# Protection of the Natural Environment Under International Humanitarian Law and International Criminal Law: The Case of the Special Jurisdiction for Peace in Colombia

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**Abstract**

This Article addresses the protection of the natural environment in a non-international armed conflict (NIAC) by applying international humanitarian law (IHL) and international criminal law (ICL) in a transitional justice tribunal. In December 2016, the Colombian government and the Revolutionary Armed Forces of Colombia–People's Army (FARC-EP) guerrilla group signed an agreement which established the Special Jurisdiction for Peace (JEP), a tribunal designed to investigate, prosecute, and punish those responsible for the most serious crimes committed during the Colombian Armed Conflict. The agreement and the regulations of the JEP establish that this tribunal could directly apply IHL and ICL when examining crimes under investigation. However, case law related to this subject matter is almost nonexistent. Therefore, the JEP should create case law that can be studied and followed by other international and domestic criminal tribunals, while shedding light on the international standard on environmental protection emanating from IHL and ICL.

In this Article, we demonstrate how the JEP can effectively use IHL and ICL when prosecuting war crimes which have harmful effects on the environment. For this purpose, Part I presents background on the Colombian Armed Conflict. Part II describes the JEP, the generalities of its legal framework, and the specifics of the use of international law by this tribunal. Part III examines relevant domestic and international sources to explain the insufficiency of domestic law and the ability of international law to surpass those limitations. Part IV recalls the sources of ICL and IHL related to the protection of the natural environment in NIACs. Finally, Part V discusses recent JEP decisions related to the protection of the natural environment and some possible conduct to be investigated in the future. We conclude by describing the benefits of the JEP's use of international law.

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## Introduction

After more than fifty years of conflict between the Colombian State and the organized armed group known as the Revolutionary Armed Forces of Colombia–People's Army (FARC-EP), the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Final Agreement) was reached in 2016.[1] This Agreement creates the Integral System of Truth, Justice, Reparations, and Non-Repetition (Integral System). The Integral System contributes to victims' rights by factfinding, prosecuting, and punishing those most responsible for severe crimes, and generating conditions for nonrepetition.[2] It contains both judicial and extrajudicial mechanisms. On the nonjudicial side, there is the Commission for the Clarification of Truth, Convivence and Non-Repetition (Truth Commission)[3] and the Special Search Unit for

1. *See* Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colom.-FARC-EP, Nov. 24, 2016, http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf [https://perma.cc/TU8P-BGYL] [hereinafter *Final Agreement*].

2. *Id.* § 5, "Agreement Regarding the Victims of the Conflict: 'Comprehensive System for Truth, Justice, Reparations and Non-Recurrence', including the Special Jurisdiction for Peace; and Commitment on Human Rights."

3. *Final Agreement*, *supra* note 1, § 5.1.1.1; *see also* Por el cual se organiza la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición, D. 588/17, abril 5, 2017, Presidencia de la República de Colombia (Colom.).

Persons Reported as Missing (Special Search Unit).[4] On the judicial side, there is the Special Jurisdiction of Peace (JEP).[5]

The JEP is the justice component of the Integral System. It prosecutes and investigates wrongful conduct committed during the Colombian Armed Conflict. In this role, the JEP imposes sanctions from a transitional standpoint to fulfill international human rights obligations of truth, justice, reparation, and nonrepetition.[6] Those obligations have significant effects on the JEP's approach to the serious crimes under its jurisdiction.[7]

Structurally, the JEP is composed of two sections. First, the Justice Chambers are comprised of: (1) the Chamber for Amnesty or Pardon, (2) the Chamber of Definition of Judicial Situations, and (3) the Chamber for Acknowledgment of Truth, Responsibility, and Determination of Facts and Conduct (SRVR).[8] Generally, these chambers have the task of defining the contexts, situations, facts, persons, and conduct that will be prosecuted.[9] Second, the Peace Tribunal is comprised of four sections: (1) the Trial Section with Recognition of Truth and Responsibility of Facts and Conduct, (2) the Trial Section Without Recognition of Truth and Responsibility of Facts and Conduct, (3) the Revision Section, and (4) the Appeals Section.[10] These sections sentence defendants under the jurisdiction of the JEP.[11]

4. *Final Agreement*, *supra* note 1, § 5.1.1.2; *see also* Por el cual se organiza la Unidad de Búsqueda de Personas dadas por desaparecidas en el contexto y en razón del conflicto armado, D. 589/17, abril 5, 2017, Presidencia de la República (Colom.).

5. *Final Agreement*, *supra* note 1, § 5.1.2.

6. *Id.* § 5.1.2.I, ¶¶ 1–16. On the role of special tribunals in transitional processes, see OHCHR Res. 2005/81, Impunity, U.N. Doc. E/CN.4/RES/2005/81, ¶ 13 (Apr. 21, 2005).

7. *See* Rodrigo Uprimny Yepes & Nelson Camilo Sánchez, *Transitional Justice in Conflict: Reflections on the Colombian Experience*, *in* Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies 258, 259, 263 (Roger Duthie & Paul Seils eds., 2017).

8. A.L. 01/17, abril 4, 2917, Diario Oficial [D.O.] 50196, art. 7 (Colom.) [hereinafter *AL01/17*]; Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction for Peace], Acuerdo No. 001 de 2018, marzo 9, 2018, art. trans. 43 (Colom.).

9. On the specifics of each section see L. 1957/19, junio 6, 2019, Diario Oficial [D.O.] 50.976, arts. 43, 46, 79, 81, 84–85 (Colom.) [hereinafter Statutory Law]. However, it must be noted that the different functions of those chambers are still in development. For example, in November 2019, the Appeals Section defined some of the functions of the Amnesty or Pardon and the Definition of Judicial Situations Chambers. *See* Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sección de Apelación octubre 9, 2019, Sentencia Interpretativa TP-SA-SENIT 2 (Colom.).

10. The Peace Tribunal has a fifth section known as the Stability and Efficiency Section. It guarantees the compliance and electivity of the *JEP*'s decisions after the end of the *JEP*'s operations. However, it has not been established yet. Statutory Law, *supra* note 9, art. 91.

11. *Id.* On the specifics of each section see arts. 92, 93, 96–97.

One of the challenges that the JEP faces is establishing facts and conduct that may constitute crimes and prosecuting those crimes that, due to their complexity, were not tried by the ordinary justice system. Indeed, the Colombian Armed Conflict was so complex that many crimes were not prosecuted by Colombian authorities, including those that had harmful effects on the natural environment.[12] Although these types of conduct have recurred in the more than fifty-year-long non-international armed conflict (NIAC) and are punishable under domestic criminal law as violations of international humanitarian law (IHL) since at least 2000, they have not been the object of investigation, prosecution, or punishment.[13]

This Article argues that the JEP is the perfect forum for prosecution and factfinding for this conduct through the use of different sources of law, customary or treaty law, especially IHL and international criminal law (ICL).

For this purpose, Part I presents background on the Colombian Armed Conflict. Part II describes the JEP, the generalities of its legal framework and the specifics of the use of international law by this tribunal. Part III examines relevant domestic and international sources to explain the insufficiency of domestic law and the ability of international law to surpass those limitations. Part IV describes the sources of ICL and IHL related to the protection of the natural environment in NIACs. Finally, Part V discusses recent JEP decisions related to the protection of the natural environment and some possible conduct to be

12. Some authors suggest that the lack of investigation of environmental damages is due to the lack of resources on the environmental authorities, and that those institutions must be reinforced in the post conflict context. *See* César Rodriguez Garavito, Diana Rodríguez Franco & Helena Durán Crane, *La paz ambiental: Retos y Propuestas para el posacuerdo*, Dejusticia 85–94, 113–15 (Jan. 2017) [hereinafter *La Paz Ambiental*].

13. On this matter, none of the reports that the Fiscalía General de la Nación [Attorney General of the Nation] presented to the *JEP* was related to this subject. However, on the public information available, the only reports that may include some study on those damages are Report 10 on FARC-EP's sources of finance and financing mechanisms and Report 14 illicit means and methods of warfare used by the FARC-EP. This also shows that the reports of the Attorney's Office do not encompass environmental damages committed by other armed actors different to the FARC-EP. *See* Fiscalía General de la Nación, *Fiscalía cumple con la entrega total a la JEP de los informes sobre los delitos del conflicto*, (Mar. 27, 2019, 8:23 PM) https://www.fiscalia.gov.co/colombia/fiscal-general-de-la-nacion/fiscalia-cumple-con-la-entrega-total-a-la-jep-de-los-informes-sobre-los-delitos-del-conflicto [https://perma.cc/N4JW-BBKH]; Fiscalía General de la Nación, *Fiscalía presenta el informe de las rentas criminales de las desmovilizadas Farc y el recuento histórico de la victimización a líderes sociales por parte de agentes del Estado* (Jan. 10, 2019, 12:28 PM), https://www.fiscalia.gov.co/colombia/noticias/fiscalia-presenta-el-informe-de-las-rentas-criminales-de-las-desmovilizadas-farc-y-el-recuento-historico-de-la-victimizacion-a-lideres-sociales-por-parte-de-agentes-del-estado [https://perma.cc/2GSB-3GM4].

investigated in the future. We conclude with the benefits of the JEP's use of international law.

