Colombia, Special Jurisdiction for Peace, Crimes against the Environment in Cauca

The case deals with the Ruling of the Judicial Panel of the Special Jurisdiction for Peace in Colombia on members of the FARC-EP accused of war crimes against the environment in the Cauca region. The discussion will focus on the protection of the environment in IHL and ICL. It also addresses the Concurring and Dissenting Opinions of the Judges of the Judicial Panel regarding the accusation of crimes against the environment.

Acknowledgments

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[**Explanation of the Special Jurisdiction for Peace:** Foreseen by the Colombia peace agreement of 2016, the Judicial Panel for the Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct investigates serious human rights violations and grave breaches of international humanitarian law committed during the armed conflict. The procedure before this Judicial Panel has a dialogic and acknowledgment connotation, which means that there is no prosecutor's office to accuse the perpetrator; instead, he (she) appears voluntarily before the Judicial Panel to give his (her) version of the facts and accept his (her) responsibility, if he (she) has any, or to point out who are the alleged perpetrators. The Judicial Panel contrasts the perpetrator's statement with other sources of information such as the investigations carried out by the ordinary justice system, the observations of the victims, the statements of other persons who appear before the Judicial Panel, and contextual analysis reports. After comparing the different sources of information, the Judicial Panel issues, such as in this case, a decision known as the "Decision on Determination of Facts and Conduct". It presents the results of its cross-checking, pointing out the facts and

conducts determined, making a legal qualification of these as international crimes (mostly crimes against humanity and war crimes), and formulating an attribution of individual criminal responsibility to those who would be the most responsible. Following this decision, the Judicial Panel convenes an Acknowledgment of Responsibility Hearing. In this hearing, the perpetrators identified as the most responsible state whether or not they recognize their responsibility in the determined facts and conducts. If the perpetrator recognizes his (her) responsibility, he (she) is included in a subsequent decision called as "Resolution of Conclusions" in which it is stated what his (her) contributions to the truth were, what his (her) recognition of responsibility consisted of and what activities he (she) presented as a sanction project to repair the harm caused to the victims. This Resolution of Conclusions is sent to the Section of the Tribunal for Peace for cases with acknowledgement of truth and responsibility, which, after a process of verification of the procedure before the Chamber, decides and imposes the sanction that the perpetrator will serve. If the perpetrator has not made significant contributions to the truth or acknowledged responsibility, then he (she) is referred to the prosecutor's office (in the JEP this is called the Investigation or Indictment Unit (UIA)). If it finds merit, the prosecutor's office will initiate adversarial proceedings before the Peace Tribunal Section for cases without acknowledgement.]

A. Case 05 - Ruling 01 of 1st February 2023

[Source: Special Jurisdiction for Peace, Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conducts, Cauca Case, Ruling SRVR-01 of the 1st of February 2023 (most footnotes omitted, our translation); available at https://relatoria.jep.gov.co/documentos/providencias/1/1/Auto_SRVR-01_01-febrero-2023.docx]

[…]

I. BACKGROUND

[…]

II. CONSIDERATIONS

[…]

A. JURISDICTION OF THE SRVR TO DETERMINE THE FACTS AND CONDUCT AND CROSS-CHECKING METHODOLOGY USED

19. Hereafter, the Judicial Panel for the Acknowledgment of Truth, Responsibility and Determination of Facts and Conduct [the Judicial Panel, also referred to by the Spanish acronym SRVR] shall determine the facts and conduct attributable to the first group of people appearing in connection with this territorial situation, who were members of the Jacobo Arenas and Gabriel Galvis Mobile Columns [combat units of the the FARC-EP,

the Revolutionary Armed Forces of Colombia–People's Army] and are considered as most responsible for the acts attributed to these structures.

[…]

20. The Political Constitution of Colombia enshrines the preferential jurisdiction of the Special Jurisdiction for Peace (SJP) [also referred to by the Spanish acronym JEP] over acts committed in the armed conflict, as well as the specific jurisdiction of the SRVR over the main perpetrators and decisive participants in the most serious and representative acts in the conflict. […] […]

E. FACTS AND CONDUCT CARRIED OUT BY THE FARC-EP IN NORTHERN CAUCA AND SOUTHERN VALLE DEL CAUCA

[…] 116. The territories of the northern Cauca and southern Valle del Cauca had a special historical, economic and geographical importance for the FARC-EP. From the moment they entered the area, they therefore tried to gain territorial and social control, profoundly impacting the rights of the indigenous, Afro-descendant and farming population that had been living there since time immemorial. This situation became particularly serious from 1993 onwards, when the Eighth National Conference of the Guerrilla approved an expansion plan that led to the creation of the Western Joint Command, the Jacobo Arenas Mobile Column and, later, the Mobile Bloc. As a result, their area of influence spread progressively from the highlands of the Cordillera Central to more populated areas, turning the region into a "battleground".

[…]

E.2.9. Environmental and territorial damage in order to gain and maintain territorial and social control of the area

489. The SJP has a mandate to evaluate, analyse and reveal the environmental degradation that occurred because of the armed conflict. Human and environmental rights are symbiotic; one cannot be understood without the other. The goal is therefore to analyse the damage caused by the war from a cross-cutting perspective that not only focuses on human beings, but also examines their relationship with the territory and how their actions impacted the environmental balance; transitional justice is also environmental justice. For this reason, during the collective version hearings carried out within Case 05 [case that investigates the crimes committed in the Cauca region in the context of the Colombian armed conflict], the Judicial Panel applied an environmental approach in order to obtain relevant and verifiable information on the damage done to the territory.

490. In particular, illegal mining and the agricultural reconversion of the area for the production of illicit crops are the two main phenomena that affected the environment in the prioritized territory. These two activities sum up the impact of war on nature. In particular, [...] illegal mining in the prioritized area was an economic

driver of violence, in that rent-seeking was a strategic objective of the armed organizations.

[…]

491. The illicit crops in turn fostered a particular concentration of effects on the environment. Their growth created a vicious circle driven by the expansion of an agricultural frontier in which land was cleared for this kind of production. One of these activities alone can have an irreparable impact. A combination of the two generates environmental damage whose imprint may be totally irreversible.

492. [...] The areas where illegal gold exploration is identified overlap with the presence of coca-leaf crops, which shows a great complementarity, particularly in the case of Cauca, where there is a 69% percentage of coincidence between mining activities and illicit crops. This reveals the tragedy of the consolidation of a process of disproportionate environmental damage in which not only nature suffered the ravages of illegal mining, but the negative effects were magnified by the modification of the land to make way for the production of illicit drugs, without any kind of rules for environmental management or impact reduction.

[…]

493. The FARC-EP, as the de facto environmental authority in the areas of influence, did not have an active policy to prevent the damage caused by illegal mining and illicit crops. In reality, they were only a rent-seeking authority for the purpose of financing their operations. [...] [I]n Suárez municipality, there are several illegal mines and […] the FARC charged a special tax to allow mining in the area. [...] [T]he guerrilla levied a fee of two million pesos for each of the backhoes used in these mines and [...] most of the activity occurred in the Timbío River. […]

494. Meanwhile, the appearing party W.-M.L [initials of a former fighter] acknowledged that, in the area of influence of the Jacobo Arenas Mobile Column, gold extraction was permitted by the FARC-EP, which also bought the mineral directly. In addition, as confirmed in the statement of the appearing party A.A.A.H., the FARC-EP was sometimes part of the mining chain in Inzá municipality, where guerrillas punished by the organization were sent to work in an emerald mine.

