was propelled into human settlements, it took considerable material and human resources to extinguish the fire). The military necessity criterion is not present in this case, as the armed hostilities were over and damage to the natural environment was clearly excessive in relation to the anticipated military advantage. Accordingly, there are reasonable grounds to believe that the action criminalised under Article 8 of the Rome Statute (environmental damage as a war crime within the context of international armed conflict) did take place. Consequently, the OTP should include this issue into further investigation. On the other hand, if it can be established that the fire caused in Borjomi-Kharagauli National Park was not intentional, the Rome Statute does not foresee criminal liability for unintentional crimes.

31 See the report published by the Government of Georgia about the environmental damage caused by the war, 10 November 2008, available at: http://georgiaupdate.gov.ge/doc/10006878/Microsoft%20Word%20-%208%20Environmental%20Desctruction_111008.pdf [last accessed on 5.02.2019]

32 *Ibid.*

33 See Request for Authorisation of an Investigation pursuant to article 15, *Situation in Georgia* (ICC-01/15-4), Office of the Prosecutor, 13 October 2015; Decision on the Prosecutor's Request for authorization of an investigation, Situation in Georgia (ICC-01/15), Pre-Trial Chamber I, 27 January 2016.

3. ENVIRONMENTAL DAMAGE AS MEANS FOR COMMITTING CRIMES UNDER THE ROME STATUTE

When issuing the second arrest warrant against the Sudanese President Omar Al-Bashir, Pre-Trial Chamber I of the ICC elaborated on the issue of water contamination (damage to the environment) as means of committing genocide. Specifically, the Chamber ruled that there were "reasonable grounds to believe" that contamination of wells and water pumps across villages and cities primarily inhabited by the ethnic groups of Fur, Masalit and Zaghawa, taken together with other criminal acts, constituted the criminal act of intentionally inciting the policy of genocide.[34] The specific intent (*dolus specialis*) to destroy above groups was evidenced through the combination of various attacks and crimes committed against them.

Similarly to the alleged genocide described above, crimes against humanity can also be committed through the means of environmental destruction, contamination or illegal exploitation of natural resources. On certain occasions, widespread and systemic attacks against civilian population can be carried out through inflicting damage to the environment both during war and peacetime. For example, "extermination" as defined under Article 7(2) of the Rome Statute can be expressed though deprivation of access to food (for example, intentionally poisoning, devastating and contaminating fields and agricultural land plots). Further, "deportation or forcible transfer of population" under the same provision can be evidenced through intentional state or individual policy of expulsing civilian population from the specific area and with this aim, turning to environmental destruction, burning villages and adjacent forests through fire, etc. The above can be achieved through intentional flooding of certain settlements, creation of fire and landslide zones, coercion of population with various methods to forcibly remove them from their homes (illegal eviction) in the interest of oil and natural resources corporations, cyber-attacks against nuclear and electric power plants and respective radiation contamination. All the above serve as examples of carrying out widespread attacks against civil population through the means of environmental damage, when such policy exists.

a) Policy Paper on Case Selection and Prioritisation and national legislation

According to the new priorities published by the Prosecutor in 2016, when choosing, investigating and prosecuting incidents, persons and conduct, the OTP will take into account environmental protection considerations and respective contemporary challenges. Namely, the Office will cooperate with State Parties on the issues of exploitation of natural resources, land dispossession and environmental protection as criminalised under national legislation.[35] Particular and even revolutionary significance should be given to the part of the Policy Paper where the OTP speaks about the gravity

34 Second Decision on the Prosecution's Application for a Warrant of Arrest, *supra* note 2, § 36-40.

35 Policy Paper on Case Selection and Prioritisation, OTP, *supra* note 4, p. 5.

(importance of the case) criterion under Article 17 (1)(d) of the Rome Statute, which is an admissibility ground before for the Court. Namely, upon assessing the gravity criterion, among others, the OTP will take into consideration not only the crimes committed by the means of damage to the environment, but also the ones that caused destruction of the environment.[36] The Paper further specifies what the ecological damage inflicted upon the victimized community means for the purposes of the ICC. This entails destruction of environment, illegal exploitation of natural resources and illegal dispossession of land.