## I. Environmental Harm in the Colombian Context: The Colombian NIAC

In Colombia, the armed confrontation between the State, represented by its armed forces, and different organized armed groups lasted approximately fifty years. Under Additional Protocol II to the Geneva Conventions and customary international law (CIL) terminology, the Colombian Armed Conflict is properly considered a NIAC.[14] In this context, some of the parties' conduct affected the individual rights of the civilian population in violation of international law. However, other structural damages occurred in violation of international law but have not been adequately addressed by the Colombian authorities such as harm to the natural environment. In response to this situation, some advocacy groups, nonprofit organizations and government institutions have started to assess the impact that the Colombian Armed Conflict has had on the environment.[15]

The different parties to the conflict harmed the natural environment in two ways. First, there are direct effects caused by the conduct of hostilities, such as the bombing of oil pipelines managed by both public and private companies, illegal mining, and the cultivation of coca

14. In this regard, Article 1 of Additional Protocol II states that for a conflict to qualify as a NIAC, it must "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, ¶ 1, June 8, 1977, 1125 U.N.T.S. 609. Also, the jurisprudence of international criminal tribunals has pointed to the existence of two essential elements: the degree of organization and the level of intensity. *See* Camilo Ramírez Gutiérrez, Evolución de los Actores Armados ante el Derecho Internacional Humanitario en el Siglo XXI (2019); s*ee also* Rogier Bartels & Katharine Fortin, *Law, Justice and a Potential Security Gap: The 'Organization' Requirement in International Humanitarian Law and International Criminal Law*, 21 J. Conflict & Sec. L. 29 (2016). *See also:* Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 561-568 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 84 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

15. *See* Contraloría General de la República [Comptroller General's Office], Minería en Colombia: Control Público, Memoria y Justicia Socio-Ecológica, Movimientos Sociales y Posconflicto (2014); Rodrigo E. Negrete Montes, *Derechos, Minería y Conflictos: Aspectos normativos*, *in* Minería en Colombia: Fundamentos para Superar el Modelo Extractivista 23, 50 (2014). In this vein, the Ombudsman's Office has shown the environmental harm caused by aerial spraying of illicit crops. *See* Defensoria del Pueblo [Ombudsman's Office], La Ejecución de la Estrategia de Erradicación Áerea de los Cultivos Ilícitos, con Químicos, Desde una Perspectiva Constucional (2018).

crops by organized armed groups and the subsequent state response of air spraying those crops.[16] Second, there is an indirect or mixed effects on the environment caused by activities that do not aim to attack the environment, but whose effects, nonetheless, harm the natural environment.[17] This latter category can include activities such as migration to zones in which illegal economies are established, including illegal mining and forced displacement.[18]

Those impacts on the natural environment are of the utmost importance for IHL when looking at the sociopolitical variants that integrate the armed conflict, particularly when one is talking about the protection of the environment in a NIAC. As Professor Paul Collier puts it, one of the primary triggers of modern irregular warfare is the existence of natural resources or raw materials in the territories in which the confrontations take place.[19] Professor Collier believes that there is an inverse cause-effect relationship between the existence of socioeconomic conditions in which illegal economies tend to flourish and the existence of armed groups, for example, the exploitation of mining resources and the existence of irregular armed actors.[20] When the former takes place, not only does the armed group tend to be affected by it because it finances them, but it also affects the civilian population by placing them in enclave economies, which leaves the civilian population in a highly vulnerable position.[21] This situation facilitates recruitment by the armed groups as joining becomes the only way of living in those areas.[22]

During such conflicts, the parties to the conflict invariably tend to conduct warfare via methods that adversely affect natural resources and the natural environment. The Colombian Armed Conflict is no different. Thus, it is essential that the JEP investigates to what extent

16. *See* John Walsh et al., La Aspersión Aérea de Cultivos de Uso Ilícito en Colombia: Una Estrategia Fallida (2008); *La Paz Ambiental*, *supra* note 12, at 28–31.

17. *La Paz Ambiental*, *supra* note 12, at 28.

18. *Id.* at 31–34.

19. Paul Collier, Guerra en el Club de la Miseria: La Democracia en Lugares Peligrosos 168 (Víctor V. Úbeda trans., 2009) [hereinafter *Guerra en el club de la miseria*]; *see also* Thomas Kruiper, Recursos Naturales, Guerras y Sanciones Internacionales: En Torno a la Eficacia de las Sanciones Selectivas en el Congo, Angola y Liberia (2014).

20. Guerra en el Club de la Miseria, *supra* note 19, at 168.

21. *Id.*

22. Similarly, when discussing the second report of Rapporteur Lehto, Eduardo Valencia Ospina addressed the subject of exploitation of natural resources to finance war and the cycles of violence that it generates. *See* Int'l Law Comm'n, Provisional Summary Record of the 3466th Meeting, U.N. Doc. A/CN.4/SR.3466, at 9 (July 8, 2019).

this type of conduct occurred contrary to IHL either by the State armed forces or by the former combatants of the FARC-EP.

## II. The Special Jurisdiction for Peace

Since explaining the entire legal basis for the JEP would require a lengthy investigation, only basic concepts related to the structure of the JEP are mentioned here. Then, the relevant legal sources used by the JEP are explained.

### A. General Regulations of the JEP

The principal legal instruments that regulate the JEP are the Final Agreement, the Legislative Act No. 01 of 2017 (AL01/17), the Statutory Law on the Administration of Justice in the Special Jurisdiction of Peace–Law 1957 of 2019 (Statutory Law), the Rules of Procedure for the Special Jurisdiction of Peace–Law 1922 of 2018, and the Law on Amnesty, Pardon, and Special Criminal Treatments–Law 1820 of 2016 (Amnesty Law). The principal function of the JEP inferred from those documents are the investigation, prosecution, and punishment of crimes not eligible for amnesty (CNEA). Perpetrators of CNEA cannot receive any type of special criminal treatment such as pardon or amnesty. CNEA include crimes which constitute serious violations of IHL, crimes against humanity, or serious human rights violations[23] caused by, as a result of, or in direct or indirect relation with the armed conflict.[24]

It must be highlighted that the JEP is a transitional justice tribunal that is itself a component of the Integral System. This status as a transitional justice tribunal means that its objective is to maximize justice to the extent possible in accordance with international obligations, while also responding to the transitional context and the maximization of other objectives—such as truth—by the other mechanisms established in the Integral System, such as the Truth Commission. This approach has been utilized since the conception of the JEP.[25] Indeed, the only persons that may be prosecuted and sanctioned under the JEP are those maximally responsible for the most representative cases which also constitute the most severe or grave crimes.[26]

23. Statutory Law, *supra* note 9, art. 8.

24. *Id.*

25. *Final Agreement*, *supra* note 1, § 5.1.

26. *AL01/17*, *supra* note 8, art. trans. 3; Statutory Law, *supra* note 9, arts. 19, 79.i, 125; *see also* Corte Constitucional [C.C.] [Constitutional Court], marzo 1, 2018, Sentencia C-007/18, ¶ 394 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], agosto 13, 2013, Sentencia C-579/13, ¶ 8.2.3 (Colom).

International law supports this position. As stated in the Final Agreement,[27] IHL explicitly establishes that Article 6.5 of Additional Protocol II[28] gives the broadest amnesty possible at the end of a NIAC. The same can be said in international human rights law (IHRL). Judge García-Sayan of the Inter-American Court of Human Rights demonstrates this position in his concurring opinion in *The Massacres of El Mozote and Nearby Places v. El Salvador*.[29] In this opinion, Judge García-Sayan establishes that in transitional contexts, there must be a harmonization between the rights to truth, justice, and reparation for victims.[30] If States employ the criminal justice system without a recognition of the transitional context, this harmonization may not be fulfilled. He similarly suggests that States may use judicial and nonjudicial mechanisms to allow for the fulfillment of those rights, prioritizing the investigation of those who bear responsibility for the most serious crimes and the use of different formulas for the criminal investigation and punishment of those who do not bear responsibility for those crimes.[31] This complex formula should be utilized on a case-by-case basis in order to address the particularity of each context while acting in accordance with IHRL.[32]

In this regard, the Integral System allows the JEP to investigate within its limits without the prejudice of the other obligations that nonprosecuted persons have in the transitional context, such as contributing to factfinding before the Truth Commission or providing information to the Special Search Unit.[33]

There exist guidelines which are used to determine whether the JEP has jurisdiction: prioritization and selection criteria. Prioritization criteria refer to a workload management method. It is a form of

27. *Final Agreement*, *supra* note 1, § 5.1.2(II), ¶ 37.

28. "At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 6, ¶ 5, June 8, 1977, 1125 U.N.T.S. 609. This provision is also included in other *JEP* regulations. *See* L. 1820/16, diciembre 30, 2016, Diario Oficial [D.O.] 50.102, art. 21 (Colom.) [hereinafter *Amnesty Law*]; Statutory Law, *supra* note 9, art. 82.

29. This position was explicitly referred by the parties to the Final Agreement. *See Final Agreement*, *supra* note 1, § 5.1.2.I, ¶ 1.

30. Case of the Massacres of El Mozote & Nearby Places v. El Sal., Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶¶ 8–10, 16 (Oct. 25, 2012) (Diego García-Sayán, J., concurring).

31. *Id.*

32. *Id.*

33. *See* Statutory Law, *supra* note 9, arts. 31.2.a, 49.

organizing the information in order to more effectively attend to the different matters that are brought.[34] Selection criteria allows the JEP establish whether a particular case shall be prosecuted and punished or not by looking for the most responsible persons and the most relevant cases. When selecting cases, the JEP decides whether or not it will apply the renunciation of criminal action.[35][36] These criteria limit the investigation, prosecution, and judgment of cases so that particular attention is given to some situations but not to the entirety of the Colombian Armed Conflict.

Like any other tribunal, the JEP's jurisdiction has limits: subject-matter (*ratione materiae*), personal (*ratione personae*), temporal (*ratione temporis*) and territorial (*ratione loci*). In this Article, we address *ratione materiae* and *ratione personae* exclusively. In respect to the former, Article 62 of the Statutory Law establishes that the tribunal's jurisdiction is over crimes caused by, as a result of, or in direct or indirect relation with the Colombian Armed Conflict.[37] Factors such as the ability to commit the crime due to the Colombian Armed Conflict or the resources that the Colombian Armed Conflict gave to the perpetrator are relevant when deciding if the conduct is related to the conflict.[38] In addition, Article 23, sole paragraph, literal (a) of the Amnesty Law prohibits the granting of amnesty, pardon, or other special criminal treatments when the conduct is qualifiable as a specific CNEA. As a result, the JEP has a duty to investigate. It is worth noting that some of these specific crimes are international crimes:

> Under no circumstances, the crimes that correspond to the following conduct[] will be the object of amnesty or pardon:
>
> A) Crimes Against Humanity, Genocide, War Crimes, taking of hostages or another serious deprivation of liberty, torture, extrajudicial executions, forced disappearing, violent carnal access and other forms of sexual violence, child abduction, forced displacement, also child

34. Jurisdicción Especial para la Paz [Special Jurisdiction for Peace], Criterios y Metodología de Priorización de Casos y Situaciones: En la Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas ¶ 16 (2018).