495. In another proceeding, the appearing party O.M.M.P. acknowledged before the SJP that the indiscriminate digging of pits in illegal mines in Danubio district, Morales municipality, caused the rivers to dry up. All this took place under the complicit gaze of the guerrilla units, which only had an economic interest in this activity. The appearing parties R.N.G.M. and E.L.G. acknowledged that the guerrilla organization charged different fees in the coca-processing chain in the region. […]

496. But the participation was not only indirect or occasional. The Judicial Panel documented cases where the guerrillas themselves had made direct investments in illegal mining activities. Such information was

obtained in the voluntary version of the facts by the appearing party S.U.O., who stated that one of his comrades owned a backhoe that was used to dig pits in the upper reaches of the Palo River in northern Cauca. The FARC-EP was moreover involved in the marketing of illegal gold [...].

497. Ultimately, the Judicial Panel must emphatically underscore that the FARC-EP had an ambiguous attitude that led to serious environmental damage as a result of its conduct, which was permissive in some cases and direct in others, with human actions that destroyed the environmental balance in the region. On paper, the guerrilla organization described itself as an army with deep environmental convictions that even prohibited the indiscriminate felling of trees. But in the heat of war the reality was very different. Whether actively or passively, the guerrilla command structure was complicit in illegal mining and the expansion of the illicit agricultural frontier. These activities have left a drastic mark on the environment, which will probably take generations to erase and which will serve as a sad reminder of the environmental crimes that were committed there. [...]

[…] 500. During the proceedings, information was collected about the impact of the attacks, the occupation of special areas to set up camps and, above all, the laying of anti-personnel mines, on the paramos [treeless plateaus] and high-mountain ecosystems:

(i) In their voluntary versions of the facts, the appearing parties who were members of the Gabriel Galvis [...] and Jacobo Arenas Mobile Columns [...] stated that many mines were planted in the paramos in the areas of influence of both units.

(ii) The collective voluntary version of the Gabriel Galvis column stated: “[…] Nonetheless, harm was caused to the environment when mortars or cylinders were fired, since they destroyed trees or made holes in the ground that damaged the mountains; trees were also felled to build sleeping quarters in the different camps.”

(iii) The [...] poisoning of the water tributary supplying the pipeline at Hacienda Miraflores in Miranda municipality, as military units were stationed there, directly impacted water resources in the area.

(iv) [...] The detonation of explosives in paramo areas caused widespread, serious and long-term damage to native species such as frailejones, which grow one centimetre per year and can live up to 200 years; these acts are attributed to the command of the Gabriel Galvis column.

(v) In the voluntary version of appearing party E.N.P., they acknowledged that they had travelled through paramo areas where they allowed the cutting of frailejones, as well as the contamination of water [...].

(vi) The victims stated that Cerro de Belén, in Caldono, owing to its geographic location, was a focus of attacks and confrontation, thus revealing the militarization of sacred sites (lakes, paramos and riverbanks), including the planting of anti-personnel landmines [...], which damage the community’s relationship with the territory.

(vii) In response to calls for truth from the victims, D.A.M. stated that: “We must recognize that our political and armed actions in the region also caused damage to the territory, with the planting of mines in sites sacred to the indigenous people, such as Lake San Rafael, and the constant fighting in the paramo. […]

[…] 502. The social and ecological damage caused during the armed conflict left a multiple ecological footprint. Disruptions such as the planting of illicit crops led to changes in the structure and composition of the paramo areas, resulting in a decline in species and micro-organisms there. These effects were the product of farming activities, and included the invasion of alien weeds, loss of organic matter and soil nutrients, and the use of agrochemicals such as pesticides and herbicides, which led to the destruction of soil structure and, with it, water-retention capacity.

[…]

F. Victims and survivors: different damages and impacts

[…] (viii) Environmental and territorial damage in order to achieve or gain territorial and social control of the area

[…]

582. It should be emphasised that, for the indigenous peoples and Afro-descendant communities, there exists an interdependence between the territory and the people who inhabit it. [...] [T]he conditions of vulnerability and impact on the peoples are the result, among other reasons, of the existence of patterns of discrimination, the pressure of the majority culture on their worldview and the specific impact of the armed conflict on indigenous communities and other ethnically diverse groups, owing, inter alia, to the dispossession or strategic use of their lands and territories. […] Many of these risks are related to the defence of the holistic life of the territory, the rivers, the animals, the sea, the mangroves, the mountains, the sacred sites and the people. This situation of violation of rights was intensified when the different armed groups burst into their environment and threatened the integrity and dignity of the territory and the people, destroying the harmony of their spiritual, cultural, social and dietary environment, which is interconnected and interdependent with the knowledge and life of all beings in the territory.

[…]

G. OWN LEGAL QUALIFICATION OF THE FACTS AND CONDUCT

584. The SRVR must make its own legal qualification based on a harmonious use of Colombian criminal law, international criminal law, international humanitarian law (IHL) and international human rights law. [The legal

qualification is the preliminary charge made by the SJP against the main perpetrators of the crimes identified] [...]

585. [...] In this regard, the Constitutional Court of Colombia stated that, for a legal qualification of the facts, it is necessary to apply not only the current Criminal Code of Colombia, but also the rules of international human rights law, IHL and the peremptory norms of jus cogens.

[…]

G.2. WAR CRIMES IN NORTHERN CAUCA AND SOUTHERN VALLE DEL CAUCA ATTRIBUTED TO THE FIRST GROUP OF APPEARING PARTIES FROM THE JACOBO ARENAS AND GABRIEL GALVIS STRUCTURES

G.2.1. Charge of war crimes in Colombia

760. War crimes are acts that gravely breach the rules of IHL applicable in international armed conflict (IAC) and/or non-international armed conflict (NIAC). After the reactivation of international criminal law after the Cold War, international jurisprudence has defined the criteria to take into account when classifying an act as a war crime. These criteria were enumerated more clearly following the Tadić case by the International Criminal Tribunal for the former Yugoslavia (ICTY). They are: [...] [See ICRC, Online Casebook, Tadić, Document A, para. 94)

[…]

763. IHL applies from the initiation of armed conflicts and extends beyond the cessation of hostilities until a peace agreement is reached.

764. As for the ratione loci, it is noted that IHL applies to the entire territory of the States involved in the IAC. In the case of an internal armed conflict, IHL applies throughout the territory under the control of a party, regardless of whether or not fighting is taking place in that area.

[…]

G.2.2. Contextual Elements of War Crimes

G.2.2.1. Definition of armed conflict

768. For war crimes to be committed, the existence of an armed conflict is required. These conflicts can be international or non-international. In an IAC, the scenario usually consists of a confrontation between the armed forces of two or more States. A NIAC, meanwhile, may exist when the armed forces of a State

confront organized armed groups over a protracted period of time, or when non-State players fight each other on the territory of the State.

769. The decision on the appeal on jurisdiction in the case of Dusko Tadić stated that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. […]

770. Most of the jurisprudence related to the existence of NIAC focuses on the criteria of the organization of the combatants and the intensity of the hostilities in order to determine whether an internal conflict exists in a given situation. Meanwhile, the requirements of territorial and social control and compliance with IHL obligations have become less important in determining the existence of an internal conflict.

771. The jurisprudence of the International Criminal Court (ICC), in the confirmation of charges in the case of the Prosecutor v. Jean-Pierre Bemba, concluded that a NIAC is characterized by the existence of armed hostilities with a certain level of intensity which exceeds that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, and which take place within the territory of a State. [...] For the ICC, organized armed groups are those that have the ability to plan military operations and put them into effect over an extended period of time. The groups must be subordinate to a responsible command, i.e. they must have a certain level of organization, which includes the possibility to impose disciplinary measures and the ability to plan and carry out military operations.

