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COMMENTS ON THE ICC OFFICE OF THE PROSECUTOR'S ENVIRONMENTAL CRIMES POLICY INITIATIVE

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COMMENTS ON THE INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR'S POLICY INITIATIVE TO ADVANCE ACCOUNTABILITY FOR ENVIRONMENTAL CRIMES UNDER THE ROME STATUTE

I. Introduction

The Public International Law and Policy Group (“*PILPG*”), Debevoise & Plimpton LLP, and Baker McKenzie offer the following comments in response to the Office of the Prosecutor’s (the “*OTP*” or “*Office*”) call for public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute.

The OTP’s increased recognition of the significance of environmental damage is not only a welcome development, in line with the U.N. General Assembly’s recent recognition of a human right to a healthy environment, it is entirely consistent with its strategic focus on “the most serious crimes of concern to the international community as a whole.”¹ Recent events—including the global climate crisis and destruction of the environment during the ongoing Situation in Ukraine—continue to highlight both the close relationship between the environment and human life, as well as the existential threats posed by widespread or severe environmental damage. We are pleased to be part of the discussion on the scope of the forthcoming policy.

In these comments, we consider key definitions in respect of the environment and environmental damage under international law (**Section II**), and set out options for investigating and prosecuting environmental damage as crimes against humanity under Article 7 of the Rome Statute (**Section III**), or war crimes under Article 8 of the Rome Statute (**Section IV**). We then provide general recommendations for the OTP’s forthcoming paper on environmental crimes (**Section V**). Specifically, we recommend that the OTP do the following:

1. Adopt the following definition of “environmental damage”: “*environmental damage*” refers to interference with or damage to the natural or human environment that directly or indirectly causes serious or substantial harm to living resources, ecosystems, agricultural areas, or human health.
2. Expressly recognize that the destruction of the environment cannot be de-linked from harms to human populations.
3. Assess the ways in which conduct constituting environmental damage, as defined above, may itself meet the elements of the crimes against humanity of: (i) murder or extermination; (ii) deportation or forcible transfer of population; (iii) persecution; and (iv) other inhumane acts of a similar character.

¹ Rome Statute, of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> (hereinafter, “*Rome Statute*”), Preamble.

4. Recognize both: (i) the particular vulnerabilities of indigenous peoples in respect of the environment; and (ii) that these vulnerabilities are relevant at every stage of investigation and prosecution, but particularly in the process of case selection and prioritization.
5. Consider how a broad, flexible approach to interpretation of the elements of Article 8(2)(b)(iv) may advance accountability for environmental crimes.
6. Consider the ways in which Article 8(2)(b)(ii) can be effectively utilized for investigation and prosecution of environmental crimes in the course of the international armed conflict.
7. Consider the ways in which environmental damage may be prosecuted as a war crime of destruction or seizure of an enemy's property under Article 8(2)(b)(xiii) (international armed conflict) or under Article 8(2)(e)(xii) (non-international armed conflict).
8. In order to prosecute the environmental damage caused by the employment of prohibited weapons enshrined in Articles 8(2)(b)(xvii)-(xviii), 8(2)(e)(xiii)-(xiv) of the Rome Statute, consider amendment of the respective Elements of Crimes by adding the explicit reference to "damage to natural environment" as an effect of the substance employed.
9. Consider the ways in which damage to the environment may be prosecuted as a war crime of pillaging under Article 8(2)(b)(xvi) (international armed conflict) or under Article 8(2)(e)(v) (non-international armed conflict).

II. Comments on Key Definitions Under International Law

Advancing accountability for environmental crimes under the Rome Statute requires first identifying conduct and impacts to the environment that may rise to the level of "grave crimes".² The international community has long recognized a direct link between the environment—generally understood as "the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space"³—and human life and well-being.⁴ This close relationship

² Rome Statute, Preamble.

³ Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text (June 2021), <https://www.stopecocide.earth/legal-definition>, Article 8 *ter* (2)(e). *See also* International Committee of the Red Cross Online Casebook, "Environment", https://casebook.icrc.org/a_to_z/glossary/environment ("The natural environment under IHL is considered to constitute the natural world together with the system of inextricable interrelations between living organisms and their inanimate environment, in the widest sense possible. It includes everything that exists or occurs naturally, such as the general hydrosphere, biosphere, geosphere, and atmosphere, as well as natural elements that are or may be the product of human intervention, such as foodstuffs, agricultural areas, drinking water and livestock.").

⁴ *See, e.g.*, United Nations, Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev.1 (16 June 1972), Principle 1; UN General Assembly, Resolution, U.N. Doc. A/76/L.75 (26 July 2022); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J.*

informs the general understanding of the nature and gravity of environmental impacts, and is reflected in existing definitions of “environmental harm” and “environmental damage” under international law.

“Environmental Harm”. Well-accepted definitions of “environmental harm” often refer to “significant” adverse impacts to human health or natural resources.⁵ The 1972 Declaration of the United Nations Conference on the Human Environment provides examples of “man-made harm” affecting “the physical, mental and social health of man,” including “dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; [and] destruction and depletion of irreplaceable resources.”⁶

“Environmental Damage”. “Environmental damage” is generally used in connection with crimes or other violations of international law involving an environmental component. For example, the work of the International Law Commission refers to “widespread, long-term and severe damage to the natural environment” in the context of crimes against the peace and security of mankind and prohibited methods and means of warfare.⁷ Article 8 of the Rome Statute similarly defines “war crimes” to include “[i]ntentionally launching an attack in the knowledge that such attack will cause . . . *widespread, long-term and severe damage to the natural environment* which would be clearly excessive in relation to the concrete and direct military advantage anticipated.”⁸

The OTP has previously recognized “environmental damage” both as an aggravating factor of crimes within its jurisdiction and as a means by which such crimes may be perpetrated. In particular, the OTP’s previous policy papers on Preliminary Examinations (2013) and Case Selection and Prioritization (2016) confirm that environmental damage is relevant to understanding the manner of commission and impact of a crime, two of the factors that guide the Office’s assessment of gravity.⁹

Reports 1996, p. 241, para. 29 (recognizing that “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”).

⁵ See, e.g., International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries (2001), Commentary to Article 2 (defining “significant” transboundary environmental harm as that which leads to “a real detrimental effect on matters such as, for example, human health . . . environment or agriculture”); UN Convention on the Law of the Sea, 1833 U.N.T.S. 397 (10 December 1982), Article 1(4).

⁶ Stockholm Declaration, Preamble, para. 3.

⁷ ILC, Draft Code of Crimes Against the Peace and Security of Mankind (1996), Article 20(g); ILC, Draft Principles on Protection of the Environment in Relation to Armed Conflicts (2022), Principle 13(2)(b).

⁸ Rome Statute, Article 8(2)(b)(iv) (emphasis added).

⁹ See International Criminal Court, *Policy Paper on Preliminary Examinations* (November 2013), para. 65; International Criminal Court, *Policy Paper on Case Selection and Prioritisation* (15 September 2016), paras. 40–41 (“The manner of commission of the crimes may be assessed in light of, *inter alia* . . . crimes committed by means of, or resulting in, the *destruction of the environment* or of protected objects.” . . . “The impact of the crimes may be assessed in light of, *inter alia*, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, *the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.*”).

III. Comments on the Investigation and Prosecution of environmental damage as Crimes Against Humanity

Under Article 5 of the Rome Statute, the Court has jurisdiction with respect to “crimes against humanity.” The concept of crimes against humanity has evolved under international law such that it no longer requires a nexus to armed conflict,¹⁰ instead encompassing the most serious atrocities that “shock the conscience of mankind.”¹¹ The prohibition on crimes against humanity is now considered a peremptory norm of international law from which no derogation is permitted, reflecting the gravity of such crimes and universal agreement that they “must not go unpunished.”¹² By virtue of the close relationship between the environment and human life, environmental damage can directly lead to widespread death, illness, forced displacement, and other serious harms to human populations. In such cases, conduct in respect of the environment may itself constitute a crime against humanity.

A. Elements of a Crime Against Humanity

Article 7 of the Rome Statute defines a “crime against humanity” as one of several specific acts when such act is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.¹³ Each of the requisite elements may be met in situations involving environmental damage.

“attack directed against any civilian population.” Article 7 further defines an “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.¹⁴ The Trial Chamber has explained that such attack denotes “a course of conduct and not a single isolated act.”¹⁵ Civilians must be the “primary target” of the attack, rather than incidental victims—meaning that a significant number

¹⁰ See International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries (2019), Commentary on Article 2 (“Article 7, paragraph 1(h) [of the Rome Statute] does not retain the nexus to an armed conflict that characterized the Statute of the International Criminal Tribunal for the Former Yugoslavia”).

¹¹ Rome Statute, Preamble.

¹² Rome Statute, Preamble.

¹³ Rome Statute, Article 7(1) (emphasis added).

¹⁴ Rome Statute, Article 7(2)(a).

¹⁵ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF, para. 1101. See also *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 A A2, Judgment (Mar. 30, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF, para. 424; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment (Mar. 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF, para. 149 (“The requirement that the acts form part of a ‘course of conduct’ shows that the provision is not designed to capture single isolated acts, but ‘describes a series or overall flow of events as opposed to a mere aggregate of random acts’.”).

of civilians must have been either affected or targeted.¹⁶ According to the International Criminal Court’s (“ICC”) Elements of Crimes, the course of conduct constituting the attack must be executed “pursuant to or in furtherance of a State or organizational policy”,¹⁷ meaning “that a State or organization intends to carry out an attack against a civilian population, whether through action or deliberate failure to take action.”¹⁸ In the context of environmental damage, this element could be met where, for instance, a State authorizes or directs the intentional pollution of water sources in a civilian area. An attack against a civilian population may also be carried out primarily through other means, but include instances of environmental damage—such as where the targeted bombing of a civilian area is accompanied by intentional burning of forests and agricultural lands.

“*widespread or systematic.*” The Trial Chamber has described these terms as referring to “the large-scale nature of the attack and to the number of targeted persons” and “the organized nature of the acts of violence and the improbability of their random occurrence,” respectively.¹⁹ Attacks carried out by means of environmental damage can be widespread—either geographically or in the extent of their impact on human populations—and systematic—if executed according to State policy as described above.

“*with knowledge.*” This requires only that the perpetrator “know that the act in question is part of the widespread or systematic attack against the civilian population.”²⁰ The perpetrator

¹⁶ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, para. 1104 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF. See also *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 A A2, Judgment, para. para. 424 (Mar. 30, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF (“While [the] requirement [that an attack be directed against a civilian population] is sometimes described in terms of whether the civilian population is the ‘primary object’ of the attack, the Appeals Chamber understands this to mean no more than that the attack targeted the civilian population.”); *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment, para. para. 154 (Mar. 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF (“That does not mean, however, that the Prosecution must prove that ‘the entire population of a geographic area’ was being targeted during the attack. Rather, the Prosecution should establish that civilians were targeted during the ‘attack’ in numbers or a manner sufficient to satisfy the Chamber that the ‘attack’ was directed against the civilian population, as opposed to just a limited number of specific individuals.”).

