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1. Introduction

1. Humanity faces a triple planetary crisis: climate change, pollution and biodiversity loss, a dire situation characterised by United Nations (UN) Secretary-General António Guterres as ‘waging war on nature’.¹ This threefold crisis has been yielding devastating consequences, inflicting widespread human suffering, particularly upon the most vulnerable individuals and communities, and over many years.
2. The environmental crisis is intrinsically linked to human rights. In July 2022, with 161 votes in favour, the UN General Assembly unanimously recognised the right to a clean, healthy and sustainable environment (R2hE).² This right has also been acknowledged in regional agreements and instruments in Africa, the Americas, Asia and Europe,³ and in more than 100 national constitutions.⁴ UN Special Rapporteurs on human rights and the environment,⁵ along with the case law of numerous regional human rights courts,⁶ have clarified both its procedural and substantive components.

¹ ‘The UN Secretary-General Speaks on the State of the Planet’ (*United Nations*) <<https://www.un.org/en/climatechange/un-secretary-general-speaks-state-planet>>.

² UNGA Res 76/300 (28 July 2022) A/Res/76/300, recognising the ‘right to a clean, healthy and sustainable environment as a human right’. There were eight abstentions, including by China and Russia. See also UNHRC Res 48/13 (8 October 2021) A/HRC/Res/48/13, recognising ‘the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights’ and encouraging States ‘to adopt policies for the enjoyment’ of such right (37 Member States of the Council of Europe supported this resolution).

³ Article 24 of the African Charter on Human and Peoples’ Rights (adopted 1 June 1981, entered into force 21 October 1986) 1520 UNTS 217; Article 11(1) of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978); Article 38 of the Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) [ST/HR/CHR/NONE/2004/40/Rev.1; Paragraph 28(f) of the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (adopted 19 November 2012); Article 1 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘Aarhus Convention’) (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

⁴ See UNHCR, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Right to a Healthy Environment: Good Practices’ (30 December 2019) UN Doc A/HRC/43/53. More States have recognised the right at the national and regional levels since this report.

⁵ See the 16 framework principles setting out basic obligations of States under human rights relating to the R2hE, as established by John Knox, Special Rapporteur on Human Rights Obligations concerning the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment, in 2018: UNHRC, ‘Report of the Special Rapporteur on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (24 January 2018) A/HRC/37/59. The framework principles highlight how existing human rights obligations apply in the context of the protection of the environment and the promotion of sustainable development. See also subsequent reports of the Special Rapporteur on Human Rights Obligations concerning the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment.

⁶ ACtHPR, *African Commission on Human and Peoples’ Rights v Republic of Kenya* (Judgment) App No 006/2012 (26 May 2017) para 199; ECOWAS, *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* (Judgment) ECW/CCJ/JUD/18/12 (14 December 2012), para 112-121; ECOWAS, *African Network for Animal Welfare v Attorney General of the United Republic of Tanzania* (Judgment) Ref No 9/2010 (20 June 2014), para 86; IACtHR, *The Environment and Human Rights (State Obligation in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights* (Advisory Opinion) OC-23/17 (15 November 2017); IACtHR, *Comunidades Indígenas Miembros de la Asociación Lhaa Honhat (Nuestra Tierra)* (Judgment) (6 February 2020), esp 202-89. Even though the European Convention on Human Rights does not enshrine the right to a healthy environment as such, the European Court of Human Rights has been called upon to develop its case-law in environmental matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks. See (i) right to life in ECtHR, *LCB v the United Kingdom* (Judgment) App No 23413/94 (9 June 1998), and

3. In its 2022 Resolution, the UN General Assembly highlighted the importance of respecting, protecting, and fulfilling this fundamental right. It noted that ‘the right to a clean, healthy and sustainable environment is related to other rights and existing international law’, and called upon international organisations to ‘adopt policies, to enhance international cooperation, strengthen capacity-building (...) in order to scale up efforts to ensure a clean, healthy and sustainable environment for all’.⁷
4. In this context, we submit that the R2hE provides a relevant lens through which to address the challenges related to the investigation and prosecution of crimes that are committed by means of, or that result in, environmental damage under the Rome Statute. The incorporation of the R2hE and its associated rights into the legal framework and policies of the International Criminal Court (ICC or the Court) would be a significant step towards mitigating the environmental crisis and building a more resilient and sustainable future.
5. We recommend that the ICC Office of the Prosecutor (OTP) adopts the R2hE and associated rights as the foundational framework for its approach on environmental crimes in accordance with Article 21(3) of the Rome Statute, which mandates the application and interpretation of the Rome Statute in a manner that is consistent with internationally recognised human rights. Specifically, we advocate for the OTP to conduct a comprehensive evaluation of any evidence brought to its attention that would reliably support allegations of severe violations and abuses⁸ of the R2hE whenever such violations endanger the habitability of the environment.⁹ This should be done with a view to determining whether there is a reasonable basis to proceed with an investigation into a situation pursuant to the criteria established by the Rome Statute.¹⁰
6. This approach is grounded in the interconnectedness between human populations and their surroundings, emphasising the intrinsic link between environmental degradation and human suffering. By placing environmental harm at the forefront of its analysis, the OTP could

ECtHR, *Öneriyıldız v Turkey* (Judgment) App No 48939/99 (30 November 2004); (ii) the right to respect for private and family life in ECtHR, *Cordella and Others v Italy* (Judgment) App No 54414/13 and 54264/15 (24 January 2019), ECtHR, *Kotov and Others v Russia* (Judgment) App No 6142/18 and 13 others (11 October 2022), ECtHR, *Locascia and Others v Italy* (Judgment) App No 35648/10 (19 October 2013), ECtHR, *Solyanik v Russia* (Judgment) App No 47987/15 (10 May 2022), ECtHR, *Tătar v Romania* (Judgment) App No 67021/01 (27 January 2009), ECtHR, *Vilnes and Others v Norway* (Judgment) App No 52806/09 and 22703/10 (5 December 2013); (iii) freedom of expression and freedom to receive and impart information in ECtHR, *Bryan and Others v Russia* (judgment) App No 22515/14 (27 June 2023), ECtHR, *Bumbeş v Romania* (Judgment) App No 18079/15 (3 May 2022), ECtHR, *Rovshan Hajiye v Azerbaijan* (Judgment) App No 19925/12 and 47532/13 (9 December 2021); (iv) freedom of assembly and association in ECtHR, *Costel Popa v Romania* (Judgment) App No 47558/10 (26 April 2016); (v) right to an effective remedy in *Hatton and Others v the United Kingdom* (Judgment) App No 36022/97 (8 July 2003); and (vi) protection of property in ECtHR, *Dimitar Yordanov v Bulgaria* (Judgment) App No 3401/09 (6 September 2018), ECtHR *Turgut and Others v Turkey* (Judgment) App No 1411/03 (8 July 2008).
⁷ UNGA Res 76/300 (28 July 2022) A/Res/76/300, recognising the ‘right to a clean, healthy and sustainable environment as a human right’, 3.

⁸ See HRC, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy’ Framework”’ (21 March 2011) A/HRC/17/31, which distinguishes between an abuse of human rights when perpetrated by a business enterprise and a violation of human rights when carried out by a State. In this document, ‘violation’ shall be understood to encompass the actions and behaviours of State actors, corporate actors, armed actors, and/or organised criminal groups, as outlined in Section 3, provided that such conduct and activities meet the criteria defined under paragraph 7.

⁹ See Laurent Neyret, « Réveiller l’écocide » (2022) 4 RSC 767. The concept of habitability should be understood as referring to local impacts for the purpose of assessing the material jurisdiction of the ICC, while regional and global impacts are relevant to the admissibility evaluation under Article 17(1)(d) of the Rome Statute.

¹⁰ See OTP, ‘Policy Paper on Preliminary Examinations’ (November 2013). See also Article 15(3) of the Rome Statute.

address the systemic impact of human actions on the environment, while also tackling harm suffered by individuals and collectives as a result of environmental degradation.

7. Human acts and conduct jeopardise environmental habitability when they result in significant and/or irreversible damage to ecosystems, disrupt vital natural processes, degrade essential resources like clean air and water, and undermine the ability of present and future generations to inhabit a safe and sustainable environment. These threats manifest through conduct and activities falling into three main categories:
 - **Destruction of ecosystems:** conduct and activities which are intended to or, in the ordinary course of events, known to cause the destruction or degradation of natural habitats and ecosystems like wetlands, forests, coral reefs and mangroves, and thereby disrupt ecological balance and reduce biodiversity.
 - **Unsustainable natural resources exploitation:** conduct and activities (such as logging, overfishing, mining, trafficking in fauna and flora, oil and gas extraction including fracking and intensive agriculture) which are intended to or, in the ordinary course of events, known to cause the extraction or harvesting of natural resources at a rate that exceeds their natural regeneration capacity, leading to environmental degradation and loss of habitat.
 - **Pollution and contamination:** conduct and activities such as industrial operations, waste management practices and infrastructure projects, which are intended to or, in the ordinary course of events, known to cause the release of harmful substances (such as industrial emissions, untreated sewage, chemical runoff and soil contamination) into the environment, posing risks to human health and ecosystem integrity.
8. When such conduct and activities involve or result in severe violations of the R2hE and associated rights,¹¹ we encourage the OTP to assess whether there is a reasonable basis to believe that a crime falling within the jurisdiction of the Court has been committed. The severity of the violations should ‘involve harm that goes beyond temporary unhappiness, embarrassment or humiliation’, and should be appreciated in light of whether the harm ‘results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life’.¹² This understanding helps to distinguish between grave violations of fundamental rights and mere temporary discomfort.
9. Against this backdrop, the present contribution seeks to identify the provisions based on which the ICC could exercise its material jurisdiction over the three categories of conduct and activities identified above (Section 2) and examines relevant modes of liability to hold individuals criminally liable for the same (Section 3). Since the effective investigation and prosecution of such activities cannot be achieved without reliable evidence collected according to the best standards and practices, the contribution also includes recommendations on that matter (Section 4). Finally, it provides suggestions on the implementation of the principle of complementarity to close the impunity gap in environmental crimes (Section 5).

¹¹ It applies to both procedural and substantial components of the R2hE, as clarified by the UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (see (n 4)) and in the case law of international and regional courts (see (n 6)).

¹² *Krstić* (Judgment) IT-98-33-T, TC (2 August 2001) para 513. See also *Akayesu* (Judgment) ICTR-96-4-T, TC I (2 September 1998) para 502; *Muthaura, Kenyatta and Ali* (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11, PTC II (23 January 2012) paras 270-279.

2. Material Jurisdiction

10. We advocate for a thorough assessment of evidence supporting any allegations of severe violations to the R2hE and associated rights that may amount to the crime of genocide, crimes against humanity or war crimes.

2.1. Genocide (Article 6 of the Rome Statute)

11. The destruction of the environment may be deemed as a method designed to imperil the existence of a protected group under Article 6 of the Rome Statute. Sub-paragraph (c) appears to be the only genocidal act which can cover the destruction of ecosystems as well as pollution and contamination, provided that they are aimed at '[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'. It must be established that the substandard measures imposed by the perpetrator are implemented and intended to ensure that the members of the group would be unable to survive by their own efforts.

12. The inclusion of the term 'deliberately' within sub-paragraph (c) presupposes that the perpetrated act must ultimately seek the physical destruction of the group,¹³ rather than its immediate obliteration.¹⁴ No proof of result is required. The *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide reveal that measures or conditions of life imposed by the perpetrator are understood as covering those circumstances that would lead to a 'slow death'.¹⁵ An ordinary and broad meaning of the term 'inflicting on the group conditions of life' serves better not only the protective purpose of the Convention,¹⁶ but particularly the rationale of sub-paragraph (c).¹⁷ Moreover, the act of '[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' does not suggest that members of the group must be in captivity or under strictly controlled measures. The wording of the provision may therefore accommodate conditions of life which are deliberately inflicted on groups not deprived of liberty.

13. The wide scope of 'conditions of life' implies that a violation of sub-paragraph (c) may take many forms. Early, but not adjudicated, examples of such genocidal act are found in the

¹³ *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries* (Yearbook of the International Law Commission, vol II, 1996) 46, para 15, fn 124: '[t]he word "deliberately" was included there to denote a precise intention of the destruction, i.e. the premeditation related to the creation of certain conditions of life'. See also Damien Short, *Redefining Genocide: Settler Colonialism, Social Death and Ecocide* (Zed Books 2016) 30: 'physical destruction need not to be direct but can of course be achieved indirectly through inflicting on the group "conditions of life" (such as dispossession and environmental destruction) which lead to that end'.

¹⁴ See also Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government and Proposals for Redress* (Carnegie Endowment for International Peace 1944) 79: 'genocide does not necessarily mean the immediate destruction of a nation'.

¹⁵ Doc E/AC.25/W.1, reprinted in Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff Publishers 2008) 981. This approach has been confirmed consistently by available jurisprudence, including *Kayishema and Ruzindana* (Judgment) ICTR-95-1-T, TC II (21 May 1999) para 115; *Stakić* (Judgment) IT-97-24-T, TC II (31 July 2003) paras 517-18 (*Stakić* (Trial Judgment)); *Brđanin* (Judgment) IT-99-36-T, TC II (1 September 2004) para 691; *Tolimir* (Judgment) IT-05-88/2-T, TC II (12 December 2012) para 740; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3, para 161.

¹⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23: '[The object of the Convention is, *inter alia*,] to safeguard the very existence of certain human groups'.

¹⁷ Elements of Crimes, Article 6(c), sub-para (4), fn 4: '[t]he term "conditions of life" may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes'.

man-made famine derived from the seizure of the crop by Soviet authorities in 1932, which caused the death of ‘millions’ of inhabitants of the Ukrainian Soviet Socialist Republic and the North Caucasus Territory between 1932 and 1933.¹⁸ A starvation program was also implemented in occupied territories against civilian population during the Second World War.¹⁹ Other measures that pursued the extermination of prisoners in concentration camps included, *inter alia*, ‘sadism, inadequate clothing, medical neglect, disease, beatings, hangings, freezing, forced suicides, shooting, etc’.²⁰ More recently, in the *Al Bashir* arrest warrant decision, Pre-Trial Chamber I referred to the Prosecution’s application in which it is stated that armed forces of the Government of Sudan ‘systematically destroyed the means of survival – including food, shelter, crops, livestock and, in particular, wells and water pumps – of the Fur, Masalit and Zaghawa civilian population in Darfur’.²¹ Similarly, the Commission of Inquiry on the Syrian Arab Republic documented ISIS’s attacks against the Yazidis in the context of sub-paragraph (c), which included, amongst other methods of destruction, restricting access to food, water and medical care.²² The Commission determined that the terrorist group had committed ‘the prohibited act of deliberately inflicting on captured Yazidis conditions of life calculated to bring about their physical destruction, in whole or in part’.²³

14. In light of the above, ‘[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ appears to encapsulate a non-exhaustive list of prohibited acts in relation to environmental destruction. Such conditions inflicted on groups could result in a lack of proper food, water, shelter, sanitation, fuel and other vital supplies that guarantee their means of survival. Having said that, and considering the legal difficulty in proving genocidal intent, prosecuting ecosystem destruction or pollution and contamination as stand-alone offences under sub-paragraph (c) holds little prospect of success.²⁴ Rather, it seems more likely that environmental destruction could provide a sufficient basis for a genocide charge only in the context of a campaign that involves other inflicting and accompanying measures directed against a protected group.²⁵

¹⁸ See US Commission on the Ukraine Famine, ‘Report to Congress’ (19 April 1988) iv <<https://babel.hathitrust.org/cgi/pt?id=uc1.l0052174679&seq=5>>. The same conduct was also reported in Kazakhstan between 1928 and 1932. See Isabelle Ohayon, ‘The Kazakh Famine: The Beginnings of Sedentarization’ (*SciencesPo*, 28 September 2013) < <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/kazakh-famine-beginnings-sedentarization.html>>.

¹⁹ IMT, *Trial of German Major War Criminals* (Judgment, 1 October 1946) 55: ‘[the defendants] degraded the standard of life of the people of occupied countries and caused starvation, by stripping occupied countries of foodstuffs for removal to Germany’.

²⁰ *ibid* 234-35.

²¹ *Al Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, PTC I (4 March 2009) para 91 (*Al Bashir* (Arrest Warrant)).

²² Commission of Inquiry on the Syrian Arab Republic, ‘“They Came to Destroy”: ISIS Crimes against the Yazidis’ (15 June 2016) A/HRC/32/CRP.2, para 138.

²³ *ibid* para 141.

²⁴ See also Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (CUP 2022) 77.

²⁵ The contextual element of the crime refers to a “conduct [that] took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”, although neither the Rome Statute nor the Elements of Crimes require that environmental destruction be accompanied by other practices to constitute genocide. See Elements of Crimes, Article 6(c), sub-para (5).