772. In the Bemba case, ICC Pre-Trial Chamber II affirmed that, in accordance with the ICC Statute, it is not required that the organized armed groups exercise control over part of the territory. This confirms what was determined in the decision on the confirmation of charges in the Lubanga case, where Pre-Trial Chamber I stated that the participation of armed groups with some degree of organization and the ability to plan and carry out sustained military operations would allow for a conflict to be characterized as a NIAC.

G.2.2.2. Hostilities between the FARC and the Colombian State […]

774. From the founding of the FARC in 1966, it engaged in continuous hostilities against the forces of the Colombian State. From 1966 to 1985, the FARC-EP claimed more than 25 conflict-related victims per year.

775. By 1973 the conflict had reached a low intensity and by 1985 it was considered a medium-intensity conflict. From 1976 onwards, the death toll linked with the conflict began to rise, with over 100 victims that year, over 200 victims in 1978, over 170 victims in 1979 and over 200 victims in 1980. In 1985, the conflict claimed more than 500 lives.

[…]

780. [...] [I]n all times and places, in the conduct of an armed conflict, both the members of irregular armed

groups and the members of the Armed Forces are obliged to respect IHL, since these rules enshrine "minimum principles of humanity that cannot be derogated from even in the harshest conflict situations". […]

G.2.2.4. Nexus between criminal conduct and armed conflict

781. Not all crimes committed in a State where there is an armed conflict are automatically war crimes. For criminal conduct to be considered a war crime, it must be sufficiently connected to an armed conflict. This link must be strong enough to establish a relationship between the crime and the context of the armed conflict such that the crime is not considered an ordinary crime but a war crime. Although the legal criteria for establishing the nexus between a crime and armed conflict has developed over the years and has been variously applied by the different international criminal tribunals and national courts, the most recurrent evidentiary standard used is the one established by the judgments of the ICTY in the Kunarac and Tadić cases.

782. In Kunarac, the ICTY Appeals Chamber determined that, for there to be a sufficient nexus between a crime and the armed conflict, the act must have been committed "in furtherance of or under the guise of the armed conflict". It has also been stated that the act must have been "occasioned by the armed conflict, which created the situation and provided an opportunity for the criminal offence".

783. In determining the nexus between a crime and the armed conflict, as noted in the appeal judgment in the Kunarac case, a court may take into account, inter alia, the following factors: (i) whether the perpetrator was a combatant, (ii) whether the victim was a non-combatant, (iii) whether the victim was a member of the adverse party, (iv) whether it could be alleged that the act had furthered the purpose of a military campaign and (v) whether the crime was committed as part or in the context of the official duties of the accused.

784. It was further stated that there is no need for a temporal or geographical link between the crime and the conflict area. In other words, for a war crime to exist, the act need not have been committed at the same time and in the same place as the hostilities.

785. In light of the above jurisprudence, it can be noted that the nexus is more easily established when the acts "were committed in furtherance of and in unison with the objectives of the military campaign against the opposing party to the armed conflict".

[…] G.2.3.7. Impact on the environment and the territory

1005. The SRVR shall now explain the reasons why it considers that the environmental damage caused by the FARC-EP in the prioritized municipalities constitutes a non-amnestiable crime in accordance with the law applicable to the SJP. This is because such acts can be classified as war crimes, as well as constituting a violation of fundamental rights recognized by international law within the crime of persecution.

1006. […] This is why, in compliance with the rules of competition laid down by international criminal law in the Celebici case, it is considered that environmental damage can be classified as a crime against humanity, from an anthropocentric and cultural perspective, as well as the war crime of environmental destruction, which allows for recognition of the environment as a victim in itself.

a. Environmental protection in IHL

1007. The ICRC has identified protection of the environment as a rule of customary IHL that restricts the manner in which armed players conduct hostilities. […]

1008. The ICRC has noted that the above-cited Rule 43 is applicable in IAC and in NIAC. It can be deduced from this rule that the principles of IHL, especially with regard to distinction and proportionality, are applicable to military operations that may have an impact on the environment.

1009. It can also be noted that such operations are not prohibited in all cases, but only in those situations where the environment cannot be considered a military objective, or when imperative military necessity authorizes damage to the environment (for instance, when nature is used to cover, conceal of camouflage combatants or another military objective in the conduct of fighting).

[…]

1013. The environment can also be considered as a protected object under IHL, thus Rule 50 of international humanitarian custom is also applicable to damage caused to the environment. This customary rule has been recognized by the ICRC as applicable to international and internal armed conflicts. Rule 50 of customary IHL establishes: “The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity.”

1014. The principle of proportionality, as a fundamental principle of IHL, is also applicable to the damage caused in the course of military operations. […]

[…]

1016. As previously stated, the principle of proportionality of attacks in internal armed conflicts is part of customary IHL. Thus, any damage to the environment that is excessive in relation to the concrete and direct military advantage anticipated is disproportionate and constitutes a violation of IHL. It should be recalled that the expression “concrete and direct” military advantage is used to indicate that the advantage must be “substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”, in accordance with Rule 14 of customary IHL [...].

[…]

1018. In its customary IHL database, the ICRC states with respect to Rule 44: [...] “It can be argued that the obligation to pay due regard to the environment also applies in non-international armed conflicts if there are effects in another State. […] Furthermore, there are indications that this customary rule may also apply to parties’ behaviour within the State where the armed conflict is taking place.”

1019. The aforementioned Rule 44 includes the precautionary principle in the analysis that must be carried out before conducting a military operation that may cause damage to the environment, and also allows for an analysis of the damages caused from an ecocentric perspective. 1020. We must also consider that the principle of precautions, as a rule of customary IHL, is also applicable in internal conflicts, as noted by the ICRC. Rule 15 of customary IHL establishes [...].

[…]

1023. Meanwhile, according to Article 35(3) of Additional Protocol I to the Geneva Conventions of 1949, it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

1024. In addition, Article 55 enshrines protection of the environment in warfare, reiterating the provisions of Article 35(3) and adding the prohibition of causing damage to the environment when this prejudices the health or survival of the population, as well as attacks against the natural environment by way of reprisals.

b. Scope of protection in international criminal law

1025. Article 8(2)(b)(iv) of the Rome Statute of the ICC designates as a war crime intentionally launching an attack in the knowledge that it will cause damage to the natural environment (as in Additional Protocol I) which would be clearly excessive in relation to the concrete military advantage [...].

1026. Although this crime was not established in the case of NIAC, it is noteworthy that the international rules prohibiting damage to the natural environment have inspired the designation of criminal offences in domestic law. It should also be remembered that the ICRC has stated that the practice of ad hoc international tribunals, in defining war crimes, “does not exclude the possibility that a State can define other serious violations of IHL as war crimes in its domestic legislation”.

1027. [...] The environment has a very special character because, as well as being protected its own right, it takes physical form in places and objects that are legally regulated by property law. Thus, with regard to internal conflicts, protection of the environment can also come about through crimes related to the protection of property, which does not exclude the importance of its protection in its own right, but rather underscores the multi-offensive character of such acts. Article 8(2)(e)(xii) is relevant here, as it designates as a war crime

“destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict”. […]

1028. According to the ICC’s interpretation of this crime, for it to be committed the property destroyed, by act or omission, must belong to “individuals or entities aligned with, or in alliance with, a party to a conflict that is adverse or hostile to the perpetrator”. This property may be public or private and movable or immovable, which is the case of certain natural resources that form part of the environment. This crime applies not only when the attack, the act of violence, is directed specifically against a military objective, but also when it is directed against civilian property, such as the environment. For the Judicial Panel, it is essential that the property, whether public or private, belong to a person or persons adverse to the armed group. This “adversary” character can be based on the categorization made by the armed group destroying or seizing the property with respect to the people attacked, without them necessarily having objectively to belong to one of the parties to the conflict. The above all becomes clearer when one considers that Article 8(2)(e)(xii) includes civilian objects among those that may be attacked, as it does not differentiate between “combatant adversaries” and “civilian combatants”, unlike Article 8(2)(e)(ix) of the Rome Statute.

