

POLICY BRIEF  
2-2021

The Environment  
and Indigenous People  
in the Context of the  
Armed Conflict and the  
Peacebuilding Process in  
Colombia: Implications for  
the Special Jurisdiction  
for Peace and International  
Criminal Justice

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## **This Policy Brief is sponsored**

by the German-Colombian Peace Institute - CAPAZ  
and the Centre for the Study of Latin American  
Criminal Law and Criminal Procedure - CEDPAL

## **Proofreading**

Luz Mercedes Hincapié

## **Design and layout**

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## **Images**

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Bogotá, Colombia, April, 2021

ISSN: 2711-0346

**F**our years have passed since the government of Colombia, under former president Juan Manuel Santos, signed a peace agreement with the Revolutionary Armed Forces of Colombia - People's Army, also known as FARC-EP (OACP, 2016). For decades, the armed conflict had shaped Colombian society, culture, politics, and the natural environment. The list of committed violations of human rights as well as international humanitarian law (IHL) is long, and includes forced displacement of millions of people, the recruitment of minors to join the ranks of guerrilla groups, planting of landmines, and killing tens of thousands of civilians. In addition to the unspeakable social impact, the armed conflict affected the environment, and inevitably also the people in it, in various negative ways; for example, deforestation caused by illegal mining and coca plantations (Negret et al., 2019; Dávalos et al., 2011), mercury pollution of watersheds from illegal gold mining (Guevara et al., 2016; Wagner, 2016), aerial fumigation of coca crops and accidental fumigation of other crops with glyphosate, and pollution of soils and river from disruption of oil pipelines. Recent progressive developments taking place in the international legal arena, spurred by increasing awareness of the negative environmental impact on local communities, have called for actions to address and repair environmental damage, even if not legally required under international law.

While the peace agreement allowed Colombia to seek reconciliation within society, the armed conflict and its complex socio-political and social-ecological impacts reverberate into the present, and environmental degradation, particularly deforestation, gains pace and becomes increasingly widespread and severe, particularly in the areas previously controlled by the FARC (Murillo Sandoval et al., 2020; Clerici et al., 2020). Colombia's indigenous peoples, who have been disproportionately affected by the armed conflict (Springer, 2012; IFRC, 2020), are also affected by the Colombian peacebuilding

projects which bring new dimensions to the recognition of their rights over territory and resources as well as the role of indigenous people in the future of environmental protection (Krause, 2020; Krause et al., 2020). These aspects need to be addressed in the peace process to ensure an ecologically as well as socially sustainable peace, in which international law can play an important role.

This policy brief aims at assessing the impact of the armed conflict in Colombia on the environment and on indigenous peoples, and the application of the rules of IHL and international criminal law to the armed conflict as well as their implications for the Special Jurisdiction for Peace (JEP) and for international criminal justice. Section 1 discusses the implications of the armed conflict as well as the peacebuilding process for indigenous peoples' rights and environmental protection in Colombia and provides a brief background to the creation of the JEP. In this section we also include a brief case study of the impact of the armed conflict on the protection of the environment in the Putumayo department. Section 2 provides a background to the rules of international law relevant to internal armed conflicts and their application in the protection of the environment and natural resource conservation, with references to the situation in Colombia. It also discusses how far international law can be applied to build sustainable peace and development in post-conflict scenarios. Section 3 starts by discussing the four core international crimes under the International Criminal Court (ICC) Statute and how they relate to environmental protection and natural resource governance in the context of the conflict in Colombia. It also discusses the potential role for non-governmental organisations (NGOs) and civil society in Colombia to bring communications before the ICC Office of the Prosecutor (OTP) for the protection of the environment and the rights of indigenous peoples. The final section summarises the findings and presents further recommendations.