2.2. Crimes against Humanity (Article 7 of the Rome Statute)

2.2.1. Contextual Elements

15. An attack against the environment should be understood as an attack that involves one or several of the above-described conduct and activities amounting to the destruction of ecosystems, the unsustainable exploitation of natural resources and/or pollution or contamination, as defined in paragraph 7.
16. An attack against the environment could encompass ‘the **multiple commission of acts** referred to in article 7(1)’, in particular deportation or forcible transfer of population, persecution and/or other inhumane acts (see Sections 2.2.2 to 2.2.5).
17. An attack against the environment could constitute an attack directed against **any civilian population**. Whilst the requirement has been interpreted as meaning that ‘the civilian population must be the primary target and not the incidental victim of the attack’,²⁶ the Appeals Chamber found that it does not necessitate ‘a separate finding that the civilian population was the primary object of the attack’.²⁷
18. The interconnectedness of the environment and humanity explains why an attack against the first would constitute an attack against the second. An attack against the environment can have local, regional and global consequences, directly or indirectly affecting dozens, hundreds or even thousands of individuals. While it is difficult to hold an individual criminally liable for the regional and global consequences of an attack on the environment, because of the difficulty of establishing the necessary link between the act in question and the harm caused, the same does not necessarily apply as regards local impacts.²⁸ Local impacts can manifest themselves in violations to the R2hE and associated rights as identified in paragraph 7.
19. This is particularly true for civilian populations whose survival directly depends on the environment for water, food, shelter, and spiritual and/or cultural reasons, including Indigenous peoples. For example, the existence of *El Cerrejón* coal mine in La Guajira, Colombia, generates disastrous impacts for the Wayúu Indigenous peoples. Not only have they developed a series of health issues due to the contamination of air, water and vegetation, but they also have lost access to clean water and, as result, are deprived of an essential element for the enjoyment of their cultural and spiritual life.²⁹
20. An attack against the environment can be conducted **pursuant to or in furtherance of a State or organisational policy**. This is notably the case when a State implements a policy aimed at facilitating the unbridled exploitation and destruction of the environment, as happened in Brazil under the administration of Jair Bolsonaro (2019-2022).³⁰ Likewise, this

²⁶ *Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) para 1104 (*Katanga* (Trial Judgment)).

²⁷ *Ntaganda* (Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 Entitled ‘Judgment’) ICC-01/04-02/06 A A2 (30 March 2021) para 418 (*Ntaganda* (Appeal Judgment)).

²⁸ Pauline Martini, Joe Holt and Maud Sarliève, ‘Mass Deforestation as a Crime against Humanity?’ (2023) 72 ICLQ 1013, 1018-19.

²⁹ Paula Companioni, ‘La Injusticia de la Mina de carbón El Cerrejón contra el Pueblo Wayúu en La Guajira’ (*Todos somos Colombia*, 28 December 2023) <<https://todossomoscolombia.org/la-injusticia-de-la-mina-de-carbon-el-cerrejon-contra-el-pueblo-wayuu-en-la-guajira/>>.

³⁰ Maud Sarliève, Nigel Povoas, Pauline Martini and Joe Holt, ‘Legal Experts’ Report. Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to

is the case when a State implements a policy against the environment the effects of which are expected to affect the civilian population, as occurred in Darfur, Sudan, with the contamination of ‘wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups’.³¹

21. The same would apply when ‘an organised body of people with a particular purpose’³² ‘actively promotes or encourages’ an attack against the environment.³³ Potential scenarios would include those where an armed group exercising control over a territory promotes, encourages or brings about an attack against the environment, for example as a means to fund their armed battle. Illustrations can be found in countries like Cambodia,³⁴ Colombia,³⁵ the Democratic Republic of the Congo (DRC),³⁶ Liberia,³⁷ Mexico,³⁸ Senegal,³⁹ and Sierra Leone amongst others,⁴⁰ where armed groups have exploited or are exploiting the environment for financial purposes.
22. ‘Deliberate failure to take action’ with the aim to encourage such attack would also point towards the existence of a State or organisational policy.⁴¹ This would encompass cases where a chief executive officer (CEO) of large company fails to take action to address

Present’ (October 2021) paras 275-416
<https://www.researchgate.net/publication/365201912_Legal_Experts'_Report_to_the_Office_of_the_Prosecutor_of_the_International_Criminal_Court>.

³¹ *Al Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09, PTC I (12 July 2010) 7 (*Al Bashir* (Second Arrest Warrant)).

³² *Gbagbo* (Confirmation of Charges) ICC-02/11-01/11, PTC I (12 June 2014) para 217.

³³ Elements of the Crimes, Article 7, 3.

³⁴ Lois M Davis, ‘Forests and Conflict in Cambodia’ (2005) 7(2) Int’l Forestry Rev 161. See also Global Diligence, ‘Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes against Humanity in Cambodia. July 2002 to Present’ (7 October 2014) <<https://www.business-humanrights.org/en/latest-news/communication-under-article-15-of-the-rome-statute-of-the-international-criminal-court-the-commission-of-crimes-against-humanity-in-cambodia/>>.

³⁵ See Flaviano Bianchini, ‘Large Landed Oil Palm Crops’ (2012) VIII(31) ITPCM Int’l Commentary, ‘Colombia. Land and Human Issues’, 22; International Crisis Group, *Deeply Rooted: Coca Eradication and Violence in Colombia* (Latin America Report No 87, International Crisis Group 2021), 5-6; International Crisis Group, *A Broken Canopy: Preventing Deforestation and Conflict in Colombia* (Latin America Report No 91, International Crisis Group 2021); InSight Crime and Igarapé Institute, ‘The Roots of Environmental Crime in the Colombian Amazon’ (September 2021) <<https://igarape.org.br/wp-content/uploads/2021/11/InsightCrime-Igarape-EN.pdf>>.

³⁶ Ruben De Koning, ‘Controlling Conflict Resources in the Democratic Republic of the Congo’ (July 2010) SIPRI Policy Brief <<https://www.sipri.org/sites/default/files/files/misc/SIPRIPB1007.pdf>>.

³⁷ Global Witness, ‘Dangerous Liaisons. The Continued Relationship between Liberia’s Natural Resource Industries, Arms Trafficking and Regional Insecurity’ (8 December 2004) <<https://reliefweb.int/report/liberia/dangerous-liaisons-continued-relationship-between-liberias-natural-resource>>.

³⁸ Flaviano Bianchini, ‘Minería y Violencia’ in Manuel Aguilar Mora (ed), *La Noche de Iguala y el Despertar de México* (Juan Pablos 2015); Ximena Santaolalla, ‘State Crime, Extraction and Cartels. The Meaning of Mining in Guerrero, Mexico’ (*Revista Harvard Review of Latin America*, 26 July 2023) <<https://revista.drclas.harvard.edu/state-crime-extraction-and-cartels-the-meaning-of-mining-in-guerrero-mexico/>>; ‘Mexican Cartel Earns More from Mining and Logging than Drugs’ (*CBC*, 17 March 2014) <<https://www.cbc.ca/news/business/mexican-cartel-earns-more-from-mining-and-logging-than-drugs-1.2575826>>.

³⁹ TRIAL International, ‘Pillage. *Westwood*: Dealing in Conflict Timber’, Press release (23 March 2020) <https://trialinternational.org/wp-content/uploads/2020/03/press-kit-Westwood_EN-1.pdf>; BBC News Africa, ‘The Trees that Bleed: How Rosewood is Smuggled from Senegal into Gambia’ (*YouTube*, 10 March 2020) <https://www.youtube.com/watch?v=G_GmLPPNbGc&ab_channel=BBCNewsAfrica>.

⁴⁰ Zoe Marks, ‘Rebel Resource Strategies in Civil War: Revisiting Diamonds in Sierra Leone’ (2019) 75 Political Geography 102059.

⁴¹ *Bemba* (Judgment pursuant to Article 74 of the Statute) ICC-01/0501/08, TC III ((21 March 2016) para 159 (*Bemba* (Trial Judgment)); *Ntaganda* (Judgment) ICC-01/04-02/06, TC VI (8 July 2019) para 667 (*Ntaganda* (Trial Judgment)).

environmental harm, although they know that their activities contribute to the unsustainable exploitation of natural resources and/or pollution and contamination.⁴²

23. An attack against the environment can be widespread and/or systematic. Amongst the elements identified by the ICC to identify the **widespread** character of an attack for the purpose of Article 7,⁴³ some are of particular relevance in the context of attacks against the environment:

- The geographical extent of the attack against the environment (e.g. large-scale campaign of deforestation, water pollution, contributions to climate change with global effects);
- The multiplicity of victims (e.g. high number of victims suffering from health issues, water or food deprivation due to water, air or soil contamination);
- The seriousness of the consequences of the attack, which should be appreciated in light of the resulting violations of the civilian population's R2hE and associated rights; and
- The duration of the attack (e.g. series of environmentally harmful practices whose execution is encouraged and facilitated through the adoption of relevant national legislation over a large period of time, or through non-compliance with existing legislation over a large period of time).

24. An illustration of the widespread character of an attack against the environment can be found in the situation of the mining town of Cerro de Pasco, Peru. Over decades of mining, the area has experienced severe environmental degradation, including soil and water contamination, air pollution and the destruction of local ecosystems.⁴⁴ The environmental degradation has resulted in significant health risks for the local population. Residents are exposed to toxic heavy metals and other pollutants through contaminated water sources, air pollution from mining operations and the consumption of crops grown in polluted soil. These environmental hazards have led to high rates of respiratory illnesses, skin diseases and other health problems amongst residents.⁴⁵ Furthermore, the mining activities in Cerro de Pasco have had profound social and economic impacts on the local community. Land subsidence and sinkholes caused by underground mining have led to the destruction of homes and infrastructure, forcing residents to relocate. The loss of agricultural land and natural

⁴² See potential illustrations: Monica Pelliccia, 'For a Beekeeping Couple in Costa Rica, Pesticides Are Killing the Buzz' (*Mongabay*, 1 April 2022) <<https://news.mongabay.com/2022/04/for-a-beekeeping-couple-in-costa-rica-pesticides-are-killing-the-buzz/>>; Maud Sarliève, 'Ecuador: Toxic Justice and Tourism by Texaco Waste Pools' (*JusticeInfo*, 14 March 2019) <<https://www.justiceinfo.net/en/40565-ecuador-toxic-justice-and-tourism-by-texaco-waste-pools.html>>; 'Powering Change or Business as Usual? Forced Evictions at Industrial Cobalt and Copper Mines in the Democratic Republic of the Congo' (*Amnesty International*, 12 September 2023) <<https://www.amnesty.org/en/latest/news/2023/09/drc-cobalt-and-copper-mining-for-batteries-leading-to-human-rights-abuses/>>.

⁴³ *Bemba* (Trial Judgment) (n 41) para 163; *Ntaganda* (Trial Judgment) (n 41) para 691.

⁴⁴ Flaviano Bianchini, Giancarlo Pascali, A Campo, Santino Orecchio, Riccardo Bonsignore, Pietro Blandino and Pietro Pietrini, 'Element Contamination of an Open-Pit Mining Area in the Peruvian Andes' (2015) 12 Int'l J Environmental Science and Technology 1065; Santino Orecchio, Flaviano Bianchini, Riccardo Bonsignore, Pietro Blandino, Salvatore Barreca and Diana Amorello, 'Profiles and Sources of PAHs in Sediments from an Open-Pit Mining Area in the Peruvian Andes' (2015) 36(4) Polycyclic Aromatic Compounds 1.

⁴⁵ Xulia Fandiño Piñeiro, Mauro T Ave, Narmeen Mallah, Francisco Caamaño-Isorna, A Nuria Guisández Jiménez, Duarte Nuno Vieira, Flaviano Bianchini and José Ignacio Muñoz-Barús, 'Heavy Metal Contamination in Peru: Implications on Children's Health' (2021) 11 Scientific Reports 22729.

resources has disrupted traditional livelihoods, exacerbating poverty and social inequality in the region.

25. An attack against the environment can also present a **systematic** character. This can be assessed in light of the following elements, amongst others:⁴⁶
- The organised nature of the acts of violence (e.g. planned and coordinated attacks against Indigenous territories for illegal purposes, like cattle-ranching, mining, logging or wildlife trafficking); and
 - The existence of patterns of crimes and ‘continual repetition of a same modus operandi’⁴⁷ (e.g. consistent and repeated overfishing or extensive agricultural exploitation in the same regions).
26. The trafficking of hazardous waste, orchestrated by organised criminal groups, could be another relevant illustration of a systematic attack: these groups follow a consistent pattern, involving criminal practices such as falsifying documents, exploiting legal loopholes and engaging in bribery. These practices, which also disproportionately impact vulnerable communities, enable criminals to profit from illicit activities while posing serious risks to public health and the environment through the associated pollution.⁴⁸
27. In most instances of environmental degradation, perpetrators primarily intend to exploit natural resources. This can imply that, at first glance, their **knowledge** of the attack is limited to aspects linked to environmental degradation, and does not encompass the awareness that the attack is also directed against a civilian population.
28. However, this element must be interpreted in light of Article 30(3) of the Rome Statute, which defines the term ‘knowledge’. Following such approach, a perpetrator ‘knowingly participates’⁴⁹ in an attack against the environment when they intend their conduct or activities to generate gross violations of a civilian population’s R2hE and associated rights, or knew that such consequence would arise from their conduct or activities in the ordinary course of events. Whilst this approach would introduce ‘an additional *mens rea* requirement and would further burden the OTP’, it would provide greater protection for the right of the accused compared to the introduction of an objective knowledge requirement.⁵⁰ This second option would presume that one knows the consequences of an attack against the environment on the civilian population ‘*because of objective, material factors*’,⁵¹ meaning that it would be enough ‘that the accused was aware of the environmental destruction’.⁵² The ‘general historical and political environment in which the acts occurred’ would be particularly relevant to assessing whether the perpetrator has such knowledge.⁵³

⁴⁶ *Katanga* (Trial Judgment) (n 26) para 1123; *Ntaganda* (Trial Judgment) (n 41) para 692.

⁴⁷ *Katanga*, *ibid*, para 1113; *Ntaganda*, *ibid*, para 693.

⁴⁸ See for example Interpol, *Strategic Report. The Nexus between Organized Crime and Pollution Crime* (NORAD 2022) <<https://www.interpol.int/en/News-and-Events/News/2022/Report-Pollution-crime-is-highly-profitable-organized-and-harming-the-planet>>.

⁴⁹ *Katanga*, *ibid*, para 1125.

⁵⁰ Martini, Holt and Sarliève (n 28) 1028. See also Chile Eboe-Osuji, ‘Crimes against Humanity: Directing Attacks against a Civilian Population’ (2008) 2 *AfrJLegalStud* 118, 122.

⁵¹ *ibid* 1026.

⁵² Caitlin Lambert, ‘Environmental Destruction in Ecuador: Crimes against Humanity under the Rome Statute’ (2017) 30 *LJIL* 707, 725.

⁵³ *Katanga and Chui* (Decision on the Confirmation of Charges) ICC-01/04-01/07-717, PTC I (30 September 2008) para 402 (*Katanga and Chui* (Confirmation of Charges)); *Al Hassan* (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) ICC-01/12-01/18, PTC I (8 November 2019) para 170.

2.2.2. Extermination (Article 7(1)(b))

29. The definition of extermination ‘includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’.⁵⁴ It quickly becomes apparent that the scope of the provision is broad for the purpose of covering an open list of acts that could amount to an ‘intentional infliction of conditions of life (...) calculated to bring about the destruction of part of a population’.⁵⁵ The destruction of ecosystems, the unsustainable exploitation of natural resources, and pollution and contamination could therefore be deemed as extermination, provided that those acts are ‘intentional’ and ‘calculated to bring about the destruction of part of a population’. Proof of result is required.
30. The wording of Article 7(2)(b) is similar but not identical to sub-paragraph (c) of Article 6 of the Rome Statute, which prohibits the act of ‘[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’. The crimes of extermination and genocide are legally distinct since the latter requires that the identity of the protected group overlaps with the intent of the perpetrator. The same does not hold true for extermination, whose threshold is considerably lower as it serves to circumscribe the scope of the crime to cases where (‘mass’) killings are committed,⁵⁶ against ‘groups’ of persons.⁵⁷
31. A joint reading of the Elements of Crimes and available jurisprudence reveals that extermination may take place in a context of widespread or systematic attack against a large number of people who are subjected to extreme conditions of living that would inevitably lead to death.⁵⁸ The ‘**large-scale**’ requisite is determined on a case-by-case basis.⁵⁹ The perpetrator’s conduct could be committed by different methods of killing, either directly (by killing the victim with a firearm) or indirectly (by creating conditions resulting in the victim’s death).⁶⁰ Both Article 7(2)(b) and the Elements of Crimes for Article 7(1)(b) refer to the deprivation of access to food and medicine as an example of measures imposed by the perpetrator on members of a civilian population,⁶¹ who do not share any common characteristics⁶² such as religion, sexual or political orientation, nationality or ethnicity.

⁵⁴ Article 7(2)(b) of the Rome Statute.

⁵⁵ *ibid.*

⁵⁶ Elements of Crimes, Article 7(1)(b), sub-para (2). See also *Vasiljević* (Judgment) IT-98-32-T, TC II (29 November 2002), para 232 (“‘extermination’ supposes the taking of a large number of lives”); *Krstić* (n 12) para 501 (“[t]he very term ‘extermination’ strongly suggests the commission of a massive crime”); *Case 001* (Judgment) 001/18-07-2007/ECCC/TC, TC (26 July 2010), para 334; *Seromba* (Judgment) ICTR-01-66-A, AC (12 March 2008) para 189.

⁵⁷ Elements of Crimes, Article 7(1)(b), sub-para (1). This is consistent with *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries* (n 13) 48, para 8 (“[e]xtermination is a crime which by its very nature is directed against a group of individuals”). See also *Akayesu* (n 12) para 591; *Musema* (Judgement and Sentence) ICTR-96-13-A, TC I (27 January 2000) para 217; *Rutaganda* (Judgment and Sentence) ICTR-96-3-T, TC I (6 December 1999) para 82.

⁵⁸ Elements of Crimes, Article 7(1)(b), sub-paras (1) to (4). See *Kayishema and Ruzindana* (Judgment) ICTR-95-1-T, TC II (21 May 1999) para 145; *Ntakirutimana* (Judgement and Sentence) ICTR-96-17-A, AC (13 December 2004) paras 521-22; *Stakić* (Judgment) IT-97-24-A, AC (22 March 2006) para 259 (*Stakić* (Appeal Judgement)).

⁵⁹ *Kayishema and Ruzindana* (Judgment) ICTR-95-1-T, TC II (21 May 1999) para 145; *Lukić and Lukić* (Judgment) IT-98-32/1-A, AC (4 December 2012) para 538.

⁶⁰ Elements of Crimes, Article 7(1)(b), sub-para (1), fn 8. See also *Krstić* (n 12) para 498; *Bradnin* (Judgment) IT-99-36-T, TC II (1 September 2004) para 389.