¹⁷ International Criminal Court, *Elements of Crimes*, art. 7: introduction, para. 3 (2013), available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

¹⁸ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, para. 1108 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF. See also *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 A A2, Judgment, paras. 1020–22 (Mar. 30, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_03027.PDF; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment, paras. 167–68 (Mar. 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

¹⁹ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, paras. 1098, 1123 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF. See also *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15 A, Judgment, para. 261 (Dec. 15, 2022), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_07146.PDF.

²⁰ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, para. 1125 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF. See also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment, para. 167 (Mar. 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF

need not have “knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization;”²¹ nor is it required that the perpetrator of the act supported or “subscribed to” the State or organization’s plan or policy.²² For this element to be met in the context of environmental damage, the perpetrators must know that the specific acts of environmental damage were, or were intended as, part of the broader attack on civilians.

Beyond these baseline elements of a crime against humanity, each act enumerated in Article 7(1) requires proof of additional specific elements, such as a particular conduct, consequence or mental element.

B. Environmental Damage as a Crime Against Humanity

Attacks on civilians that are carried out by means of environmental damage may meet the elements of several crimes enumerated in Article 7 of the Rome Statute, including: “murder” (Article 7(1)(a)) or “extermination” (Article 7(1)(b)); “deportation or forcible transfer of population” (Article 7(1)(d)); “persecution” of certain identifiable groups (Article 7(1)(h)); and, “other inhumane acts of a similar character” (Article 7(1)(k)). This section examines each crime, and provides illustrative case studies to guide the OTP’s consideration of how environmental damage may meet the requisite elements.

Murder or Extermination. For environmental damage to be a potential crime of either murder or extermination, the following elements would need to be met:

- The perpetrator killed one or more person;
- The conduct was committed as part of a widespread or systematic attack directed against a civilian population; and,
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

In addition to the above elements of murder, the crime of extermination requires that:

- The perpetrator killed one or more persons, *including by inflicting conditions of life calculated to bring about the destruction of part of a population*; and,

²¹ (“[T]he perpetrator must be aware that a widespread attack directed against a civilian population is taking place and that his action is part of the attack.”).

International Criminal Court, *Elements of Crimes*, art. 7(1)(a) (2013), available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>; *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Trial Judgment, paras. 2919–25 (Feb. 4, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF. See also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment, para. 167 (Mar. 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF (“[T]he ‘knowledge’ element ‘should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization’.”).

²² *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, para. 1125 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

- The conduct constituted, or took place as part of, a mass killing of members of a civilian population.

Other cases of environmental damage provide relevant case studies for considering how these elements may apply in the context of environmental damage. For example, in the 1990s the Ba’athist government of Iraq carried out what was described by Human Rights Watch as a “violent government campaign” against the Ma’dan people, a group of Shi’a Muslims that inhabited the marshlands of southern Iraq, that involved an environmental element: the damming and draining of marshlands around the confluence of the Tigris and Euphrates rivers, which were home to the Ma’dan.²³ According to Human Rights Watch, documents uncovered in 1992 revealed that the Ba’athist government had designed a plan of action intended to “put an end to the hostile presence” in the marshes, including by “poisoning the environment and burning homes.”²⁴ Areas of the marshland designated for drainage were also subjected to regular artillery bombardment, resulting in mass casualties.²⁵ As a result of the broader campaign against the Ma’dan, thousands of locals fled or were killed.²⁶ Speaking years later to a delegation from the National Committee for Saving Marshes, the current President of Iraq underlined that “[t]he draining of the marshes was a crime by any standards, and Iraq continues to feel the negative effects.”²⁷

The elements of murder and extermination could be applied to the facts of this case study as follows:

- *First*, the conduct constituting environmental damage was carried out as part of a widespread and systematic attack on civilians. Indeed, evidence of the Ba’athist government’s “plan of action” showed that the government specifically intended to target the Ma’dan, a civilian population living in the marshes, through a series of actions intended to “put an end to [their] hostile presence.” This also demonstrates the attack was “calculated to bring about the destruction of part of a population,” an element required under the crime of extermination.²⁸
- *Second*, the perpetrators intended the environmental damage to be part of the coordinated attack. That element is likely met in this case study, where the perpetrators specifically

²³ Human Rights Watch, The Iraqi Government Assault on Marsh Arabs (Jan. 2003), *available at* <https://www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm>.

²⁴ Human Rights Watch, The Iraqi Government Assault on Marsh Arabs (Jan. 2003), *available at* <https://www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm>.

²⁵ Human Rights Watch, The Iraqi Government Assault on Marsh Arabs (Jan. 2003), *available at* <https://www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm>.

²⁶ Human Rights Watch, The Iraqi Government Assault on Marsh Arabs (Jan. 2003), *available at* <https://www.hrw.org/legacy/backgrounder/mena/marsharabs1.htm>.

²⁷ Iraqi Presidency, “The President Receives Delegation from National Committee for Saving Marshes” (13 January 2023), <https://www.presidency.iq/EN/Details.aspx?id=3970>.

²⁸ Kelly, Michael J., The Tricky Nature of Proving Genocide Against Saddam Hussein before the Iraqi High Tribunal. *Cornell International Law Journal*, Vol. 38, 2005, pages 995–999.

included measures intended to cause harm to the environment—*e.g.*, “poisoning the environment”—in their plan of action.²⁹

- *Third*, the environmental damage carried out by the perpetrator killed one or more persons (as required for the crime of murder) and indeed caused mass casualties of the Ma’dan (as required for the crime of extermination). For instance, as Human Rights Watch reported in 2003, “[b]y late 1991 and early 1992, military attacks on the marshes were resulting in scores of casualties per month.”³⁰

Deportation or Forcible Transfer of Population. Environmental damage may also be used as the means to forcibly transfer or displace civilians.³¹ A common fact pattern involves displacement that is authorized or directed by a State in order to make land available for natural resource exploitation. Environmental damage may be calculated to drive civilian groups away from their homes by making conditions of life untenable. The elements of deportation or forcible transfer of population are as follows:

- The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.³²
- Such person or persons were lawfully present in the area from which they were so deported or transferred.
- The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
- The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.³³

The attempted expulsion of the Ogiek people of Kenya from their ancestral forest homelands illustrates how the crime of deportation or forcible transfer could be driven by exploitation of the environment. The Ogieks have been subject to forced evictions for decades.³⁴

²⁹ Kelly, Michael J., *The Tricky Nature of Proving Genocide Against Saddam Hussein before the Iraqi High Tribunal*. Cornell International Law Journal, Vol. 38, 2005, pages 995–999.

³⁰ Human Rights Watch, *The Iraqi Government Assault on Marsh Arabs* (Jan. 2003), *available at* <https://www.hrw.org/legacy/backgrounders/mena/marsharabs1.htm>.

³¹ Forcibly transferred is equivalent to and interchangeable with “forcibly displaced.” Elements of Crimes, Article 7(1)(d).

³² Threats of force and coercion “such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment” are sufficient to meet the standard for “forcibly” under Article 7(1)(d). International Criminal Court, Elements of Crimes, Article 7(1)(d).

³³ International Criminal Court, Elements of Crimes, Article 7(1)(d).

³⁴ Amnesty International, *Submission to the Study on Indigenous Peoples by the Special Rapporteur on Adequate Housing*, 3–5 (June 14, 2019) (noting that “[m]ost evictions are ordered by the District

In 2009, for instance, the Kenyan Government issued eviction notices ordering approximately 20,000 members of the Mau Ogiek community to leave their ancestral homelands in the East Mau Forest within 30 days, while at the same time granting logging concessions on these lands.³⁵ Evictions have been violently enforced, including by burning homes and the surrounding forest.³⁶ Amnesty International, the Centre for Minority Rights Developments, and Minority Rights Group International have reported on these evictions as well as widespread environmental destruction of the Mau Forest, arguing that such conduct constitutes grave violations of human rights.³⁷ The African Court of Human and Peoples' rights similarly found that in 2009, the Ogiek people were expelled from their ancestral lands "against their will," in violation of the provisions of the African Charter on Human and Peoples' Rights, including in respect of the rights to dispose of their own wealth and natural resources.³⁸

This case study demonstrates how the elements of deportation or forcible transfer of population could be applied in the context of environmental damage:

- *First*, the Kenyan government forcibly displaced thousands of members of the Ogiek community who were lawfully present in their ancestral homeland, having lived there continuously "since time immemorial."³⁹ The expulsion of the Ogiek from their lands has been carried out through formal eviction notices as well as violence, including burning homes and forest.
- *Second*, the conduct was committed as part of a widespread expulsion campaign affecting thousands of people, and was specifically directed against members of the Ogiek community.
- *Third*, the expulsion campaign was intended to drive the Ogiek from their lands. The simultaneous granting of logging concessions suggested that the government's purpose was to open these lands to natural resource exploitation.

Commissioner (a local government official) and carried out by the Kenya Forest Service, but in some cases Ogiek were driven out by other communities who settled on their land.") available at <https://www.amnesty.org/en/documents/ior40/0544/2019/en/>.

³⁵ See *African Commission on Human and Peoples' Rights v. Kenya*, Application No. 006/2012 Af. Ct. H.R., Judgement, para. 130 (May 26, 2017), available at <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/5fe/9a9/5f55fe9a96676974302132.pdf>.

³⁶ See Amnesty International, *Submission to the Study on Indigenous Peoples by the Special Rapporteur on Adequate Housing*, 3–5 (June 14, 2019) ("The destruction of Ogiek homes are an on-going violation.").

³⁷ Amnesty International, *Ogiek Case: Protection of an Indigenous Community in Kenya* (June 25, 2023), available at <https://www.amnesty.org/en/latest/campaigns/2023/06/ogiek-case-protection-of-an-indigenous-community-in-kenya/>.

³⁸ See African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Kenya*, Application No. 006/2012, Judgement (26 May 2017), paras. 131, 227. See also African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Kenya*, Application No. 006/2012, Judgement on Reparations (23 June 2022), at 1.

³⁹ Amnesty International, *Ogiek Case: Protection of an Indigenous Community in Kenya* (June 25, 2023), available at <https://www.amnesty.org/en/latest/campaigns/2023/06/ogiek-case-protection-of-an-indigenous-community-in-kenya/>.

Persecution. The Rome Statute prohibits as a crime against humanity “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law.”⁴⁰ The crime of persecution must be carried out with the requisite intent to discriminate against the targeted persons “because the perpetrator perceives the victim as belonging to a particular group or collectivity.”⁴¹ Such intent may be inferred from the perpetrator’s behavior or other circumstances surrounding the commission of the crime.⁴²

Environmental damage often is targeted against indigenous ethnic groups, who may be an “identifiable group” for purposes of Article 7(1)(h). The “cultural, spiritual and social identity” of indigenous peoples is often closely tied to their ancestral homelands, meaning the very existence of these groups can be targeted through environmental damage.⁴³ Indeed, the Special Rapporteur on the rights of Indigenous Peoples has warned that environmental destruction and the dispossession of indigenous lands can threaten the very “physical and cultural survival” of indigenous groups, making them particularly susceptible to the crime of persecution.⁴⁴

The elements of the crime of persecution are as follows:

- The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
- The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
- Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
- The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

⁴⁰ Rome Statute, Article 7(1)(h).