## Nature Conservation, Indigenous Peoples, and Peacebuilding Processes in Colombia

The Colombian armed conflict was mostly a rural conflict, taking place in the marginal rural zones of the country. During the armed conflict three types of organized violence took place: intra-state violence between armed groups and the state, non-state violence between the different armed groups, and one-sided violence where armed groups targeted civilians (UCDP, 2020). Human rights violations during the armed conflict were widespread and committed by all sides, and included massacres of civilians, targeted assassinations such as the infamous *falsos positivos* scandal that involved the state military and police, and the deployment of anti-personnel mines across the Colombian countryside. The extensive violence affected millions of people, many of which were forcibly displaced in the process and migrated to urban centres in search for security and a better safer life (Beittel, 2015). The internal migrations affected the social fabric of 'receiving' cities, leading to widespread informal settlements characterized by people living in poverty.

Colombia is a country of remarkable bio-cultural diversity, having outstanding biological diversity (WWF-Colombia, 2017) and 115 recognized indigenous and Afro-Colombian groups that make up an estimated 4.4% of the population (DANE, 2019). However, half of the country's indigenous reserves or *resguardos* are located in the 150 municipalities most affected by forced displacements, which means indigenous peoples and their territories have been greatly impacted by the armed conflict (Arango, 2017). Many indigenous communities suffered violence at the hands of guerrilla groups, paramilitaries and the state's security forces when their territories were turned into battlefields for military action and targeted for exploitation of the natural resources that provided a source of income for the various armed groups and paramilitaries (Beittel, 2015; Rodríguez, 2016; Guevara et al., 2016). Moreover, during the armed conflict, indigenous people were at a significantly higher risk of forced recruitment due to the intensification of armed confrontations in their territories, which overlap with strategic corridors used by armed groups and with resource exploitation. For instance, by some estimates, an indigenous child was 674 times more likely to be recruited by an illegal armed group than a minor in any other part of the country (Springer, 2012; UNSC, 2012).

Environmental destruction and degradation were other results of Colombia's armed conflict. During the armed conflict illegal coca crops replaced natural forests and its processing to cocaine also polluted rivers and soils (Dávalos et al., 2011; EJOLT, 2017). Moreover, the state's response to eradicate coca plantations via aerial fumigation with glyphosate herbicide created additional pollution causing environmental degradation of native ecosystems and non-coca crops as well as health problems for local populations (Sadinsky & Campos Iriarte, 2019; Dávalos et al., 2011; EJOLT, 2017). After discontinuing areal fumigation in 2015, the government of Colombia decided to resume the practice to eradicate coca plantations despite critique from farmers and civil society groups (Reuters, 2020).

Gold mining was an important source of income for illegal groups and caused widespread mercury pollution of rivers and watersheds, a practice that continues to this day (Rodríguez & Rubiano Galvis, 2016; Guevara et al., 2016; Wagner, 2016). The rivers and fish in the Colombian Amazon region contain high levels of mercury from alluvial gold damaging not only the ecosystem but also causing high health hazards in human populations and particularly in indigenous groups who rely on fish as a main staple food (Nuñez-Avellaneda et al., 2014). This connection between environmental damage and the impact on human health becomes obvious in the case of mercury pollution from gold mining in Colombia. For instance, the levels of mercury found in fish in the municipality of Puerto Leguizamo in Putumayo were the highest across the Colombian Amazon, exceeding the thresholds considered safe for human consumption (Nuñez-Avellaneda et al., 2014).

Another important source of environmental pollution are guerrilla attacks on oil pipelines (in particular by the ELN). During the armed conflict destruction of oil infrastructure was frequently used as a weapon to disrupt economic activities and target the state which led to an estimated more than 3 million barrels of crude oil seeping into Colombian soil and rivers. Attacks against oil infrastructure also continue to date and are used as a political weapon, particularly in the north-eastern Caño Limón-Coveñas pipeline and the southern Transandino pipeline that passes from the Putumayo department to the port city of Tumaco in Nariño (Pardo Ibarra, 2018). The Putumayo department has been most affected by these and by 2018 it had registered 1,109 targeted attacks (Pardo Ibarra, 2018).