⁶¹ Elements of Crimes, Article 7(1)(b), sub-para (1), fn 9.

⁶² *Lukić and Lukić* (n 59) para 538.

Selected killings fall to this effect under the scope of extermination.⁶³ Concerning the **mental element** of the crime, the Elements of Crimes seem to be oriented towards requiring an intent to participate in the killings or in inflicting the conditions of living that would inevitably result in the death of persons.⁶⁴ Unlike the crime against humanity of persecution, extermination does not require a discriminatory motive on the part of perpetrator.

32. The wide scope of Article 7(1)(b) may contemplate different acts pertaining to environmental destruction. By way of example, the contamination of food or water resources vital to the survival of a certain civilian population appear to meet the requirement ‘inflicting conditions of life’ as it creates the circumstances that ultimately may cause the mass death of individuals. A single killing in the context of a destruction program or policy involving large-scale killings may be subject to individual criminal responsibility as long as the perpetrator acted in the knowledge of such context.⁶⁵ In the *Al Bashir* arrest warrant decision, Pre-Trial Chamber I referred to the main elements of extermination by stating that the crime ‘requires that the relevant killings constitute or take place as part of “a mass killing of members of a civilian population”.’⁶⁶ In this respect, the same Chamber held that it was ‘of the view that there are reasonable grounds to believe that acts of extermination, such as the alleged killing of over a thousand civilians in connection with the attack on the town of Kailek on or around 9 March 2004, were committed by [Government of Sudan] forces against civilians primarily from the Fur, Masalit and Zaghawa groups, in the Darfur region, during the relevant period’.⁶⁷ Pre-Trial Chamber I relied on evidence presented by the Prosecution, who contended that such armed forces ‘systematically destroyed the means of survival – including food, shelter, crops, livestock and, in particular, wells and water pumps – of the Fur, Masalit and Zaghawa civilian population in Darfur’.⁶⁸

2.2.3. Deportation or Forcible Transfer of the Population (Article 7(1)(d))

33. The criminalisation of forcible transfers is meant to ‘protect the right of individuals to remain in their homes or communities unhindered’.⁶⁹ Therefore, it should be applicable whenever the destruction of ecosystems, unsustainable exploitation of natural resources, pollution and contamination reaches a scale that inevitably results in the deportation or forcible displacement of a population.
34. The *actus reus* of the crime against humanity of forcible transfer of population requires first to establish that a civilian population faces a genuine lack of choice but to leave the places where they were lawfully present. The ‘**genuine lack of choice**’ may result from ‘other factors than intentional firing at civilians or the civilian population’.⁷⁰ Criteria to be considered include ‘the prevailing situation and atmosphere, as well as all other relevant circumstances, including in particular the victims’ vulnerability’.⁷¹ This would cover the situation of local communities where the toxic substances emitted as a result of the extraction

⁶³ *Draft Code of Crimes against the Peace and Security of Mankind with Commentaries* (n 13) 48, para 8: ‘[extermination] also applies to situations in which some members of a group are killed while others are spared’.

⁶⁴ See Elements of Crimes, Article 7(1)(b), sub-paras (1) and (4).

⁶⁵ *Kayishema and Ruzindana* (n 59) para 147. This position has been endorsed by Kai Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing* (OUP 2014) 85: ‘it is the combined effect of a vast murderous enterprise and the accused’s part in it, in contrast to a simple murder, which gives the crime [of extermination] its specificity and distinctiveness’.

⁶⁶ *Al Bashir* (Arrest Warrant) (n 21) para 96.

⁶⁷ *ibid* para 97.

⁶⁸ *ibid* para 91.

⁶⁹ *Ntaganda* (Trial Judgement) (n 41) para 1069.

⁷⁰ *Ntaganda* (Trial Judgement) (n 41) para 1056.

⁷¹ *ibid* para 1056.

of natural resources are such that civilians living in these pollution-affected areas have inevitably and predictably been forced to leave their homes, such as in Cerro de Pasco (Peru),⁷² Oyu Tolgoi (Mongolia)⁷³ or the Farmington river basin (Liberia).⁷⁴ In these places, contamination of water, soil and/or air have created conditions of life such that local populations either leave or die. In the *Al Bashir* case, the OTP reached the same conclusion with respect to attacks targeting the victims' essential resources for survival, such as water wells, as a means of displacing the population.⁷⁵ The African Court on Human and Peoples' Rights also took a similar stance in the *Mau Ogiek* case, ruling that Kenya violated the Ogiek community's rights to land, culture and freedom of religion by forcibly displacing them for the economic development of the Mau Forest.⁷⁶

35. The '**lawful presence**' requirement does not require the victim to have had a legal residence in the area: 'this protection extends to individuals who, for whatever reason, have come to live in a community, including internally displaced persons who have established temporary homes after being uprooted from their original communities'.⁷⁷ This element would therefore be satisfied if applied to Indigenous communities, including those living on lands that have not been formally recognised as Indigenous lands. The question of the link between ecosystem destruction and forced displacement arises in the case of many Indigenous populations whose habitats disappear. This includes the Arctic Region, where permafrost thawing disrupts ecosystems and habitats, affecting wildlife populations crucial for Indigenous peoples' food, clothing and cultural practices, potentially leading to their displacement. Additionally, Indigenous communities in tropical forests encounter comparable challenges due to deforestation and habitat destruction, endangering their traditional way of life and prompting relocation in search of alternative survival strategies. In large portions of the Amazon, for example, climate change and deforestation could cause the rainforest to reach a tipping point as soon as 2050. For Indigenous peoples, this massive-scale ecosystem transformation away from the rainforests that have existed for millennia, could interrupt cultural practices, livelihoods, access to food, water and ecological knowledge systems.⁷⁸

36. Regarding the '**unlawful nature of the displacement**', in the examples mentioned, authorities might justify their decision to displace people by claiming compliance with regulations developed as part of economic policy. It is interesting to note that in this respect, the Extraordinary Chambers in the Courts of Cambodia ruled that '[e]conomic policy is not a recognised ground under international law to justify forced population transfers'.⁷⁹ When

⁷² See 'Case Study. Mining. Environmental and Human Contamination Cerro de Pasco Lead Mine' (*Center for Climate Crime Analysis*) <<https://climatecrimeanalysis.org/project/environmental-and-human-contamination-cerro-de-pasco-lead-mine/>>; 'Cerro de Pasco: A Community Being Swallowed by a Mine' (*Justice, Peace, Integrity of Creation*, 1 January 2022) <<https://www.jpjic-jp.org/en/a/cerro-de-pasco-a-community-being-swallowed-by-a-mine/>>.

⁷³ See 'Oyu Tolgoi Mining Conflict in Mongolia' (*Climate Diplomacy*) <<https://climate-diplomacy.org/case-studies/oyu-tolgoi-mining-conflict-mongolia/>>; 'Is Rio Tinto Managing Herders in "Oyu Tolgoi City" in the South Gobi Region of Mongolia' (*London Mining Network*, 14 October 2012) <<https://londonminingnetwork.org/2012/10/is-rio-tinto-managing-herders-in-oyu-tolgoi-city-in-the-south-gobi-region-of-mongolia/>>.

⁷⁴ Swed Watch, *Murky Waters. Environmental and Human Rights Impacts of Natural Rubber Processing in Liberia* (Swed Watch 2021) <<https://swedwatch.org/wp-content/uploads/2021/02/reportmurkywaters.pdf>>.

⁷⁵ *Al Bashir* (Second Arrest Warrant) (n 31).

⁷⁶ *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 6). See also Gillett (n 24) 81–83.

⁷⁷ *Ntaganda* (Trial Judgement) (n 41) para 1069.

⁷⁸ Bernardo M Flores et al, 'Critical Transitions in the Amazon Forest System' (2024) 626 *Nature* 555.

⁷⁹ *Case 002/01* (Case 002/01 Judgement) 002/19-09-2007/ECCC/TC, TC (7 August 2014) para 550. The Trial Chamber stated that even if the humanitarian or economic situation could have justified the evacuation, the

coercive measures resulting in displacement are enforced after an environmental attack, it could be argued that these measures aim to protect the population and safeguard their rights, thereby justifying the displacement as lawful. This is where examining the intent or *mens rea* becomes decisive.

37. The ***mens rea* requirement** for the crime against humanity of forcible transfer of population necessitates demonstrating that the perpetrator intended the removal of the person(s) to be permanent. This entails showing that the individual either intended to cause the forcible transfer or was aware that it would occur in the ordinary course of events, as outlined in Article 30(2)(b) of the Rome Statute. Such instances have occurred previously as a result of ecosystem destruction, unsustainable resource exploitation, contamination and pollution, as evidenced in the *Al Bashir* Arrest Warrant or the *Mau Ogiek* case ruling by the African Court on Human and Peoples' Rights. Importantly, the ability of forcibly displaced persons to return to their former residence at a later time does not affect the assessment of the original displacement's legality. The duration of displacement does not alter its illegality. The duration of the displacement has no impact on its illegality.⁸⁰

2.2.4. Persecution (Article 7(1)(h))

38. Intentional and severe deprivations of the R2hE and associated rights, contrary to international law,⁸¹ are relevant for considerations under Article 7(1)(h) of the Rome Statute.⁸² Concrete cases have demonstrated that victims of such deprivations can be targeted as a group or collectivity as such, or by reason of the identity of a group or collectivity 'based on **political, racial, national, ethnic, cultural, religious, gender or other grounds** that are universally recognised as impermissible under international law'.⁸³
39. This would include, for example, the treatment and targeting of Indigenous persons and others who depend on, and defend, the Brazilian Legal Amazon during the tenure of Jair Bolsonaro's administration in Brazil from 2019-2022. The targeted Indigenous peoples and other traditional populations⁸⁴ in the Brazilian Amazon represent an easily identifiable group in respect of whom discrimination is prohibited under international law.⁸⁵ Such communities depend on the ecosystems of the Brazilian Legal Amazon for water, food, shelter, and often for their religious, cultural or traditional identities. Any attacks directed against these ecosystems necessarily and intrinsically also constitute attacks against the population dependent upon them.⁸⁶ Conduct such as the poisoning and re-routing of rivers, contamination of soil, destruction of hunting grounds, depletion of fish stocks, pollution of the air and the destruction of burial grounds or other locations of cultural significance all point to severe violations of this fundamental right.⁸⁷

requirement of proportionality was not met, and evidenced that point by stating that the refugees never returned, and that 'food, shelter, medicine and transport' were provided sporadically.

⁸⁰ *Simic* (Trial Judgment), para 134.

⁸¹ See Section 1.

⁸² See further discussions in Martini, Holt and Sarliève (n 28) 1030-32.

⁸³ See Article 7(2)(h) of the Rome Statute and Elements of Crimes, Article 7(1)(h), sub-para 2 and 3.

⁸⁴ These groupings include the *Quilombolas* (the descendants of Afro-Brazilian slaves who escaped from slave plantations that existed in Brazil until abolition in 1888), *Ribeirinhos* (self-dependent communities who live along the riverbanks), *Extrativistas* or *Seringueiros* ('rubber tappers', communities who remove non-timber forest products without felling the trees) and landless rural workers and their families – see Sarliève, Povoas, Martini and Holt (n 30) paras 59-63.

⁸⁵ *Tadić* (Judgment) ICTY-94-1-A, AC (15 July 1999) para 305: the discriminatory intent 'is an indispensable legal ingredient' of the crime of persecution.

⁸⁶ See Article 7(2)(a) of the Rome Statute.

⁸⁷ See *ibid*, Annexes 1 and 2.

40. In a context such as the one that occurred in Brazil from 2019-2022, where environmental crimes so clearly degrade and destroy the natural environment upon which identifiable groups depend for their basic needs and their way of life, charges of persecution could be brought based on these severe violations of the R2hE, alongside any other charges deemed appropriate in the context of that offending (having regard to the requirement that the persecutory conduct must have been committed ‘in connection with any act referred to in Article 7(1) or any crime within the jurisdiction of the Court’).⁸⁸
41. The same could arguably be said of the situation of the pastoralist communities located around the Oyu Tolgoi mine, in Mongolia, where nomadic herders have had their traditional grazing lands disrupted or appropriated and have been forced to relocate to make way for mining infrastructure, leading to loss of livelihoods and cultural dislocation. Mining activities have resulted in pollution of water sources and land degradation, which have negatively impacted pasturelands and the health of livestock, further threatening the sustainability of nomadic pastoralism.⁸⁹
42. The elements of persecution include the requirement to demonstrate that **the perpetrator targeted individuals or groups based on their identity or targeted the group itself**, and that such targeting was **motivated by grounds universally recognised as impermissible under international law**, such as political, racial, national, ethnic, cultural, religious, gender, or other prohibited grounds. While these elements may not always be fulfilled in every case involving violations of the R2hE, their application could be conceptually straightforward in certain instances of environmental offenses.
43. To take again the example of the targeted Indigenous and traditional populations in the Brazilian Legal Amazon during the presidential tenure of Jair Bolsonaro, these groups were perceived as obstacles hindering the unsustainable exploitation and destruction of the forest and its resources. They were deliberately targeted by virtue of their Indigenous identity and their opposition to the unbridled exploitation of the environment. Proving these elements in cases involving deprivations of the R2hE inflicted upon these groups, based on their protected status as Indigenous persons, should theoretically pose no significant obstacle.

2.2.5. Other Inhumane Acts (Article 7(1)(k))

44. Article 7(1)(k) provides that it is an offence to intentionally inflict ‘great suffering’ or ‘serious injury to body or to mental or physical health’ by means of an inhumane act of a character similar to any of the other offences mentioned in Article 7(1).
45. Article 7(1)(k) is a residual category of crimes against humanity whose open formulation leaves scope to expand the ambit of the offences under Article 7(1), albeit Pre-Trial Chamber II has recognised that the provision ‘must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity’.⁹⁰ Nonetheless, it requires only an incremental development of the existing case law in respect of Article 7(1)(k) to hold that that the great suffering caused by environmental destruction could constitute an other inhumane act within the meaning of Article 7(1)(k).
46. The first aspect of the first element of the crime requires that ‘[t]he perpetrator inflicted **great suffering, or serious injury to body or to mental or physical health**’. There are at least two possible routes to satisfying this element in the context of the environmental

⁸⁸ Elements of Crimes, Article 7(1)(h), sub-para 4, fn 22: ‘[i]t is understood that no additional mental element is necessary for this element other than that inherent in element 6’.

⁸⁹ ‘Oyu Tolgoi Mining Conflict in Mongolia’ (n 73).

⁹⁰ *Muthaura, Kenyatta and Ali* (n 12) para 269.

offending: (i) that the contamination of waterways, soil and food chains has caused serious injury to body or physical health;⁹¹ and (ii) that the destruction of the forest has caused ‘great suffering’ or serious injury to the mental health of those who depend on the forest. This latter option may perhaps be most relevant in the context of Indigenous persons or others whose way of life is intimately related to the environment being destroyed.

47. As regards the concept of the infliction of ‘great suffering’, it is of note that in *Muthaura, Kenyatta and Ali*, the OTP sought to bring charges of other inhumane acts on the basis, *inter alia*, of the anguish caused as a result of damage to property.⁹² In particular, the OTP referred to ‘destruction or vandalizing of property and businesses’ and ‘destroying homes and businesses through acts of arson and looting personal properties’.⁹³ The Pre-Trial Chamber was not satisfied that the evidence established the requisite ‘great suffering’ to constitute an other inhumane act because it failed to establish that the acts of destruction of property caused ‘serious injury to mental health’, and because nothing was presented ‘to the effect of establishing the occurrence, the type and the intensity of the alleged mental suffering caused, in itself, by the loss of property’.⁹⁴ However, the Pre-Trial Chamber did not rule out the possibility, in principle, that the suffering caused by the destruction of property could amount to another inhumane act.

48. While not a direct comparator, the comments of the Court in the *Al Mahdi* judgment demonstrate that the Court is alive to the harms that can be inflicted on local communities by the destruction of sites of cultural and religious importance.⁹⁵ Trial Chamber VIII considered that the fact that the buildings targeted by the defendant (mausoleums and a mosque) ‘were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu’ was relevant in assessing the gravity of the crime committed.⁹⁶ While those comments were made in the context of sentencing a defendant who had pleaded guilty to the war crime of intentionally directing attacks against ten buildings of a religious and historical character, it is not an excessive leap to recognise that the great suffering caused by such destruction could also ground a charge under Article 7(1)(k). Moreover, the protected cultural values referred to in that case can be considered analogous to the values which underlie the protection of the natural environment, *a fortiori* in the context of Indigenous and other populations for whom the environment in question has a particular cultural, religious or social value, and who depend on the natural environment for their sustenance, health and shelter.

49. In addition, the great suffering must have been inflicted ‘**by means of an inhumane act**’,⁹⁷ and such act must have been ‘of a **character similar** to any other act referred to’ in

⁹¹ As mentioned in Section 2.1 and Section 2.2.2, it is noteworthy that the Second Arrest Warrant for former Sudanese President Omar Al Bashir noted that there were reasonable grounds to believe that forces under the President’s control had contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked (*Al Bashir* (Second Arrest Warrant) (n 31)). While this was stated in the context of a charge of genocide by deliberately inflicting conditions of life calculated to bring about the group’s physical destruction, it is recognition of the fact that the systematic poisoning of drinking water sources in Darfur constituted the means by which a crime within the jurisdiction of the Court could be committed.

⁹² *Muthaura, Kenyatta and Ali* (n 12).

⁹³ *ibid* paras 267-68.

⁹⁴ *ibid* para 279.

⁹⁵ *Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171, TC VIII (27 September 2016).

⁹⁶ *ibid* para 79.

⁹⁷ Elements of Crimes, Article 7(1)(k), subpara 1.