It is apparent that the Court wants to better reflect environmental protection considerations in its case-law. The preamble of the Rome Statute refers to, *inter alia*, the interests of future generations and highlights the preventive role of the Court.[37] The cornerstone principle of environmental protection, sustainable development, is also based on the prevention of damage to future generations.[38] Both international environmental and international criminal law, to a certain extent, are preventive in their nature and the protection of interests of future generations in the long-term perspective is the further point of convergence between them. The basis and precondition for criminalising environmental destruction internationally is the increased tendency of criminalising environmental crimes nationally.[39] For example, Article 409 of the Georgian Criminal Code refers to ecocide and stipulates that it could be committed both during peacetime and armed conflict.[40] The Georgian legislation provides the following definition and sanction for ecocide:

,,Article 409. Ecocide

1. Ecocide, or the contamination of atmosphere, land and water resources; mass extermination of animals or plants; or any other conduct that could lead to ecological disaster, -

   is punished by detention from 12 to 20 years.

2. The same conduct committed during armed conflict,-

   is punished by detention from 14 to 20 years or life sentence.“

Accordingly, the Georgian Criminal Code provides for greater sanction for ecocide committed during armed conflict. The crime of ecocide is foreseen within the Criminal Code of Moldova as well, however, it does not distinguish the ecocide committed during armed conflict and stipulates that ecocide is “intentional mass extermination of flora or fauna; contamination of atmosphere or water resources; or any other conduct that led to or will lead do ecological disaster”.[41] The definition of ecocide is missing from the Ukrainian Criminal Code Article 442 (though Ukraine is not a party to the Rome Statute, it accepted ICC jurisdiction on 17 April 2014 in line with Article 12 (3) of the Rome Statute).[42]

36 *Idem*. p. 14.

37 Preamble of the Rome Statute *supra* note 25.

38 *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia*), *supra* note 7, § 140.

39 See for examples Articles 287-306, Criminal Code of Georgia, 13 August 2019

40 *Idem*. Article 409.

41 Article 136, The Criminal Code of the Republic of Moldova, No. 985-XV, 18 April 2002

42 Article 441, Criminal Code of Ukraine, 1 September 2001

The ICC cannot go beyond the Rome Statute and the legal principle of *nullum crimen sine lege* and cannot extend its jurisdiction over the damage caused to the environment, which is not related to either genocide, or war crimes or crimes against humanity. The desire of the OTP to criminalise crimes against environment is most welcome, together with the tendency of introducing respective sanctions nationally. However, given the high threshold for prosecuting environmental damage under the Rome Statute, the potential for prosecuting this crime on a national level is more likely than before the ICC.

4. CONCLUSION

21 years after the adoption of the Rome Statute, ICC still considers the environmental protection interests as secondary. This could be due to the lack of widespread incidents intentionally diverted against the environment throughout past 17 years. On the other hand, the reluctance of the Court to deal with the environmental issues might be explained by the jurisdictional limitations imposed by the Statute. There is only provision within the Rome Statute, Article 8 (2)(b)(iv) that criminalises damage to the environment as a war crime. However, even this provision sets such a high threshold for prosecution that in practice it is quite difficult to carry out effective criminal justice based on it. Namely, the Prosecutor can rely on this provision only during international armed conflict, with the preconditions that the environmental damage is intentional, "widespread", "long-term" and "severe"; and at the same time – in the process of inflicting damage to the environment – the alleged perpetrator should have knowledge that the environmental damage caused would be clearly excessive in relation to the military advantage anticipated.

Though the Prosecutor tries to reflect modern environmental challenges into the work of the ICC through new priorities declared in 2016, given the existing legal framework, this attempt looks more like a desire to win over the international community than real "green justice".

To conclude, according to international criminal law, the environment is considered more as means of committing a crime, than a victim of an international crime. In light of the Rome Statute, direct damage inflicted upon individual is legally more significant than the indirect damage inflicted upon future generations through environment. This stands true for the genocide and crimes against humanity committed by means of environmental pollution. However, given respective political will, ICC possesses very limited but still existent leverage in the form of Article 8 (2)(b)(iv) of the Rome Statute to prosecute perpetrators of environmental damage during international armed conflict.