35. *Id.* ¶ 17.

36. For the purposes of this paper, the phrase "[r]enunciation of the criminal action" refers to the decision made by the JEP refusing to prosecute someone related to a CNEA. This decision must be based, among others, in the small representativeness of the case or the lower level of responsibility or involvement of the person in the crime. That does not mean that the JEP denies the occurrence of the crime, it just establishes that it will not prosecute a person for it. It must be noted that it is not the same as the granting of an amnesty or a pardon. It is a *sui generis* legal figure.

37. Statutory Law, *supra* note 9, art. 62.

38. *Id.*; *see also AL01/17*, *supra* note 8, art. trans. 5.

> recruitment in conformity with the provisions of the Rome Statute. If any criminal judgment used the wording "ferocity," "barbarism," or another equivalent, amnesty or pardon could not be granted exclusively for [CNEA].[39]

This formula was determined by the Colombian Constitutional Court (Constitutional Court) to be the "rule of exclusion of amnesty, pardons and renunciation of criminal action."[40] Similarly, Article 19 of the Statutory Law establishes that there cannot be renunciation against perpetrators of a CNEA according to Article 23 of the Amnesty Law.[41][42]

Thus, although the JEP has jurisdiction to investigate all crimes committed during the Colombian Armed Conflict, it will concentrate its efforts on prosecuting and punishing those most responsible for the most serious and representative crimes perpetrated.

*Ratione personae* jurisdiction encompasses both compulsory and voluntary jurisdiction. The compulsory jurisdiction of the JEP extends over individuals that must present themselves obligatorily before the JEP. Article 63 of the Statutory Law regulates the JEP's compulsory jurisdiction. It states that the JEP will have compulsory jurisdiction over (1) members of the former guerrilla FARC-EP who either were included in the lists that the FARC-EP gave to the national government or who were convicted for their membership in or collaboration with that group (even if they themselves do not recognize their membership or collaboration); and (2) members of the armed forces—that is, persons who were part of the police or military forces when allegedly perpetrating the crimes under investigation.[43]

The voluntary jurisdiction of the JEP extends over third parties. A third party is any person aside from members of the armed forces or the FARC-EP that contributed to the Colombian Armed Conflict, such as politicians, civil servants, or the civil population. When studying the constitutionality of AL01/17, the Constitutional Court held that

39. *Amnesty Law*, *supra* note 28, art. 23. The underlined part was declared constitutional under the condition that child recruitment is a CNEA when the victim turned fifteen years old before June 25, 2005 and eighteen years old after June 25, 2005. This is because of the entry into force in relation to Colombia of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 15, 2018, Sentencia C-080/18, ¶ 3.2.3(iii) (Colom.) [hereinafter *C-080*].

40. Corte Constitucional [C.C.] [Constitutional Court], marzo 1, 2018, Sentencia C-007/18 (Colom.).

41. Statutory Law, *supra* note 9, art. 19.2.

42. The underlined part was declared constitutional under the condition that if the conduct under study was the crime of genocide, crimes against humanity, or war crimes, they must be systematic. *C-080*, *supra* note 39.

43. Statutory Law, *supra* note 9, art. 63.

third parties could not be subject to the JEP's compulsory jurisdiction because the tribunal was a result of the negotiation between two parties, and only they consented to the JEP's jurisdiction. If the JEP imposed compulsory jurisdiction on third parties, it would constitute a violation of the guarantees of independence and impartiality as well as to the right to be heard by a competent judge or tribunal.[44] Nonetheless, if the third parties wish to appear voluntarily before the JEP, the JEP may hear such cases regarding crimes arising from the Colombian Armed Conflict.[45]

Thus, the JEP can investigate both combatants and noncombatants for crimes that occurred in the course of the Colombian Armed Conflict, but it will prosecute and punish only those most responsible for CNEA. As long as these cases involve international crimes, the JEP should use IHL and ICL to resolve these cases.

### B. The Applicability of International Law to the JEP

The JEP's application of international law in prosecuting crimes committed during the Colombian Armed Conflict flows from two sources. First, the Constitutional Block, rooted in Articles 93 and 214 of the Colombian Constitution, addresses the application of IHL and IHRL. Second, some norms explicitly compel the JEP to apply international law. Both, the Block and the JEP's norms, as well as sources of international law are discussed in this Part.

#### 1. The Constitutional Block

The Constitutional Block, as Professor Rodrigo Uprimny states,[46] is an attempt to systematize international law. It includes international norms at the same level as the Constitution in application of Articles 93 and 214 of the Colombian Constitution. In its plain text, Article 93 establishes that IHRL treaty law that cannot be suspended under any circumstance will prevail in the national legal system.[47] Nonetheless, the Constitutional Court has extended the Block to include different norms and categories. Furthermore, Article 214 states that human rights

44. This last part was established in transitory Article 16 of AL01/17 after the Constitutional Court's judgment. *See* Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17, ¶ 5.5.2 (Colom.).

45. *AL01/17*, *supra* note 8, art. trans. 16.

46. Rodrigo Uprimny, *El Bloque de Constitucionalidad en Colombia: Un Análisis Jurisprudencial y un Ensayo de Sistematización Doctrinal*, https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_46.pdf [https://perma.cc/N78F-MGN6].

47. Constitución Política de Colombia [C.P.] art. 93.

and fundamental freedoms may not be suspended and that the rules of IHL shall be respected in all cases.[48]

The Constitutional Court has distinguished between the Block, *stricto sensu* and *lato sensu*.[49] The former is composed of norms that follow the plain text of Article 93 and are tantamount to the Constitution in the Colombian legal system. The latter is composed of norms that are not included in domestic law at the same level as the Constitution but can be used when interpreting constitutional norms. Uprimny and other authors[50] argue that the Block makes the constitution a living instrument, which can include new rights progressively. Nevertheless, when reviewing the case law of the Court, it does not limit the Block solely to rights. For example, the Constitutional Court has held that some parts of the Rome Statute—such as the description of crimes—are a part of the Block *stricto sensu*, though not the full treaty.[51]

As previously mentioned, Articles 93 and 214 refer mainly to IHRL norms.[52] Therefore, these articles evolve into guidelines for public authorities for respecting human rights in any of its activities. That means that the Block is a general clause rather than an express mandate related to the competence of an authority. Consequently, the JEP can use the Block in cases it considers it appropriate, but the Block does not compel the JEP to apply international law in every situation as long as domestic constitutional law sufficiently regulates the matter. For example, in the decisions related to the accreditation of indigenous peoples addressed below, the JEP applied the Block when referring to the rights of indigenous peoples and their standing before the JEP.[53]

In other words, the Constitutional Block provides for the use of international law as a general guideline directed toward all Colombian institutions. Bearing in mind that the JEP is a tribunal that works under

48. *Id.* art. 214.

49. Corte Constitucional [C.C.] [Constitutional Court], abril 18, 2012, Sentencia C-469/16, § VI(7)(iv), ¶¶ 43–46 (Colom.).

50. *See* Edgar Hernán Fuentes Contreras, Materialidad de la Constitución 140–44 (2010); Uprimny, *supra* note 46, at 4.

51. Corte Constitucional [C.C.] [Constitutional Court], abril 18, 2012, Sentencia C-290/12 (Colom.).

52. *AL01/17*, *supra* note 8, art. trans. 5.

53. Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] noviembre 12, 2018, Auto SRVBIT 079, ¶¶ 49–52 (Colom.) [hereinafter *SRVBIT 079*]; Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] enero 17, 2020, MP: R. E. Sánchez, Auto No. 02, at 19–20 (Colom.) [hereinafter *Auto No. 02*].

the Colombian Constitution and is a part of the Colombian State, it may refer to the Block when it sees it fit.

2. The Specific Regulation of the JEP: International Law as Lex Specialis.

Although the JEP has guidelines emanating from international law applicable via the Constitutional Block, the normative framework that regulates it expressly commands the use of IHL and ICL as *lex specialis*. First, Articles 5 and 22 of AL01/17 establish that the conduct under investigation must be qualified jointly under domestic and international law:

> Article 5. . . . The JEP, when adopting resolutions or judgment, shall make a legal qualification . . . based in the Colombian Criminal Code and/or the norms of International Law in the field of [IHRL], [IHL] or [ICL], always in application of the most-favorable law principle.[54]

Article 23 of the Statutory Law establishes the determination of the applicable law and mandates the use of IHRL and IHL:

> Article 23. Applicable Law. . . . [T]he legal frameworks of reference include primarily [IHRL] and [IHL]. The sections of the Tribunal for Peace, the Chambers and the Investigation and Prosecution Unit, when adopting their resolutions or sentences, shall make a legal qualification of the System concerning the conduct that is the object of the same, a qualification that shall be based on the norms of the general and special part of the Colombian Criminal Code and/or the norms of [IHRL], [IHL] or [ICL], always with the obligatory application of the principle of favorability.
>
> The resulting qualification may be different from the one previously made by the judicial, disciplinary or administrative authorities for the qualification of these conduct[], since International Law is understood to be applicable as the juridical framework of reference.[55]

Other articles relevant to prosecution are Articles 29 (providing for the use of IHRL standards when investigating), Article 40 (discussing the widest amnesty possible under IHL), and Article 42 (reiterating the CNEA) of AL01/17.[56]

In May 2019, the Appeals Section of the JEP issued its first interpretative judgment. In the interpretive judgment, the Appeals Section asserted its function as the final interpretative body of the jurisdiction and reiterated the applicable law to the JEP procedures:

54. *AL01/17*, *supra* note 8, art. trans. 5. It must be noted that art. trans 22 follows a similar wording.