Article 7(1).⁹⁸ While we do not contend that all instances of grazing, logging, mining, ranching or other activities which lead to deforestation and environmental destruction are inhumane, such characterisation would be appropriate in the case of, for example, the destruction of a sacred site or a location of particular cultural importance to Indigenous persons and other ethnic or traditional communities, even where the underlying activity (for example, mining) was not inherently inhumane when viewed in isolation. Similarly, the diversion of a river for an infrastructure project, resulting in a severe deprivation of food⁹⁹ and water for communities downstream, and the consequent damage to human health and the way of life of such persons, could also fairly be described as an inhumane act.

50. We do not suggest that Article 7(1)(k) is broad enough to criminalise environmental destruction unconditionally. That provision requires that the acts in question be of a similar ‘character’ (i.e. nature and gravity) to the other acts listed in Article 7(1)(a)-(j), and the anthropocentric nature of the crimes in those subsections renders it unlikely that the destruction of property could ever be recognised as an ‘other inhumane act’ under Article 7(1)(k) in its own right. The offence could only be made out where the environmental destruction in question had the consequence of inflicting great suffering on a human population.

51. While this may mean that most environmental crimes fall outside of the ambit even of Article 7(1)(k), we suggest that our interpretation of the Article is a permissible one which would serve to put environmental destruction to the forefront of the Court’s analysis of crimes against humanity in at least some circumstances. Rather than discussing other crimes against humanity which happened to have occurred against the backdrop of illegal mining, deforestation, land-grabbing and other environmental destruction, those very activities would become central to the Court’s consideration of the offending behaviour, as they are the acts causing the ‘great suffering’ at the heart of the offence. This approach therefore offers the advantage of putting the environmental destruction at the centre of the Court’s analysis, albeit the offence would still require the ‘great suffering’ of a human person before it could be made out.

2.3. War Crimes (Article 8 of the Rome Statute)

2.3.1. Contextual Elements

a) Awareness of the Existence of a Conflict

52. Establishing the perpetrator’s knowledge of the factual circumstances that the existence of an armed conflict¹⁰⁰ should not pose significant challenges when considering the environmental impact of a conflict. One possible difficulty could arise in cases of prolonged occupation, where the intensity of the fight is no longer obvious, although the unsustainable

⁹⁸ Elements of Crimes, Article 7(1)(k), subpara 2. Pursuant to footnote 30 of the Elements of Crimes, it is understood that character ‘refers to the nature and gravity of the act’.

⁹⁹ In Cnaan de Cachiacu, in the Peruvian Amazon, the river was so polluted that the community could not fish and malnutrition was rampant. See Compliance Advisory Ombudsman, ‘Appraisal Report. Maple Energy Plc. Cnaan and Nuevo Sucre, Peru’ (10 May 2012) C-I-R9-Y12-F155; Human Rights Law Clinic of the University of California, Berkley, School of Law, ‘Accountability & International Financial Institutions. Community Perspectives on the World Bank’s Office of the Compliance Advisor Ombudsman’ (March 2017) 65 <<https://www.law.berkeley.edu/wp-content/uploads/2015/04/Accountability-International-Financial-Institutions.pdf>>.

¹⁰⁰ Elements of the Crimes, Article 8, Introduction.

exploitation of natural resources, destruction of ecosystems and pollution/contamination is even more likely.

53. In the West Bank, where the Israeli-Palestinian conflict has endured for decades, the awareness of armed conflict might have been obscured at times by the complex political and legal status of the territory. Despite periods of relative calm, the environmental impact of the conflict is evident in the continued unsustainable exploitation of natural resources, including land expropriation for settlements and agricultural activities, as well as ecosystem destruction resulting from construction projects and waste disposal practices. The environmental consequences persist irrespective of the fluctuating intensity of the conflict, significantly impacting essential rights such as access to water, food and health.¹⁰¹
54. Following the annexation of Crimea by Russia in 2014, tensions and geopolitical shifts unfolded between pro-Ukrainian and pro-Russian population groups. Pro-Russian factions would have asserted the Peninsula's Russian identity, denying the existence of any armed conflict, while others would have identified the situation as a military occupation, creating potential challenges with respect to the awareness requirement. Nevertheless, the Russian annexation has reportedly resulted in the unsustainable exploitation of natural resources, such as illegal logging and mining activities, alongside ecosystem destruction caused by the development of civilian and military infrastructure, notably the construction of the Kerch Bridge.¹⁰²
55. In such cases, where the determination of whether a situation of occupation exists might impact the awareness of armed conflict, a case-by-case assessment will be necessary, guided by customary international law, as reflected in Article 42 of the Hague Regulations of 1907, and by the International Court of Justice jurisprudence.¹⁰³

b) Nexus between the Armed Conflict and the Criminal Conduct

56. The OTP should consider the criteria developed in the ICC jurisprudence to establish the nexus between the armed conflict and the criminal conduct which causes severe violations of the R2hE and associated rights.¹⁰⁴
57. It is worth stressing that **the perpetrator does not need to be a member of a party to the armed conflict** for the alleged crimes to be considered as occurring 'within the context' of an armed conflict.¹⁰⁵ Non-military actors have been prosecuted for war crimes in the past,

¹⁰¹ 'Assessment Reveals that Environmental Degradation Is Threatening the Viability of the West Bank and Gaza' (*Conflict and Environment Observatory*, 8 June 2020) <<https://ceobs.org/un-report-details-environmental-degradation-in-west-bank-and-gaza/>>; UNEP, *State of Environment and Outlook Report for the Occupied Palestinian Territory 2020* (UNDP 2020) <<https://www.unep.org/resources/report/state-environment-and-outlook-report-occupied-palestinian-territory-2020>>.

¹⁰² Romashchenko Mykailo Ivanovych and Serhii Anatoliyovitch Shevchuk, 'About Some Environmental Consequences of Kerch Strait Bridge Construction' (2018 6(1) *Hydrology* 1; Sofia Sadugurska, 'Mines, Sunken Ships, Destroyed Nature Reserves – What Do We Know about the Impact of the Russian War on the Black Sea and the Sea of Azov' (*Eco Action*, 22 August 2023) <<https://en.ecoaction.org.ua/what-do-we-know-about-the-impact-of-the-russian-war-on-the-black-sea-and-the-sea-of-azov.html>>.

¹⁰³ *Legal Consequences on the Construction of a Wall in the Occupied Palestine Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 78; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168, para 172. See also Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94(885) ICRC 133.

¹⁰⁴ *Bemba* (Trial Judgment) (n 41) paras 142-44; *Katanga* (Trial Judgment) (n 26) 1176; *Ntaganda* (Trial Judgment) (n 41) para 731.

¹⁰⁵ *ibid.*

including crimes involving severe violations of the R2hE and associated rights.¹⁰⁶ In domestic jurisdictions, numerous cases are emerging against executives of companies and banks in industries like oil, minerals, wood, beef and cement. These cases seek to hold individuals accountable for allegedly collaborating with armed groups or authoritarian regimes to safeguard their economic interests, irrespective of the detrimental impact on local communities' environment and natural resources.¹⁰⁷

58. The **status of the victims** may be relevant in establishing the nexus between the armed conflict and the conduct leading to severe violations of the R2hE and associated rights. This is of particular relevance for cases involving the destruction of ecosystems, as well as pollution and contamination. In the West Bank,¹⁰⁸ environmental degradation attributed to the construction of Israeli settlements, industrial zones and military checkpoints, has particularly impacted Palestinian civilians. This is because the activities result in the discharge of untreated sewage, hazardous waste and pollutants into the environment, which contribute to the contamination of water sources and agricultural lands. The long-lasting impacts on water and soil will affect generations to come, irrespective of whether a peace agreement is reached. In Colombia, victims of the *Fuerzas Armadas de Colombia – Ejército del Pueblo's* (FARC-EP) practices of illegal mining and reconversion of agricultural lands – which it was found had a drastic footprint on the environment that will likely take generations to erase – were primarily Indigenous and Afrocolombian communities.¹⁰⁹

59. Likewise, **whether the existence of the armed conflict significantly influenced the perpetrator's decision-making or ability to commit the crime**¹¹⁰ is a relevant factor to establish the nexus between an armed conflict and severe violations of the R2hE and associated rights. This criterion is particularly relevant for crimes involving environmental degradation, often economically driven. Indeed, it is not uncommon to see organised criminal groups and corporate actors take advantage of situations of conflict to facilitate the commission of crimes for their economic benefit, at the expenses of the environment and the local communities depending on it. For instance, in Casamance, a region in southern Senegal, the conflict between the Senegalese government and the *Mouvement des forces démocratiques de Casamance* has led to the unsustainable exploitation of natural resources, particularly rosewood, resulting in deforestation and environmental degradation, intensifying the challenges faced by local communities and ecosystems.¹¹¹ In the DRC,

¹⁰⁶ See the trial of Alfred Jodl in *Trial of German Major War Criminals* (n 19); UNWCC, *Polish Forestry Case* (Judgment) Case No 7150 in UNWCC, *1948 History of the United Nations War Crimes Commission and the Development of the Laws of War* (HMSO 1948) 496. See also 'The Proliferation of Corporate War-Crimes Cases' (2023) 29(8) *Strategic Comments* xv.

¹⁰⁷ Trial International, *Universal Jurisdiction Annual Review 2023* (Trial International 2023). <https://trialinternational.org/wp-content/uploads/2023/11/UJAR-2023_13112023_updated.pdf>.

¹⁰⁸ See *ibid* and Violet Qumsieh, 'The Environmental Impact of Jewish Settlements in the West Bank' (1998) 5(1) *Palestine-Israel Journal* <<https://pij.org/articles/427/the-environmental-impact-of-jewish-settlements-in-the-west-bank>>. Regarding the situation in the Gaza strip, see World Bank, the EU and the UN, *Gaza Rapid Damage and Needs Assessment* (International Bank for Reconstruction and Development / The World Bank 2021) <https://unsco.unmissions.org/sites/default/files/gaza_rapid_damage_and_needs_assessment_july_2021_1.pdf>.

¹⁰⁹ Jurisdicción Especial para la Paz, *Auto de determinación de hechos y conductas dentro del Caso No. 05 "Situación Territorial en la región del Norte del Cauca y del Sur del Valle del Cauca" frente al primer grupo de comparecientes de las CM Jacobo Arenas y Gabriel Galvis* (Auto No 01 de 2023) Expediente 9002794-97.2018.0.00.0001 (1 February 2023) E.2.9.

¹¹⁰ *Stakić* (Appeal Judgment) para 342. See also *Kunarac et al* (Appeal Judgment) IT-96-23 1 IT-96-23/1-A, AC (12 June 2002) para 58; *Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1, AC (2 October 1995) para 70.

¹¹¹ Pauline Martini and Maud Sarliève, 'Fighting Deforestation in Non-International Armed Conflicts: The Relevance of the Rome Statute for Rosewood Trafficking in Senegal' (2022) 11(1) *TEL* 95.

conflict hotspots within protected areas like the Virunga National Park and the Garamba National Park worsen ecosystem degradation. Ongoing violence leads to targeted attacks on park rangers attempting to curb illegal wildlife crime and deforestation. These attacks, often perpetrated by armed groups operating within conflict zones, exploit instability and insecurity to extract natural resources for various purposes, including funding their activities.¹¹² Consequently, the conflict directly contributes to the destruction of ecosystems and undermines conservation efforts in the region.

60. The nexus can also be established where **the purpose of the destructive activities aligns with the ultimate goal of a military campaign**. The Scorched Earth Policies implemented by Nazi troops during their withdrawal from Norway at the end of World War II illustrate ecosystem destruction influenced by conflict. The German military employed this policy to delay the advance of Soviet forces, resulting in the near-total destruction of crops, livestock, buildings and infrastructure in northern Troms, Norway. Despite claims of military necessity, the Nuremberg Tribunal did not recognise the policy as justified.¹¹³ This could also be applied to the destruction of the Marshlands of southern Iraq. During Saddam Hussein's rule, the Iraqi government undertook large-scale drainage projects in the 1990s to suppress rebellion by the Indigenous Marsh Arabs. This deliberate destruction of the Mesopotamian Marshes, carried out as a military tactic, led to the loss of thousands of square kilometres of wetlands, destruction of wildlife habitats and displacement of the Marsh Arab population.¹¹⁴ Other illustrations include the Operation Ranch Hand in Vietnam, Cambodia and Laos, where several highly toxic herbicides, including Agent Orange, were used to clear dense vegetation notably to deprive the National Liberation Front of South Vietnam of vegetation cover, causing widespread deforestation and environmental contamination. This caused long-lasting ecological devastation and serious health issues for both the Vietnamese, Cambodian and Laotian population and American military personnel involved in the spraying operations, that is still observed to this day, violating fundamental principles of international humanitarian law (IHL).¹¹⁵
61. Lastly, we stress that the **fundamental principles of IHL** – distinction, military necessity, proportionality and humanity – are key for the protection of the environment and those depending on it during armed conflict.¹¹⁶ Distinction mandates the differentiation between military and civilian targets, preventing attacks on environmentally significant sites. Military necessity dictates that force should only be used for defined military objectives, considering the environmental impact of targeting enemy property. Proportionality ensures that military actions do not cause disproportionate environmental damage relative to military gain. The principle of humanity prohibits unnecessary suffering and destruction, protecting vital civilian resources like water and agriculture. Upholding these principles is essential for

¹¹² Elodie Toto, 'In DRC, Virunga Deforestation Escalates as Fighting Sends Refugees into Park' (*Mongabay*, 29 November 2023) <<https://news.mongabay.com/2023/11/in-drc-virunga-deforestation-escalates-as-fighting-sends-refugees-into-park/>>; 'DRC Stockpiles Fuel Illegal Wildlife Trade' (*Oxpeckers*) <<https://oxpeckers.org/2023/08/drc-stockpiles/>>.

¹¹³ See *Alfred Jodl* (n 106) 517. in: *Law Reports of Trials of Major War Criminals* (1949) 517.

¹¹⁴ JW Dellapenna 'Ecocide and Genocide in the Iraqi Marshlands' (2007) 104(IV) *River Basin Management* 401; Aaron Schwabach, 'Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts and Environmental Damage in Non-International Conflicts' (2004) 15(1) *Colo J Int'l Envtl L & Pol'y* 1.

¹¹⁵ Henry Danchi and Richard J Chen, 'Agent Orange Toxicity' in *Treasure Island (FL)* (ed, *StatPearls [Internet]*) (StatPearls Publishing 2024) <<https://www.ncbi.nlm.nih.gov/books/NBK594243/>>.

¹¹⁶ UNEP, *Protecting the Environment during Armed Conflict. An Inventory and Analysis of International Law* (UNEP 2009) 12-13 <<https://www.unep.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international>>.

the OTP and the Court to fulfil their mandate, ensuring environmental preservation for future generations amid the challenges of armed conflict.

2.3.2. War Crimes in International Armed Conflicts

a) Wilfully Causing Great Suffering, or Serious Injury to Body or Health (Article 8(2)(a)(iii))

62. The war crime of ‘[w]ilfully causing great suffering, or serious injury to body or health’ stems from the Geneva Conventions of 1949, constituting grave breaches in all of them.¹¹⁷ Article 8(2)(a)(iii)’s corresponding provision in the Rome Statute applicable in non-international armed conflicts is Article 8(2)(c)(i), which succinctly refers to ‘[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’. The rationale of Article 8(2)(a)(iii) is to treat protected persons humanely and to respect their physical and mental integrity at all times.

63. Severe violations of the R2hE and associated rights could fall within the ambit of the provision. Indeed, the Elements of Crimes for Article 8(2)(a)(iii) only contain one specific element, which denotes that the provision is not restricted to causing physical suffering or pain, but it covers also the causing of mental suffering or pain.¹¹⁸ No specific purpose is required,¹¹⁹ although the terms ‘great’ and ‘serious’ appear to include those acts which do not reach the high threshold established by the crime against humanity of torture. The assessment of seriousness of an act or omission resulting pain or suffering has been said to be, ‘by its very nature, relative’,¹²⁰ and it therefore must be determined on a case-by-case basis.¹²¹ This must take into consideration all relevant circumstances, ‘including the nature of the act or omission, the context in which the crime occurs, its duration and repetition, the physical, mental and moral effects of the act on the victim, and the personal circumstances of the victim, including age, sex and health’.¹²² Available jurisprudence has sustained the view that ‘causing serious bodily or mental harm does not necessarily mean that the harm is permanent and irremediable’,¹²³ but it ‘must go beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.’¹²⁴ Concerning the mental element of the crime, the term ‘wilfully’ is traditionally understood as covering both intent and recklessness.¹²⁵ This approach has been revised by available jurisprudence, which

¹¹⁷ Articles 50 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 51 Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; Article 130 Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949; Article 147 Convention (IV) relative to the Protection of Civilian Persons in Time of War.

¹¹⁸ Elements of Crimes, Article 8(2)(a)(iii), sub-para (1). See also *Čelebići* (Judgment) IT-96-21-T, TC (16 November 1998) para 552 (*Čelebići* (Trial Judgement)); *Blaskić* (Judgment) IT-95-14-T, TC (3 March 2000) para 156; *Naletilić and Martinović* (Judgment) IT-98-34-T, TC (31 March 2003) para 339. See also *Kordić* (Judgment) IT-95-14/2-T, TC (26 February 2001) para 245.

¹¹⁹ *Čelebići*, *ibid*, para 442; *Case 001* (n 56) para 453.

¹²⁰ *Krnjelac* (Judgement) IT-97-25-T, TC II (15 March 2002) para 131.

¹²¹ *Krstić* (n 12) para 513.

¹²² See *Krnjelac* (n 120) para 131; *Čelebići* (Trial Judgement) (n 118) para 536, citing ECtHR, *A v United Kingdom* (Judgment) (23 September 1998) para 20.

¹²³ *Akayesu* (n 12) para 502.

¹²⁴ *Krstić* (n 12) paras 511-513; *Case 001* (n 56) para 454.