1029. In this case, the former combatants have acknowledged that the adversary was the Colombian State, with respect to which the Rio Declaration on Environment and Development established that “States have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. It should be borne in mind that, from the day it was founded as an armed organization, the FARC-EP had the objective of attacking the State through the use of arms, thus an attack on natural resources also implies an attack on the State, as an adversary in the armed conflict.

1030. As for the third element of the crimes, the ICC noted that military objectives lack protection under IHL, for this protection does not extend to objects which “by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. The military advantage of destroying objects belonging to the “adversary” must be definite and in no way indeterminate or merely potential. The military need to destroy the objects must be imperative. The ICC has considered this type of necessity to exist when “the perpetrator has no other option” but to destroy the object, which was not the case of the attacks on the environment in the prioritized territory. By virtue of the above, the necessary elements are met to qualify the attacks on the environment described in Section E of this Ruling as constituting a war crime in line with subparagraph 8(2)(e)(xii) of the Rome Statute.

[…]

1032. In accordance with these requirements, for the purposes of NIAC and specifically for Colombia, a systematic interpretation of the existing international legal sources can lead to the conclusion that a violation

of IHL would occur if Rules 43, 44 and 45 of the ICRC's study on customary IHL were breached. These rules, while they do not constitute an uncontested affirmation of custom, have been repeatedly applied by multiple States, which have incorporated them into their national legislation. These include Colombia, which, in the Basic Military Manual (1995) of the Ministry of Defence, prohibited damage to the natural environment using the same wording as Rule 45.

1033. It is relevant here to mention the Martens Clause, which is understood as a cornerstone of IHL. This clause was confirmed by paragraph 4 of the Preamble to Additional Protocol II and later taken up by the Colombian Constitutional Court in its constitutionality ruling C-225 of 1995, when it determined that this paragraph, which refers to the principles of humanity and the dictates of the public conscience, is an illustration of the Martens Clause; considering that its purpose is to prevent the possibility that any conduct not prohibited by the Protocol is perceived as permitted. There is thus an awareness of the obligation to protect a healthy environment in the context of NIAC, which takes shape with the confirmation of the Martens Clause, giving concrete form to the prohibition found in international custom.

1034. In addition to the above and continuing with the requirements established in the Tadić decision, the violation is sufficiently serious when it it constitutes an affront to the principle of distinction; given that the environment is considered as civilian property. This concurs with the fact that consequences were caused for the ethnic communities by impacting their identity with regard to their direct relationship with the land as part of their worldview and their traditional use of the land; thus giving rise to a direct violation of their human rights and the prohibition of discrimination inherent to IHL.

[…]

[...]d. Non-amnestiable nature of crimes against the environment […] 1062. In this case, it has been demonstrated that the Jacobo Arenas and Gabriel Galvis Mobile Columns caused serious damage to the natural environment that is widespread and long-term:

[…]

1063. This impact gave rise to damage that was: (i) widespread, i.e. over a broad geographical area, as it occurred in much of the prioritized territory, both in paramo areas, which were affected by the planting of mines, attacks and the establishment of camps, and in the places where coca and marijuana cultivation spread massively, as related in subparagraph a) of Section E.1.2.2., and from which these structures derived millions in revenue from the collection of what they called taxes; (ii) long-term, i.e. generating effects over a long period of time, since the harm done to paramo ecosystems has a very long recovery period; (iii) severe, i.e. involving significant disruption of or damage to human life, natural economic resources or other assets; because the excessive illegal mining in protected areas, the massive deforestation of forests and reserves and the contamination of important water sources that impacted the lives of the communities and caused

environmental degradation alter the very composition of the national ecosystem's cycle.

H. IDENTIFICATION OF INDIVIDUAL RESPONSIBILITY OF THE FIRST GROUP OF APPEARING PARTIES FROM THE GABRIEL GALVIS AND JACOBO ARENAS STRUCTURES

[…]

V. DECISION

[…]

B. Concurring Opinion – Judge Belkis Florentina Izquierdo Torres

[Source: Special Jurisdiction for Peace, Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conducts, Cauca Case, Concurring Opinion of Judge Belkis Florentina Izquierdo Torres on Ruling SRVR-01 of the 1st of February 2023 (footnotes omitted, our translation); available at https://relatoria.jep.gov.co/documentos/providencias/1/4/AV_Dra-Belkis-Izquierdo_Auto_SRVR-01_01-febrero-2023.pdf]

[…]

1. With due respect for the decisions of the Judicial Panel for the Acknowledgement of Truth, Responsibility and Determination of Facts and Conduct (hereinafter the Judicial Panel) [also known by its Spanish acronym, SRVR], I should like to clarify the vote in SRVR Ruling No. 001 of 1 February 2023, within Case 05, which determined the facts and conduct of the first group of appearing parties from the Jacobo Arenas and the Gabriel Galvis Mobile Columns in the Territorial Situation in the northern Cauca and southern Valle del Cauca region.

[…]

3. [...] In this regard, within the framework of the renewed discussions in the Judicial Panel, I should like to clarify the vote on two inter-connected issues: (i) the SRVR's own legal classification; and (ii) the legal classification of the destruction of Nature, the Territory and sacred sites.

[…] ii. Legal qualification of environmental destruction in NIAC

48. Specifically, regarding the classification of the destruction of Nature and the Territory, when reviewing the Rome Statute, given the lack of a provision enshrining long-term, widespread and severe damage to the environment as a war crime in non-international armed conflict (NIAC), unlike in the framework of

international armed conflict (IAC), Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court, an attempt was made to find a multi-offensive penal provision that would protect similar legal rights in NIAC, by analysing Article 8(2)(e)(xii) of the Rome Statue, which establishes as a war crime “destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict”.

[…]

50. I thus consider that the legal classification used for the destruction of the environment, applying Article 8(2)(e)(xii) of the Rome Statute, does not correspond to the understanding of Territory and Nature that the Ethnic Peoples have. The assertion that it is the property of the adversary ignores the fact that the Ethnic Territories, where the sacred sites are found, are: (i) constitutionally collective property and as such inalienable, imprescriptible and unseizable; (ii) an indivisible unit with the Peoples that inhabit it; and, (iii) territories of peace.

[…]

58. As there is no express rule in international criminal law regarding the prohibition of attacking civilian property in the framework of NIAC, both the ICRC and the International Criminal Court (ICC) have interpreted that civilian objects are understood to be included within the war crime of destruction and seizure of the adversary’s property. However, the rules governing the legal classification made by the Special Jurisdiction for Peace (SJP) are much more complete and allow for more specific accountability and greater compatibility of the elements of the crimes with factual reality, especially with the perspective and legal systems of the Ethnic Peoples.

59. Nature is civilian property and its protection derives from this; a relationship with the “adversary” should therefore not be required, as this is a figure that blurs the notion of people and civilian property. It is thus considered that application of Article 8(2)(e)(xii) of the Rome Statute does not correspond to the understanding of Nature, Territory and sacred sites professed by the Ethnic Peoples.

[…] The Territory as cultural property and a place of worship for Ethnic Peoples

63. The Indigenous Peoples and the Black Afro-Colombian People have an intimate relationship with their Territory, which is essential for their physical, cultural and spiritual survival. Rather than understanding the damage done to landscape units or natural resources, what is needed is a relational approach that considers the breakdown of socio-ecological relationships on multiple temporal and spatial scales, the deterioration of life in the broad sense, and the loss of the Peoples’ ability to remain and thrive in their territories because of the destruction of the spiritual and material conditions necessary for work and food, collective self-reliance and cultural reproduction.