⁴¹ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-1762-Red, Trial Judgement, para. 2739 (Feb. 4, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF; *Le Procureur c. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgement, para. 1010 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

⁴² *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-1762-Red, Trial Judgement, para. 2739 (Feb. 4, 2021), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF.

⁴³ UN Department of Economic and Social Affairs, Indigenous Peoples, *Mandated Areas -Environment*, available at <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html>.

⁴⁴ See, e.g., Special Rapporteur on the Rights of Indigenous Peoples, *Peru: Changes to Forestry Law Will Threaten Survival of Indigenous Peoples*, UN Expert Warns, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Jan. 31, 2024), available at <https://www.ohchr.org/en/press-releases/2024/02/peru-changes-forestry-law-will-threaten-survival-indigenous-peoples-un>.

A relevant case study for applying the elements of the crime of persecution in the context of environmental damage concerns the widespread attacks against the Fur, Masalit, and Zaghawa peoples of Darfur, Sudan by Omar Al Bashir's forces.⁴⁵ These attacks are widely recognized as a potential genocide,⁴⁶ and the Pre-Trial Chamber issued arrest warrants against Al Bashir both for genocide and for murder, extermination, and other crimes against humanity.⁴⁷ In 2004, Human Rights Watch reported that Al Bashir's forces and *Janjaweed* militias had "systematically attacked and destroyed villages, food stocks, water sources" and other essential items and "killed thousands of Fur, Masalit, and Zaghawa."⁴⁸

Civilian water sources were also polluted and destroyed as part of this campaign. Residents of Furawiya village reported that for several months, "aerial bombardments targeted wells and the livestock gathered around them," and that during the final ground assault on this civilian village, water sources were intentionally targeted: "one well was destroyed by a bomb; another well was reported to have been poisoned." In addition, "[e]yewitnesses in Terbeba [village] reported seeing the *Janjaweed* destroy the sole pump for a communal well."⁴⁹

In considering how environmental damage could meet the elements of persecution, the OTP may look to the application of the above elements in this case study:

- *First*, it was committed as part of a widespread and systematic attack against civilian villages. Indeed, the Pre-Trial Chamber found "reasonable grounds" to believe that, as part of the attack on civilian populations, "and with knowledge of the attack," government forces "contaminated the wells and water pumps of the towns and villages primarily inhabited by the Fur, Masalit and Zaghawa groups that they attacked".⁵⁰
- *Second*, the attack targeted members of the Fur, Masalit and Zaghawa ethnic groups on the basis of their ethnicity. The intent of the perpetrators to target these groups can be inferred

⁴⁵ Kelly, Michael J., *The Debate over Genocide in Darfur, Sudan*. U.C. Davis Journal of International Law & Policy, Vol. 18, 2011, pages 205–223.

⁴⁶ Kelly, Michael J., *The Debate over Genocide in Darfur, Sudan*. U.C. Davis Journal of International Law & Policy, Vol. 18, 2011, pages 205–223.

⁴⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, paras. 21–24, 43 (July 12, 2010), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF.

⁴⁸ Human Rights Watch, *Darfur Destroyed* (May 6, 2004), available at <https://www.hrw.org/report/2004/05/06/darfur-destroyed/ethnic-cleansing-government-and-militia-forces-western-sudan>.

⁴⁹ John Heffernan & Jennifer Leaning, *Darfur – Assault on Survival: A call for Security, Justice and Restitution*, PHYSICIANS FOR HUMAN RIGHTS, 37 (Jan. 1, 2006), available at <https://phr.org/our-work/resources/darfur-assault-on-survival/>. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir* Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, para. 36 (July 12, 2010), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF.

⁵⁰ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, para. 36 (July 12, 2010), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF.

from their behavior during the attack, including shouting: “We will kill you, Nuba” and “We will exterminate the Nuba.”⁵¹

- *Third*, this conduct took place as part of an organized, large-scale “pattern of conduct” that had been directed against these ethnic groups for the better part of five years, resulting in the deaths of more than 1,000 Fur, Masalit and Zaghawa civilians.⁵² The difference in treatment of these specific groups suggests that the perpetrators knew the environmental damage was intended to be part of a broader attack against them. Indeed, the Pre-Trial Chamber found there were reasonable grounds to believe that targeted “villages and towns. . . were selected on the basis of their ethnic composition and that towns inhabited by other tribes, as well as rebel locations, were bypassed in order to attack towns and villages known to be inhabited by civilians belonging to the Fur, Masalit and Zaghawa ethnic groups.”⁵³
- *Fourth*, the acts constituting environmental damage were intended to deprive one or more members of the Fur, Masalit and Zaghawa ethnic groups of their fundamental human rights, and did in fact deprive them of the right to water.⁵⁴

Other Inhumane Acts of a Similar Character. Even where certain of the elements described above are not present, environmental damage may cause “great suffering” or “serious injury to body or to mental and physical health.”⁵⁵ In such cases, it may be considered an inhumane act of a similar character to other crimes against humanity. Such acts entail the following:

- The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
- Such act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute.
- The perpetrator was aware of the factual circumstances that established the character of the act.

⁵¹ John Heffernan & Jennifer Leaning, *Darfur – Assault on Survival: A call for Security, Justice and Restitution*, PHYSICIANS FOR HUMAN RIGHTS, 37 (Jan. 1, 2006), available at <https://phr.org/our-work/resources/darfur-assault-on-survival/>. See also *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 93 (March 4, 2009), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF.

⁵² *The Prosecutor v. Omar Hassan Ahmad Al Bashir* Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, para. 38 (July 12, 2010), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF.

⁵³ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, para. 11 (July 12, 2010), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04826.PDF.

⁵⁴ Trajan, Jennifer, Why the Killing in Darfur is Genocide. *Fordham International Law Journal*, Vol. 31, 2007, pages 1051–1052.

⁵⁵ Rome Statute, Article 7(1)(k).

- The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

In considering how environmental damage could constitute an inhumane act of a similar character to other crimes against humanity, the OTP may look to the example of the widely reported “campaign of massacres, rape, and arson” by the Myanmar military across hundreds of villages inhabited by Rohingya Muslims, which included the razing of “scores of Rohingya villages” and “dozens of farms.”⁵⁶ According to Reuters, official records capture discussions by military commanders prior to the attack that suggest Rohingya civilians were the intended target. During such discussions, commanders reportedly used a racial slur for the Rohingya, “said that the Rohingya had grown too numerous” and “agreed to carefully coordinate communications so the army could move ‘instantly during the crucial time.’”⁵⁷ An estimated 690,000 Rohingya Muslims were forced to flee the violence and destruction.⁵⁸ The U.N. High Commissioner for Human Rights has called these “acts of appalling barbarity,” highlighting the grave nature of these atrocities on a scale similar to other crimes against humanity.

This case study demonstrates how environmental damage could meet the elements of an inhumane act of similar character to other crimes against humanity:

- *First*, the burning of farmland was committed as part of a widespread and systematic attack against the Rohingya,⁵⁹ carried out alongside the burning of homes and entire villages, as well as widespread killing and rape.
- *Second*, official records suggest that the perpetrators *intended* to target Rohingya civilians, and were thus aware that acts of environmental damage were part of a broader attack.

⁵⁶ See Human Rights Watch, *Myanmar: No Justice, No Freedom for Rohingya 5 Years On* (Aug. 24, 2022), available at <https://www.hrw.org/news/2022/08/24/myanmar-no-justice-no-freedom-rohingya-5-years>; Reuters, *The Rohingya Crisis: Burned to the Ground* (Dec. 31 2017), available at <https://fingfx.thomsonreuters.com/gfx/rngs/MYANMAR-ROHINGYA/010060630DW/index.html>.

⁵⁷ Reuters, *Planned Purge* (Aug. 4, 2022), available at <https://www.reuters.com/investigates/special-report/myanmar-rohingya-warcrimes-investigation/>.

⁵⁸ Reuters, *The Rohingya Crisis: Burned to the Ground* (Dec. 31 2017), available at <https://fingfx.thomsonreuters.com/gfx/rngs/MYANMAR-ROHINGYA/010060630DW/index.html>; Amnesty International, *Myanmar: New Landmine Blasts Point to Deliberate Targeting of Rohingya* (Sep. 10, 2017), available at <https://www.amnesty.org/en/latest/press-release/2017/09/myanmar-new-landmine-blasts-point-to-deliberate-targeting-of-rohingya/>; Sergio Peçanha & Jeremy White, *Satellite Images Show More Than 200 Rohingya Villages Burned in Myanmar*, NEW YORK TIMES (Sep. 18, 2018), available at <https://www.nytimes.com/interactive/2017/09/18/world/asia/rohingya-villages.html>.

⁵⁹ Curfman, Geoff, *ICC Jurisdiction and the Rohingya Crisis in Myanmar*, Just Security (Jan. 9, 2019), available at <https://www.justsecurity.org/50793/icc-jurisdiction-rohingya-crisis-myanmar/>.

- *Third*, the perpetrators inflicted great suffering, including serious bodily injury and loss of livelihoods, by burning farmland. Such conduct caused hundreds of thousands of Rohingya to flee their homes.⁶⁰
- *Fourth*, the widespread burning of farmland for the sole purpose of inflicting suffering on the Rohingya and driving them out of Myanmar is of a similar character to other crimes against humanity, including forced displacement, extermination, and persecution.

IV. **Comments on the Investigation and Prosecution of Environmental Damage as War Crimes**

Natural environment as an object of a war crime is expressly referred to only in Article 8(2)(b)(iv) of the Rome Statute.⁶¹ The overall language thereof is inspired by Article 35(3) and Article 55 of the Additional Protocol I to the Geneva Conventions 1949 (API), which includes some special provisions aiming to protect the natural environment.

Elements of the crime that are discussed below:

- the perpetrator launched an attack;
- 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;
- widespread, long-term and severe damage to the natural environment;
- damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- the perpetrator launches an attack “*intentionally*” and “*in the knowledge*” that such attack will cause damage to the natural environment.

Although the legal construction under Article 8(2)(b)(iv) of the Rome Statute is built in the manner that the natural environment is considered the collateral object of the crime, the damage thereto is considered the key circumstance, which should be proved during the prosecution.

Below we set out our views as to the limitations for the accountability of environmental damage as a war crime under Article 8(2)(b)(iv) and specific recommendations as to the prosecution of the respective war crime.

⁶⁰ Curfman, Geoff, ICC Jurisdiction and the Rohingya Crisis in Myanmar, Just Security (Jan. 9, 2019), available at <https://www.justsecurity.org/50793/icc-jurisdiction-rohingya-crisis-myanmar/>.