¹²⁵ *Blaskić* (n 118) para 152; *Case 001*, *ibid*, para 455.

held that, to establish the necessary *mens rea*, it is not sufficient that the perpetrator knew that the conduct would cause the suffering or injury.¹²⁶

64. In the context of environmental destruction, the use of Agent Orange and other herbicides during the Vietnam War in the Mekong Delta region is particularly illustrative since it provoked significant environmental contamination, causing long-term damage to soil, water sources and ecosystems. The toxic effects of the herbicides also had severe health consequences for civilian populations, including birth defects, cancer and other illnesses. The act of ecosystem destruction is also of relevance in the context of the Gulf War in 1991. Iraqi forces deliberately released millions of barrels of oil into the Persian Gulf, causing one of the largest oil spills in history. The deliberate destruction of oil wells and the release of oil into marine ecosystems led to severe environmental devastation, impacting the health and livelihoods of civilian populations in Kuwait and neighbouring countries. A third example may be found in the Niger Delta conflict opposing amongst others local communities and oil companies installed in the region, due to ‘the environmental degradation of the land and water on which the local communities depend for their sustenance’.¹²⁷ Oil spillage and constant gas flaring destroyed the communities’ source of livelihood,¹²⁸ in addition to causing significant public health issues including cancers and infertility.¹²⁹ All cases appear to meet the threshold established by Article 8(2)(a)(iii) and sub-paragraph (1) of the Elements of Crimes.

b) Extensive Destruction and Appropriation of Property (Article 8(2)(a)(iv))

65. Article 8(2)(a)(iv) of the Rome Statute prohibits the destruction and appropriation of property as a war crime. The ICC has defined the term ‘property’ with regard to Article 8(2)(e)(xii), and stated that it encompasses ‘all types of property, movable and immovable, as well as public and private property’.¹³⁰ A traditional interpretation of the term ‘property’ typically covers tangible and intangible assets, whether private or public, that hold value. This may include buildings, industrial plants, infrastructure, as well as vehicles, machinery, equipment and personal belongings.

66. We argue that it may also include natural resources and environmental assets.¹³¹ While the inclusion of natural resources within the scope of the ICC notion of ‘property’ would be subject to the Court’s further appreciation, the ICC should rule in the affirmative based on the jurisprudence of international human rights courts, which consider that the right to property covers natural resources,¹³² such as ‘air, land, water, natural gas, coal, oil,

¹²⁶ *Strugar* (Judgment) IT-01-42-T, YC II (31 January 2005) para 236; *Martić* (Judgment) IT-95-11-T, TC I (12 June 2007) para 60.

¹²⁷ Thomas A Imobighe, ‘Conflict in Niger Delta: A Unique Case or a “Model” for Future Conflicts in Other Oil-Producing Countries?’ in Rudolf Traub-Mertz and Douglas Yates (eds), *Oil Policy in the Gulf of Guinea. Security & Conflict, Economic Growth, Social Development* (Friedrich-Ebert-Stiftung 2004) 103.

¹²⁸ *ibid* 104.

¹²⁹ Orish Ebere Orisakwe, ‘Crude Oil and Public Health Issues in Niger Delta, Nigeria: Much Ado about the Inevitable’ (2021) 194 *Environmental Research* 110725.

¹³⁰ *Katanga* (Trial Judgement) (n 26) para 892; *Ntaganda* (Appeal Judgement) (n 27) para 1152.

¹³¹ See reflections on the question in *Martini and Sarliève* (n 111) 104-106.

¹³² *African Commission on Human and Peoples’ Rights v Republic of Kenya* (n 6); IACtHR, *Yakye Axa Indigenous Community v Paraguay* (Merits, Reparations and Costs) (17 June 2005) para 137; IACtHR, *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits, Reparations and Costs) (27 June 2012) para 145; IACtHR, *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and Their Members v Panama* (Judgment) (14 October 2014) paras 111-12; IACtHR, *Garifuna Community of Punta Piedra and Its Members v Honduras* (Preliminary Objections, Merits, Reparations and Costs) (8 October 2015) para 165; IACtHR, *Triunfo de la Cruz Garifuna Community and Its Members v Honduras* (Merits, Reparations and Costs) (8 October 2015) para 100; IACtHR, *Kaliña and Lokono Peoples v Suriname* (Merits, Reparations and Costs) (25 November 2015)

petroleum, minerals, wood, topsoil, fauna, flora, forests and wildlife'.¹³³ Applied to the context of Indigenous territories, which often encompass vast areas of land and resources, the recognition of natural resources as property would cover the land, water and wildlife they rely upon for their survival and cultural identity.¹³⁴

67. Under Article 8(2)(a)(iv), the destruction of property or its appropriation must be extensive and carried out wantonly to be considered a war crime. Numerous examples illustrate how international armed conflicts may involve the wanton destruction of ecosystems on a large scale, such as the scorched earth policies of World War II or the use of toxic herbicides in Vietnam, Laos and Cambodia as part of Operation Ranch Hand. Other examples highlight how the appropriation of property in times of conflict can lead to the unsustainable exploitation of natural resources. For instance, illegal mining and mineral extraction have been rampant in conflict zones or occupied territories such as Sierra Leone, Angola, Niger, the DRC, Colombia, Afghanistan, Nagorno-Karabakh, as well as in the Donbas region or in Crimea. Similarly, land grabbing frequently occurs in conflict-affected regions for agricultural, logging projects or timber and wildlife trafficking, as evidenced by examples such as Israeli settlement expansion in the West Bank, Colombia's civil war and the DRC.
68. In most cases, the zones where are located these ecosystems or resources benefit from a multilayer protection based on the laws of armed conflict, including one or more of the Geneva Conventions of 1949, human rights treaties and multilateral environmental agreements.¹³⁵ Whether or not the perpetrator is aware of these protections would have to be assessed on a case-by-case basis.
69. The assessment must be systematically conducted on a case-by-case basis to determine whether the destruction or appropriation of property was justified by military necessity. This evaluation can become particularly complex in situations where industrial plants or energy infrastructures have been targeted, leading to significant pollution or contamination from the release of hazardous substances such as asbestos, chemicals or oil. In such cases, careful consideration is needed to balance military objectives with the protection of the environment and civilian populations, ensuring that any damage or appropriation is proportionate and necessary for legitimate military purposes. This could be applied in relation to the situation in Ukraine where the extensive appropriation of property on a large scale has been reported

para 129; IACtHR, *Xucuru Indigenous People and Its Members v Brazil* (Preliminary Objections, Merits, Reparations and Costs) (5 February 2018) para 115; IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (Merits, Reparations and Costs) (6 February 2020) para 94; ECtHR, 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property' (Council of Europe, 30 April 2021), para 74 (referring to ECtHR, *Dog ̇an and Others v Turkey* (Judgement) App Nos. 8803-8811/05, 8813/02 and 8815-8819/02 (29 June 2004) para 139).

¹³³ IACHR, 'Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' (30 December 2009) OEA/Ser.L/V/II. Doc 56/09, para 41. See also Article V(1) of the African Convention on the Conservation of Nature and Natural Resources, Algiers; ACHPR, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights', para 54 (emphasis added). This is in line with the phrasing of Article 21(1) and (2) of the Banjul Charter.

¹³⁴ Sandra Cuffe, 'Over a Third of Conflicts over Development Projects Affect Indigenous People: Study' (*Mongabay*, 19 June 2023) <<https://news.mongabay.com/2023/06/over-a-third-of-conflicts-over-development-projects-affect-indigenous-people-study/>>.

¹³⁵ Anne Dienelt, *Armed Conflicts and the Environment, Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law* (Springer 2022) 277-322.

in the occupied territories of Donbas and Crimea since 2014.¹³⁶ Moreover, within the territory of Ukraine itself, the widespread shelling strategy employed since February 2022 has resulted in significant destruction of property. Similarly, in Gaza, reports indicate unprecedented levels of destruction since the 7th of October 2023, stressing the urgent necessity for adherence to IHL principles to mitigate the environmental impact of armed conflict.

c) Intentionally Directing Attacks against Civilian Objects (Article 8(2)(b)(ii))

70. Article 8(2)(b)(ii) of the Rome Statute prohibits attacks against civilian objects as a war crime. It is based largely on Article 52 of Additional Protocol I, which reflects customary international law.¹³⁷ While the war crime under the Rome Statute is drafted differently, its intention remains to prohibit the direct targeting of civilian objects insofar as they do not qualify as military objectives. Damage to civilians or civilian objects incidental to an attack on combatants or military objectives is addressed separately under Article 8(2)(b)(iv).
71. This prohibition, which specifically pertains to international armed conflicts under the Rome Statute, holds relevance in cases involving environmental destruction or degradation. In the context of prosecuting environmental harm, it may apply in two ways:¹³⁸ firstly, if and when an attack causes harm to civilians or their property as a result of environmental destruction, such as contaminating water sources or destroying agricultural land; and secondly, if and when the environment itself is targeted, such as bombing a nature reserve or polluting a protected ecosystem.
72. Conversely, to avoid falling under this prohibition, it must be demonstrated that the environmental elements targeted (such as industrial sites or infrastructure) directly contribute to military action and that their destruction or neutralisation offers a clear military advantage.¹³⁹ For instance, targeting a power plant to disrupt enemy communications may be justified under this provision if it provides a definite military advantage. However, indiscriminate attacks resulting in widespread environmental damage, without direct military necessity, would likely violate this prohibition.
73. The last two arrest warrants issued by the OTP and confirmed by Pre-Trial Chamber II hold potential significance for case law in this matter.¹⁴⁰ These warrants specifically refer to the war crime of directing attacks at civilian objects for the destruction resulting from missile strikes carried out by forces under their command against the Ukrainian electric infrastructure, from at least 10 October 2022 to at least 9 March 2023 across multiple locations. These sites are deemed essential civilian infrastructures for the civilian population during a harsh winter. The resulting environmental destruction, including pollution from the release of toxic chemicals and hazardous materials, as well as habitat disruption and

¹³⁶ For an analysis of the issues specific to occupied territories, see Pouria Askary and Katayoun Hosseinnejad, 'A Possible Legal Framework for the Exploitation of Natural Resources by Non-State Armed Group (2023) 105(924) ICRC 1522. UNEP, *Protecting the Environment during Armed Conflict* (n 116) 19.

¹³⁷ Michel Cottier and Matthias Lippold, 'Article 8. War Crimes' in Kai Ambos (ed), *Rome Statute of the International Criminal Court. Article-by-Article Commentary* (CH Beck 2021) 404-10; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules* (ICRC 2005) 25-26.

¹³⁸ See Gillett (n 24) 122.

¹³⁹ See Additional Protocol I, Article 52(2).

¹⁴⁰ 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov' (*ICC-CPI*, 5 March 2024) <<https://www.icc-cpi.int/fr/news/situation-en-ukraine-les-juges-de-la-cpi-delivrent-des-mandats-darret-contre-sergei-ivanovich#:~:text=Today%2C%20March%202024%2C%20Pre,Kobylash%20and%20Mr%20Viktor%20Kinolayevich>>.

contamination of water and air quality, may pose significant risks to ecosystems and jeopardise the R2hE and associated rights for affected communities.

d) Intentionally Launching an Attack Knowing that It Will Cause Widespread, Long-Term and Severe Damage to the Natural Environment (Article 8(2)(b)(iv))

74. Article 8(2)(b)(iv) prohibits intentional attacks launched with the knowledge that they would cause ‘widespread, long-term, and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’. Its application is limited to international armed conflicts, and the criteria set establish a high threshold. As a result, it is unlikely that incidental battlefield damage from conventional warfare would meet this provision.
75. Some commentators are of the view that this crime’s *actus reus* is overly vague, making it challenging to establish disproportionate attacks.¹⁴¹ Its *mens rea* also makes it difficult to prove that a perpetrator ‘knew’ the attack would be disproportionate. As a result, it is unlikely that battlefield damage incidental to conventional warfare would not normally fall under this provision, a view expressed also by the International Criminal Tribunal for the Former Yugoslavia in its report on the North Atlantic Treaty Organization’s bombing campaign in Kosovo.¹⁴² Indeed, taken together, this suggests that ‘in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate’.¹⁴³ An analysis of the environmental consequences of the atomic bombings of Nagasaki and Hiroshima further stresses the difficulty in assessing the proportionality of the attack and the excessive nature of the military advantage gained.¹⁴⁴ Both sources suggest that even clear cases of environmental harm may be difficult to assess under the framework of the proportionality test.
76. Some experts argue that the Rome Statute represents a regression from earlier protections offered by IHL,¹⁴⁵ notably Additional Protocol I, regarded as the ‘primary norm’. Conversely, others assert that States remain obligated to adhere to existing IHL provisions and view the Rome Statute as an important initial step in operationalising these norms by establishing a permanent institution empowered to prosecute individuals for the gravest violations of IHL and international human rights law.¹⁴⁶ The true extent of its impact can only be gauged through its application and the subsequent testing of its interpretation by the Court. This may unfold in the near future, considering that the provision is among the crimes charged under the last two arrest warrants issued by the OTP and confirmed by Pre-Trial Chamber II on March 2024, regarding events spanning from at least 10 October 2022 to at least 9 March 2023.¹⁴⁷

¹⁴¹ Jessica C Lawrence & Kevin Jon Heller, ‘The limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime’ (2007) 20 *Geo Int’l Env’tl L Rev* 61.

¹⁴² ICTY, ‘Final Report of the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia’, para 2 <<https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal>>. See also Cottier and Lippold (n 137) 428.

¹⁴³ ICTY, *ibid*, para 22.

¹⁴⁴ See also Gillett (n 24) 111.

¹⁴⁵ Mark Drumbl, ‘Waging War against the World: The Need to Move from War Crimes to Environmental Crimes’ (1998) 22 *Fordham Int’l L J* 122, 145.

¹⁴⁶ Jessica C Lawrence and Kevin Jon Heller, ‘The limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime’ (2007) 20 *Geo Int’l Env’tl L Rev* 61.

¹⁴⁷ ‘Situation in Ukraine: ICC Judges Issue Arrest Warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov’ (*ICC-CPI*, 5 March 2024) <<https://www.icc-cpi.int/fr/news/situation-en-ukraine-les-juges-de-la-cpi-delivrent-des-mandats-darret-contre-sergei->

77. The Nova Kakhovka disaster and the situation in Gaza might also call for the application of Article 8(2)(b)(iv). It is not contested that the recent destruction of the Nova Kakhovka Dam, in the early hours of 6 June 2023, has caused extensive flooding along the lower Dnieper River, resulting in extensive environmental damage, heavy metal contamination, dissemination of landmines and disruption to the region's water supply. Given the severity of the situation, there appears to be ample justification for utilising this case to test the provisions of Article 8 through prosecution, in collaboration with Ukrainian prosecutorial authorities.¹⁴⁸ This approach aligns with Recommendation 14 of the High-Level Working Group on the Environmental Consequences of War,¹⁴⁹ which encourages the ICC Prosecutor to evaluate the case of the Nova Kakhovka Dam collapse for prosecution, to ensure that the individuals responsible are held accountable. Similarly, consideration could be given to prosecuting the destruction of the Gaza Strip due to the significant environmental damage caused by the ongoing conflict in the region, including damage to infrastructure, contamination of land and water resources, and disruption of ecosystems, all of which have severe and long-term consequences for the environment and the well-being of the civilian population.

f) Destroying or Seizing the Enemy's Property (Article 8(2)(b)(xiii))

78. Article 8(2)(b)(xiii) of the Rome Statute refers to the war crime of destroying or seizing enemy property. It requires that the perpetrator deliberately destroys or seizes specific property belonging to a hostile party, which is determined by looking at whether the property 'belongs to individuals or entities aligned with or with allegiance to a party to the conflict adverse or hostile to the perpetrator'.¹⁵⁰ This property must be protected under IHL from such acts. Additionally, the perpetrator must be aware of the factual circumstances establishing the property's status. The destruction or seizure of the property must not be justified by military necessity.

79. This does not impact the applicability of this provision to environmental destruction, as property may encompass environmental objects, including natural resources (see paragraph 66). This is corroborated by the precedent set by the Nuremberg Tribunal, which deemed a policy of scorched earth described in paragraph 60 against the enemy's property unjustified by military necessity.¹⁵¹

g) Pillaging (Article 8(2)(b)(xvi))

80. Acts of 'pillaging' prohibited in the context of both international and non-international armed conflicts are of particular interest when considering the destruction of the environment.¹⁵² Pillaging is often considered an environmental crime,¹⁵³ as the practice of

ivanovich#:~:text=Today%2C%205%20March%202024%2C%20Pre,Kobylash%20and%20Mr%20Viktor%20K inolayevich>.

¹⁴⁸ Thomas Obel Hansen 'Could the Nova Kakhovka Dam Destruction Become the ICC's First Environmental Crimes Case?' (*Just Security*, 9 June 2023) <<https://www.justsecurity.org/86862/could-the-nova-kakhovka-dam-destruction-become-the-iccs-first-environmental-crimes-case/>>.

¹⁴⁹ Andriy Yermak and Margot Wallström, 'An Environmental Compact for Ukraine. A Green Future: Recommendations for Accountability and Recovery' (9 February 2024), Recommendation 14 <https://www.president.gov.ua/storage/j-files-storage/01/24/69/cc0dab040b3207268e5c8fb5275b22e4_1707492952.pdf>.

¹⁵⁰ *Ntaganda* (Trial Judgement) (n 41) para 1160.

¹⁵¹ See the trial of Alfred Jodl in *Trial of German Major War Criminals* (n 19); *Polish Forestry Case* (n 106).

¹⁵² See *Armed Activities on the Territory of the Congo* (n 103).