55. Statutory Law, *supra* note 9, art. 23.

56. *See AL01/17*, *supra* note 8, arts. trans. 29, 40, 42.

> This mandate demands the constant normative harmonization of the Jurisdiction, both to fill gaps and determine which are the sources and legal instruments that integrate the transitional order. . . . In fact, according to [A]rticles 5 and 22 of Legislative Act 1 of 2017, the law in the JEP, for these purposes, includes (i) the Colombian Criminal Code; (ii) [IHRL]; (iii) [IHL], and (iv) [ICL]. Despite sharing some purposes and values, these regulatory bodies of law display differences and even contradictions. Their simultaneous implementation, without a hermeneutic articulation that provides this universe with a certainly reasonable coherence would generate traumas and equally diverse and discordant solutions within the Jurisdiction. It is not in vain that the [Constitutional Court] pointed out that the *JEP* " . . . must assume a task of interpretation and application of the law that requires harmony between the internal and international order.[57]

The regulations mentioned and the Appeals Section interpretation mean that the JEP must always apply IHL and ICL and not just use it as a parameter of interpretation. This application must harmonize both domestic and international law, but the JEP may follow a different approach at sentencing if the change is based on international law.

On the other hand, neither AL01/17 nor the Statutory Law differentiate between international law sources. Indeed, it does not specify that the JEP can only apply treaty law, such as the Rome Statute or Additional Protocol II, or apply CIL, such as the International Committee of the Red Cross (ICRC) Study on Customary Rules of IHL. Therefore, the JEP can apply IHL and ICL regardless of its source. This ability to apply IHL and ICL provides the JEP an opportunity to establish or crystalize new rules for the protection of the natural environment under IHL and ICL.

In this vein, treaty law includes instruments such as the Rome Statute, which does not alone include the protection of the natural environment under IHL and ICL; such protection is still dispersed in different international law sources. Despite this dispersion, it is clear that there is a prohibition against directing an attack against the environment in a NIAC when such an attack does not respect proportionality or distinction principles under IHL. States have the obligation to investigate, prosecute, and punish serious war crimes that can be classified as grave breaches. However, the specifics of that conduct, the scope of responsibility, and the threshold needed in order for environmental harm to rise to the level of war crimes are grey areas which the JEP can shed light on while fulfilling their obligations for the Colombian State.

57. Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sección de Apelación abril 3, 2019, Sentencia Interpretativa TP-SA-SENIT 1, ¶ 19 (Colom.).

Finally, the necessity for the clarification of this area of law must be stressed in order to protect the natural environment and prosecute those who have harmed it. Even though the Final Agreement does mention the environment and its protection, specific JEP regulations are almost silent on the matter. The most important mention of the environment is one of the options given by Article 141 of the Statutory Law regarding special sanctions.[58] It establishes that when deciding to implement this type of sanction, judges must consider the effects on the natural environment. Logically, the JEP should consider those same effects when investigating, prosecuting, and sanctioning the most serious crimes during the Colombian Armed Conflict.

The JEP must seek to enforce international law and its values. However, it can only be effective if it builds a sophisticated framework using the widest array of sources possible. The challenge for this tribunal will be to widen the scope of its investigation by having a complex understanding of the Colombian Armed Conflict, while looking forward to effectively closing the violent period that Colombia has witnessed in past decades.

## III. Protection Under Domestic Law

Article 22 of the Statutory Law establishes that the JEP must also apply domestic law, specifically, the Colombian Criminal Code, when investigating crimes under its jurisdiction.[59] In 2000, the Colombian Congress adopted the current Criminal Code. It establishes 37 crimes in the Chapter titled "Crimes against International Humanitarian Law."[60] Those crimes are related to the conduct of hostilities within the jurisdiction of the Colombian State. Notably, every single article starts with the

58. There are three different types of sanctions: special sanctions, alternative sanctions, and ordinary sanctions. Special sanctions are restorative sanctions with no prison time, which facilitate reparations for victims. Such sanctions apply to those responsible for grave crimes who, since the beginning of the process before the JEP, fully acknowledge their responsibility and contribute the truth. Five to eight years of restorative labors apply to those directly responsible for crimes, while two to five years apply to indirect participants in the crimes. The alternative sanctions are directed to those who acknowledge their responsibility at later stages in the process. Those incur prison sentences of five to eight years if directly responsible for the crimes, or two to five years if indirectly responsible. Finally, persons found guilty at the end of the trial but before the "Absence of Acknowledgment" section may be subject to ordinary sanctions. Such sanctions carry fifteen to twenty years of imprisonment. Statutory Law, *supra* note 9, arts. 125–30.

59. Statutory Law, *supra* note 9, art. 22.

60. Those articles are included in Articles 135 to 164 in Book II, Title II, Sole Chapter of the Colombian Criminal Code. *See* Código Penal [C. Pen.] [Criminal Code], arts. 135–64 (Colom.).

*chapeau* "[t]he person who, in the course of armed conflict . . ."[61] These articles consequently do not differentiate between International Armed Conflicts (IACs) and NIACs, which means that those crimes can be prosecuted in both types of conflicts. Three different offenses involve the protection of the natural environment in armed conflicts.

First, Article 154 establishes the crime of destruction and appropriation of protected objects.[62] It punishes those who destroy or appropriate protected objects under IHL by either illegal or excessive means in relation to the actual military advantage. It provides protection, *inter alia*, to the natural environment. It is an umbrella clause, however, establishing that the article will only apply in cases that are not encompassed in other special provisions. Nevertheless, Articles 157 and 164 would seem to exclude the application of Article 154 when it concerns the protection of the natural environment.

Second, Article 157 establishes the crime of attack towards works and installations containing dangerous forces and punishes this well-known prohibition, though it does not explicitly consider the natural environment as a directly protected object.[63] However, protection of the natural environment could emerge by interpreting that the natural environment is essential for the livelihood of the civilian population, protecting it indirectly. Furthermore, Article 157 protects the natural environment in the event of an attack towards a work or installation containing dangerous forces which has a harmful effect on the environment. Yet, Article 157 requires an *effective* attack directed towards those works and installations, which is not always the case.[64]

Third, Article 164 establishes the crime of destruction of the environment.[65] This crime protects the natural environment against specific attacks towards it.[66] This means that there is an exception to Article 154. Nonetheless, in order to be applicable, (1) the method or means employed must be conceived to cause harm to the natural environment; and (2) the nature of that expected damage must be widespread, longterm and severe.[67] However, it is unnecessary to show actual harm. Nevertheless, this article does not cover crimes in which the natural environment was targeted by means or methods that were not designed to cause environmental harm, nor does it protect from

61. *Id.*
62. *Id.* art. 154.
63. *Id.* art. 157.
64. *Id.*
65. *Id.* art. 164.
66. *Id.*
67. *Id.*

"incidental" harms. Resultantly, Articles 157 and 164 do not include all of the conceivable types of environmental harms sustained in the course of armed conflict.[68]

| CRIMES AGAINST THE NATURAL ENVIRONMENT IN THE CONTEXT OF AN ARMED CONFLICT IN COLOMBIAN DOMESTIC LAW | | |
|---|---|---|
| ARTICLE 154 ESTABLISHES THE CRIME OF DESTRUCTION AND APPROPRIATION OF PROTECTED OBJECTS.<br>The person who, in the course and conduction of armed conflict and outside the primarily criminal cases which provide a more substantial penalty, destroys or appropriates protected objects under [IHL] by illegal or excessive means to the actual military advantage expected, shall be liable to a term of imprisonment . . .<br>Paragraph: to the effects of this and the other articles of this title, the following shall be understood as protected objects under [IHL]<br><br>1. Civilian objects which are not military objectives<br>2. Cultural objects and places destined for purposes of worship<br>3. Objects indispensable to the survival of the civil population<br>4. The elements which integrate the natural environment<br>5. Works and Installations are containing dangerous forces. | ARTICLE 157 ESTABLISHES THE CRIME OF ATTACK TOWARDS WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES:<br>The person who, in the course and conduction of armed conflict and without justification based on imperative military needs, attacks dams, dikes, power plants, nuclear power plants, or other works or installations containing dangerous forces, shall be liable to a term of imprisonment . . .<br>If the attack derives in the release of forces with loss or damage to property or objects necessary for the livelihood of the civilian population, the penalty shall be . . . | ARTICLE 164 ESTABLISHES THE CRIME OF DESTRUCTION OF THE ENVIRONMENT:<br>Anyone who, on the course and conduction of an armed conflict, uses methods or means of warfare conceived to cause widespread, long-term and severe damage to the natural environment, shall be liable to a term of imprisonment . . . |

It is conceivable that Article 154 could be applied to such environmental harms due to its status as an apparent umbrella clause. However, domestic case law is almost silent on the use of this article in relation to the protection of the natural environment, leaving open the possibility that Article 154 may be applied to conduct harming the environment.[69]

Despite this possibility, these provisions have been ineffective at prosecuting crimes against the environment in the ordinary criminal system. Therefore, the JEP should use a different approach when prosecuting these types of conduct. IHL and ICL, thus, play an important

68. *Id.* arts. 154, 157, 164 (translated by the authors).

69. In fact, there are few decisions on this crime, none of which are related to the protection of the natural environment. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Pen. noviembre 8, 2017, M.P.: F.A. Castro Caballero, Radicación No. 48866 (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Pen. diciembre 16, 2015, M.P.: P. Salazar Cuellar, Radicación No. 45143 (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Pen. agosto 14, 2013, M.P.: Luis Guillermo Salazar Otero, Aprobado Acta No. 263 (Colom.).

role. Indeed, international law contains provisions with a broader range of protection that the JEP can use to investigate, prosecute, and punish conduct under its jurisdiction that has led to environmental harm.