⁶¹ Article 8(2)(b)(iv) of the Rome Statute defines as a war crime: “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 non-human environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

A. Strategies and Limitations for the Application of Article 8(2)(b)(iv)

War Crime Under Article 8(2)(b)(iv) is to be Prosecuted if Committed in the Context of an International Armed Conflict Only. As expressly indicated in the Rome Statute⁶² and the Elements of Crimes,⁶³ the Prosecution must demonstrate that there is a nexus between the armed conflict and the conduct under investigation.

“Armed conflict” and “international armed conflict” are not defined in the Rome Statute, or the Elements of Crimes. Consequently, the principles and rules of international law shall apply. According to conventional and customary international humanitarian law, international armed conflict relates to any armed conflict between two or more States, cases of military occupation of all or part of the territory of the State, as well as wars of national liberation.⁶⁴ Neither the reasons for the confrontation nor the circumstances regarding declaration/non-declaration of war or degree (threshold) of the violence, matter. In accordance with ICC jurisprudence, international armed conflict exists in cases of armed hostilities between States either through their respective armed forces or other actors acting on their behalf.⁶⁵

The Perpetrator “launched an attack”. The first element of a war crime under Article 8(2)(b)(iv) (according to the Elements of Crimes) sets forth that the perpetrator “launched an attack”. Although both the Rome Statute and the Elements of Crimes do not provide for the definition of the term “attack” in this context, the Elements of Crimes prescribes that the elements for war crimes under Article 8(2) of the Rome Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.⁶⁶

In fact, international humanitarian law bridges the gap relating to the absence of definition of the said term. As a concept, the definition of term “*attack*” was primarily proposed by the ICRC in its 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, *i.e.* the term “*attack*” shall apply to acts of violence committed against the adverse

⁶² Rome Statute of the International Criminal Court, art. 8(2)(b), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁶³ International Criminal Court, *Elements of Crimes*, art. 8(2)(b)(iv) (2013), available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

⁶⁴ Geneva Conventions 1949, Art. 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 1(3), 4, June 8 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977), available at <https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf>; *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment, para. 541 (Mar. 14, 2012), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, para. 1177 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

⁶⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment, para. 541 (Mar. 14, 2012), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, para. 1177 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

⁶⁶ International Criminal Court, *Elements of Crimes*, art. 8 (2013), available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

party by force of arms, whether in defense or offense.⁶⁷ This definition was further imported into the API⁶⁸ and is currently considered as part of international humanitarian law.

The foregoing approach is confirmed by the jurisprudence of different international criminal tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”).⁶⁹ For instance, the judgment in the case *Prosecutor v. Pavle Strugar* (Case No. IT-01-42-T, Judgement (TC), 31 January 2005, ICTY) contains the following:

Pursuant to Article 49(1) of Additional Protocol I to the Geneva Conventions “attacks” are acts of violence against the adversary, whether in offence or in defence. According to the ICRC Commentary an attack is understood as a “combat action” and refers to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict.⁷⁰

The ICC in its jurisprudence also resorted to the said definition as enshrined in API. In particular, the ICC in *Katanga and Chui* (ICC PT. Ch. I, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008) argues as follows:

The war crime provided for in article 8(2)(b)(i) of the Statute consists of carrying out an attack against one or more individual civilians not taking active part in hostilities or against a civilian population whose allegiance is with a party to the conflict that is enemy or hostile to that of the perpetrator. In this regard, the Chamber notes that in article 49(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949 (“the AP I”), the term “attack” is defined as an “act of violence against the adversary, whether in offence or defense.”⁷¹

⁶⁷ 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, Art. 3.

⁶⁸ API, Art. 49.

⁶⁹ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment, para. 282 (Jan. 31, 2005), available at <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-01-42/JUD133R2000184306.pdf>; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment and Opinion, para. 52 (Dec. 5, 2003), available at <https://ucr.irmct.org/scasedocs/case/IT-98-29#trialChamberDecisions>; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, para. 47 (Feb. 26, 2001), available at <https://ucr.irmct.org/scasedocs/case/IT-95-14%2F2#eng>.

⁷⁰ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment, para. 282 (Jan. 31, 2005), available at <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-01-42/JUD133R2000184306.pdf>.

⁷¹ *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision, para. 266 (Sept. 30, 2008), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF..

Furthermore, in its report on the *Situation on Registered Vessels of Comoros, Greece and Cambodia*, the Office of the Prosecutor found that “an attack includes all acts of violence against an adversary.”⁷²

Considering the above, the scope of the term “attack” is considered to be firmly established, broadly interpreted and encompasses the following: (i) any acts of violence; (ii) such acts to be committed against the adverse party; (iii) armed forces to be used; (iv) acts of violence may take place either in defense or offense. Importantly, there are no limitations as to the means utilized for the attack. Such interpretation is favorable for ICC prosecution purposes.

The “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”. According to Article 8(2)(b)(iv) of the Rome Statute, the respective war crime is “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 ...”⁷³

Taking into account that the drafters of the Rome Statute: (i) used the disjunctive “or” between different detrimental effects of the attack; and (ii) neither this Article, nor the Elements of Crimes indicate what should be the primary target of the attack (for the purpose of qualification), the act of causing damage to the natural environment constitutes a war crime (subject to the conditions and limitations prescribed by this Article) even if such environmental damage does not directly harm human interests. A similar approach is, among others, supported by some scholars.⁷⁴ In fact, such approach makes such war crime the first genuinely eco-centric.

Moreover, given that both the Rome Statute and the Elements of Crimes are silent with regard to the primary object of the attack, it means that such primary object could be whatever or whoever (e.g. civilian objects, civilian population, enemy’s forces etc.). The key circumstance, which matters in the context of the respective attack (and a war crime as a whole), is that the collateral damage to the natural environment had taken place.

“widespread, long-term and severe damage to the natural environment”. As the conjunctive “and” is used between the respective adjectives under Article 8(2)(b)(iv), these three conditions are cumulative for the purpose of accountability for environmental damage.

Neither the Rome Statute, nor the Elements of Crimes provide clarification or guidance as to how terms “widespread”, “long-term” and “severe” should be understood in the context of Article 8(2)(b)(iv). This is problematic in the context of criminal prosecution due to the principle *nullum crimen sine lege*⁷⁵ (enshrined in the Rome Statute), which prescribes that: (i) a person shall

⁷² International Criminal Court, *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, para. 93 (Nov. 6, 2014), available at [https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf).

⁷³ Rome Statute, Article 8(2)(b)(iv) (emphasis added).

⁷⁴ Heller, Kevin Jon and Lawrence, Jessica C., *The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime*. *Georgetown International Environmental Law Review (GIELR)*, Vol. 20, 2007, page 2.

⁷⁵ Rome Statute, Art. 22.

not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court; and (ii) the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.

The principle *nullum crimen sine lege* is well-known as the principle of legality requiring crimes to be “as specific and detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, namely both the objective elements of the crime and the requisite *mens rea*.”⁷⁶

Due to the absence of the respective terminology in the Rome Statute and the Elements of Crimes, recourse can be had to applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.⁷⁷

Similar terminology is used in the API and the ENMOD. For instance, the requirement of “long-term” damage under the API is interpreted (through the Protocol’s *travaux préparatoires*) as lasting decades.⁷⁸ In turn, the United States Army Judge Advocate General School’s Operational Law Handbook interprets “widespread” as meaning “several hundred square kilometers” and “severe” as “any act that prejudices the health or survival of the population.”⁷⁹

Under the ENMOD, these three terms are generally agreed to mean the following: (i) “widespread”: encompassing an area on the scale of several hundred square kilometers; (ii) “long-lasting” (instead of term “long-term” as indicated in the Rome Statute): lasting for a period of months, or approximately a season; (iii) “severe”: involving serious or significant disruption or harm to human life, natural and economic resources or other assets.⁸⁰ In this context, it is worth noting that the same Report of the CCD (containing the Understandings relating to Article 1 of the ENMOD) contains the express provision that “it is further understood that the interpretation set forth above is intended exclusively for this Convention and is not intended to prejudice the interpretation of the same or similar terms if used in connexion with any other international agreement.”⁸¹

In light of the above, there is no legal requirement to apply the interpretation of these terms under ENMOD. Moreover, recourse to the API could preclude prosecution for severe

⁷⁶ Heller, Kevin Jon and Lawrence, Jessica C., The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime. *Georgetown International Environmental Law Review (GIELR)*, Vol. 20, 2007, page 13.

⁷⁷ Rome Statute, Art. 21(1).

⁷⁸ Report of Committee III, Second Session (CDDH/215/Rev.1; XV, 263), in H.S. LEVIE, 2 PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 276 (1980).

⁷⁹ INTERNATIONAL & OPERATIONAL LAW DEP’T, U.S. ARMY, OPERATIONAL LAW HANDBOOK 5-8 (1995).

⁸⁰ 1976 CCD Understanding Relating to Article I of ENMOD, 31 United Nations General Assembly Official Records Supp. No. 27 (A/31/27), Annex I.

⁸¹ 1976 CCD Understanding Relating to Article I of ENMOD, 31 United Nations General Assembly Official Records Supp. No. 27 (A/31/27), Annex I.

environmental damage. The same criticism is consistently expressed by a number of scholars⁸². Finally, the ICRC in its 1993 Report to the UN General Assembly noted the following:

The question as to what constitutes “widespread, long-term and severe” damage and what is acceptable damage to the environment is open to interpretation. There are substantial grounds, including from the *travaux préparatoires* of Protocol I, for interpreting “long-term” to refer to decades rather than months. On the other hand, it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be.⁸³

Taking into account the above, and given the absence of the respective definitions in the Rome Statute and the Elements of Crimes, the ICC has space for their interpretation. We propose the ICC consider the following approach with regard to the scope of such terms.

In our opinion, all terms shall be interpreted taking into account the damage made to a particular area, country, uniqueness of biological environment, community, etc. Although the terms shall be used in cumulation for each case, the meaning of the terms shall be assessed individually taking into account particular circumstances.

Within the context of the above framework, our recommendations are as follows:

- term “widespread”: (i) to consider the effect of the environmental damage to the region/locality as a whole; (ii) to consider both direct and indirect damage (effect of the damage may be expected to spread or materialize beyond the concrete geographical area where the attack took place). A similar approach was suggested by the ICRC.⁸⁴
- term “long-term”: assessment of the criterion “long-term damage” could also take into account the duration of the indirect (or foreseeable reverberating) effects of the use of a given method or means of warfare (i.e., not only its direct and immediate effects could be considered). The similar approach was suggested by the ICRC.⁸⁵
- term “severe”: assessment of the criterion “severe damage” could also include the interdependency of the natural environment, as damage to one component (or “part”) can

⁸² Heller, Kevin Jon and Lawrence, Jessica C., *The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime*. Georgetown International Environmental Law Review (GIELR), Vol. 20, 2007, page 14; Triffterer Otto/Ambros Kai, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: Beck/Hart, 2016), page 378, para. 253; Freeland, S. (2015), *Addressing the intentional destruction of the environment during warfare under the Rome statute of the international criminal court*, page 90.