¹⁵³ See Olivia Radics and Carl Bruch, 'The Law of Pillage, Conflict Resources, and Jus Post Bellum' in Carsten Stahn, Jens Iverson and Jennifer S Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017) 145.

looting natural resources, which has become an increasingly frequent feature of armed conflicts, has been repeatedly denounced by the international community.¹⁵⁴ For example, in 2003, the UN Security Council condemned the plunder and illegal exploitation of natural resources in the DRC.¹⁵⁵

81. Whilst the illegal exploitation of natural resources which provokes and sustains a conflict has not yet been directly addressed by the ICC, it found in *Katanga* that extensive destruction of civilian property including food and animals constituted the crime of pillage in non-international armed conflict.¹⁵⁶ This, as discussed in paragraph 7, leaves room for finding that natural resources can also be pillaged, including in international armed conflicts.

h) Starvation (Article 8(2)(b)(xxv))

82. Article 8(2)(b)(xxv) of the Rome Statute prohibits the war crime of starvation as a method of warfare. This crime encompasses deliberately using starvation of civilians as a tactic by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies, as provided for under the Geneva Conventions. The application of this provision is particularly significant in conflict zones where environmental destruction exacerbates the impact on civilian populations.

83. This crime is directly relevant to environmental destruction, as '[o]bjects indispensable to the survival of the civilian population' include '[items] such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works'.¹⁵⁷

84. The deliberate targeting of environmental resources has served as a method of warfare, causing not only starvation but also widespread ecological devastation with far-reaching consequences for both human and environmental well-being in conflict zones. In the context of armed conflict, depriving civilians of these vital resources often begins with the destruction of their environment, aiming to weaken the enemy population or gain a strategic advantage in the conflict. In such cases, demonstrating the deliberate nature of the act is important as the intent is an essential component of the crime.

85. For example, in South Sudan, Human Rights Watch has reported that government forces, including armed militia, have conducted a military campaign targeting rebel-held territories. This campaign has allegedly involved killing civilians, burning homes and looting food stocks, leading to forced displacement. Essential resources for survival such as water sources and agricultural land, have been destroyed, with long-term consequences for the environment and the affected communities.¹⁵⁸

86. In Yemen, airstrikes have reportedly targeted crucial agricultural and water infrastructure, alongside restrictions on humanitarian aid and naval blockades, severely

¹⁵⁴ In addition to the Statement of the UN Security Council President on 25 June 2007 (UNSC, 'Statement by President of the Security Council' (25 June 2007) S/PRST/2007/22), see the work of Global Witness on 'conflict resources' (timber, diamonds and minerals) at 'Responsible Minerals' (*Global Witness*) <<https://www.globalwitness.org/en/campaigns/conflict-minerals/>>. See also UNEP, *Protecting the Environment during Armed Conflict* (n 116) 33.

¹⁵⁵ UNSC Res 1493 (28 July 2003) UN Doc S/RES/1493, para 28.

¹⁵⁶ *Katanga* (Trial Judgement) (n 26) para 519.

¹⁵⁷ ICRC, 'Commentary of 1987, Article 14 of AP II' at 1458, para 4803 <<https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977/article-14/commentary/1987>>. See also Gillett (n 24) 127.

¹⁵⁸ Human Rights Watch, "'They Burned It All.'" Destruction of Villages, Killings, and Sexual Violence in Unity State South Sudan' (*Human Rights Watch*, 2015) <<https://www.hrw.org/report/2015/07/23/they-burned-it-all/destruction-villages-killings-and-sexual-violence-unity-state>>.

impeding access to food and water and worsening the humanitarian crisis. These actions, carried out despite the known dire consequences, including widespread starvation, not only violate the right to food and water but also pose significant environmental risks, jeopardising public health, the R2hE and associated rights.¹⁵⁹

87. Similar policies have been reported in Syria, where the ‘surrender or starve’ strategy employed by both the government and armed opposition groups has led to the forced displacement of thousands.¹⁶⁰ Likewise, in Gaza, since the 7th of October 2023, Israel forces’ intense shelling has exacerbated conditions that lead to inevitable starvation, despite repeated international calls for aid delivery. Water, sanitation and hygiene services are reportedly amongst the most impacted facilities, further compounding the humanitarian crisis. Instances of Israeli attacks targeting civilians seeking aid have been documented, revealing a disturbing pattern of violence from mid-January to late February 2024.¹⁶¹
88. The targeting of agricultural lands, water infrastructure and natural resources disrupts delicate ecological balances, threatening biodiversity and the long-term sustainability of the environment, on which these communities depend. Recognising the environmental consequences of starvation as a method of warfare flags the importance of holding perpetrators accountable for their actions. Efforts to address the crime of starvation in conflict should incorporate environmental considerations into humanitarian responses and peacebuilding initiatives. Addressing the environmental dimensions of conflict-induced starvation is essential to strive towards building more sustainable and resilient societies in the aftermath of conflict.

2.3.3. War Crimes in Non-International Armed Conflicts

a) Murder (Article 8(2)(c)(i)-1)

89. The elements of the war crime of murder committed in non-international armed conflicts are the same as those of the crime against humanity of murder,¹⁶² with the specificity that Article 8(2)(c)(i)-1 refers to the killing of adversary combatants, provided that they have laid down their arms or have been placed *hors de combat* by sickness, wounds, detention or any

¹⁵⁹ The Yemen data project database recorded 16,449 airstrikes between March 2015 and March 2018, with the majority targeting Sa’ada and Sana’a (<<https://yemendataproject.org/>>). See also Martha Mundy, ‘The Strategies of the Coalition in the Yemen War: Aerial Bombardment and Food War’ (World Peace Foundation 2018) <<https://reliefweb.int/sites/reliefweb.int/files/resources/Strategies%20of%20Coalition%20in%20Yemen%20War.pdf>>.

¹⁶⁰ HRC, ‘Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014. Report of the Group of Eminent International and Regional Experts as submitted to the UN High Commissioner for Human Rights’ (9 August 2019) UN Doc A/HRC/42/17, paras 51-56; ‘Syria: Surrender or Starve Strategy Displacing Thousands of Amounts to Crimes Against Humanity’ (*Amnesty International*, 13 November 2017) <<https://www.amnesty.org/en/latest/press-release/2017/11/syria-surrender-or-starve-strategy-displacing-thousands-amounts-to-crimes-against-humanity/>>. See the UN Human Rights Council’s 2014 damning report detailing violations of international law (OHCHR, ‘Living Under Siege: The Syrian Arab Republic’ (February 2014) <<https://www.ohchr.org/en/documents/research-papers/living-under-siege-syrian-arab-republic>>. See also further detailed analysis in conjunction with country experts on South Sudan, Syria and Yemen in the forthcoming report of the GRC-WPF Starvation Compendium (<www.starvationaccountability.org>).

¹⁶¹ ‘In Focus: The Effects of Israel’s Military Offensive on Gaza’s WASH Facilities’ (*Relief Web*, 2 June 2021) <<https://reliefweb.int/report/occupied-palestinian-territory/focus-effects-israel-s-military-offensive-gaza-s-wash>>.

¹⁶² *Kordić and Cerkez* (Judgment) IT-95-14/2-T, TC (26 February 2001), para 236; *Krnojelac* (n 120) para 323; *Naletilić and Martinović* (Judgment) IT-98-34-T, TC (31 March 2003) para 248; *Blagojević and Jokić* (Judgment) IT-02-60-T, TC I (17 January 2005) para 556; *Brima et al* (Judgment) SCSL-04-16-T, TC II (20 June 2007) para 688; *Taylor* (Judgment) SCSL-03-01-T, TC II (18 May 2012) 533-46 (*Taylor* (Trial Judgment)) para 412.

other cause.¹⁶³ The Elements of Crimes additionally include ‘civilians, medical personnel, or religious personnel’, the latter group comprising ‘those non-confessional non-combatant military personnel carrying out a similar function’.¹⁶⁴

90. The same would apply to cases involving environmental destruction, contingent upon establishing a causal link between the accused’s interaction with the environment and the death of the victim(s), whether through action or inaction. Importantly, the death of the victim(s) can be inferred circumstantially from the evidence, thus not requiring that the dead body has been recovered.¹⁶⁵ The *mens rea* would be established where the perpetrator acted deliberately or failed to act (i) in order to cause the death of one or more persons; or (ii) whereas he or she was aware that death would occur in the ordinary course of events.¹⁶⁶

91. The attack against the Iraqi Marshlands might be used as an example of a conduct that may result in the murder of one or more persons not taking active part in hostilities. The Marshlands are – or were – a wetland with a unique ecosystem at the junction of the Euphrates and Tigris rivers and are home to thousands of Iraqis. Measures to dry them were taken by Saddam Hussein in the early 1990s, primarily with the aim to retaliate against the Shiite population in Southern Iraq for their role in the uprising against his government. By 2001, some estimated that 90 per cent of the marshlands had disappeared, leading to a loss of biodiversity, the death or displacement of up to 190.000 people and dramatic forced changes to the way of life and livelihood for thousands more.¹⁶⁷

b) Cruel Treatment (Article 8(2)(c)(i)-3)

92. The offence of cruel treatment under Article 8(2)(c)(i)-3 is the same as that of Article 8(2)(a)(ii), applicable in international armed conflicts, meaning that the elements of crimes also identical. Severe violations of the R2hE and associated rights could amount to ‘severe physical or mental pain or suffering’ as outlined in paragraphs 47 and 48. Indeed, the pain or suffering inflicted by the perpetrator upon the victim does not need to be lasting,¹⁶⁸ so long as it is real and serious.¹⁶⁹ Reason suggests that the offence may comprise different acts, provided that all factual circumstances of the conduct are taken into consideration.¹⁷⁰ Such circumstances may include *inter alia* the effects on the victim’s state of health.¹⁷¹

c) Pillaging (Article 8(2)(e)(v))

93. As addressed in paragraphs 80 and 81, pillage can be directed against natural resources. This also applies in non-international armed conflicts, where looting of natural resources is

¹⁶³ Elements of Crimes, Article 8(2)(c)(i)-1, sub-para (2).

¹⁶⁴ *ibid.*

¹⁶⁵ *Lukic and Kukic* (Judgment), IT-98-32/1-T (20 July 2009), para 904; *Milutinovic et al* (Judgment) IT-05-87-T (26 February 2009), para 137.

¹⁶⁶ See also *Bemba* (Trial Judgment) (n 41), paras 89-90; *Katanga* (Trial Judgment) (n 46), paras 780-81.

¹⁶⁷ Human Rights Watch, *The Iraqi Government Assault on the Marsh Arabs*. Briefing Paper’ (Human Rights Watch 2003) <<https://www.hrw.org/legacy/backgrounders/mena/marsharabs1.htm>>. See also John Fawcett and Victor Tanner, *The Internally Displaced People of Iraq* (SAIS Project on Internal Displacement, October 2002), 33.

¹⁶⁸ *Kunarac et al* (Judgment) IT-96-23-T & IT-96-23/1-T, TC (22 February 2001) para 501; *Martić* (Judgment) IT-95-11-T, TC I (12 June 2007) para 80.

¹⁶⁹ *Krnjelac* (n 120) para 131.

¹⁷⁰ *Taylor* (Trial Judgment) (n 162) para 435 (‘cruel treatment may encompass acts of mutilation’); *Limaj*, *ibid.*, para 332 (unlawful seizure, unlawful detention for prolonged periods and interrogation constitute ‘a serious attack on human dignity, and therefore [constitute] cruel treatment’). See also Elements of Crimes, Article 8(2)(c)(i)-3, sub-para (3).

¹⁷¹ *Orić* (Judgment) IT-03-68-T, TC II (30 June 2006) para 352; *Simić et al* (Judgment) IT-95-9-T, TC II (17 October 2003) para 75; *Krnjelac* (n 120) para 131.

current practice for armed groups willing to fund their battle, like it took place or is taking place in countries like Afghanistan, Colombia, the DRC and Senegal.¹⁷²

94. Utilising Article 8(2)(e)(v) to prosecute individuals for pillage would require a prior assessment of the ownership of the natural resources, insofar as pillage of property must take place ‘without the consent of the owner’.¹⁷³ Doctrinal research on the matter may be helpful to overcome the challenge resulting from such requirement.¹⁷⁴

d) Destroying or Seizing the Property of an Adversary (Article 8(2)(e)(xii))

95. As paragraphs 78 and 79 addressed, the destruction or seizure of natural resources could amount to the crime of pillage under Article 8(2)(e)(xii) insofar as natural resources can be considered as ‘property’.¹⁷⁵
96. Prosecutions for destroying or seizing the enemy’s property in non-international armed conflicts would however be limited to those cases against combatants of a non-State armed group. Article 8(2)(e)(xii) indeed requires the property to belong to the enemy, which, in the case of natural resources, are likely to be considered either as the property of the population as a whole (or, in cases of natural resources found on Indigenous lands, to Indigenous communities), or as the property of the State, by virtue of the principle of permanent sovereignty over natural resources, even in cases of occupation.¹⁷⁶ Such interpretation could leave room for the prosecution of members of the *Mouvement des Forces Démocratiques de Casamance*, operating in Casamance, Senegal, involved in rosewood trafficking.¹⁷⁷ The Colombian Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*) adopted a similar interpretation, noting that the ‘adversary’ character of the property is to be appreciated from the perspective of the armed group.¹⁷⁸
97. The provision would moreover allow for the prosecution of individuals responsible for the implementation of scorched earth policies aiming at destructing or polluting natural resources including crops and water. This took place in several Central and South American States such as Guatemala,¹⁷⁹ El Salvador,¹⁸⁰ and Nicaragua.¹⁸¹

3. Most Relevant Modes of Liability

3.1. Selection and Prioritisation

98. Four main categories of actors are involved in severe violations of the R2hE and associated rights that amount to international crimes falling under the jurisdiction of the ICC:
- State actors;

¹⁷² See (n 35 - 40).

¹⁷³ Elements of the Crimes, Article 8(2)(e)(v), subparas 1 and 2.

¹⁷⁴ Martini and Sarliève (n 111) 107-11.

¹⁷⁵ Section 2.3.2(b).

¹⁷⁶ *Armed Activities on the Territory of the Congo* (n 91) para 244. See Martini and Sarliève (n 111) 111-12.

¹⁷⁷ Martini and Sarliève (n 111).

¹⁷⁸ *Auto No 01 de 2023* (n 109) 1028.

¹⁷⁹ ‘Guatemala’ (*Centre for Justice & Accountability*) <[¹⁸⁰ Gregory J Boyle and Michael E Kennedy, ‘Scorched Earth in El Salvador: Military Now Targets Civilians Living in the War Zone’ \(*Los Angeles Times*, 24 January 1989\) <<https://www.latimes.com/archives/la-xpm-1989-01-24-me-764-story.html>>.](https://cja.org/where-we-work/guatemala/#:~:text=Scorched%20Earth%3A%201982%2D1983&text=His%20reign%20from%20March%201982,70%2C000%20were%20killed%20or%20disappeared.>.</p></div><div data-bbox=)

¹⁸¹ Paul Smith, ‘Beyond the Line of Fire: The War on Health in Nicaragua’ (1995) 11(2) *Medicine and War* 91.

- Corporate actors;
- Armed actors, i.e. both national armed forces and armed groups; and
- Members of organised criminal groups.

99. In accordance with the OTP's current policy on case selection and prioritisation, we recommend that the OTP focuses on the conduct of mid- and high-level perpetrators of these categories.¹⁸² Different elements would be relevant to assess the suspects' level of responsibility, including:

- Their *de jure* and *de facto* position within the State/corporation/armed forces or groups/criminal group allegedly involved in the commission of the grave violations of the R2hE and associated rights;
- The degree of their intent, especially if it includes the existence of discriminatory motives; and
- The extent of their knowledge on the impacts that their conduct, or the activities of the State/corporation/armed forces or groups/criminal group to which they belong, have on individuals' R2hE and associated rights, as well as on the environment in general.

3.2. Most Relevant Modes of Liability (Article 25(3) of the Rome Statute)

3.2.1. Commission (Article 25(3)(a))

100. **Direct and indirect perpetration** could be helpful modes of liability to hold high- and mid-level members of armed groups or organised criminal groups liable for severe violations of the R2hE and associated rights under the Rome Statute. This would concern scenarios where the accused committed such violations, or when these violations were committed by an intermediate agent over whom the accused exerted control.¹⁸³

101. **Co-perpetration** could also be of use to find both armed actors and State officials criminally liable when they have established an agreement or common plan¹⁸⁴ involving the commission of conduct or activities that constitute severe violations of the R2hE and associated rights. **Indirect co-perpetration** would be particularly relevant in cases where circumstances are similar to those in *Ntaganda* or *Al Bashir*. Bosco Ntaganda, former Deputy Chief of Staff in charge of operations of the *Forces Patriotiques pour la Libération du Congo*,¹⁸⁵ was indeed found liable as an indirect co-perpetrator for a series of crimes which, we argue, can be committed through severe violations of the R2hE and associated rights, including crimes against humanity of persecution and forcible transfer of population, and the war crimes of pillage and destruction of the adversary's property.¹⁸⁶ Similarly, Sudan's former President Omar Al Bashir is prosecuted as an indirect co-perpetrator for crimes that we submit can be committed by means of the same violations, namely genocide by deliberately inflicting conditions of life calculated to bring about a protected group's physical destruction and the crime against humanity of extermination.¹⁸⁷

¹⁸² OTP, 'Policy Paper on Case Selection and Prioritisation' (15 September 2016) paras 42-43.

¹⁸³ *Katanga* (Trial Judgment) (n 46) para 1399.

¹⁸⁴ See *Lubanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06, TC I (14 March 2012) paras 980-88.

¹⁸⁵ *Ntaganda* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda) ICC-01/04-02/06, PTC II (9 June 2014) para 15.

¹⁸⁶ *Ntaganda* (Trial Judgment) (n 41) 535-38.

¹⁸⁷ *Al Bashir* (n 21).