## The Unintended Consequences of the Peace Agreement: Environmental Degradation and Indigenous People's Territories as Contemporary Victims of the Conflict

Since the FARC's disarmament, it became increasingly clear that the group exercised a de-facto state authority with rules and regulations in the territories previously under its control (Murillo Sandoval et al., 2020; Van Dexter & Visseren-Hamakers, 2019; Betancur-Alarcón & Krause, 2020). Although it may seem from an international perspective that the Colombian armed conflict with the FARC has come to an end, hostilities continue with FARC dissident and other guerrilla groups as well as armed gangs and drug cartels. Most noticeably, intimidations and violence against human and indigenous rights activists and environmental defenders has increased. Since the peace agreement was signed, hundreds of social and indigenous leaders, environmental defenders and human rights activists have been killed in Colombia (UNHCHR, 2020). Implementation of the peace agreement goes against the interests of some landholders and drug traffickers, and, therefore, social leaders working on the implementation of the peace accords, promoting the agreement's comprehensive rural reform or the substitution of coca for other crops are increasingly threatened and assassinated (Ramírez, 2019). Between January 2017 and June 2018, 36 coca growers seeking to substitute coca with other crops were killed (Ramírez, 2019). The unceasing violence against social leaders has earned Colombia the inglorious 2<sup>nd</sup> and 3<sup>rd</sup> places respectively, among the countries with the highest number of assassinations of human right defenders, and of social and environmental leaders in the past four years (Global Witness, 2019; Global Witness, 2017; UN, 2020).

While the armed conflict led to significant environmental damage and degradation, the post-conflict transition has brought a sharp rise in environmental degradation, even encroaching in areas such as national parks that were previously better protected. Due to continuous threats from FARC dissident groups, the National Parks authority has had to withdraw their park rangers from several protected areas such as the Rio Puré, Apaporis, Serranía de Chiribiquete, La Paya, Sierra de la Macarena, Tinigua and Picachos Natural Parks, leaving these areas without the presence of any environmental law enforcement authority (Colprensa, 2020). Deforestation in Colombia soared in expectation of the peace agreement

and since its ratification (GFW, 2019; Clerici et al., 2020; Negret et al., 2019; Armenteras et al., 2018; Prem et al., 2018).

There is strong spatial overlap between those areas that record high levels of violence and those that exhibit illegal conversion of forests to agricultural land uses, cattle pastures, and coca plantations (Murillo Sandoval et al., 2020; Clerici et al., 2020; Negret et al., 2019; Prem et al., 2018). The Amazon frontier departments of Colombia in particular are experiencing a sharp rise in deforestation (Clerici et al., 2020), which has already affected recognized indigenous territories, for instance the Resguardo Indígena Nukak-Maku in Guaviare and the Resguardo Indígena Llanos del Yarí - Yaguará II in Caquetá. These two indigenous reserves have already lost an estimated 4,000 ha of primary forests, and deforestation through illegal land claims is a threat for many more indigenous reserves across the Amazon region (Finer & Mamani, 2020).

Illegal land grabbing has become the main driver of deforestation in Colombia, most acutely in the Amazon region's frontier departments of Putumayo, Caquetá, and Guaviare. These land grabs are financed by large landowners, who seek to use the current void and absence of state control to expand their land holdings by cutting down large stretches of forests (Murillo Sandoval et al., 2020; Van Dexter & Visseren-Hamakers, 2019). Unfortunately, the peace process must be considered an unintended instrument of land grabbing and illegal land markets (Murillo Sandoval et al., 2020), which is fuelled by the highly unequal access to, and control of land. In Colombia, a small share of landowners possesses most of the agricultural lands. This unequal distribution was, ironically, perpetuated by armed groups during the conflict due to the violent displacements of small-scale farmers, and it has now further increased in the aftermath of the peace agreement (Guereña, 2017).

## The Special Jurisdiction for Peace and Colombia's Indigenous Groups

In 2016, Colombia was the first country to negotiate a peace agreement which had to respect the obligations of the ICC Statute. During the peace negotiations, former president Santos and the FARC's peace negotiators agreed upon the creation of a Special Jurisdiction for Peace (in Spanish Jurisdicción Especial para la Paz-JEP), which is a parallel legal system and tribunal dedicated to resolving cases involving former combatants, state agents as well as civilians participating in the hostilities.