For example, international law must be used when applying the exclusionary rule of amnesty, pardons, and renunciations of criminal action—as mentioned above—whenever the JEP must study whether or not a case is a CNEA. Meanwhile, in cases where other crimes like terrorism were charged, the JEP can review if the conduct is a war crime against the natural environment or if amnesty or another special treatment applies. In the same vein, it must be stressed that the use of domestic law is limited by a statute of limitations in Article 22 of AL01/17.[70] Conduct that occurred before 2000 cannot be prosecuted by the JEP under the current Criminal Code.[71] Prosecution of this type of conduct is usually brought under a terrorism theory without bringing to light the complexity of environmental harms incurred via alleged acts of terrorism.[72]

Thus, the sole application of the crimes contained in the domestic Criminal Code are not enough to provide a satisfactory response to the damage or destruction of the natural environment. A direct application of international law by the JEP may help when establishing the facts and allocating responsibility for crimes during the Colombian Armed Conflict.

## IV. Protection Under International Law

### A. Damage to the Natural Environment Under IHL

Under IHL, some regulations seek to protect the natural environment either directly or indirectly, even though environmental protection is not the central aim of IHL. Indeed, IHL regulates armed conflict

70. *AL01/17*, *supra* note 8, art. trans. 22.

71. This also relates to the application of the *nullun crimen sine lege* principle. Another example on this is the limitation on child recruitment made by the Constitutional Court. *See C-080*, *supra* note 39.

72. An example is the case known as the Machuca Massacre. In this case, the Criminal Chamber of the CSJ discussed the possible application of liability through a formula denominated 'through organized power apparatus,' when examining the conduct of members of the ELN, specifically the Central Command, in relation to the bombs placed around a pipeline which subsequently set fire to the village of Machuca, located in the municipality of Segovia (Antioquia) resulting in seventy killings. On that decision, the Criminal Chamber could not conclude that the crime was committed against the natural environment, specifically the harm caused to water sources due to the oil spill. On the contrary, the liability of the ELN militiamen and commanders regarding the death of 71 people was assessed. *See* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Pen. agosto 08, 2007, M.P.: María del Rosario González de Lemos, Proceso No. 25974 (Colom.).

through different approaches, such as by limiting the means or methods used in warfare or conduct related to the protection of persons and objects. IHL also has provisions that protect the natural environment, which, in themselves, have a double connotation: as violations of IHL and as international crimes punishable under ICL.

IHL contains two promising approaches for prosecuting crimes with environmental harms. First, IHL protects civilian objects and prohibits attacks against civilians. Here, the main goal is to protect humans from harm to objects necessary for their survival. For example, oil pipelines, when bombed, could contaminate water sources used by the civilian population and, thus, would be protected under the category of works and installations containing dangerous forces.

Second, IHL addresses attacks, directed specifically at the natural environment, which cause widespread, longterm, and severe environmental damage. This protection is established when there is no military necessity or a lack of proportionality between the damage caused and the military advantage received.

IHL's potential for addressing environmental harms are discussed by Professor Mete Erdem. Professor Erdem discusses two possible approaches to the protection of the environment under IHL.[73] The first is the protection of the environment as an object needed for the survival of the civil population.[74] The second is the direct protection of the environment.[75] This distinction can be described as the anthropocentric and ecocentric approaches, respectively.

Although Professor Erdem posits that the two approaches are distinct—or are even mutually exclusive—in fact, they are intertwined and complement each other. In fact, having both may be important when addressing situations where one must simultaneously recognize the effects on the environment as a subject and on people who have a relationship with the affected natural environment. An example is the situation of indigenous peoples addressed below.

Particularly in the case of environmental protection, the primary sources come from Customary International Humanitarian Law (customary IHL).[76] In the same vein, the International Criminal Tribunal

73. Mete Erdem, *Enforcing Conventional Humanitarian Law for Environmental Damage During Internal Armed Conflict*, 29 Geo. Int'l Env't L. Rev. 436 (2017).

74. *Id.* at 436, 440–41, 444–45.

75. *Id.* at 436, 440–41, 475–76.

76. *See generally* 1 Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law (2005) [hereinafter *ICRC CIHL*]; Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War (2d ed. 2016); The 1949 Geneva Conventions: A Commentary (Andrew Clapham et al. eds., 2018). On the

for the Former Yugoslavia established in the Tadić case[77] that violations of customary IHL could be considered war crimes. As an extension of this reasoning, violations of customary IHL that relate to the protection of the environment could be considered war crimes.

Different interpretations of international law can arise when studying multiple sources jointly. Interpretive tools of international law include Article 21 of the Rome Statute, Article 30 of the Statute of the International Court of Justice (ICJ), or the principles of interpretation of the 1969 Vienna Convention on the Law of Treaties.[78] This Article examines those different sources, which include both hard and soft law sources.

Hard law sources include Geneva Conventions I–IV (GC I–IV), Additional Protocols I and II, customary IHL, the Rome Statute, and the International Criminal Court (ICC) Rules of Procedure and Evidence, and judgments emanating from international criminal tribunals.[79] These sources tend to consider the following: (1) severe breaches of IHL when attacking civilian objects; (2) serious breaches when attacking installations containing dangerous forces; (3) serious breaches when attacks cause widespread, longterm, and permanent damage to the natural environment; and (4) conduct falling under Additional Protocol I and Article 8(2)(b)(iv) of the Rome Statute, incidentally causing death, injury, or excessive damage.[80]

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importance of CIL and its identification, see Marie G. Jacobsson (Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts), *Preliminary Rep. on the Protection of the Environment in Relation to Armed Conflicts*, ¶¶ 89, 116, U.N. Doc. A/CN.4/674 (May 30, 2014) [hereinafter *Jacobsson first report*].

77. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

78. In this sense, Article 21 of Rome Statute says: "The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict . . . ." Rome Statute of the International Criminal Court, art. 21, Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. On its part, Article 30 of Vienna Convention on the Law of Treaties establishes that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 30, May 23, 1969, 1155 U.N.T.S. 331.

79. Nonetheless, as Jacobsson noted, in this subject, the jurisprudence is scarce. Marie G. Jacobsson (Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts), *Second Rep. on the Protection of the Environment in Relation to Armed Conflicts*, ¶¶ 89, 92, U.N. Doc. A/CN.4/685 (2015) [hereinafter *Jacobsson second report*].

80. Those norms have a dual character. On one hand, there is the prohibition in itself during the armed conflict. On the other, there is the sanction arising from a conduct contrary to IHL.

The most crucial sources of soft law today are put forth by the International Law Commission (ILC), such as the reports by Special Rapporteurs Marie G. Jacobsson and Marja Lehto on Protection of the Environment in Relation to Armed Conflicts.[81] The second report by Maja Lehto, addressing the specifics of the protection of the natural environment in NIACs, is of the utmost importance.

### B. Damage to the Natural Environment as a Severe Breach of Customary IHL

At first, one might conclude that attacks which harm the environment are not among grave breaches contemplated under conventional international law. For instance, treaty IHL is silent on many of these issues, while other types of breaches of IHL, such as illegal killings or rape, are clearly established as grave breaches.[82] However, damage to the natural environment is a severe breach of customary IHL.

Developments in customary IHL emphasizing the protection of the environment during armed conflicts began in the 1970s. Scholars have noted that "in the early 1970s, two developments occurred: the international community began addressing environmental protection generally, and it also made a serious attempt to remedy the deficiencies of legal protection for victims of armed conflict.[83] Both developments were prompted by a scandal of public opinion triggered by several key events. In the international environmental realm, these were environmental disasters such as major oil spills, as well as a broad citizens' movement." As Professor Michael Bothe states, "As to the law of

81. *See Jacobsson first report*, *supra* note 76; *Jacobsson second report*, *supra* note 79; Marie G. Jacobsson (Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts), *Third Rep. on the Protection of the Environment in Relation to Armed Conflicts*, U.N. Doc. A/CN.4/700 (2016) [hereinafter *Jacobsson third report*]; Marja Lehto (Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts), *First Rep. on the Protection of the Environment in Relation to Armed Conflicts*, U.N. Doc. A/CN.4/720 (2018); Marja Lehto (Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts), *Second Rep. on the Protection of the Environment in Relation to Armed Conflicts*, U.N. Doc. A/CN.4/728 (2019) [hereinafter *Lehto second report*].

82. This is according to Article 51 of the Second Geneva Convention, Article 130 of the Third Geneva Convention, and Article 147 of The Fourth Geneva Convention. However, this conclusion loses its basis when customary IHL is revised. *See* Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II) art. 51, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

83. *See* Rosario Domínguez Matés, La Protección del Medio Ambiente en el Derecho Internacional Humanitario (2005).

armed conflict, the developments were the Vietnam War, the protection of human rights in occupied territories . . . and the armed conflicts that occurred during decolonization."[84]

In the following years, concrete developments were rare until the 1990s. As the ICRC recalls, from the 1970s to 1993, international law scarcely discussed the prospect of addressing environmental harms via international law. Two important milestones were the discussion and adoption of the Environmental Modification Convention (ENMOD) and the report submitted to the UN General Assembly by the ICRC.[85] Then, in 2007, the matter was further developed in the ICRC study on customary IHL.[86]

Rules 43,[87] 44,[88] and 45[89] of the ICRC's study on customary IHL establish the prohibition of attacks directed against the natural environment in three ways. Although the report expresses reservations about the application of Rule 45 in a NIAC, Rules 43 and 44 maintain the protection of the environment via application of the distinction[90] and precautionary principles.[91] The Rules suggest that in both NIACs and IACs, the parties to the conflict should apply these principles when directing an attack, even if they lack scientific certainty of environmental harm. In the same vein, principles of proportionality, distinction, necessity, and precaution, as established in Common Article 3 to the GCs,[92] can be read to limit attacks on the natural environment.

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84. Michael Bothe et al., *International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities*, 92 Int'l Rev. Red Cross 569, 571 (2010).

85. *ICRC customary IHL*, *supra* note 76, at 144.

86. In 1998, scholars Jean-Marie Henckaerts and Louise Doswald-Beck directed a study on customary international humanitarian law, that document was published in 2007, its legal resources were: the state practice, the *opinion juris*, the impact on treaty law, the research national sources of practice, the research in ICRC archives and expert consultations. *ICRC customary IHL*, *supra* note 76, at xxxi–lvii.