⁸³ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2004), page 175.

⁸⁴ Guidelines on the protection of the natural environment in armed conflict, ICRC, September 2020, page 33, para. 57.

⁸⁵ Guidelines on the protection of the natural environment in armed conflict, ICRC, September 2020, pages 34-35, para. 61-66.

have immediate, lasting or deferred effects on other components. The similar approach was suggested by the ICRC.⁸⁶

The ICC can also consider separate events of damage (series of events) of the same kind (taking place in parallel or during some period of time within the same armed conflict) as one “continuous” war crime. The Rome Statute and the ICC Elements of Crimes seem not to preclude resort to such an approach. If employed, this approach would provide more understanding and knowledge of the spread, degree and duration of the harmful effects (either direct or indirect) to the natural environment. The reasonability of utilizing the suggested recommendations and approaches shall be assessed on the case-by-case basis (given the circumstances of each particular case).

Military necessity defenses should be viewed skeptically when the case is such that “*severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*”. Another condition, which significantly increases the threshold for accountability for environment damage as a war crime under Article 8(2)(b)(iv), is the proportionality test employed in this provision: “. . . 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.”⁸⁷

Accordingly, the damage to the natural environment should not only be “excessive” with regards to the concrete and direct overall military advantage anticipated, but it should be “clearly” so. Irrespective of any uncertainties as to what “excessive” means, the inclusion of the descriptor “clearly” suggests an intention to set as the requisite threshold an even higher level of damage, since there must be a difference between damage that is excessive and damage that is clearly excessive, although how this is to be determined is unclear.⁸⁸

Neither the Rome Statute, nor the Elements of Crimes clarify what the phrase “clearly excessive” means in the context of the said provision. Moreover, customary international law does not shed light on this concept.

The difficulty of interpretation of this phrase was also already highlighted in the 2000 Committee Report examining NATO’s actions during Operation Allied Force. In this report, the Committee arrived at the conclusion that the use of the word “clearly” ensures that criminal responsibility would be entailed only in cases where the excessiveness of the incidental damage was obvious.⁸⁹

In light of the above, it seems that interpretation of the phrase “clearly excessive” is part of the evaluation category, which meaning shall be interpreted by the ICC’s judges on a case-by-case basis depending on the circumstances of a particular situation.

⁸⁶ Guidelines on the protection of the natural environment in armed conflict, ICRC, September 2020, pages 37-38, para. 72-72.

⁸⁷ Rome Statute, Article 8(2)(b)(iv) (emphasis added).

⁸⁸ Freeland, S. (2015), Addressing the intentional destruction of the environment during warfare under the Rome statute of the international criminal court, page 207.

⁸⁹ International Criminal Tribunal for the former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 21, available at <https://www.icty.org/x/file/Press/nato061300.pdf>.

The language of Article 8(2)(b)(iv) of the Rome Statute requires it to evaluate whether the damage to the natural environment was clearly excessive in relation to “the concrete and direct overall military advantage anticipated.”

The Elements of Crimes in footnote 36 set forth that the expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.⁹⁰

Although the Elements of Crimes provide some guidance for the evaluation purposes, there are still uncertainties as to the meaning of words in the concept of “the concrete and direct overall military advantage anticipated.”

In particular, it is unclear as to how “direct” the military advantage must be in order to be “necessary.”⁹¹ There is also no agreed understanding as to how widely the notion of “military advantage” might extend. In this context, some scholars suggest that it is very broad and is “not necessarily restricted to tactical gains.”⁹² Some other commentators suggested that the concept of military advantage may not be as expansive as military necessity.⁹³ Some scholars argue the military “value” of any particular act(s) is to be determined on the basis of “the broader purpose” of the particular operation.⁹⁴

The ICRC states that the term “concrete and direct” was used “to indicate that the advantage must be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded.”⁹⁵

However, the suggested interpretation seems not to reflect the rule of customary international law as the scope of concept “concrete and direct overall military advantage” is interpreted by many States and scholars in different ways.

As an alternative idea, for the purposes of the conduct of the proportionality test, it is also worth considering the substantiation employed in the case law of the European Court of Human Rights (“*ECHR*”). In particular, in the case *Isayeva v. Russia*, the court arrived at the following conclusion: “Any use of force must be no more than ‘absolutely necessary’ for the achievement of

⁹⁰ Elements of Crimes, page 19, footnote 36.

⁹¹ Freeland, S. (2015), Addressing the intentional destruction of the environment during warfare under the Rome statute of the international criminal court, page 141.

⁹² Freeland, S. (2015), Addressing the intentional destruction of the environment during warfare under the Rome statute of the international criminal court, page 141.

⁹³ Freeland, S. (2015), Addressing the intentional destruction of the environment during warfare under the Rome statute of the international criminal court, page 141.

⁹⁴ Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary (2004), page 173.

⁹⁵ The International Committee of the Red Cross (ICRC) 1987 *Commentary* on Article 57 AP I, para. 2209.

one or more of the purposes In particular, it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.”⁹⁶

The above approach may be applied in the manner that the damage to the natural environment (given its “widespread, long-term and severe” character) could be justified only in case, when (i) the attack was absolutely necessary and (ii) it was planned and controlled by the authorities so as to minimize, to the greatest extent possible, the spread, duration and severity of the damage to the natural environment.

For the foregoing reasons, the proportionality test should be conducted on the basis of analysis of the circumstances of each particular case. Given the vagueness of the criteria employed in Article 8(2)(b)(iv), it is likely to be up to the ICC’s judges which weight should be assigned to each particular criterion in the overall situation at hand.

The Perpetrator Launches an Attack “intentionally” and “in the knowledge” that Such Attack Will Cause Damage to the Natural Environment. Article 8(2)(b)(iv) of the Rome Statute prescribes that the perpetrator launches an attack “intentionally” and “in the knowledge” that such attack will cause damage to the natural environment (subject to the qualification criteria enshrined in the respective provision).

The Elements of Crimes set forth that unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime only if the material elements are committed with intent and knowledge. For the purposes of this Article, a person has intent where: (i) in relation to conduct, that person means to engage in the conduct; (ii) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Terms “know” and “knowingly” shall be construed accordingly.⁹⁷

Moreover, footnote 37 of the Elements of Crimes clarifies that the knowledge element requires that the perpetrator make the value judgment as described therein (as to consequences of the attack launch). An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time.⁹⁸

From a practical standpoint, such dual requirement (presence of both intention and knowledge) raises additional concerns as to the perspectives of bringing the perpetrators to criminal liability for the “clearly excessive” environmental damages. Such a standard means that a perpetrator should possess the actual or constructive knowledge as to the gravity of the damage to the environment resulting from the attack. In practice, the military commander could be just in the mistaken belief that such conduct was warranted by military necessity.⁹⁹

⁹⁶ *Isayeva v. Russia*, Eur. Ct. H.R., Application no. 57950/00 (emphasis added).

⁹⁷ Elements of Crimes, Art. 30.

⁹⁸ Elements of Crimes, footnote 37.

⁹⁹ International Criminal Tribunal for the former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 23, available at <https://www.icty.org/x/file/Press/nato061300.pdf>.

Considering the foregoing (including the high threshold for the proportionality test), it seems more feasible to prove the mental elements of this war crime in the conduct of a superior commander(s) (regardless of his/her/their official capacity(ies)), who gave the instructions to his/her subordinates to launch a particular attack. In practice, superiors, who hold the official positions (even not being related to the military service), as a general rule, are more conscious and have more knowledge as to the harmful effects of the specific attack. For this purpose, the Rome Statute contains the specific provision stating that it shall apply equally to all persons without any distinction based on official capacity. In particular, the official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.¹⁰⁰

Thus, from the practical standpoint, it would be reasonable to investigate the conduct of both direct executors of the attack and their superiors, who execute the effective control/supervision and/or give the instructions to the respective subordinates to act in the respective manner.

In conclusion, the application of Article 8(2)(b)(iv) of the Rome Statute presents numerous limitations. However, there are some recommendations, which may, to some extent, serve to advance accountability for environmental crimes:

- the scope of the term “*an attack*” should encompass the following: (i) any acts of violence; (ii) such acts to be committed against the adverse party; (iii) armed forces to be used; (iv) acts of violence may take place either in defense or offense. There should be no limitations as to the means utilized for the attack;
- the terms “widespread”, “long-term” and “severe” (as the characteristics of the damage caused to the natural environment) shall be interpreted taking into account the damage made to a particular area, country, uniqueness of biological environment, community etc. Although the terms shall be used in cumulation for each case, the meaning of the terms shall be assessed individually taking into account particular circumstances.;
- recommendation as to the scope of term “widespread”: (i) to consider the effect of the environmental damage to the region/locality as a whole; (ii) to consider both direct and indirect damage (effect of the damage may be expected to spread or materialize beyond the concrete geographical area where the attack took place);
- recommendation as to the scope of term “long-term”: assessment of the criterion “long-term damage” could also take into account the duration of the indirect (or foreseeable reverberating) effects of the use of a given method or means of warfare (i.e., not only its direct and immediate effects could be considered);
- recommendation as to the scope of term “severe”: assessment of the criterion “severe damage” could also include the interdependency of the natural environment, as damage

¹⁰⁰ Rome Statute, Art. 27.

to one component (or “part”) can have immediate, lasting or deferred effects on other components;

- the phrase “clearly excessive” should be understood in the manner that the excessiveness of the damage is “obvious”;
- the damage to the natural environment (given its “widespread, long-term and severe” character) could be justified only in case, when (i) the attack was absolutely necessary and (ii) it was planned and controlled by the authorities so as to minimize, to the greatest extent possible, the spread, duration and severity of the damage to the natural environment.

B. Alternative Strategies for the Investigation and Prosecution of Environmental Crimes under the Legal Framework of War Crimes

As the application of Article 8(2)(b)(iv) of the Rome Statute presents numerous limitations, there is a need to explore alternative strategies for the qualification of environmental damage as war crimes and thus for its investigation and prosecution under the Rome Statute. Depending on how the natural environment is categorized, the damage caused thereto can be prosecuted under Article 8(2)(b)(ii), Article 8(2)(b)(xiii), (international armed conflict), Article 8(2)(e)(xii) (non-international armed conflict), Article 8(2)(b)(xvi) (international armed conflict) or under Article 8(2)(e)(v) (non-international armed conflict).

Regarding the matter as to which particular item of Article 8(2) would serve the most appropriate basis to prosecute the environmental damage, it depends on the circumstances of a particular case, evidence at hand and the OTP’s evaluation thereof. For instance, damage to Ukraine’s natural environment caused by the alleged intentional destruction of Khahovka Dam (Ukraine), may involve factual circumstances capable of meeting elements of a war crime under either Article 8(2)(b)(ii) or Article 8(2)(b)(iv).

The Natural Environment is Protected as a Civilian Object. Although the natural environment is not explicitly mentioned in Article 8(2)(b)(ii) of the Rome Statute that recognizes intentionally directing attacks against civilian objects as a war crime, the definition of civilian object may be interpreted broadly to encompass natural environment and its components allowing to prosecute environmental damage under this Article.