[…]

70. For this reason, it shall now be explained why the damage done to Nature and the Territories described in the Ruling on the Determination of Facts and Conduct in Case 05, caused mainly by illegal mining and the use of illicit crops in sacred sites, also constitutes the war crime of destruction of cultural property or places of worship.

[…]

72. In the Al-Madhi case, being the first time the ICC applied Article 8(2)(e)(iv), the court proceeded to interpret the article and its elements. It stated that special protection of cultural property can be found in Articles 26 and 27 of the 1907 Hague Conventions and the 1919 Commission on Responsibilities, which identified the wanton destruction of religious, charitable, educational and historical buildings and monuments as a war crime. The Geneva Conventions also recognized the need for special protection of some objects that already enjoyed general protection as civilian objects. Thus, later instruments included greater protection of cultural property, including Protocols I and II to the Geneva Conventions and the Second Protocol to the Hague Convention of 1954.

73. Regarding the element of "directing an attack", the ICC considered this to encompass any act of violence against protected property regardless of whether it was carried out during the conduct of hostilities or once the object had fallen under the control of an armed group, since the Rome Statute did not make this distinction. In the view of the Judicial Panel, this reflects the special status of religious, cultural, historical and similar objects, for indeed, cultural property is protected as such by IHL from crimes committed both in and outside of battle.

[…]

75. Article 8(2)(e)(iv) of the Rome Statute is strongly in line with Article 16 of Protocol II Additional to the Geneva Conventions, which protects cultural property and places of worship, "which constitute the cultural or spiritual heritage of peoples", by prohibiting acts of hostility against them and their use in support of the military effort.

[…]

77. Meanwhile, the ICRC Commentary on Article 16 of Additional Protocol II establishes that places of worship are those which "have a spiritual importance independently of their cultural significance, and express the belief of a people". Thus, "the cultural and spiritual heritage of peoples" means those objects whose importance transcends national borders and that are unique owing to their link to the history and culture of a people. The wording heritage of "peoples" rather than of "a country" was chosen precisely to avoid problems

of intolerance with regard to religions that do not belong to the country concerned and the places where such religions are practised. This means that the places do not have to have global importance but that it is enough, in order for them to be protected, that they have special value for a people.

[…]

79. Meanwhile, although different in scope, the Second Protocol (of 1999) to the Hague Convention of 1954, applicable to NIAC, sets forth the grave breaches of this instrument in Article 15; these include (...) c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; (...) e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

80. Similarly, customary international law protects cultural property in both IAC and NIAC. Rule 38 [...]. Rule 39 [...]. Rule 40 [...].

[…] 83. From all the above, it can be interpreted that, in referring to “buildings”, Article 8(2)(e)(iv) of the Rome Statute does so from a Western perspective, but by virtue of legal pluralism this should be understood in a broad sense as “place”, according to the beliefs and views of each people. The ICRC has asserted that: “The destruction of cultural property can be seen as an attempt to destroy not just churches and libraries, for example, but the cultural identity of an entire society. The struggle to defend the cultural property of a population, and hence respect for its dignity, is therefore an integral part of the humanitarian operation aimed at protecting that population”. Likewise, the term “religion” must be understood in a broad sense that encompasses, within the freedom of worship and different belief systems, the spiritual practices of Ethnic Peoples in accordance with their worldviews.

84. This is particularly relevant for the Ethnic Peoples because, as has been explained, from a relational ontology point of view the Indigenous Peoples and the Black Afro-Colombian People have, according to their cosmovision, their own systems of health, education, justice, government, etc., which adhere to a principle of integrality and are founded on their own laws, such as the Law of Origin and Nature, the Word of Life, the Greater Law, the Peoples’ Own Law, Living Well and Joyful Living.

85. Thus, on the one hand, as the ICC has indicated, attacks against objects of this kind do not necessarily have to have been committed in the course of hostilities, and for this reason it is understood that illegal mining activities and illicit crops [...]. It is clear that the places where these acts were committed were not military objectives. In addition, the use of anti-personnel landmines has been absolutely forbidden since the Ottawa Convention, ratified and in force in Colombia since 2000.

86. Neither illegal mining nor illicit crops represented a military advantage, and much less an imperative military necessity, as they were an activity aimed at financing the organization that did not consist of attacking the enemy. The above was in clear violation of the IHL principles of distinction, proportionality and

precaution.

87. For example, in 2003, the FARC's Gabriel Galvis Mobile Column mined the paramo area in the southern Valle del Cauca, which is a sacred place for the community. Regarding this type of damage, the victims stated that "The invasion of sacred sites by the different armed groups led to their contamination and with it the physical and spiritual disharmony of the territory and of the people, who stopped going to these places, either out of fear of the conflict or because the plants for ritual use that grew there had dwindled, so the harmonization rituals were weakened. In some of these sacred sites, the armed groups left explosive devices that prevented traditional doctors from going there."

[…]

94. In light of all the above, it is considered that – within the framework of ethnic and cultural diversity and legal pluralism, and as the embodiment of the different ethnic-racial, territorial and environmental perspectives, taking into account that this is a territorial situation that investigates, among other things, crimes committed against Ethnic Peoples and Territories – the principles, logic and rationale of these Peoples' own justice systems had to be incorporated and the facts, conduct and serious, various and disproportionate damage linked to the destruction of the Territory and sacred sites examined in greater depth. In this way, specific accountability on the issue is achieved, through the charge of the war crime of destruction of cultural property and places of worship, in line with Article 8(2)(e)(iv) of the Rome Statute and Article 156 of the Colombian Penal Code.

[…]

C. Partial Dissenting Opinion – Judge Catalina Díaz Gómez

[Source: Special Jurisdiction for Peace, Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conducts, Cauca Case, Partial Dissenting Opinion of Judge Catalina Díaz Gómez on Ruling SRVR-01 of the 1st of February 2023 (footnotes omitted, our translation); available at https://relatoria.jep.gov.co/documentos/providencias/1/4/AV_Dra-Catalina-Di%CC%81as_Auto_SRVR-01_01-febrero-2023.pdf]

[1] With due respect for the majority position of the Judicial Panel in adopting Ruling 01 of 2023 on the Determination of Facts and Conduct in Macro-Case 05 "Territorial Situation in the northern Cauca and southern Valle del Cauca region", I should like to explain the reasons why I detach myself partially from that decision, with regard to the charge of destruction of the environment under domestic law as a war crime against the appearing parties from the Jacobo Arenas and Gabriel Galvis Mobile Columns of the FARC-EP.

[…]

[2] An examination of the sections on facts and conduct (Section E) and damage (Section F) allows us to establish that recourse to the crime of destruction or seizure of enemy property without military advantage is rather complementary and subsidiary in the argument, since in no case do either the appearing parties or the victims identify the natural environment as State property that the guerrillas attacked in order to illegitimately reduce the adversary's combat capacity. These sections contain valuable documentation on the damage done to nature, which is one of the autonomously accredited victims in the Macro-Case, and which is incompatible with the idea that nature was considered strictly as property of the adversary in the logic of the conflict.

[…]

[3] [...] As the damage was caused by complex economies that preceded and outlived the presence of the FARC-EP in the region, it is impossible to determine the damage caused specifically by the FARC-EP based on their heterogeneous contribution to these illegal economies. It is true that environmental damage has multiple causes and is often the result of the cumulative effects of practices spread over long periods of time, but the argumentative requirements for the charge of the crime of environmental destruction as a war crime are not satisfied by the mere finding that the boom in these economies and their environmental damage coincided with the presence of the FARC-EP.