87. *Id.* at 143–46. This rule establishes that the principles about hostile conduct are enforced in the same way when regarding affects to the natural environment.

88. *Id.* at 147–51. This rule establishes that the means and methods of warfare must be employed with due regard to the protection and preservation of the environment. Additionally, all precautions should be taken when conducting military operations in order to reduce incidental damage to the natural environment.

89. *Id.* at 151–58. This rule is effectively the most important because it has established to protection the environmental in war times.

90. *Id.* at 143–44.

91. *Id.* at 149–51.

92. This Article is considered by some authors as a "little convention" related to the protection of victims and the limitation of means and methods of warfare in NIAC. *See* Lindsey Cameron et al., *Conflicts Not of an International Character*, *in* Comment on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 126 (2016).

Thus, in customary IHL, there are customary rules concerning the protection of the environment in NIACs. In other spheres of international law, although the developments are less clear or binding to States, there are some developments which aim to protect the natural environment during hostilities on times of war. International law, therefore, does contemplate the protection of the natural environment.

### C. From Article 21 to Article 8(2)(b)(iv): The Way from the Rome Statute

Authors, such as scholar Patrick Nagler, have proposed the harmonization of war crimes under the Rome Statute, for instance, Article 8(2)(b)(iv) which addresses disproportionate attacks.[93] His suggestion does not make an analogy between applicable crimes under IACs and NIACs. He harnesses customary IHL to expand the article's scope without triggering the rules of interpretation included in Article 21 of Rome Statute. He posits that disproportionate attacks in and of themselves constitute a serious violation of customary IHL and imposes individual responsibility in NIACs. The problem with this vision is that the Rome Statute does not allow the enforcement of the same crimes in both NIACs and IACs. Authors like Professor Marco Sassòli have similar ideas regarding the protection of the environment. For example, he argues for the necessity of a joint study of the Rome Statute and customary IHL and even seeks to include international environmental law in this proposed study.[94]

These new approaches validate the idea that the Rome Statute is not the compilation or codification of all international crimes under ICL. The stipulations inside the ICRC Customary Rules related to the protection of the environment, its application to NIACs as a basis for war crimes, and the lower threshold required to be applied in comparison to the one required by Article 8(2)(b)(iv), demonstrate the existence of rules of CIL that are different from those enshrined in the Rome Statute. In the same vein, examples different from those that apply *stricto sensu* to hostile conduct, such as the prohibition against pillaging natural resources, show that in order to thoroughly investigate, prosecute, and punish war crimes related to the destruction of the environment, judges, and tribunals must use CIL.

93. *See Patrick S. Nagler, Research Brief: Harmonizing War Crimes Under the Rome Statute*, Geneva Acad. Int'l Humanitarian Law & Hum. Rts. 1, 3 (Mar. 2019), https://www.geneva-academy.ch/joomlatools-files/docman-files/Harmonizing%20War%20Crimes%20Under%20The%20Rome%20Statute.pdf [https://perma.cc/2978-FSJG].

94. *See* Marco Sassòli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, ¶ 10.10 (2019) [hereinafter Sassòli IHL].

The international community tends to generate new rules aimed at the direct protection of the natural environment in armed conflicts. This practice has led to the construction of rules prohibiting this particular type of action when conducting military operations—mainly under customary IHL and without regard to whether it is an IAC or a NIAC.

Now, by using this formula, the JEP has the opportunity to establish a constant and vital precedent in the protection of the environment by using conventional and customary IHL and ICL to accomplish its objective to investigate, prosecute, and punish those responsible for war crimes in the Colombian Armed Conflict.

### D. The Political Dimension of the Prohibition of Environmental Harm

Both the Gulf War and the conflict in Kosovo prompted an international debate about the extensive damage[95] to the natural environment caused by the use of warfare methods and the future implications for humanity.[96] After those events, a "slow-paced race" began for the international protection of the natural environment in both IACs and NIACs.[97]

The protection has tended to consider the environment as a particular object and not just an object related to the civil population. For example, the ICJ recalled in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that the destruction of the environment cannot be justified by military necessity and that States must take into account environmental factors when addressing necessity and proportionality regarding the pursuit of legitimate military objectives.[98]

This development is also reflected in Principle 24 of the Rio Declaration. It states that "[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."[99] This could be translated to protection in terms of Common Article 3 to the GCs (application

95. *See* Michel B. Likosky, Law, Infrastructure, and Human Rights 71–72 (2006).

96. Freeland Steven, Addressing the International Destruction of the Environment During Warfare Under the Rome Statute of International Criminal Court 134–35 (2015).

97. Rosario Domínguez Matés, *supra* note 83, at 85–87.

98. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 30–33 (Jul. 8).

99. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I, princ. 24 (Aug. 12, 1992).

of the core principles) while constituting protection of the environment in itself.

Likewise, ENMOD (1) focuses on damage caused to another State Party, and therefore does not foresee situations such as damage caused in the national territory itself or in areas located outside the jurisdiction of States (such as the high seas); and (2) states that the conduct must be intentional or deliberate (and therefore does not include collateral damage).[100] Because of these considerations, its scope is not as broad as it may seem. Despite this, and because of its effects and conventional definitions, its scope may instead be expanded by Articles 54 and 55 of Additional Protocol I (in the case of IACs).[101]

ENMOD enforces IHL as a protection for the different natural processes and elements that compose the natural environment (earth, biotics, lithosphere, hydrosphere, atmosphere, and outer space).[102] Indeed, the treaty allows attacks towards the environment when, given the circumstances, it can be considered a military objective.[103] Nonetheless, this does not mean that the rule allows attacks toward the natural environment.[104]

In recent years, discussion of about environmental protection in NIACs has become more prevalent. This can be seen in two ways: first,

100. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques arts. I–II, Oct. 5, 1978, 1108 U.N.T.S. 151 [hereinafter *ENMOD*]. It must be noted that Colombia is not a State Party to this convention. However, it is still important to recall it as long as it allows to see how International Law has seen the protection of the natural environment.

101. Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, *in* The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory 513 (R. St.J. Macdonald & Douglas M. Johnston, eds. 1983); *see also* Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 Am. U. Int'l L. Rev. 275 (2008). It must be highlighted that these developments are typical of IACs in which States limit their means and methods of warfare against other political entities of equal status. This is not the same in NIACs. Here, these types of obligations of self-restraint are more diffuse. In fact, in the four Geneva Conventions and their Additional Protocols, only the Additional Protocol II has obligations for States in internal situations. This problem increases with the organized armed group since they do not subscribe to international instruments, and the enforceability of such duties becomes more complicated by any tribunal.

102. *ENMOD*, *supra* note 100, art. II.

103. Article I of ENMOD establishes that the restriction to environmental modification techniques apply only to those techniques which are used with a military or any other hostile purpose which also have widespread, longlasting or severe effects. *ENMOD*, *supra* note 100, art. I. However, as Sassòli states, those three factors are alternatives, not cumulative. *See* Sassòli IHL, *supra* note 94, ¶ 10.193.

104. *See generally* Environmental Protection and the Law of War: A Fifth Geneva Convention on the Protection of the Environment in the Time of Armed Conflict (Glen Plant ed., 1992).

via the Rome Statute and the work of the ICC; second, the ILC's work is additionally instructive in this area.

Regarding the former, Article 8 of the Rome Statute establishes war crimes related to environmental damage in IACs.[105] As mentioned by Rapporteur Lehto, the first and only article that protects against environmental damage is Article 8(2)(b)(iv) of the Rome Statute.[106] Although the crimes in Articles 8(2)(a) and 8(2)(b) of the Rome Statute do not apply to NIACs, the interpretation of this provision might be useful to shed some light on the protection of the environment under IHL and ICL in this type of conflicts.

In interpreting this clause, scholars Roberta Arnold and Stefan Wehrenberg acknowledge critiques made by some authors and the United Nations Environmental Project to the standard of widespread, longterm, and severe damage.[107] Indeed, it seems that there exists a consensus among different authors that the Rome Statute standard for an attack to be considered as a war crime is much higher than the one contained in ENMOD or in ICRC Customary Rules 43 to 45.[108] For her part, Rapporteur Lehto highlights that even if Article 8(2)(b)(iv) is the only article in the Rome Statute that mentions the protection of the environment, some crimes established in Articles 8(2)(c) and (e) can be related to the protection of the environment in NIAC.[109] Rapporteur Lehto also posits that crimes against humanity or the crime of genocide, both committed in the context of a NIAC could affect the environment, and the clauses of the Rome Statute that prescribe them, can be used in order to sanction harms to the natural environment.[110] In fact, when studying the practice of the Office of the Prosecutor of the ICC (Prosecutor's Office), an interest in the protection of the natural environment can be identified.

The most important decision related to the protection of the environment under the ICC's jurisdiction is the application made by the Prosecutor's Office under Article 58 of the Rome Statute in the situation

105. *Rome Statute*, *supra* note 78, art. 8(2)(b)(iv).

106. *Lehto second report*, *supra* note 81, ¶ 60.

107. Roberta Arnold & Stefan Wehrenberg, *Paragraph 2(b)(iv): Intentionally Launching an Attack in the Knowledge of Its Consequences to Civilians or to the Natural Environment*, *in* The Rome Statute of the International Criminal Court: A Commentary 378, ¶ 253 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016).

108. *Id.*; *see also* Jérôme de Hemptinne, *Prohibitions of Reprisals*, *in* The 1949 Geneva Conventions: A Commentary 575, 581 (Andrew Clapham et al. eds., 2015); Michel Bothe, *The Administration of Occupied Territory*, *in* The 1949 Geneva Conventions: A Commentary 1455, 1463, 1504, 1548 (Andrew Clapham et al. eds., 2015).

109. *Lehto second report*, *supra* note 81, ¶ 60.