Definition of Attack. The first element of the Elements of Crimes requires that “the perpetrator directed an attack.”¹⁰¹ However, neither the Rome Statute nor the Elements of Crimes define the term “attack.” As discussed in *Strategies and Limitations for the Application of Article 8(2)(b)(iv)* above the scope of the term “an attack” is considered as firmly established and should most probably should be further referred by the ICC in the broadest meaning as (i) any acts of violence; (ii) such acts to be committed against the adverse party; (iii) armed forces to be used; and (iv) acts of violence may take place either in defense or offense.

¹⁰¹ Elements of Crimes, Art. 8(2)(b)(ii), page 12.

Further, there must be a causal link between the perpetrator's conduct and the consequence of the directed attack.¹⁰² Similar to the war crime of attacking the civilian population¹⁰³ there does not seem to be a requirement that the attack results in some damage or destruction,¹⁰⁴ but the intention to direct an attack that counts as the third element of the Elements of Crimes and requires that "the perpetrator intended such civilian objects to be the object of the attack" suffice.

Natural Environment as Civilian Object. Neither the Rome Statute itself, nor the Elements of Crimes provide definitions of the terms "civilian object" or "military objective".

The second element of the Elements of Crimes specifies that "the object of the attack was civilian objects, that is, objects which are not military objectives."¹⁰⁵

Civilian objects are defined in Article 8(2)(b)(ii) in the negative, as "objects which are not military objectives," thereby supporting the overall international humanitarian law approach.¹⁰⁶ Military objectives are thus "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage"¹⁰⁷ which will be analyzed below.

There is no exhaustive list of civilian objects, or list of military objectives. Given the absence of any additional categories in international humanitarian law, and the "negative" construction used in Article 8(2)(b)(ii) unless the objects are military objectives, they should be regarded as civilian objects.¹⁰⁸ Thus, it appears reasonable to treat the natural environment by default as a civilian object.¹⁰⁹ Consequently, all components of the natural environment not considered military objectives could fall under the protection of general principles and rules of the international humanitarian law, including prohibition of deliberate and/or wanton attacks on civilian objects,¹¹⁰ principles of distinction, proportionality and precautions.

¹⁰² Elements of Crimes, Art. 8(2)(b)(ii), page 12.

¹⁰³ Rome Statute, Art. 8(2)(b)(i).

¹⁰⁴ *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, Judgment, paras. 59–62 (Dec. 17, 2004), available at https://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf.

¹⁰⁵ Elements of Crimes, Art. 8(2)(b)(ii), page 12.

¹⁰⁶ API, Art 52(1) and Rule 8 of the ICRC Study on Customary International Humanitarian Law.

¹⁰⁷ API, Art. 52(2).

¹⁰⁸ Article 52(1) AP I and Rule 8 of the ICRC Study on Customary International Humanitarian Law; such approach was also supported by the US in Comments of the United States on the International Law Commission's draft principles on the protection of the environment in relation to armed conflicts October 6, 2021, p 11; US - Protection of the environment (un.org). Same approach is further reflected in the International Law Commission's Draft Articles on the Protection of the Environment in relation to Armed Conflicts which provide that "the natural environment must not be attacked unless it has become a military objective"

¹⁰⁹ Henckaerts J-M. and Doswald-Beck L. (2009), Customary International Humanitarian Law, Volume 1, Rules, Rules 9.

¹¹⁰ *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, p. 257, para. 78, available at <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>. Similar prohibition of damage or destruction to the natural environment "not justified by military necessity and

Where the natural environment does not qualify as military objective and therefore qualifies as a civilian object, including for the purposes of Article 8(2)(b)(ii) of the Rome Statute, the general rules affording protection to civilian objects, including any part of the natural environment that is not a military objective, would apply and may, depending on the circumstances, cover damage to the natural environment that has failed to pass the requirements of Article 8(2)(b)(iv).

And, therefore, it is reasonable to consider the environment and all of its components in its broadest interpretation by default are protected by the international humanitarian law as the civilian object (s) (including, under 1949 Geneva Conventions, Additional Protocols thereto and customary international humanitarian law) unless they qualify as military objectives.

Natural Environment as Military Objective. Depending on the circumstances and the course of hostilities, the natural environment, as any other civilian object, may be regarded as a military objective. However, that distinct part of the natural environment in question must fulfill a two-pronged test: (i) it must, by its nature, location, purpose or use, make an effective contribution to military action and (ii) its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, must offer a definite military advantage.¹¹¹

It must, by its nature, location, purpose or use, make an effective contribution to military action. As a general rule, contribution by nature would include all objects directly used by the armed forces, such as weapons, military equipment, military airports or army headquarters.¹¹² Contribution by location would include objects, which “have no military function but which, by virtue of their location, make an effective contribution to military action,¹¹³ or so called “dual-use objects” (for example, bridges, airports, power plants, manufacturing plants, and integrated power grids).¹¹⁴ Contribution by purpose is concerned with the intended future use of an object while contribution by use with its present function.¹¹⁵ All objects that normally are civilian objects and are used for civilian purposes must be assessed on a case-by-case basis.

Consequently, the natural environment would never by its “nature” make an effective contribution to military action and cannot be considered a dual-use object. This is because the term “nature” refers to the intrinsic character of an object, and the intrinsic character of the natural environment is civilian. However, some parts of the natural environment may make an effective contribution to military action due to its location, namely if it has tactical importance, purpose or

carried out wantonly,” is reiterated in the San Remo Manual of 1995 on International Law Applicable to Armed Conflicts at Sea.

¹¹¹ API, Art 52(2).

¹¹² Triffterer Otto/Ambros Kai, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: Beck/Hart, 2016), page 363.

¹¹³ Triffterer Otto/Ambros Kai, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: Beck/Hart, 2016), page 363.

¹¹⁴ Commentary on the Law of the International Criminal Court, FICHL Publication Series No.29 (2017), page 80.

¹¹⁵ Triffterer Otto/Ambros Kai, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: Beck/Hart, 2016), page 363.

use.¹¹⁶ There are numerous examples when a hill may contribute effectively to the military action of enemy forces by location if it provides them with a vantage point over an adversary's camp, and similarly a mountain pass may contribute effectively to the military action of enemy forces if it allows them to advance more quickly as they occupy territory.¹¹⁷

The purpose (i.e. intended future use) or use of foliage in a specific forest area may contribute effectively to military action by providing cover for a troop maneuver. However, the general concept of an "area" (or part of the natural environment as discussed above) does not require that a large forest area is deemed to be a military objective simply because combatants are located in a small portion of it. It may be considered as only that portion of the forest that has been identified as directly contributing to military action will potentially become a military objective, provided that the second part of the test is also fulfilled.¹¹⁸

Further, the key point of this first part of the test is whether such parts of the natural environment by their location, purpose or use should make an "effective contribution to military action." The term "military" automatically excludes any other contribution to the military activities (e.g. political or economic benefits).¹¹⁹ In the ICRC's view, this means that the contribution must be directed towards the *actual war-fighting* capabilities of a party to the conflict, and accordingly that a contribution merely to the war-sustaining capabilities of a party to the conflict is not sufficient to make the object fulfill the definition of a military objective.¹²⁰ This differentiation is crucial. For example, under the ICRC view, an area of the natural environment where the mining of high-value natural resources takes place, while it may generate significant revenue for the war effort (i.e. war-sustaining capabilities) of an adversary, does not make a direct effective contribution to immediate military action.¹²¹

Its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, must offer a definite military advantage. The total or partial destruction, capture or neutralization of a distinct part of or specific object belonging to the natural environment, in circumstances prevailing at the time, must offer a definite military advantage. The "military advantage" itself must be definite and cannot be potential or indeterminate.¹²² The term "definite" further adds such military advantage to be concrete and perceptible, rather than hypothetical or

¹¹⁶ Triffterer Otto/Ambros Kai, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: Beck/Hart, 2016), page 363.

¹¹⁷ Guidelines on the protection of the natural environment in armed conflict, ICRC, September 2020, page 47.

¹¹⁸ Guidelines on the protection of the natural environment in armed conflict, ICRC, September 2020, pages 47-48.

¹¹⁹ Triffterer Otto/Ambros Kai, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: Beck/Hart, 2016), page 363.

¹²⁰ Guidelines on the protection of the natural environment in armed conflict, ICRC, September 2020, page 48.

¹²¹ Guidelines on the protection of the natural environment in armed conflict, ICRC, September 2020, page 47.

¹²² *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Judgment, n. 3182 (July 8, 2019), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

speculative.¹²³ It is usually assessed from the attacker's perspective.¹²⁴ Thus, those ordering or executing the attack are supposed to have concrete information as to what the advantage offered by attacking the distinct component of the environment would be and assess it.

It still remains unclear whether the definition of military advantage should relate to one specific military operation or can be viewed in light of a wider operation or military action more generally. Since there is a discussion around concrete and perceptible military advantage it appears reasonable to assess military advantage from the standpoint of immediate consequences gained with the attack (for instance, ground occupied or weakening the military forces of the adversary).

To conclude, for the natural environment or any of its components, a case-by-case assessment is required to verify whether any particular part of the environment by virtue of its location, purpose or use could effectively contribute to military action and whether its partial destruction, capture or neutralization offered a definite military advantage. However, there are no obstacles for investigation and prosecution of attacks directed against particular parts of the natural environment under Article 8(2)(b)(ii) of the Rome Statute.

The Natural Environment is Protected as an Enemy Property. Damage to environmental properties may be prosecuted as a war crime of destruction or seizure of an enemy's property under Article 8(2)(b)(xiii) (international armed conflict) or under Article 8(2)(e)(xii), provided that they are not justified by military necessity.

The military necessity may be a limitation to the prosecution of environmental damage as the destruction or seizure of an enemy's property. However, the necessity should be assessed according to a high standard and in the light of the legitimacy of the military purpose, which could only be the weakening of adverse military forces.

Pursuant to the Rome Statute, the Court has jurisdiction with respect to war crimes, which include "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (...) (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war."¹²⁵

The Elements of Crimes provide a list of elements to be identified for the qualification of war crime of destruction of an enemy's property, which requires in particular that (i) the perpetrator destroyed or seized certain property, (ii) such property was property of a hostile party and protected from that destruction or seizure under the international law of armed conflict and (iii) the destruction or seizure was not justified by military necessity.¹²⁶

¹²³ Triffterer Otto/Ambros Kai, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: Beck/Hart, 2016), pages 363-364.

¹²⁴ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, para. 893 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

¹²⁵ Rome Statute, Article 8 (2) (b) (xiii). Similar provisions apply to non-international conflicts (see Article 8 (2) (e) (xii)). The analysis presented in this comment applies for both articles. The present analysis will focus on the nature of the property protected as well as the exemption related to military necessity.