[4] In relation to the documented damages, without having established any causal link with the acts of the appearing parties, the Ruling affirms the responsibility of the members of the FARC-EP based on the idea that their rent-seeking policy fostered the occurrence of these damages through the authorization of these illegal economies in areas under the guerrilla group's control and the imposition of taxes on illegal miners, coca-leaf growers and intermediaries in the cocaine economy. Developing this point, the Ruling states that members of the FARC-EP, as "de facto environmental authorities" (paras. 493–497) in the areas under their control, must have been aware of the environmental impact of the economies they were supporting, and that by facilitating their expansion they became co-perpetrators of the crime of environmental destruction as a war crime. According to the Ruling, the territorial control exercised by the guerrilla imposed on them a duty to protect nature, which the members of this organization could not evade at the risk of committing a war crime.

[5] Subsuming the armed group's rent-seeking policy – which took concrete form in the granting of authorizations for the exploitation of resources and the collection of taxes – under the crime of "use of methods or means designed to cause widespread, long-term and severe damage to the natural environment", [...] is based not on an analogy but on a false equivalency. As I noted in the previous section, the "interpretative reinforcement" of the crime of environmental destruction as a war crime imposes the need to prove the intentionally launched attack in connection with which severe, widespread and long-term damage was caused through the use of means and methods that violate the IHL principles of distinction, proportionality and precaution. Such an attack is not comparable, and in no way admissible under conventional or customary IHL, with a rent-seeking policy.

[6] I consider untenable the attempt to redefine the FARC-EP's extortions from miners and coca growers as attacks against nature, and as such non-amnestiable crimes under the law applicable by this jurisdiction. This resignification is based, as I have sought to demonstrate, on an unjustified extension of the individual criminal responsibility of the appearing parties, a false equivalency between extortion and attacks, and an unprecedented reinterpretation of the duties of the parties to the conflict, which clearly violates the principle of the broadest possible amnesty set forth in the Geneva Conventions and included in the Statutory Act of the SJP.

[…]

D. Concurring Opinion – Judge Óscar Parra Vera

[Source: Special Jurisdiction for Peace, Judicial Panel for Acknowledgement of Truth, Responsibility and Determination of Facts and Conducts, Cauca Case, Concurring Opinion of Judge Óscar Parra Vera on Ruling SRVR-01 of the 1st of February 2023 (footnotes omitted, our translation); available at https://relatoria.jep.gov.co/documentos/providencias/1/4/AV_Dr-Oscar-Parra_Auto_SRVR-01_01-febrero-2023.pdf]

[…]

(b) Notion of territorial control under the Fourth Geneva Convention of 1949

11. One of the arguments within the decision that seem to impose special obligations on the FARC-EP is its designation as the de facto environmental authority in the areas of influence. This premise gives rise to one of the sources of responsibility for the damage done to the environment, since it is noted in several parts of the analysis that the members of the armed group did not take action to prevent damage to nature, and that they basically raised revenue to finance their operations. This sui generis situation for the rules of NIAC seems to be more common in conventional wars regulated by IHL, in what are referred to as the duties of the occupying powers in these types of conflict.

[…]

13. Within the modern rules of IHL, Article 60 of the Fourth Geneva Convention of 1949 set forth the "responsibilities of the Occupying Power". According to commentary on this provision, one of the obligations it entails is administration of the occupied territory. This in turn gives rise to the sub-obligation to "take measures for the protection of the environment and the appropriation of land for the use of the civilian population of the occupied territory". This humanitarian provision refers mutatis mutandis to the argument made within the decision that the former FARC-EP had de facto authority over the territory of northern Cauca and southern Valle de Cauca.

14. The commentary to the Fourth Geneva Convention notes that, under the Hague Regulations, a distinction must be made between private property and natural resources that are public property, since privately owned property is not available for use by the occupying force, as it can only be disposed of by its owners. In spite of this, the right to use it is subject to legal limitations, in particular those related to environmental purposes, which are found in the pre-existing law that is maintained. Thus, if these obligations are transferred to non-State armed groups that have de facto authority through the use of force, it follows that "their duty of good governance of the occupied [de facto captured] territory may also introduce limitations on the use of some private property, in order to respect the international order with regard to the standards of environmental protection".

15. Having noted the above, in the case of the administration of the territory under the de facto authority of the former FARC-EP, its members should have ensured territorial integrity, care for natural resources, preservation of soil integrity, etc., since the obligation to protect the environment must be balanced against the sovereignty of States over natural resources. In this regard, one element of the duty of good governance of occupied territories is the use of natural resources and protection of the environment. This obligation, as has been proven, was not fulfilled by the former guerrilla organization and thus a humanitarian rule was breached, under the terms of the use and control of territory by armed players in the context of armed conflicts.

(c) The concepts of "attack" under jus in bello and nature as "property of the adversary" when establishing certain prohibitions related to the conduct of hostilities and application of the war crime 8(2)(e)(xii) of the Rome Statute

16. Continuing with my argument, another complex element of the decision is the consideration that the planting of illicit crops and mining of the territory can be considered as attacks. This could contravene the notion of attack under IHL in the conduct of hostilities. Firstly, with regard to the concept of attack, it is necessary to refer to Article 49(1) of Protocol I of 1977 additional to the Geneva Conventions (AP I). […]

17. Article 49(1) of AP I defines "attacks" as acts of violence against the adversary, whether in offence or in defence. What is more, the concept of "attack" may be assessed either as a whole or as a set of steps in a military operation. Other provisions of AP I, however, seem to indicate that the notion of attack is limited to each military objective, as can be seen from Article 52(2) of AP I. For the purposes of an attack, the scenario must be one of operational actions or military operations, which excludes other activities that the non-State armed group may be carrying out including in the context of the armed conflict, such as, for instance, the exploitation of land.

18. Meanwhile, while I agree with the approach adopted in the decision of the Judicial Panel, I consider it pertinent to refer to some points regarding the perspective adopted in arriving at the classification of environmental destruction. Article 8(2)(e)(xii) of the Rome Statute could give rise to some challenges for

effective environmental protection. One of them concerns the condition that the property belong to the adversary. As noted by the Judicial Panel in reference to the Katanga case, ownership by an adversary means that the objects in question must belong to individuals or entities aligned with or in alliance with a party to the conflict that is adverse or hostile to the perpetrator. This condition could limit the material scope of the war crime. Indeed, the question of the ownership of natural resources is determined by national legislation, and many national constitutions vest ownership of natural resources in the State. It could then not be disputed that the prohibition applied mainly to armed groups that exploit natural resources belonging to the State or to persons affiliated with the State.

19. The above interpretation could also affect approaches that take into account the relationship between ethnic peoples and the territory. Thus, given that nature is civilian property and that its protection derives from this, a relationship with the “adversary” should not be required. Application of Article 8(2)(e)(xii) of the Rome Statute may therefore not correspond to the understanding of nature, territory and sacred sites that the ethnic peoples profess. This article could likewise hamper recognition of the environment as a human right of the community, or even as a subject of rights with its own legal personality. Thirdly, this provision could prove insufficient to protect the environment, since neither the environment as a whole nor some of its parts, such as migratory bird species and straddling fish stocks, the high seas, outer space and the ozone layer, are entirely within the territory or jurisdiction of one State.

20. Another challenge to Article 8(2)(e)(xii) of the Rome Statute concerns the exception of military necessity, given that the prohibition of destroying or seizing an adversary’s property does not apply in case of military necessity. In relation to natural resources, this prohibition could be understood as authorizing acts of exploitation if they are strictly necessary in order to defeat the adversary. Although the military necessity exception can only be invoked in extreme circumstances, some argue that it is not entirely excluded that the exception could cover exploitation for the purpose of financing an armed conflict. This seems at least to be the case when revenue from resources is used to meet the basic needs of members of armed groups, such as food, clothing and shelter. The decision could have further developed the non-applicability of this exception, as the application of this article could have led to the complex conclusion that the planting of illicit crops and the practice of illegal mining were necessary to finance the armed group and, therefore, to defeat the enemy.