110. *Id.*

of Sudan.[111] In this application, the Prosecutor's Office finds that there are sufficient grounds to investigate Omar Al-Bashir for the crime of genocide, crimes against humanity, and war crimes.[112] Among others, the Prosecutor's Office finds that attacks towards water sources are acts that may be prosecutable under the crime of genocide.[113]

Similarly, in September 2016, the Prosecutor's Office issued a Policy Paper on case selection and prioritization.[114] In this document, the Prosecutor's Office illuminates the environmental impact of war in two ways. First, it establishes that the Prosecutor's Office will collaborate with countries that have investigations of conduct that constitutes severe crimes under domestic law.[115] Second, it affirms that case selection and prioritization shall consider the environmental impact of the conduct that are under investigation by the Prosecutor's Office, specifically in assessing the gravity of crimes.[116]

In conclusion, one can identify the interest of the ICC, specifically the Prosecutor's Office, in prosecuting serious crimes that adversely affect the environment. That interest is achieved within the specific reach of the ICC's jurisdiction, that is, war crimes in IACs. However, this highlights the inapplicability of crimes designed specifically for the protection of the natural environment in NIACs.

Returning to the ILC's work, Rapporteur Lehto posits the need for protection of the environment not only via the application of IHL and ICL but also IHRL and international environmental law.[117] For example, she recalls the effects that forced displacement has on the environment,[118] as well as means used by armed groups to finance themselves, such as poaching and the exploitation of the environment.[119] Those remarks concluded in what has become, among others, Draft

111. Situation in Darfur, Sudan, Case No. ICC-02/05, Public Redacted Version of the Prosecutor's Application Under Article 58 (Sept. 12, 2008), https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-157-AnxA [https://perma.cc/U62G-6XQ2].

112. *Id.* ¶ 62.

113. *Id.* ¶¶ 14, 31,174–76, 200, 357.

114. The Office of the Prosecutor, *Policy Paper on Case Selection and Prioritization*, ICC (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_ Prosecutor's Office -Policy_Case-Selection_Eng.pdf [https://perma.cc/SMN7-YE26].

115. *Id.*

116. *Id.* ¶¶ 40–41.

117. Rapporteur Lehto highlights this position on the potentiality that the Martens Clause has for interpreting provisions according to IHRL and international Environmental Law to enhance the protection of the Natural Environment. *Lehto second report*, *supra* note 81, ¶¶ 173–83.

118. *Lehto second report*, *supra* note 81, ¶¶ 39–49.

119. *See* Hyeran Jo, Compliant Rebels: Rebel Groups and International Law in World Politics 56 (2015).

Principles 8 and 18 relative to human displacement and pillaging, respectively, in the ILC's "[t]ext and titles of the draft principles provisionally adopted by the Drafting Committee on first reading."[120]

## V. Case Studies: Recent JEP Decisions and Potential New Prosecutions

As described above, Colombian domestic law on its own is insufficient to protect the natural environment in the course of the Colombian Armed Conflict or in the event of another armed conflict. The prohibitions posited in the Colombian Criminal Code do not have a broad and comprehensive view of effects to the natural environment that could happen in the case of a military confrontation. That is why lawyers and legal institutions—especially the JEP—must use international law when addressing harm to the natural environment in the Colombian Armed Conflict context.

As demonstrated, the JEP has the jurisdiction to investigate, prosecute, and punish crimes related to harms against the natural environment in the context of the Colombian Armed Conflict. In this sense, there are some situations that occurred during the conflict that were not reviewed by local authorities but could be investigated by the JEP. Furthermore, these cases or situations have conditions which allow the JEP to address issues such as widespread, longterm, and severe damage to the natural environment and the application of IHL general principles such as the proportionality principle or the distinction principle.

### A. Recent JEP Cases: Cases 002 and 005

As discussed, the JEP has the function of selecting and prioritizing cases that fall under its jurisdiction. In that process, the JEP has opened so-called "cases," which are macro-cases that encompass different crimes either by the zone of occurrence or the type of crime. As of March 2020, the JEP has opened seven cases related to different types of victimization that occurred nationwide or regionally.[121] Of those

120. Int'l Law Comm'n, Protection of the Environment in Relation to Armed Conflicts, U.N. Doc. A/CN.4/L.937, draft princs. 8, 18 (June 6, 2019) [hereinafter *ILC Draft Principles on First Reading*].

121. On Case 001, see Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] julio 04, 2018, Auto No. 002 de 2018 (Colom.). On Case 002, see Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] julio 10, 2018, Auto No. 004 de 2018 (Colom.) [hereinafter *Decision 004*]. On Case 003, see Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y

seven cases, there are four decisions in two cases, Cases 002 and 005, that show the possibility of developments in ICL and IHL in relation to the protection of the environment.

The first two are Decision 074 of 2018 and Decision 032 of 2019 that opened Case 005. This case is related to various serious violations of human rights and IHL that occurred in the north of the Department of Cauca and south of the Department of Valle del Cauca in southwest Colombia.[122]

In both decisions, the SRVR, which establishes the facts and conduct that will be prosecuted, referred to the environmental impact that the Colombian Armed Conflict had on the Cauca inhabitants.[123] Among others, it mentioned the effects that the destruction of the environment had on groups under special protection, such as indigenous and poor peoples, and Afro-Colombian and Romani communities.[124] It also highlighted the fact that some of the hazardous effects on the environment came from activities such as deforestation, illegal mining, cultivation of illegal crops (particularly coca crops), and attacks on oil pipelines.[125]

The third decision issued in Case 002 relates to serious human rights and IHL violations that occurred in the Nariño Pacific Coast (southwest Colombia).[126] In Decision 079 of 2019, the SRVR recognized as victims the 32 indigenous groups belonging to the Awá indigenous people associated within the indigenous association Unidad

Conductas [SRVR] julio 17, 2018, Auto No. 005 de 2018 (Colom.). On Case 004, see Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] septiembre 11, 2018, Auto No. 040 de 2018 (Colom.). On Case 005, see Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] noviembre 8, 2018, Auto No. 078 de 2018 (Colom.) [hereinafter *Decision 078*]; Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] marzo 12, 2019, Auto No. 032 de 2019 (Colom.) [hereinafter *Decision 032*]. On Case 006, see Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] febrero 26, 2019, Auto No. 027 de 2019 (Colom.). On Case 007, see Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas [SRVR] marzo 01, 2019 Auto No. 029 de 2019 (Colom.).

122. On Decision 078, the *SRVR* opened the case related to different crimes that occurred in eight municipalities located in the mentioned region. *See Decision 078*, *supra* note 121. In Decision 032, the Chamber added nine municipalities. *See Decision 032*, *supra* note 121.

123. *Decision 078*, *supra* note 121, ¶ 15.9.

124. *Decision 032*, *supra* note 121, ¶ 6.2.1.3.9.

125. *Id.*; *Decision 078*, *supra* note 121, ¶ 15.9.

126. *Decision 004*, *supra* note 121.

Indígena del Pueblo Awá–UNIPA.[127] When doing this, the SRVR spoke about the *Katsa Su*. This concept relates to the conception that the Awá People have of the world and its components as a whole, including the territory, the people, and even the supra-natural species. In the words of the Chamber:

> According to the Awá people, they belong to the "Katsa Su," which is alive, is Mother Earth, are the fountain of good living and the house of the Awá people and the beings that inhabit it. In the Katsa Su the Awá people carry out every experience of spirituality . . . Effectively, for the indigenous peoples as the Great Awá Family, "The world is not dual, everything is one, interrelated and interdependent; there is no separation between the material, the cultural and the spiritual. Also, everything is alive and sacred, not just human beings, but also hills, caves, water, houses, plants, and animals have social agency . . . Then, the Katsa Su is woven from relationships endowed of sacred significance and integrated by diverse communal, social, and natural relations underlying the existence and identity of the Awá People. In words of a member of the Awá People: "without territory, we do not exist."[128]

Under that basis, the Chamber recognized that the *Katsa Su* (the territory) was a victim itself, which derives its right to participate as a direct victim in the proceedings before the JEP via the Awá indigenous groups and its representatives.[129]

The SRVR took a similar view in Decision 02 of 2020 in Case 005. In that decision, a wide number of indigenous groups represented by the Consejo Regional Indígena del Cauca Regional–CRIC and the Asociación de Cabildos Indígenas del Norte del Cauca–ACIN were recognized as victims. The SRVR established that the "Great Nasa Territory of the Çxhab Wala Kiwe" was also a victim due to the relationship between the indigenous peoples and the territory.[130]

The importance of those decisions is the recognition not only of the environmental effects and damages that occurred during the Colombian Armed Conflict that could amount to international crimes, but also the recognition of the environment as a victim itself in relation to the concept indigenous peoples have of it. Therefore, one can conclude that the JEP does have an interest in prosecuting crimes that have harmful effects on the environment not only from a hegemonic and western point of view, but also from a nonhegemonic and nonwestern world

127. *SRVBIT 079*, *supra* note 53, ¶¶ 8–13, First Resolutive Point.
128. *Id.* ¶¶ 81, 86.
129. *Id.* at First Resolutive Point.
130. *Auto No. 02*, *supra* note 53, at 18–24, Fifth Resolutive Point.

view. On that point, it must be highlighted that the relationship between indigenous peoples, their territory and the effect of armed conflict in the environment was included by Rapporteur Jacobsson[131] which resulted in the Draft Article 5 and established the importance of the consulting with those peoples while taking remedial measures.[132]

Nevertheless, these cases are not the only situations in which the JEP can analyze this type of crime. As discussed above, prioritization is a workload management tool. That means that some conduct is not yet being investigated by the Justice Chambers but could be when, in the next months or years, the JEP opens new situations or cases. In this vein, some conduct that may constitute international crimes under the scope of the JEP will be addressed below.