¹²⁶ The Elements of Crimes also require that the perpetrator was aware of the factual circumstances that established the status of the property, the conduct took place in the context of and was associated with an

The Elements of Crimes also require that the perpetrator was aware of the factual circumstances that established the status of the property, the conduct took place in the context of and was associated with an international armed conflict and the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The present comment will analyze how the environment could be protected under Article 8(2)(b)(xiii) and Article 8(2)(e)(xii) and focus in particular on the nature of the property protected as well as the exemption related to military necessity.

The property protected under Article 8(2)(b)(xiii) and Article 8(2)(e)(xii). First, the Elements of Crimes do not limit or specify the type of property which is protected under Article 8(2)(b)(xiii) and Article 8(2)(e)(xii). The ICC ruled that “Article 8(2)(e)(xii) of the Statute covers all types of property, movable and immovable, as well as public and private property.”¹²⁷

Thus, environmental objects should be protected by the prohibition of destruction or seizure, as long as they are considered as property.¹²⁸

- private-owned environmental property, either moveable (natural resources, natural goods, such as agricultural goods...), or immovable (forests or fields belonging to individuals or communities);
- public-owned environmental property, either moveable (natural resources owned by the State or any public authorities) or immovable (infrastructures, natural spaces which are public property).

Secondly, the Elements of Crimes provide two conditions related to the property: (i) the property must belong to a hostile party and (ii) the property must be protected from that destruction or seizure under the international law of armed conflict.

On the first condition, the ICC considers that this condition is met if it can be established that “the property did not belong to persons who were part of, or aligned with, an armed force or group the perpetrators were part of,” which will be the case if the property at stake belongs “to individuals or entities aligned with or with allegiance to a party to the conflict that is adverse or hostile to the perpetrators”¹²⁹ or if the individuals or entities owning the property showed “that they were not aligned to or supportive of the perpetrators’ party or its objectives.”¹³⁰ Therefore, in

international armed conflict and the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

¹²⁷ *Le Procureur c. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgement, para. 1152 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF. See also *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2775.

¹²⁸ Gillett, M. G. (2018, June 19). *Prosecuting environmental harm before the International Criminal Court*. See also, ICRC, *Guidelines on the Protection of the Environment*.

¹²⁹ *Le Procureur c. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgement, para. 1160 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

¹³⁰ *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2776.

the case of public properties, such conditions can be easily met in case the properties destroyed or seized by armed forces belong to the State that is an adversary of these armed forces.

On the second condition, the ICC usually considers that international law protects properties which are not “military objectives,” *i.e.* “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹³¹ The “military advantage” must be definite and cannot be potential or indeterminate.¹³² It is assessed from the attacker’s perspective.¹³³

For example, the following are considered military objectives: “establishments, buildings and positions where enemy combatants, their materiel and armaments are located, and military means of transportation and communication” or “economic targets that effectively support military operations.”¹³⁴

On the contrary, the following are considered civilian objects, which are therefore not military objectives, “civilian areas (...), dwelling (...), and the natural environment as prima facie civilian objects, provided in the final analysis, they have not become military objectives.”¹³⁵

For natural environment or areas, a case-by-case analysis should be conducted in order to assess whether the above-mentioned conditions are met (objects that make an effective contribution to military action and whose total or partial destruction, capture or neutralization offer a definite military advantage; see also the above-mentioned paragraph on the natural environment protected as a Civilian Object).

In addition, particular care must be taken for works and installations containing dangerous forces, *i.e.* dams, dykes and nuclear electrical generating stations, as well as chemical plants and petroleum refineries, which are considered as military objectives, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population.¹³⁶ Therefore, such facilities, even if qualified as military objectives, are still protected from destruction that would (*i*) cause severe losses among the civilian population causing indirectly severe environmental

¹³¹ *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2777.

¹³² *Le Procureur c. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgement, n. 3182 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

¹³³ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, para. 893 (Mar. 7, 2014), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

¹³⁴ Henckaerts J-M. and Doswald-Beck L. (2009), *Customary International Humanitarian Law*, Volume 1, Rules, Rules 8.

¹³⁵ Henckaerts J-M. and Doswald-Beck L. (2009), *Customary International Humanitarian Law*, Volume 1, Rules, Rules 9.

¹³⁶ Henckaerts J-M. and Doswald-Beck L. (2009), *Customary International Humanitarian Law*, Volume 1, Rules, Rules 43.

damages or (ii) causing environmental damages resulting in severe losses among the civilian population.¹³⁷

The Exemption Related to Military Necessity. ICC jurisprudence considers that the destruction of an enemy's property to be justified if "it was required for the attainment of a military purpose and otherwise in conformity with IHL."¹³⁸ The destruction and seizure of an enemy's property are allowed so long as such measures are necessary to accomplish a legitimate military purpose, which can only be "to weaken the military capacity of the adversary."¹³⁹ The standard of necessity required is considered as "quite high"¹⁴⁰: as an example, the measure consisting of clearing a section of trees to set up a camp on the only safe location—which would be on top of a forested hill—could be considered as necessary.¹⁴¹

The Natural Environment is Protected by the Prohibition of Pillaging. Damage to the environment may qualify as pillaging as long as there is an appropriation intended for "private or personal use," which can be difficult to demonstrate in practice (except for the case of private exploitation of the environment, including for the benefit of a public authority acting as a private entity).

The Elements of Crimes provide however an important limitation, since such war crime requires the intent to appropriate the property for "private or personal use", which can be difficult to demonstrate in practice for environmental properties (except for the case of private exploitation of the environment, including for the benefit of a public authority acting as a private entity).

Pursuant to the Rome Statute, the Court has jurisdiction with respect to war crimes, which include "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (...) (xvi) pillaging a town or place, even taken by assault."¹⁴²

The Elements of Crimes provide for a list of points to be considered for the qualifying acts of pillage as war crimes. These include the following:

¹³⁷ ICRC, *Guidelines on the Protection of the Environment*.

¹³⁸ *Le Procureur c. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgement, para. 1164 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

¹³⁹ ICRC, *Guidelines on the Protection of the Environment*.

¹⁴⁰ ICRC, *Guidelines on the Protection of the Environment*.

¹⁴¹ ICRC, *Guidelines on the Protection of the Environment*.

¹⁴² Rome Statute, Article 8 (2) (b) (xvi). Similar provisions apply to non-international conflicts (see Article 8 (2) (e) (v)). The analysis presented in this comment applies for both articles.

- The perpetrator appropriated certain property;
- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
- The perpetrator appropriated certain property;
- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
- The appropriation was without the consent of the owner;
- The conduct took place in the context of and was associated with an armed conflict (international and non-international);
- The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

This comment next analyzes how damages to the environment caused in the context of war could be qualified as “pillaging” under Article 8(2)(b)(xvi) and Article 8(2)(e)(v). It will analyze in particular the element related to the appropriation of property and to the intention to deprive the owner of the property and to appropriate the good for private or personal use.

“The Perpetrator Appropriated Certain Property”.

On the property protected by the prohibition of pillaging. Neither the Rome Statute nor the Elements of Crimes provide any specification regarding the property protected by the prohibition of pillaging. The ICC has ruled that the prohibition of pillaging encompasses (i) private or public goods and (ii) moveable or immovable goods.¹⁴³ The qualification of pillaging has been applied for goods owned by individuals, such as agricultural items (food, livestock and animals).¹⁴⁴ Considering the broad scope of the notion of “property,”¹⁴⁵ the war crime of pillaging could also concern the pillaging of:

¹⁴³ *Le Procureur c. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgement, para. 1028 (July 8, 2019), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF; *Bemba*, no. ICC-01/05-01/08, March 21st, 2016, para. 115; *Katanga*, no. ICC-01/04-01/07, September 30th, 2008, para. 329.

¹⁴⁴ *Katanga*, no. ICC-01/04-01/07, March 7th, 2014.

¹⁴⁵ ICRC Guidelines on the protection of the natural environment in armed conflict, ICRC, September 2020.

- Private-owned natural goods: moveable goods, such as resources, agricultural goods, or other natural resources¹⁴⁶; immovable goods such as fields or forests;
- Moveable or Immovable goods owned by communities¹⁴⁷;
- Public-owned immovable goods: public-owned infrastructures or public-owned natural goods (e.g. national protected areas, national parks).

The property can be determined on the basis of the national rules of the country where alleged pillaging occurs¹⁴⁸ or on “the customary law of the community (i.e. practices on possession, titles and registration).”¹⁴⁹

On the action prohibited as pillaging. First, pillaging must be understood as the “appropriation” of a property.¹⁵⁰ The ICC explained that the term “appropriation” implies that “the enemy’s property has come under the control of the perpetrator.”¹⁵¹ The theft of objects belonging to civilians is a classical example of “appropriation.”¹⁵² As for immovable goods, we may assume that the occupation and control of a natural space could be considered as an appropriation. “Appropriation” can take various forms, whether perpetrated by individuals or as “acts of organized or systematic appropriation.”¹⁵³

Secondly, “pillaging” also implies the appropriation of a good without the consent of its owner.¹⁵⁴ This lack of consent can be deduced from the fact that the owner has fled¹⁵⁵ or by acts of coercion, which can be established in the event of armed conflict, for example by the use of force or through threats, intimidation or pressure by the perpetrator.¹⁵⁶

“The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use”. Pursuant to the Elements of Crimes, the perpetrator must have appropriated goods for a “private or personal use.” If the Elements of Crimes do not define what should be considered as a “private or personal use,” they indicate that appropriation justified by military necessity cannot be qualified as pillaging.¹⁵⁷

¹⁴⁶ Gillett, M. G. (2018, June 19). *Prosecuting environmental harm before the International Criminal Court.*

¹⁴⁷ *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2766.

¹⁴⁸ Stewart, J. G. (2011). *Corporate War Crimes: Prosecuting the Pillage of Natural Resources.*

¹⁴⁹ *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2766.

¹⁵⁰ Elements of Crimes, on Article 8 (2) (b) (xvi) and Article 8 (2) (e) (v) of the Rome Statute.

¹⁵¹ *Katanga*, no. ICC-01/04-01/07, September 30th, 2008, para. 330.

¹⁵² *Katanga*, no. ICC-01/04-01/07, March 7th, 2014.

¹⁵³ *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2763.

¹⁵⁴ *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2766.

¹⁵⁵ *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2766.

¹⁵⁶ *Bemba*, no. ICC-01/05-01/08, March 21st, 2016, para. 116.

¹⁵⁷ Elements of Crime, footnote 47.