21. To date, most of the existing jurisprudence regarding the prohibition of destroying or seizing an adversary’s property refers to the destruction of assets, in particular homes and other objects belonging to civilians, but not to the environment. Thus, in the Katanga case, the accused was convicted of the war crime of destroying an adversary’s property, for having demolished and burned houses belonging to people from the Hema ethnic group, whom the perpetrator saw as his “adversary” because of their allegiance to the Union of Congolese Patriots.

[…]

23. However, as explained, the application of Article 8(2)(e)(xii) of the Rome Statute and Article 164 of the Penal Code to the facts established within the decision gives rise to challenges in terms of the relationship between the illicit crop plantations and the excavation and extraction of mining resources on the one hand and the notion of attack necessary for application of Article 164 of the Penal Code on the other. Regarding the concept of nature and the environment as property of the enemy, as has been upheld, it would be difficult for it to be owned by one of the conflict parties, because of the very character of these complex bodies called territory, nature, system and other notions, although the constitution of this international crime, as in the Ruling on the Determination of Facts and Conduct, is an option.

(d) The war crime of seizure of resources, looting and pillage

24. As I have argued in the present clarification, the ex-members of the former guerrilla, having de facto authority over the territory, had special duties in terms of the administration and conservation of public property and special respect for private property under an analogous interpretation and application of the elements of the Fourth Geneva Convention. This assessment implies that the environment is not only considered as civilian property, but that it is understood in its complexity as an interrelational element of the surroundings of the ethnic and Afro-descendant communities.

25. Now, having understood this analytical scheme of the situation in northern Cauca and southern Valle del Cauca, it must be established what conduct in these situations or contexts may be attributable to the non-State armed group and could be non-amnestiable as a result, owing to the gravity of the acts committed. I shall thus proceed to explain which war crime could also serve to qualify the established facts, and which is consistent with the severity of the damages caused by the former FARC-EP to the environment and the territory.

26. The Rome Statute enshrines as a war crime, in Article 8(2)(e)(v), the act of “pillaging a town or place, even when taken by assault”. This act, which is applicable to NIAC and also exists for so-called international armed conflicts (IAC) in Article 8(2)(b)(xvi), appears in the version of the statute as “pillaging a town or place, even when taken by assault”; that is, it refers to the customary rule of the prohibition of pillaging. Rule 40, for instance, prohibits “any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people” and Rule 52 states that “pillage is prohibited”.

27. IHL enshrines this prohibition in the case of NIAC in Article 4(2)(g) of AP II to the 1949 Geneva Conventions, to which Colombia is a party, and which states that pillage is explicitly prohibited against persons not taking a direct part in hostilities. In international criminal law, the rule on pillage is a way of protecting the civilian population from the seizure or destruction of their property in the context of both IAC and NIAC. This refers to different acts such as looting and pillaging, as well as, without distinction, the appropriation or destruction of civilian property. The prohibition under IHL, reflected in the war crime, has

been recognized and applied by several international courts. In the case of Armed Activities in the Republic of Congo, the International Court of Justice (ICJ) (i) emphasized that the principle of sovereignty is permanent over the natural resources of a State and forms an integral part of customary international law, and (ii) developed international law with regard to the environment in the context of occupation since it did not consider that the topic was relevant to the facts before it as they referred to individual looting and not to a government policy of draining the natural resources of an occupied area. Notwithstanding the above, the ICJ notes emphatically that for the purposes of conduct contrary to IHL, the existence of looting, plundering and exploitation of civilian property was proven, particularly of natural resources located in the Democratic Republic of the Congo.

[…]

29. Firstly, with regard to the nature of the property, the ICRC established, in its Guidelines on the Protection of the Environment in Armed Conflict, that "given that components of the natural environment can be subject to ownership such that they are "property" [...] the prohibition of pillage also applies to those parts of the natural environment that constitute property." This interpretation is relevant, as Ramírez and Saavedra point out, in the sense that protection is given over all objects that may be owned by private individuals, communities or the State, which is consistent with that laid down by the ICJ, which held that pillage may occur over natural resources, a question that is similar to the Draft Principles on Protection of the Environment in Relation to Armed Conflicts adopted by the International Law Commission.

30. Thus, it could be said that the appropriation of natural resources, soils, rivers and other water sources or elements that are part of the complex interrelationship of the environment can be the object of protection under this rule of international criminal law. In the case of the former guerrilla, as demonstrated in the case on which I am clarifying my position, such appropriation is clear when it comes to assessing the legal classification. Thus, subsuming the acts into this international crime would be another possibility for the qualification of the territorial acts as established in this first determination of the facts and conduct in Case 05.

[…]

Discussion

I. Classification of the Situation and Applicable Law

1. *(Document A, paras 768-775)* How would you classify the situation between the armed forces of Colombia and the FARC-EP? At the time of the facts 1995-2014? (GC I-IV, Common Art. 3; P II, Arts 1 and 2)

2. *(Document A, para. 780)*

1. What is the applicable law? Is the FARC-EP bound by IHL? Why?

2. *(Document B, para. 85)* Are armed groups prohibited to use anti-personnel landmines) At least in a State party to the Ottawa Convention? Why?
3. *(Document A, paras 116, 763 and 764)* What is the scope of application of IHL of NIACs? Would IHL apply to the whole territory of Colombia, or only to certain regions? In the specific case, does it apply to the Cauca region?
4. *(Document D, paras 11-15, 24)* Considering that the FARC-EP had control over the territory and was the "de facto authority", could they be bound by the occupying power obligations under GC IV or the Hague Regulations by analogy? Do you agree with Judge Óscar Parra Vera´s arguments?

3. *(Document A, paras 584-585)*

1. Which rules has the SJP jurisdiction to apply? How does the SJP determine the legal qualification of conducts?
2. *(Document A, paras 19-20 and 489)* The SJP has competence over which facts? *(Document A, paras 489-502)* Which was the environmental damage determined by the SJP?

II. The Nexus with the Armed Conflict

4. *(Document A, paras 781-785)*

1. Is the "nexus requirement" only an element of war crimes or is it also a condition for the applicability of IHL?
2. During an armed conflict, does IHL regulate conduct that has no link to the conflict?
3. Is the nexus a requirement for the applicability of all IHL rules, or only some rules?

5. *(Document A, paras 781-785)* Was the nexus requirement relevant in this case? What is the purpose of the nexus requirement for war crimes?

6. (Document A, paras 489-502, 1040 and 1063) Do you think the environmental damage identified by the SJP has a link with the armed conflict?

1. Considering the illegal mining and illicit crops?
2. The attacks that damaged the environment?
3. The destruction made when constructing camps or installing land mines?

III. War Crimes

7. *(Document A, para. 760)* Are all IHL violations war crimes? How do you determine if the violation amounts to a war crime? (See ICTY, The Prosecutor v. Tadić, Appeals Chamber, Jurisdiction, para. 94)

8. *(Document A, paras 1025-1028; Document B, paras 48-59)* Is there a war crime regarding damage to the environment in NIACs? If not, under which war crime would you criminalize environmental damage? How did the SJP solve this issue?