### B. Aerial Herbicide Spraying

As Professors Hector Olásolo and Felipe Tenorio-Obando show, organized armed groups have used drug trafficking to finance their activities.[133] In response, the Colombian State implemented a program of aerial herbicide spraying over coca crops.[134] Olásolo and Tenorio-Obando conclude that some operations of aerial herbicide spraying over illegal crops—specifically coca crops—could amount to an attack under IHL.[135] Further, they also state that under IHL, those attacks are unlawful as the crops and the farmers who grow them cannot be considered lawful targets under IHL, since they do not directly

131. *Jacobsson third report*, *supra* note 81, ¶¶ 121–29. Rapporteur Jacobbsson also highlighted the importance between indigenous peoples and their territories which has been developed by the Inter-American Court of Human Rights. *See* Río Negro Massacres v. Guat., Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284 (Sept. 4, 2012). This relation is of such nature that the Court recently acknowledged its importance for those peoples' economic, social and cultural rights such as a healthy natural environment or the right to water; s*ee also* Indigenous Communities of the Lhaka Honhat (Our Land) Ass'n v. Arg., Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶¶ 194–254 (Feb. 6, 2020).

132. *See ILC Draft Principles on First Reading*, *supra* note 120, draft princ. 5 (maintaining that with respect to the "[p]rotection of the environment of indigenous peoples: 1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit. 2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.").

133. Héctor Olásolo & Felipe Tenorio-Obando, *Are the Targets of Aerial Spraying Operations in Colombia Lawful Under International Humanitarian Law?*, 20 Y.B. Int'l Humanitarian Law 229, 232 (Terry D. Gill et al. eds., 2017).

134. *Id.* 230–31, 234–37; *La Paz Ambiental*, *supra* note 12, at 29–30.

135. Olásolo & Tenorio-Obando, *supra* note 133, at 237–40.

participate in hostilities.[136] This position (the harmful effects of aerial herbicide spraying over coca crops) is also posited by scholars Rodriguez Garavito, Rodriguez Franco, and Durán Crane.[137]

In addition to those conclusions, these attacks are likely also illegal under IHL because of their disproportionality and lack of distinction, which result in harmful effects on the natural environment.[138] In fact, this policy had a transboundary effect over the frontier with Ecuador, which resulted in a case before the ICJ.[139] This was resolved via an amicable agreement between Ecuador and Colombia. However, as Professor Fabian Cárdenas and scholar Oscar Casallas argue, the agreement reached between the Governments of Ecuador and Colombia that resulted in the discontinuance of the proceedings brought by Ecuador could amount to a Colombian recognition of international responsibility.[140]

It would be useful if the JEP considers the recognition of responsibility when addressing this specific conduct. Indeed, this recognition before an international tribunal allows litigants to avoid a moot debate on whether or not the aerial spraying was an international wrongful act and lets the JEP focus its attention on the assessment of those conduct under IHL and ICL, especially because the zones prioritized under Case 002 are the same as those in which the aerial spraying of the ICJ case was based.

### C. Bombing of Oil Pipelines

In Colombia, different organized armed groups have intentionally bombed pipelines as a form of military response toward the State while making a political claim.[141] Indeed, the FARC-EP had a left-wing

136. *Id.* at 240–48.

137. *La Paz Ambiental*, *supra* note 12, at 29–30.

138. Some of the effects that those operations had on inhabitants of the departments of Nariño and Putumayo in southwest Colombia are collected by late colombian sociologist and member of the Truth Commission Alfredo Molano Bravo. *See* Alfredo Molano Bravo, Del otro lado (2017).

139. Aerial Herbicide Spraying (Ecuador v. Colom.), Order, 2013 I.C.J. 278 (Sept. 13).

140. Cárdenas and Casallas posit that the first part of the agreement reached between the parties is the recognition of responsibility of Colombia for the violation of territorial sovereignty and the environmental damage caused by the aerial herbicide spraying in the frontier between the two States. The rest of the agreement relates to the obligation to stop the wrongful act and the reparation of the injury caused by it. *See* Fabián Augusto Cárdenas Castañeda & Oscar Orlando Casallas Méndez, *La Negociación como Estrategia de Defensa del Estado y el Caso* Ecuador c. Colombia *por las Fumigaciones con Glifosato*, *in* The Law of International Litigation: Legal Tools and Strategy for International Disputes Resolution in the 21st Century 179, 205–11 (Rafael A. Prieto Sanjuán ed., 2015).

141. Fundación Ideas para la Paz, *El ELN y la Industria Petrolera: Ataques a la Infraestructura en Arauca* 7–8 (2015), http://cdn.ideaspaz.org/media/website/document/55411b8a3ccab.pdf [https://perma.cc/QD9E-TTNX] [hereinafter *ELN e Industria*

political motivation, so they saw the oil industry as an enemy.[142] Thus, they bombed oil pipelines, causing damage to the natural environment with the subsequent oil spill.[143] Since 2018, there have reportedly been 1500 different instances of this practice over forty years that resulted in 3.7 million oil barrels spilled, some of them due to both FARC-EP and National Liberation Army–ELN attacks.[144] A concrete example of this conduct is the bombing of the Trans-Andean Oil Pipeline in 2015 by the FARC-EP at the municipality of Tumaco (which is included in Case 005), which spilled approximately 10,000 oil barrels that eventually flowed into the Pacific Ocean.[145] This conduct is clearly related to the Colombian Armed Conflict, falling under the jurisdiction of the JEP.

From a legal standpoint, one could argue that this conduct is contrary to IHL. Specifically, it violates principles such as proportionality, distinction, and precaution. It also violates ICRC Customary Rules 43 and 44 (and one could make the case for Rule 45). Given the multitude of IHL principles violated (and even domestic law), it is easy to conclude that this conduct can be considered a war crime. Thus, the JEP has not only the ability but the obligation to investigate, prosecute, and punish those responsible. In addition, in this particular case, the JEP has the opportunity to use both the Elements of the Crimes and the Rome Statute when addressing (and solving) the issue of the high threshold to prove widespread, long term, and severe damage to the natural environment previously described.

### D. Natural Resources and Illegal Mining by Nonstate Armed Actors

As has been shown, the present Article relates mainly to war crimes and its effects on the environment. Nonetheless, some harmful

*Petrolera*]; Alfonso Avellaneda Cusaria, *Petróleo, ambiente y conflicto en Colombia*, *in* Guerra, sociedad y medio ambiente 455, 493 (Martha Cárdenas & Manuel Rodríguez Becerra ed., 2004); *La Paz Ambiental*, *supra* note 12, at 29.

142. Germán Nicolás Pataquiva García, *Las FARC, su origen y evolución*, 19 UNISCI Discussion Papers 154, 174 (2009); *ELN e Industria Petrolera*, *supra* note 141, at 8.

143. *La Paz Ambiental*, *supra* note 12, at 29; *see also* Revista Semana, *Voladuras: una cruda arma de guerra* (2019), http://especiales.sostenibilidad.semana.com/voladuras-de-oleoductos-en-colombia/index.html [https://perma.cc/RF93-NBTZ].

144. Jorge Sáenz V, *Oleoducto Caño Limón-Coveñas ha sufrido 1.500 atentados*, El Espectador (Jan. 15, 2018, 8:15 PM), https://www.elespectador.com/economia/oleoducto-cano-limon-covenas-ha-sufrido-1500-atentados-articulo-733475 [https://perma.cc/P24P-RQJ7].

145. Tatiana Pardo Ibarra, *En Colombia se han derramado 3,7 millones de barriles de crudo*, El Tiempo (Apr. 20, 2018, 9:29 PM), https://www.eltiempo.com/vida/medio-ambiente/cifras-de-derrames-de-crudo-en-colombia-en-los-ultimos-anos-207664 [https://perma.cc/R7HM-BMUH].

effects are not related exclusively to war crimes. Some clear examples are the case of forced displacement and illegal mining.

Forced displacement has been one of the most severe effects that the Colombian Armed Conflict had on the civilian population.[146] Even if forced displacement is studied under the scope of IHRL and as a crime against humanity, there must also be acknowledgement of the impacts that forced displacement has had on the natural environment. For example, a study conducted by the International Law and Policy Institute[147] illustrates the effect that this humanitarian crisis had on the environment in Colombia. The gravity and side effects of forced displacement may be enough to open a countrywide case. Nonetheless, the harmful effects that forced displacement had on the environment could—and must—be considered when addressing this issue.

Finally, another relevant activity is illegal mining conducted by FARC-EP. As some authors put it, this was one of FARC's main sources of financing that harmed the natural environment.[148] Hence, it is important that the JEP approaches this matter while producing case law that could contribute to the resolution of other conflicts in which organized armed groups similarly use illegal mining as a form of financing.

## Conclusion

The transitional legal framework in Colombia is complicated due to the intertwined sources of domestic and international law. That does not make the JEP judges' work easy when addressing crimes perpetrated in the Colombian Armed Conflict, especially those that resulted in harms to the natural environment. However, the JEP has taken on the challenge of addressing those crimes. Consequently, the use of international law could evolve into an innovative approach that integrates the complexity brought by international law, specifically IHL and ICL.

The ability of the JEP to harness this complex framework when addressing damages to the natural environment would allow the JEP to become a pioneer tribunal, creating case law that encompasses

146. *See* Centro Nacional de Memoria Histórica, Una Nación Desplazada: Informe Nacional del Desplazamiento Forzado en Colombia (2015).

147. *See* International Law and Policy Institute, Protection of the Natural Environment in Armed Conflict: An Empirical Study 5, 46 (2014); *see also Lehto second report*, *supra* note 81, ¶ 40.

148. *See* OECD, Due Diligence in Colombia's Gold Supply Chain: Overview 11–12 (2017); *see also* Max G. Manwaring, *The Revolutionary Armed Forces of Colombia (FARC): A Transnational Criminal-Insurgent-Terror Phenomenon*, *in* Terrorist Criminal Enterprises: Financing Terrorism Through Organized Crime 84 (Kimberley L. Thachuk & Rollie Lal eds., 2018).

customary and conventional IHL and ICL relating to environmental harms for the first time and, more specifically, apply international law principles applicable to the Colombian State in NIACs. In so doing, the JEP could illuminate the scope and reach of IHL and ICL when protecting the natural environment, while exposing the legal consequences of attacks during the nearly fifty-year-long Colombian Armed Conflict.