102. Domestic courts have followed such direction in cases involving environmental crimes. For example, the Colombian Special Jurisdiction for Peace found that military commanders of the armed group FARC-EP were responsible as indirect co-perpetrators (*coautoría mediata por aparatos organizados de poder*) for the war crime of ‘impacts on the environment and the territory’ (*afectaciones al medio ambiente y el territorio*). This followed illegal mining and practices of reconversion of agricultural lands to cultivate illicit crops over multiple lands, including Indigenous and Afrocolombian territories.¹⁸⁸ The Court considered inter alia the existence of a common plan to attack certain localities to ascertain social and territorial control and expulse local institutions; the essential contribution of the accused in the realisation of such plan; as well as their participation in conduct that affected the environment and their awareness of the effects of such conduct on the environment.¹⁸⁹

103. By contrast, Article 25(3)(a) is unlikely to provide avenues to prosecute corporate actors, including CEOs and other high- or mid-level staff members of corporations responsible for severe violations of the R2hE and associated rights. This is because the *mens rea* element attached to the mode of liability is unlikely to be fulfilled. Forms of perpetration presuppose that the perpetrator *intended* to commit the crime or intended the agent to commit the crime, and, in instances of indirect perpetration, that the perpetrator was also aware of the factual circumstances which allowed the person to exert control over the crime.¹⁹⁰ Likewise, forms of co-perpetration require the existence of a common plan aiming at the commission of the crime.¹⁹¹ While corporate actors are often *aware* that severe violations of the R2hE and associated rights are being committed or are likely to be committed, it does not necessarily imply that they *intend* to commit such violations themselves or through an intermediate agent.¹⁹²

3.2.2. Participation (Article 25(3)(b)-(d))

a) Ordering, Soliciting or Inducing (Article 25(3)(b))

104. The mode of liability enshrined in Article 25(3)(b) is particularly relevant in cases against individuals holding high-level positions within one of the four categories of actors identified in paragraph 98. Heads of States or Ministries, CEOs, commanders and superiors, as well as leaders of organised criminal groups, may be in a position to instruct, prompt, encourage or influence their colleagues or subordinates to engage into conduct and activities causing severe violations of the R2hE and associated rights.

105. In Brazil, former President Jair Bolsonaro and other members of his administration, including Ricardo Salles, adopted a public rhetoric between 2019 and 2021 to induce the unsustainable exploitation of natural resources. This is likely that it has had a direct effect on the commission of severe violations of the R2hE and associated rights of Indigenous peoples and other local communities living in or in the surroundings of the Brazilian Legal Amazon.¹⁹³

106. In Ecuador, the Texaco-Chevron case involves allegations that Texaco, later merged with Chevron, implemented cost-cutting measures in its oil extraction operations, leading to inadequate waste management practices and environmental harm. These practices are known

¹⁸⁸ Auto No 01 de 2023 (n 109), esp E.2.9, G.2.3.7 and H.

¹⁸⁹ *ibid.*, H.2.1.2.2(f), H.2.2.2.2(f), H.2.3.2.2(e), H.2.4.2.2(f)

¹⁹⁰ Emphasis added. See Bruce Broomhall, ‘Article 25. Individual Criminal Responsibility’ in Kai Ambos (ed), *Rome Statute of the International Criminal Court. Article-by-Article Commentary* (CH Beck 2021).

¹⁹¹ *ibid.*

¹⁹² Emphasis added.

¹⁹³ See Sarliève, Povoas, Martini and Holt (n 30) esp 75-111.

or expected to cause the release of harmful substances, resulting in severe violations of the R2hE and associated rights. Numerous evidence and arguments alleging corporate responsibility for environmental destruction have been presented in extensive litigation and legal proceedings, including expert reports highlighting the long-term impact of oil contamination on ecosystems and Indigenous communities.¹⁹⁴ Although there were no criminal proceedings, it could be argued that CEOs who instructed, prompted, encouraged or influenced subordinates to engage in cost-cutting measures knew the nature, scope and impact of the violations of the R2hE and associated rights caused by these practices, particularly on Indigenous peoples, provided that evidence thereof is presented.

b) Aiding, Abetting or Otherwise Assisting (Article 25(3)(c))

107. Whilst options to hold corporate actors liable under Article 25(3)(a) remain limited despite their involvement in the commission of severe violations of the R2hE and associated rights (see paragraph 103), they may be held liable for aiding and abetting others in the commission of international crimes aimed at facilitating the destruction of ecosystems, unsustainable exploitation of natural resources or contamination and pollution.

108. Current proceedings against Ian Lundin and Alexandre Schneiter, the former two directors of Swedish company Lundin Oil, before Swedish courts may serve as an illustration.¹⁹⁵ In 1997, Lundin Oil obtained an oil concession over a non-State controlled area in southern Sudan (now part of South Sudan's territory). It is alleged that Sudanese government committed serious violations of IHL between 1999 and 2003 'in order to create the conditions for Lundin Oil to conduct its business',¹⁹⁶ with the assistance of Lundin Oil's directors, who were aware of the crimes being committed. It reportedly resulted in the forced displacement of 160.000 people and killing of 12.000 others.¹⁹⁷ While the requisite intent under Article 25(3)(a) would be hard to establish to hold the directors liable as perpetrators, they could hold liable as aiders and abettors. This would be on the ground that they provided assistance to the Sudanese army to enable the commission of the crimes to "secure" the oilfield¹⁹⁸ in full knowledge that the crimes would be committed¹⁹⁹ in the ordinary course of events.²⁰⁰

109. Likewise, other actors, including State officials, who provide an assistance to an individual for the commission of severe violations of the R2hE and associated rights with

¹⁹⁴ See Maud Sarliève, 'Ecuador: Toxic Justice and Tourism by Texaco Waste Pools' (*JusticeInfo*, 14 March 2019) <<https://www.justiceinfo.net/en/40565-ecuador-toxic-justice-and-tourism-by-texaco-waste-pools.html>>. See also Permanent Court of Arbitration, *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador in the matter of an arbitration before a tribunal constituted in accordance with the treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investment, signed 27 August 1993 (the "Treaty" or "BIT") and the UNCITRAL Arbitration Rules, 1976 (the "UNCITRAL Arbitration Rules")* (Second Partial Award on Track II) Case No 2009-23 (30 August 2018).

¹⁹⁵ See other examples in 'The Proliferation of Corporate War-Crimes Cases' (2023) 29 Strategic Comments 32.

¹⁹⁶ 'Indicted with Complicity in Grave War Crimes – Today the Trial in the Lundin Oil Case Begins in Sweden' (*Civil Rights Defenders*, 5 September 2023) <<https://crd.org/2023/09/05/indicted-with-complicity-in-grave-war-crimes-today-the-trial-in-the-lundin-oil-case-begins-in-sweden/>>.

¹⁹⁷ 'Major Setback for Victims in the Lundin Oil Trial' (*Civil Rights Defenders*, 30 November 2023) <<https://crd.org/2023/11/30/major-setback-for-victims-in-the-lundin-oil-trial/>>.

¹⁹⁸ Jason Patinkin, 'Lundin Case: A Swiss Oil Executive on Trial for Sudan War Crimes' (*SwissInfo*, 8 September 2023) <<https://www.swissinfo.ch/eng/business/lundin-case-a-swiss-oil-executive-on-trial-for-sudan-war-crimes/48797050>>.

¹⁹⁹ 'Lundin Energy Lawsuit (Re Complicity in War Crimes, Sudan)' (*Business & Human Rights Resource Centre*, 11 November 2021) <<https://www.business-humanrights.org/en/latest-news/lundin-petroleum-lawsuit-re-complicity-war-crimes-sudan/>>.

²⁰⁰ *Al Hassan* (n 53) para 909.

the aim to facilitate such violations, could be held liable under Article 25(3)(c) of the Rome Statute. For instance, Charles Taylor was held liable for aiding and abetting the Revolutionary United Front (RUF) in the commission of war crimes in Sierra Leone,²⁰¹ notably by providing fuel and mining equipment to allow the RUF to unsustainably exploiting Sierra Leone's natural resources and facilitating relationship between the RUF and a diamond dealer.²⁰² This could also concern Brazil's former President Jair Bolsonaro and members of his administration, who, through the adoption of policies, instruments and measures meant to enable environmental degradation, have purposefully facilitated the commission of severe violations of the R2hE and associated rights of Indigenous and other local peoples living in the Brazilian Legal Amazon.²⁰³

c) Contributing in Any Other Way (Article 25(3)(d))

110. Prosecuting individuals under Article 25(3)(d) of the Rome Statute could circumvent a lack of *mens rea* under Article 23(3)(c). It would allow the prosecution of those who intentionally contributed to the commission, by a group, of severe violations of the R2hE and associated rights without intending to facilitate such violations, but in the knowledge of the group's criminal purpose or activity. The accused's functions and powers could justify their contribution to the crime, including persecution.²⁰⁴
111. In particular, this mode of liability could be used to prosecute high- or mid-level corporate actors whose employees are engaged in a common plan that they know will result in the commission of environmental infractions or severe violations of human rights, including the R2hE.²⁰⁵ In this regard, 'contributing in any other way' could be an adequate mode of liability to prosecute CEOs of companies like Shell, which amongst others is responsible for environmental damage and public health issues in Ogoniland, in Niger Delta,²⁰⁶ and Glencore, which owns the Peruvian company Volcan SAA operating the Cerro de Pasco mine and causing disastrous impacts for the civilian population and the environment.²⁰⁷
112. This mode of liability could also be used in cases where State and corporate actors fail to enact or enforce adequate laws and regulations to prevent chemical accidents, they may be considered to have knowingly contributed to severe violations of R2hE and associated rights. Their functions and powers within their respective roles could justify their contribution to the crime, including persecution of affected communities. One well-known example is the Bhopal gas tragedy in 1984, where over half a million people in Bhopal, India, were exposed to methyl isocyanate gas from a Union Carbide pesticide plant, resulting in thousands of deaths.²⁰⁸ Similarly, accidents at mining sites have led to massive releases of toxic substances, as seen in the collapse of tailings ponds at Mariana and Brumadinho in Brazil (2015 and 2019, respectively),²⁰⁹ the spill of copper sulphate in the rivers Bacanuchi

²⁰¹ *Taylor* (Judgment) SCSL-03-01-A, AC (26 September 2013).

²⁰² *Taylor* (Trial Judgment) (n 162) 2138-2173.

²⁰³ Sarliève, Povoas, Martini and Holt (n 30) paras 422-28.

²⁰⁴ *Al Hassan* (n 53) para 997.

²⁰⁵ *ibid* para 801.

²⁰⁶ UNEP, *Environmental Assessment of Ogoniland* (UNEP 2011) <<https://www.unep.org/topics/disasters-and-conflicts/country-presence/nigeria/environmental-assessment-ogoniland-report>>.

²⁰⁷ See Section 2.2.1.

²⁰⁸ Edward Broughton, 'The Bhopal Disaster and Its Aftermath: A Review' (2005) 4(1) *Environmental Health* 6.

²⁰⁹ Paola Pinheiro Bernardi Primo et al, 'Mining Dam Failures in Brazil: Comparing Legal Post-Disaster Decisions' (2021) 18(21) *Int'l J Environ Res Public Health* 11346.

and Sonora in Mexico in 2014,²¹⁰ as well as the Baia Mare disaster in Romania (2000).²¹¹ Explosions of warehouses containing toxic substances could also be considered, for instance, following the catastrophes in Beirut (2020)²¹² and Tianjin, China (2015).²¹³ These incidents highlight the urgent need for strict regulations and effective safety measures to prevent such disasters and protect human rights and the environment from the devastating consequences of chemical accidents. If it can be demonstrated that State and corporate actors were aware of the risks posed by their activities and knowingly failed to take appropriate measures to prevent accidents or mitigate their impacts, they could be held accountable under Article 25(3)(d) for their contribution to the accidents and resulting violations of R2hE and associated rights.

3.2.3. Responsibility of Commanders and Other Superiors (Article 28)

113. Article 28 of the Rome Statute could offer the adequate framework for prosecuting those military commanders and other superiors who fail to take action to prevent or repress the commission of severe violations of the R2hE and associated crimes, or to report such conduct to relevant authorities.

114. **Article 28(a)** of the Rome Statute could be relevant in cases where armed actors are responsible for severe violations of a civilian population's R2hE and associated rights. Concrete examples show that it may concern both national armed forces and non-State armed groups. For example, Russian colonels are accused of 'supervising the destruction of the Kharkiv Institute of Physics and Technology'.²¹⁴ Likewise, the Wagner Group has been accused of illegal mining and logging in the Central African Republic.²¹⁵

115. Similarly, **Article 28(b)** could be of relevance when corporate actors are involved in the commission of severe violations to the R2hE and associated rights, assuming that the superior-subordinate relationship between the CEO and their employees meets the threshold established in the provision. The applicability of Article 28(b) could be considered in holding corporate actors accountable for their actions, particularly when there is a clear superior-subordinate relationship between the CEO and their employees, meeting the threshold outlined in the statute. For instance, it is alleged that CEOs overseeing certain fossil fuel companies have systematically encouraged unsustainable practices in extracting fossil fuels,

²¹⁰ 'Desastre Ecológico en los Ríos Bacanuchi y Sonora' (*Gobierno de México*, 6 August 2019) <<https://www.gob.mx/cenapred/es/articulos/desastre-ecologico-en-los-rios-bacanuchi-y-sonora>>.

²¹¹ UNEP / OCHA, 'Spill of Liquid and Suspended Waste at the Aurul S.A. Retreatment Plant in Baia Mare. Assessment Mission, Romania, Hungary, Federal Republic of Yugoslavia. 23 February - 6 March 2000. Report' (31 March 2000) <<https://reliefweb.int/report/romania/cyanide-spill-baia-mare-romania-unepocha-assessment-mission-advance-copy>>.

²¹² Human Rights Watch, 'Lebanon: 3 Years On, No Justice for Beirut Blast, UN Rights Body Should Set Up International Fact-Finding Mission' (*Human Rights Watch*, 3 August 2023) <<https://www.hrw.org/news/2023/08/03/lebanon-3-years-no-justice-beirut-blast#:~:text=The%20August%204%2C%202020%2C%20Beirut,and%20causing%20extensive%20property%20damage.>>

²¹³ 'Tianjin Chemical Blast: China Jails 49 for Disaster' (*BBC News*, 9 November 2016) <<https://www.bbc.com/news/world-asia-china-37927158>>; Susan Lloyd McGarry et al, 'Preventing the Preventable: The 2015 Tianjin Explosions' (2017) <<https://www.preventionweb.net/publication/preventing-preventable-2015-tianjin-explosions>>.

²¹⁴ 'Ukraine Accuses Russian Military Personnel of Ecocide, Aggression, and War Crimes' (*BNN*, 14 February 2024) <<https://bnnbreaking.com/politics/ukraine-accuses-russian-military-personnel-of-ecocide-aggression-and-war-crimes>>.

²¹⁵ Catrina Dorse, Joseph S Bermudez Jr and Jennifer Jun, 'Central African Republic Mine Displays Stakes for Wagner Group's Future' (*CSIS*, 3 July 2023) <<https://www.csis.org/analysis/central-african-republic-mine-displays-stakes-wagner-groups-future>>.

despite being aware for at least the past 50 years of the detrimental impact of resulting greenhouse gas emissions on the planet's habitability, climate and associated severe violations of the R2hE.²¹⁶ This type of scenario illustrates how Article 28(b) could be invoked to address the responsibility of corporate actors in such situations.²¹⁷

116. The use of Article 28 to establish one's liability in the context of environmental degradation should not warrant a departure from the conditions already developed in the jurisprudence.²¹⁸ To assess whether the commander or superior has taken **all necessary and reasonable measures** within their power to prevent the commission of severe violations to the R2hE and associated rights specifically,²¹⁹ the OTP could take into consideration the following elements, together with other factors already established in the jurisprudence:²²⁰

- The absence of preventive measures (e.g. the adoption of clear instructions, or an active policy to prevent environment harm,²²¹ or of measures to raise awareness on environmental and associated harms; ensuring that subordinates are trained in relation to environmental and associated harms) to limit the impacts of the commander's or superior's subordinates conduct and activities on civilian populations' R2hE and associated rights, and on the environment more generally;
- When planning an attack against civilian objects or infrastructures, the absence of (adequate) assessment on potential impacts of the attack on natural resources and the environment; and
- The absence of monitoring of the impacts of the commander's or superior's subordinates conduct and activities on civilian populations' R2hE and associated rights, and on the environment more generally.

4. Best Investigation and Prosecution Practices

117. Investigating and prosecuting crimes committed by means of or resulting in environmental damages share similarities with other ICC investigations. Like any other investigation, they should begin with a well-defined method/investigation plan and the implementation of successful investigative techniques and prosecutorial strategies. Similarly, establishing causation between criminal conduct and environmental harm poses challenges, particularly in politically sensitive or conflict-affected environments, along with

²¹⁶ Benjamin Franta, 'Early Oil Industry Knowledge of CO₂ and Global Warming' (2018) 8 *Nature Climate Change* 1024; Geoffrey Supran and Naomi Oreskes, 'Assessing ExxonMobil's Climate Change Communications (1977–2014)' (2017) 12(8) *Environmental Research Letters* 084019. See also the Barbados amicus to IACtHR for a history of climate science knowledge: 'Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile. Written Observations on Behalf of Barbados' <https://corteidh.or.cr/sitios/observaciones/OC-32/2_Barbados.pdf>. Similarly, national governments have long known that burning of fossil fuels would cause climate change and substantial humanitarian consequences would result (e.g. since the Charney report to the US Congress in 1979 – see Ad Hoc Study Group on Carbon Dioxide and Climate, *Carbon Dioxide and Climate: A Scientific Assessment* (National Academy of Science 1979) <https://geosci.uchicago.edu/~archer/warming_papers/charney.1979.report.pdf>).

²¹⁷ See *Musema* (Judgement) ICTR-96-13-T, TC I (27 January 2000) esp paras 880 and 894: Alfred Musema, a tea factory director in Rwanda, was convicted of genocide and crimes against humanity despite having no role in shaping the broader socio-political context of the genocide against the Tutsis.

²¹⁸ *Bemba* (Trial Judgment) (n 41) paras 170-213.