The ICC did not provide any clear definition or exhaustive elements regarding the scope of the “private or personal use.”¹⁵⁸ In the *Bosco Ntaganda* case, the ICC analyzed in particular whether the seized goods could be used for military purposes: since vehicles and medical equipment could be used for military purpose, the ICC could not establish the “private or personal use.”¹⁵⁹ For other goods (chairs, mattresses, ...), the ICC took into account the fact that such goods did not “serve an inherently military purpose” and that some goods “considered of high quality or value were usually given to the commanders” or could be found at Ntaganda’s residence.¹⁶⁰

In the *Ongwen* case, the ICC considered that the special intent condition (“private or personal use”) was met considering that Ongwen gave the instruction to pillage goods and that “the circumstances of the appropriation do not allow for consideration of military necessity as a justification.”¹⁶¹

Regarding “military necessity,” explanatory elements have been provided by the ICC with regards to the war crime of destruction of enemy property: the ICC referred to the definition set by Article 14 of the Lieber Code of 24 April 1863: “Military necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”¹⁶² In the light of the above, “private or personal use” may be assessed on the basis of the type of goods involved, as well their potential use as military items or for a military purpose. In addition, the criterion of “private or personal use” is not required by other international norms applicable to pillaging and could therefore be considered as excessively restrictive.¹⁶³

As a result, to determine whether the appropriation or occupation of natural or environmental property was intended for private or personal use, the assessment should focus on whether such environmental properties may be used as military items or for a military purpose (for instance by applying the grid of analysis applicable to “military objectives”). If this is not the case, it is a serious indication that the environmental property may have been used for private or personal interest, especially if the exploitation of the natural resources appropriated offer “the potential of substantial enrichment.”¹⁶⁴

In addition, reference to “private use” corresponds to the case where an individual or a group would appropriate a property for the “private use” of another individual or another entity.¹⁶⁵

¹⁵⁸ Nuzban Y. (January 2022), “*For private or personal use*”: *The meaning of the special intent requirement in the war crime of pillage under the Rome Statute of the International Criminal Court*.

¹⁵⁹ *Bosco Ntaganda*, no. ICC-01/04-02/06, July 8th, 2019, para. 1041.

¹⁶⁰ *Bosco Ntaganda*, no. ICC-01/04-02/06, July 8th, 2019, para. 1042.

¹⁶¹ *Ongwen*, no. ICC-02/04-01/15, February 4th, 2021, para. 2873, 2926, 2972 and 3019.

¹⁶² *Katanga*, no. ICC-01/04-01/07, March 7th, 2014, para. 894.

¹⁶³ ICRC, *Guidelines on the Protection of the Environment*; Stewart, J. G. (2011). *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*; Gillett, M. G. (2018, June 19). *Prosecuting environmental harm before the International Criminal Court*.

¹⁶⁴ ICRC, *Guidelines on the Protection of the Environment*.

¹⁶⁵ *Bosco Ntaganda*, no. ICC-01/04-02/06, July 8th, 2019, para. 1030.

Therefore, the appropriation by individuals of natural resources or areas for the benefit of private corporate entities (for example, if the exploitation of such properties would support the activity of these entities or increase their revenues) may also be qualified as pillaging. Similarly, appropriation by individuals of natural resources or areas for the benefit of public authority acting as a private corporate entity may also be qualified as pillaging.

V. Recommendations

A. Recommendations on Key Definitions

As detailed above, certain crimes committed by means of environmental damage or that include environmental damage as an aggravating factor are capable of falling within the Court's jurisdiction under the existing provisions of the Rome Statute. To advance accountability for such crimes, we recommend that the following definition of "environmental damage" be adopted in the OTP's forthcoming policy paper:

"environmental damage" refers to interference with or damage to the natural or human environment that directly or indirectly causes serious or substantial harm to living resources, ecosystems, agricultural areas, or human health.

This definition identifies both: the types of conduct at issue; and the type and severity of resulting harms that could be "sufficiently grave" to justify further action by the Court. Thus, the definition offers clarity as to how environmental damage might fall within the scope of the Court's jurisdiction and mandate.

B. Recommendations on the Investigation and Prosecution of Environmental Damage as Crimes Against Humanity

On the basis of the comments set out above in Section III, we recommend that the OTP's policy paper include an assessment of the ways in which environmental damage, as defined above, may itself meet the elements of the crimes against humanity of murder or extermination; deportation or forcible transfer of population; persecution; and other inhumane acts of a similar character. This is consistent with the OTP's existing policy guidance, which recognizes that the existence and scale of environmental destruction may be relevant to assessing the gravity of a crime potentially falling within the Court's jurisdiction and that environmental damage is a means by which such crimes may be perpetrated.

To the same end, we further recommend that the OTP expressly recognize that the destruction of the environment cannot be de-linked from harms to human populations. To the contrary, the environment is the "living space" of mankind, and the health and well-being of human populations depends on it.

This is especially true in the case of indigenous peoples, whose cultural, spiritual, and social identities are often linked to the environment, and who may rely on their ancestral homelands for traditional practices. Indeed, restricting access to or enjoyment of indigenous

peoples' land can lead to "extreme poverty" and "precarious or sub-human living conditions in the fields of access to food, water, dignified housing, basic utilities and health" for the affected indigenous communities.¹⁶⁶ It can also threaten their very way of life and the basis of "traditional knowledge systems."¹⁶⁷ Ancestral lands are thus "not merely a matter of possession and production but a material and spiritual element" that are required in order to achieve the full and complete enjoyment of human rights. These considerations are also relevant to assessing the gravity of a crime; as the OTP has explained, "[t]he impact of the crimes may be assessed in light of, *inter alia*, the increased vulnerability of victims . . . or the social, economic and environmental damage inflicted on the affected communities." On that basis, we recommend that the OTP recognize in its forthcoming policy paper both: (i) the particular vulnerabilities of indigenous peoples in respect of the environment; and (ii) that these vulnerabilities are relevant at every stage of investigation and prosecution, but particularly in the process of case selection and prioritization.

C. Recommendations on the Investigation and Prosecution of Environmental Damage as War Crimes

Below we outline our recommendations in order to make the ICC prosecution of war crimes under Article 8(2)b(iv) more feasible and increase the chances to bring the perpetrator(s) to the criminal liability, namely:

- the scope of the term "*an attack*" should encompass the following: (i) any acts of violence; (ii) such acts to be committed against the adverse party; (iii) armed forces to be used; (iv) acts of violence may take place either in defense or offense. There should be no limitations as to the means utilized for the attack;
- the terms "widespread", "long-term" and "severe" (as the characteristics of the damage caused to the natural environment) shall be interpreted taking into account the damage made to a particular area, country, uniqueness of biological environment, community etc. Although the terms shall be used in cumulation for each case, the meaning of the terms shall be assessed individually taking into account particular circumstances.;
- recommendation as to the scope of term "widespread": (i) to consider the effect of the environmental damage to the region/locality as a whole; (ii) to consider both direct and indirect damage (effect of the damage may be expected to spread or materialize beyond the concrete geographical area where the attack took place);
- recommendation as to the scope of term "long-term": assessment of the criterion "long-term damage" could also take into account the duration of the indirect (or foreseeable

¹⁶⁶ Inter-American Commission on Human Rights, Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II. Doc.56/09 (30 December 2009), para 57 (citing Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Case No. 125, Judgement on Merits, Reparations and Costs (17 June 2005), para. 164 & Inter-American Court of Human Rights, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54 (30 December 2009), paras. 1076–1080).

¹⁶⁷ UN Department of Economic and Social Affairs, Indigenous Peoples, "Mandated Areas -Environment" <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html>.

reverberating) effects of the use of a given method or means of warfare (i.e., not only its direct and immediate effects could be considered);

- recommendation as to the scope of term “severe”: assessment of the criterion “severe damage” could also include the interdependency of the natural environment, as damage to one component (or “part”) can have immediate, lasting or deferred effects on other components;
- the phrase “clearly excessive” should be understood in the manner that the excessiveness of the damage is “obvious”;
- the damage to the natural environment (given its “widespread, long-term and severe” character) could be justified only in case, when (i) the attack was absolutely necessary and (ii) it was planned and controlled by the authorities so as to minimize, to the greatest extent possible, the spread, duration and severity of the damage to the natural environment;

Article 8(2)(b)(ii) can be effectively utilized for investigation and prosecution of environmental crimes in the course of the international armed conflict based, inter alia, on the following:

- civilian object should encompass natural environment (including any part thereof)
- unless any distinct part of the natural environment becomes a military objective it should be protected as a civilian object under IHL
- to qualify as military objective, a relevant distinct part of the natural environment must fulfill a two-pronged test: (i) it must, by its nature, location, purpose or use, make an effective contribution to military action and (ii) its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, must offer a definite military advantage
- interpretation of both “effective contribution to military action” and “definite military advantage” should be narrowed to exclude (i) any political, economic or other benefits except for military, and/or (ii) delayed and/or hypothetical and speculative contribution/advantage anticipated by the perpetrator as a result of the attack against any distinct part of the natural environment

Damage to the environment can be prosecuted as a war crime of destruction or seizure of an enemy’s property under Article 8(2)(b)(xiii) (international armed conflict) or under Article 8(2)(e)(xii) (non-international armed conflict) considering that:

- The notion of “property” can be interpreted broadly to cover (i) movable and immovable properties, and (ii) public-owned or private-owned (by communities or by individuals) properties, which can correspond to a broad range of environmental assets subject to property (natural resources, natural areas, etc.);
- Environment should benefit from the protection granted by international law of armed to civilian objects. The environment would not benefit from this protection if it is considered as a military objective: however, this consideration requires to demonstrate that the mere

destruction of the environment or seizure of environmental assets would “make an effective contribution to military action” and “offer a definite military advantage” (these two criteria being cumulative). Any potential contribution to military action or potential military advantage should be excluded. These two criteria should be assessed according to a case-by-case analysis.

In order to prosecute the environmental damage caused by the employment of prohibited weapons enshrined in Articles 8(2)(b)(xvii)-(xviii), 8(2)(e)(xiii)-(xiv) of the Rome Statute, the respective Elements of Crimes should be amended by adding the explicit reference to the “damage to natural environment” as an effect of the substance employed.

Damage to the environment may be prosecuted as a war crime of pillaging under Article 8(2)(b)(xvi) (international armed conflict) or under Article 8(2)(e)(v) (non-international armed conflict). Indeed, “pillaging” relates to the appropriation of a “property” which can be interpreted broadly. The notion of “property” covers: *(i)* private-owned natural moveable goods (resources, agricultural goods, or other natural resources) and private-owned immovable goods (fields or forests); *(ii)* moveable or immovable goods owned by communities, and *(iii)* public-owned immovable goods (public-owned infrastructures or public-owned natural goods, for example national protected areas, national parks). The property should be determined on the basis of the relevant national legal sources of the country where alleged pillaging occurs (national law, customary law, etc).

VI. Conclusion

The OTP’s forthcoming paper on environmental crimes presents an opportunity to both clarify the ways in which contemporary instances of environmental damage might fall within the scope of existing provisions of the Rome Statute, and to advance accountability for such crimes. Building on its 2013 and 2016 policy papers, the OTP can take a leadership role in recognizing the importance of the environment to human life and well-being—and, conversely, underscore the grave significance of environmental damage and its effects on human populations. By adopting a broad definition of environmental damage, the OTP could provide clarity and consistency to the assessment of environmental crimes. Moreover, by issuing guidance on the ways in which environmental damage may constitute a crime against humanity under Article 7 of the Rome Statute; as well as adopting broad, flexible interpretations of the elements under Article 8, the OTP can progress its goal of advancing accountability for the most serious environmental crimes as a key component of meeting its institutional obligations under the Rome Statute.