IV. General Protection of the Environment

9. Does IHL contain specific provisions on the protection of the environment during NIACs? If so, which ones? (P II, Arts 14, 15 and 16; CIHL, Rules 43-45) (See also ICRC, 2020 Guidelines, Rules 1–3)

10. What is considered as natural environment for IHL? What can fall in that category? Does it protect both fauna and flora? (ICRC, 2020 Guidelines, paras 16-17)

11. What are the obligations of NSAGs with regard to natural resources? Does IHL prohibit armed groups to use natural resources in the areas which they effectively control? (ICRC, 2020 Guidelines, Rule 26)

12. *(Document A, para. 493; Document D, paras 11-15 and 24)*

1. Under IHL of NIACs is there an obligation to prevent environmental damage? Even if it is done by civilians not attributable to a party? (ICRC, 2020 Guidelines, Rule 26)
2. Should the rules of IHL of IACs be applied by analogy in NIACs? Which regime, in particular, could apply by analogy? What rules do you foresee as relevant? How would transplantation of certain international armed conflict rules affect the equality of belligerents? What issues might arise with such an approach? Would certain rules help to perpetuate the conflict? (GC I-IV, Common Art. 3; P I, Arts 35 and 55, GC IV, Art. 53, HR, Arts 43, 46, 53 and 55) (See also ICRC, 2020 Guidelines, Recommendation 18 and Rules 15, 26-32)
3. If the FARC-EP were to be bound by GC IV and the Hague Regulations, what obligations regarding the environment would they have? (GC IV, Art. 53, HR, Arts 43, 46, 53 and 55) (See also ICRC, 2020 Guidelines, Rule 15)
4. If GC IV and Hague Regulations were to be applicable to the FARC-EP, could the failure to prevent environmental damage violate IHL?

V. Conduct of Hostilities and the Environment

13. *(Document A, paras 1007-1020)*

1. *(Document A, paras 1007 and 1008)* Are the rules of the conduct of hostilities applicable to military operations that damage the environment? (CIHL, Rule 43)
2. Is only an attack directed against the environment prohibited by IHL and criminalized by the ICC Statute or also its destruction by the party controlling it? What is the difference between the two? (CIHL, Rule 43; ICC Statute, Art. 8(2)(b)(iv))
3. *(Document A, para. 1009)* Under which circumstances may the environment be considered a military target? Does environmental protection take precedence over imperative military necessity? (CIHL, Rule 43) (See also ICRC, 2020 Guidelines, Rule 13)
4. *(Document A, paras 1014 and 1016)* Does the principle of proportionality only apply to attacks or to all military operations? Does an attack that produces excessive damage to the environment in relation to the concrete military advantage anticipated, violate the rule of proportionality? (CIHL, Rules 14 and 43) (See also ICRC, 2020 Guidelines, Rule 7)
5. *(Document A, paras 1018-1020)* Should environmental damage be considered when assessing the rule

of precautions? Do you agree that CIHL Rule 44 applies to the conduct of parties within the State where the NIAC is occurring? (CIHL, Rules 15 and 44) (ICRC, CIHL Rule 44 Practice, paras 12-15) (See also ICRC, 2020 Guidelines, Rule 8)

6. *(Document A, paras 1027-1032)* Is the destruction of an object part of the natural environment, which is under control of a party by that party justified under IHL or the ICC Statute if it constitutes a military objective? Can an object be a military objective for the party that controls it? (CIHL, Rule 8)

14. *(Document A, para 1034)* Is the environment a civilian object? If so, how is it protected by IHL? (CIHL, Rules 9-10 and 43)

15. *(Document A, para. 582; Document B, paras 63-94)*

1. May the environment be protected as a cultural object under IHL? (P II, Art. 16; CIHL, Rules 38-40) (ICRC, 2020 Guidelines Rule 12)
2. What is the difference between destruction of cultural property and an attack against cultural property? Is only an attack against cultural property prohibited by IHL and criminalized under the ICC Statute? Or also its destruction by a party in whose power it is? (P II, Art. 16; CIHL Rule 38; ICC Statute, Art. 8(2)(e)(iv))
3. *(Document B, paras 85-87)* Is the concept of attack of the war crime of destruction of cultural property wider than in IHL? Does the illegal mining and establishment of illicit crops or landmines fall within the concept of attack of this crime? (ICC Statute, Art. 8(2)(e)(iv))
4. Was the environmental damage by the FARC-EP a violation of IHL? Was it the war crime enshrined in Article 8(2)(e)(iv) of the Rome Statute? (P II, Art. 16; CIHL, Rules 38-40; ICC Statute, Art. 8(2)(e)(iv))

16. *(Document A, paras 1013, 1028-1030; Document B, paras 48-59; Document C, para. [2]; Document D, paras 18-21)*

1. May the environment be considered as a property of the adversary, therefore protected from seizure and destruction? (CIHL, Rule 50) (See also ICRC, 2020 Guidelines, Rule 13)
2. Could the environment be considered the property of the State? Of an armed group? Taking into account the Judges' opinions?
3. *(Document D, para. 20)* May the exploitation and damage of the environment with the purpose of financing the basic needs of members of an armed group be justified by military necessity? (ICRC, 2020 Guidelines, Rule 13, para. 180)
4. Do you agree with the SJP's conclusion that the environmental damage by the FARC-EP violated IHL? (CIHL, Rule 50) (See also ICRC, 2020 Guidelines, Rule 13)

17. *(Document A, paras 1023 and 1024, 1038-1063)*

1. Is widespread, long-term and severe damage to the environment prohibited by IHL of NIACs? Why does the SJP apply the rule enshrined in Article 55 of Additional Protocol 1? (CIHL Rule, 45; P I, Arts 35 and 55)
2. How would you define the threshold of damage required by Article 55 of Additional Protocol 1? Did the environmental damage identified by the SJP fulfil this threshold? (P I, Art. 55)

3. *(Document C, paras [3]-[5])* May the environmental damages that resulted from illegal mining and crops be attributable to the FARC-EP? Do you agree with Judge Catalina Díaz Gómez opinion?
4. *(Document C, paras [5] and [6])* To establish a violation of Article 55 of Additional Protocol I, is it necessary to prove that there was an attack as defined by IHL? (P I, Art. 55)
5. *(Document C, paras [5] and [6]; Document D, paras 16 and 17)* Is the financing policy based on the illegal mining and crops of the FARC-EP an attack? A military operation? Is the definition of attack of Additional Protocol I Art. 49 applicable to NIACs? Do you agree with the opinions of the judges Catalina Díaz Gómez or Óscar Parra Vega regarding the attack? (P I, Arts. 49 and 55)
6. May illegal mining and establishment of illicit crops be considered as means or methods of warfare?
7. Do you agree with the SJP's conclusion that the attacks, installation of land mines, establishment camps, illegal mining and crops violated the rule enshrined in Art. 55 of Additional Protocol I? (For more details on the facts see *Document A, paras 489-502*) (P I, Art. 55)

18. *(Document A, para. 1033)* How does the Martens Clause apply to environmental protection? Do you agree with the approach of the SJP? (ICRC, 2020 Guidelines, Rule 16)

19. *(Document D, paras 24-30)*

1. Is pillage prohibited in NIACs? (P II, Art 4(2)(g); CIHL, Rules 40 and 52) (See also ICRC, 2020 Guidelines, Rules 12 and 14)
2. Does the exploitation of natural resources by armed groups constitute, in all or some circumstances, pillage as prohibited by IHL? Could the exploitation of natural resources by the government ever constitute pillage under IHL? (P II, Art 4(2)(g); CIHL, Rules 40 and 52)
3. Do you agree with Judge Óscar Parra Vera? Was the illegal mining and establishment of illicit crops by the FARC-EP pillage?

20. *(Document A, paras. 489-502)* Considering the dissenting and concurring opinions of the Judges, do you believe the SJP should have criminalized the environmental damage made by the FARC-EP? If so, how? As damage to a cultural object? To an object of the adversary? As widespread, long-term and severe damage to the environment? Pillage? An analogy to occupation law?

1. Regarding illegal mining and illicit crops?
2. Considering the attacks that damaged the environment?
3. Assessing the destruction made when constructing camps?
4. The installation of anti-personnel land mines?