²¹⁹ Article 28(a)(ii) and (b)(iii) of the Rome Statute.

²²⁰ See in particular *Bemba* (Trial Judgment) (n 41) para 203-4.

²²¹ See the facts of *Auto No 01 de 2023* (n 109), esp E.2.9, G.2.3.7 and H, where the Special Jurisdiction for Peace stressed that the FARC-EP failed to adopt an active policy to prevent environmental damage.

practical hurdles such as limited access to affected areas and concerns over safety and evidence tampering.

118. However, what sets investigations into environmental damage apart is the specialised expertise and techniques required, distinct from those needed in more classical investigations. While traditional methods like forensics, satellite imagery analysis and expert testimonies still play a role, accessing and using the right **technical and scientific expertise** is essential for comprehensive evidence collection, analysis and presentation. Tailoring these approaches on a case-by-case basis ensures effectiveness.

119. Such endeavours demand high-quality resources, including human expertise and technical infrastructure. While costly, an effective approach necessitates a multifaceted strategy and adherence to best practices, with an **interdisciplinary team** at its core. Given the limited budget of the OTP, addressing the specialised expertise required for environmental investigations may require exploring flexible and cost-effective solutions, such as interdisciplinary **collaboration or outsourcing** to seasoned experts.

4.1. The Right Technical and Scientific Evidence

120. Investigating and prosecuting crimes related to environmental damage requires a multifaceted approach and adherence to best techniques and scientific practices to ensure effective outcomes. Indeed, the proper collection of scientific evidence is not only fundamental to ensuring accountability but also to protecting the environment and preventing future destruction or degradation. Without such evidence, there will be no reliable factual basis upon which legal action can be taken. State of the art techniques and scientific evidence is a key element in investigating the nature and scope of the environmental damage(s) and the associated crimes for several reasons.

a) **Identification of the crime:** scientific evidence helps investigators understand the specific nature and scope of the environmental damage(s). For instance, in cases of water pollution, chemical analysis can identify the pollutants present, their sources and their impact on aquatic ecosystems. They can also clarify the severity of the associated crime or crimes and their systematic and/or widespread nature.

b) **Establishing causality:** scientific evidence is key to establish a causal link between an action and its environmental consequences, which, depending on their nature, scope, impact on the R2hE and associated rights, could be considered criminal. This requires careful analysis and interpretation of data, and it might require specific analysis (like isotope analysis or climate modelling for example) to demonstrate whether, how and to which extent the actions of the perpetrator directly led to environmental harm or severe violations to the R2hE and associated rights. In the context of climate change, harm may be environmentally mediated, such as through intensifying storms or heatwaves, and result in harm to individuals or groups of individuals without necessarily entailing harm to the environment itself. By establishing causality, investigators can identify and therefore attribute responsibility to the perpetrators.

c) **Quantifying environmental damage:** the acts and conduct driving the unsustainable exploitation of resources, the destruction of ecosystems, or their pollution/contamination often result in or involve significant damage at a 'local' level. These acts and conduct may also involve wider changes to the atmosphere or ocean which do not themselves entail environmental 'harm', but which result in severe consequences for individuals or communities exposed to these impacts. Scientific evidence allows investigators to quantify the extent of this damage, providing valuable information for legal proceedings and

enforcement actions. Scientific evidence is also key in order to establish if the nature and scope of the impact is such that it may be considered systematic and/or widespread.

d) **Establishing health effects:** the acts and conduct driving the unsustainable exploitation of resources, the destruction of ecosystems, or their pollution/contamination may ultimately affect humans. Scientific evidence allows investigators to connect the impact of these activities on the environment to their consequences on humans and therefore establish the nexus with the relevant crime under the jurisdiction of the ICC. For example, epidemiological methods have been used to demonstrate mortality caused by the effects of climate change in raising temperatures.²²²

e) **Formulating effective policies:** scientific evidence gathered from criminal investigations can inform the development of policies and regulations aimed at preventing similar crimes by means of, or resulting in environmental damages in the future. By understanding the causes and consequences of environmental damage, policymakers can design more effective strategies for environmental protection and enforcement.

f) **Public awareness:** publicising the scientific findings of criminal investigations raises awareness about environmental issues and holds perpetrators accountable for their actions. By communicating the results of investigations to the public, authorities can highlight the importance of environmental protection and the consequences of crimes by means of, or resulting in environmental damages. This can lead to increased public support for conservation efforts and greater scrutiny of industries and activities that pose environmental risks.

4.2. A Multidisciplinary Team

121. Scientific evidence constitutes the essential factual basis facilitating justice and accountability for crimes by means of, or resulting in environmental damage. However, the complexity and multifaceted nature of these crimes demand an interdisciplinary approach to evidence collection that spans various fields of expertise. Harnessing the collective knowledge and skills of professionals from diverse disciplines will help achieve a comprehensive understanding of the causes and effects of each alleged crime, and ensure that investigations are thorough and well-rounded. These factors will enable authorities to accurately assess the impact, causality and consequences of crimes by means of, or resulting in environmental damages.

122. This collaborative effort ensures that investigations are conducted with the highest standards, allowing for the identification of the most responsible perpetrators and ultimately, for the protection of the environment and affected communities, thereby safeguarding the rights of present and future generations. Central to this approach is the formation of a multidisciplinary team comprising, aside from anthropologists and lawyers, the following individuals:

- a) **Prosecutors and investigators:** they should guarantee that all the process of collecting evidence and gather information is done with the standards required by the investigation.
- b) **Earth scientists:** they are at the core of the investigation. They need to have experience in collecting the evidence required to establish the elements of the crimes, as defined

²²² Ana Maria Vicedo-Cabrera et al, 'The Burden of Heat-Related Mortality Attributable to Recent Human-Induced Climate Change' (2021) 11(6) Nature Climate Change 492–500.

above. There might be subgroups focusing on the different affected matrix: water, soil, air, climate, forests, etc.

- c) **Geospatial experts:** they analyse and assess the reliability of satellite data. Satellites provide vast datasets of information about the state of the earth system and are often free and available.²²³ This represents a valuable source of information that can highlight environmental crimes, especially in area where there is no guaranteed access (like in conflict areas).
- d) **Doctors and health experts:** whenever the pollution or other environmental or environmentally-mediated harm causes health effects, doctors, epidemiologists and other health professionals who can investigate the extent to which the alleged criminal acts caused certain health effects, play a key role. Their involvement might also include specific medical analysis (blood, urine, hair) and/or clinical checks.
- e) **Forensic experts:** they utilise forensic techniques and technologies, such as DNA and chemical tracing, to identify sources of pollution and perpetrators of crimes by means of, or resulting in environmental damages.
- f) **Financial investigators:** they conduct financial investigations to trace illicit proceeds from crimes by means of, or resulting in environmental damages. This can be related to opaque private companies, but the same technique can be applied to the chain of command of an army decision or of a government.
- g) **Data analysts:** they store, process and analyse all the data collected.

123. The OTP could strengthen its investigative capacity by establishing its own roster of experts through the creation of a pre-selected list of trustworthy scientists and researchers. This proactive approach would streamline access to relevant expertise when needed, ensuring swift and efficient investigations into crimes affecting the environment.

124. Another possible avenue to access critical and tailored expertise is the development of solid partnerships with reputable organisations specialising in environmental investigations, such as Source International, the Centre for Climate Crimes Analysis, the Environmental Investigation Agency, or the Environmental Law Alliance Worldwide. These organisations' proven track records in the field confirm their ability to provide the required assistance in collecting clear and reliable evidence of environmental crimes.

125. Similarly, collaborating with organisations like Justice Rapid Response, renowned for the quality of their rosters, offers yet another promising strategy to enhance the OTP's investigative capabilities.

126. By leveraging these partnerships and initiatives, the OTP can significantly strengthen its ability to investigate and prosecute crimes affecting the environment, thereby advancing justice and accountability for the protection of present and future generations.

4.3. A Determination to Leverage Knowledge and Expertise

127. Leveraging the knowledge and expertise of others is another avenue to ensure that best practices are implemented for investigating and prosecuting crimes committed by means or

²²³ Examples include the EU's Copernicus Programme of Earth observational data.

resulting environmental damages and presents a valuable opportunity to strengthen the existing capacities.

128. Collaborating with professionals from diverse backgrounds and studying past cases enriches investigators' and prosecutors' understanding of investigative techniques, evidentiary standards and prosecutorial strategies.

129. This could be done through the organisation of seminars or workshops where best practices in relation to method/investigating plans and/or investigating techniques/prosecutorial strategies of crimes committed by means of or resulting in environmental damages would be reviewed.

130. Seminars or workshops on **method/investigating plan** could focus on two particular aspects:

- **Evidence collection:** topics for seminars or workshops on the matter could include challenges encountered in evidence collection, particularly in politically sensitive or conflict-affected environments and methods for overcoming them. Possible strategies for addressing these challenges could be explored, including overcoming limited access to affected areas, ensuring the safety of researchers or witnesses, and preventing evidence manipulation or destruction by involved parties.
- **Earth scientists and lawyers:** as one of the challenges often encountered in evidence collection is ensuring effective collaboration between earth scientists and lawyers, seminars or workshops addressed to earth scientists and lawyers could include finding a common language to discuss technical, scientific and operational difficulties, as well as hurdles in establishing causation and assessing the severity of environmental damage. Possible strategies for addressing these challenges could also be explored.

131. Seminars or workshops on **investigative techniques and prosecutorial strategies** could address two main themes:

- **Successful approaches:** topics for seminars or workshops on this subject could include the examination of successful investigative techniques, evidentiary standards and prosecutorial strategies employed in previous cases involving environmental damage. This analysis would inform best practices and highlights the importance of techniques such as environmental forensics, satellite imagery analysis, remote sensing, soil and water sampling, and expert testimonies in establishing the necessary elements of the crime and the causal link between criminal conduct and environmental harm.
- **Case studies and lessons learned:** topics for seminars or workshops on these issues could include case studies or examples of landmark cases where environmental crimes were effectively investigated and prosecuted. These case studies and examples would assist in identifying innovative approaches and lessons learned, emphasising key factors contributing to successful outcomes such as strong evidentiary foundations, international cooperation, use of expert witnesses and strategic legal arguments.

132. A collaborative approach with organised seminars and workshops around these key themes has the potential to encourage the development of innovative responses to environmental crimes, thereby building capacity within the investigative and prosecutorial teams. It would also contribute to promoting international cooperation in line with the

principles of complementarity outlined in the Rome Statute, the foundation of the ICC's intervention.

5. Principle of Complementarity

5.1. Implementation of the Principle of Complementarity (Article 17 of the Rome Statute)

133. States bear the primary responsibility to investigate and prosecute environmental crimes, when such crimes fall within the material jurisdiction of the ICC.²²⁴ This obligation is reinforced by international instruments establishing States' duty to provide access to justice in environmental matters.²²⁵

134. An ICC intervention is therefore warranted only when the concerned State is unwilling or unable to genuinely carry out proceedings. Given the significant evidentiary and practical challenges inherent in investigating and prosecuting environmental crimes,²²⁶ we invite the OTP to consider intervention in the following situations or cases involving environmental degradation, where a Rome Statute crime is believed to have occurred, or suspected of being committed:

- In cases of State inaction, consistent with existing jurisprudence;²²⁷
- When there is an absence of domestic legislation governing environmentally harmful activities;
- When existing domestic legislation may result in severe violations of the R2hE and associated rights, such as regulations enabling unsustainable exploitation of natural resources;
- In instances of inadequate implementation or enforcement of domestic legislation regulating environmentally harmful activities.

135. The existence of national non-criminal proceedings, like administrative or civil proceedings,²²⁸ against individuals allegedly responsible for environmental degradation does not necessarily hinder a State's unwillingness or inability to genuinely administer justice. The OTP should conduct a rigorous assessment of the State's potential intent to shield the suspect(s) from their criminal liability, as well as the potential significant breakdown of the State's judicial system. In cases where the OTP determines that national judicial proceedings

²²⁴ Preamble, Articles 1 and 17 of the Rome Statute.

²²⁵ Aarhus Convention (n 3); Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ('Escazú Agreement') (adopted 4 March 2018, entered into force 22 April 2021) 3397 UNTS C.N.195.2018.

²²⁶ See, for example, Pauline Martini and María Paula López Velásquez, 'Holding Corporations Liable for Breaches of Indigenous Peoples' Right to a Healthy Environment in Colombia: Chimera or Reality?' (2023) 25 ICLR 268.

²²⁷ *Katanga and Chui* (Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07-1497, AC (25 September 2009) para 78.

²²⁸ Note that the absence of criminal proceedings does not necessarily amount to a situation of impunity, which can be defined as 'the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims' (UN Commission on Human Rights, 'Promotion and Protection of Human Rights. Impunity. Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher. Addendum. Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) E/CN.4/2005/102/Add.1, 6).

demonstrate a lack of willingness or ability by the State to genuinely carry out proceedings, it should also carefully consider the presence of such proceedings in its interests of justice analysis under Article 53(1)(c) and (2)(c) of the Rome Statute.

136. The existence of national criminal or non-criminal proceedings against corporations should not prevent the OTP from opening a case against individuals belonging to the said corporation involved in the same criminal activities by virtue of the ICC's 'same person/same conduct' test.²²⁹

137. The prosecution of environmental degradation as a crime under ordinary criminal law and not as an international crime should not bear any weight in the OTP's admissibility assessment.²³⁰

138. In line with its policy of positive complementarity and Strategic Plan 2023-2025,²³¹ the OTP should favour exchange of good practices and lessons with States that have experience in investigating and prosecuting environmental crimes, like the DRC²³² and Colombia.²³³

5.2. Assessment of Gravity (Article 17(1)(d) of the Rome Statute)

139. The infliction of environmental damage, together with other factors including the vulnerability of the victims and the scale and nature of the crimes, is relevant to assess whether a case is of sufficient gravity to justify an action by the ICC.²³⁴ Against this background, we invite the OTP to consider the global and regional impacts of the conduct or activities that could amount to international crimes, as defined in paragraph 7, in its gravity assessment under Article 17(1)(d) of the Rome Statute.²³⁵

140. Considerations relevant to assessing gravity may include the magnitude, duration and irreversibility of harm and the number of people affected. Impacts of climate change, for instance, may meet criteria for gravity in case section. This is because ample evidence demonstrates that greenhouse gas emissions cause substantial mortality and ill-health globally, that the impacts of long-lived greenhouse gases such as carbon dioxide, and of some pollutants like heavy metals or other chemical compounds, will continue for centuries or millennia, after the allegedly criminal conduct (emissions), and some impacts are

²²⁹ *Kenyatta* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute) ICC-01/09-02/11-96, PTC II (31 May 2011) para 52.

²³⁰ See *Gaddafi and Al Senussi* (Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gadafi') ICC-01/11-01/11-547, AC (21 May 2014) para 113.

²³¹ Strategic Goal 2 of ICC-CPI, 'Office of the Prosecutor Strategic Plan 2023-2025' (13 June 2015).

²³² 'Army Chief Condemned for the Mirenzo Crimes' (*Trial International*, 22 November 2018) <<https://trialinternational.org/latest-post/mirenzo-theatre-of-confrontations-between-militia-and-the-congolese-army/>>; 'Shining Verdict in the Kokodikoko Case (DRC)' (*Trial International*, 19 November 2019) <<https://trialinternational.org/latest-post/shining-verdict-in-the-kokodikoko-case-drc/>>; 'DRC: Former Militiaman Chance Sentenced to Life in South Kivu' (*Trial International*, 14 September 2021) <<https://trialinternational.org/latest-post/environmental-crimes-brought-before-the-court-in-south-kivu-drc/>>; 'Upcoming Trial of Congolese Warlord in France Is a Historic Step toward Justice' (*Trial International*, 8 November 2023) <<https://trialinternational.org/latest-post/upcoming-trial-of-congolese-warlord-in-france-is-a-historic-step-toward-justice/>>.

²³³ Auto No 01 de 2023 (n 109). See also Jurisdicción Especial para la Paz, *Reflexiones sobre el Enfoque Territorial y Ambiental en la Jurisdicción Especial para la Paz* (Jurisdicción Especial para la Paz 2022) <<https://www.jep.gov.co/Infografas/docs/libro-comision-territorial-2022.pdf?csf=1&e=dzP9xa>>.

²³⁴ 'Policy Paper on Preliminary Examinations' (n 10) paras 62–65.

²³⁵ See Martini, Holt and Sarliève (n 28) 1022.

irreversible even if action is taken to remove the pollution of the atmosphere.²³⁶ Changing of atmospheric composition through greenhouse gas emissions and land use and land cover change (e.g. deforestation, forest degradation) leads to climate change impacts that entail direct risks to life and health, and indirect risks through environmental harm, with extensive/global effects, causing particular harm to vulnerable or highly exposed communities. In the context of climate change, sea-level rise (for low-lying regions) or certain climate-related disasters such as extreme drought may similarly render areas uninhabitable, resulting in forced transfer of populations. Impacts that are irreversible, or non-reversible over centuries to millennia, include the loss of ecosystems, species extinctions and sea-level rise. The impacts of the emissions of greenhouse gases such as carbon dioxide are generally independent of the location at which the emissions were produced: they occur both proximate to the location of emissions and globally.²³⁷

²³⁶ See, e.g. Hans-Otto Pörtner et al, 'Summary for Policymakers' in Intergovernmental Panel on Climate Change (IPCC) (ed), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2023); Mariana Romanello et al, 'The 2023 Report of the Lancet Countdown on Health and Climate Change: The Imperative for a Health-Centred Response in a World Facing Irreversible Harms' (2023) 402(10419) *The Lancet* 2346.

²³⁷ Rupert F Stuart-Smith et al, 'Global Climate Change Impacts Attributable to Deforestation Driven by the Bolsonaro Administration: Expert Report for Submission to the International Criminal Court' (August 2021) <https://www.smithschool.ox.ac.uk/sites/default/files/2022-03/ICC_report_final-sept-2021.pdf>.