The creation of JEP paves the way for national reconciliation based on restorative justice and forms part of the transitional justice component of the Peace Agreement (Comprehensive System of Truth, Justice, Reparations and Guarantees of Non-Recurrence). Through JEP Colombia follows international standards of justice which means it cannot offer judicial pardons for gross human rights violations and war crimes that took place during the armed conflict. In addition to investigating crimes committed by the FARC, JEP investigates crimes by the State, for instance the military, which carried out some of the worst atrocities of the armed conflict under former president Uribe.

Regarding indigenous people, JEP includes, *inter alia*, a special ethnic commission (Comisión Étnica) and a special territorial and environmental commission (Comisión Territorial y Ambiental). JEP has three open territorial cases<sup>1</sup> that relate to the violation of human rights perpetrated against indigenous and Afro-Colombian communities. An additional important recognition took place in 2019 when JEP formally recognized the environment as a 'silent victim' of the Colombian armed conflict, albeit this recognition is geographically limited to three municipalities in the department of Nariño (Tumaco, Barbacoas and Ricaurte) within Case 02 (JEP, 2018).

#### **Case Study: The Putumayo - Human and Indigenous Rights Violations During Colombia's Armed Conflict Continue into the Post-Conflict Transition**

The Putumayo department, in the South of Colombia, stretches from the Andean Cordillera eastwards into the Amazon rainforest, bordered by Ecuador and Peru to the South. The Putumayo department exemplified the complexity of Colombia's armed conflict and large part of the department has long been under the de-facto rule of the FARC guerrilla (fronts 32 and 48) and paramilitary armies because it was a major producer of coca during the armed conflict (Ramírez, 2011). Nonetheless, Putumayo was and continues to be a major oil producing region in Colombia. Furthermore, the department is the most affected by attacks against oil pipelines and

infrastructure in Colombia, with an estimated 1,100 attack events (Pardo Ibarra, 2018).

Moreover, because Putumayo had high conflict intensity during the armed conflict, forced recruitment of children, in particular indigenous children, was also widespread in the department (UNSC, 2012). While Putumayo is home to only 0.71% of Colombia's population, 40% of its population are victims of the armed conflict, which reside in the department (Unidad de Víctimas, 2020b). The national registry of victims (Unidad para la Atención y la Reparación Integral a las Víctimas) recorded approximately 136,000 victims of the armed conflict in the Putumayo region (Unidad de Víctimas, 2020b) and about 253,000 forcibly displaced people up until 2019—which could be double (Unidad de Víctimas, 2020a).

At present, Putumayo serves as a show-case for the clash between an expansionist and primary resources dependent economic development agenda promoted by the State (DNP, 2018) and local rights to access and use of natural resources (CNMH, 2015). Putumayo is exemplary of many other peripheral regions of Colombia where clashes between rival armed groups and the state trying to seize control has led to the militarization of everyday life (Ramírez, 2019; Nilsson & González Marín, 2020; Meger & Sachseder, 2020).

A characteristic Putumayo shares with other departments is the high level of informal land holdings, which was supposed to be addressed through the Comprehensive Rural Reform as part of the Peace Agreement. However, rural reform advances slowly at best (Kroc Institute, 2019), and the recognition of land rights and the provision of security for local populations and indigenous groups continue to be major issues in Putumayo (Ortiz, 2020). There are multiple accounts of oil and mining concessions overlapping with recognized and claimed indigenous territories (CCJ, 2019), giving rise to new tensions and conflicts and rights violations (Rodríguez, 2016). The appearance of new armed actors in Putumayo is a continuous source of violence and forced displacement of local peasants and people belonging to indigenous ethnicities (Ortiz, 2020).

The case of Putumayo exemplifies the complexity of Colombia's armed conflict and current peacebuilding efforts, notably in

<sup>1</sup> Case 02 - Territorial Situation of the Tumaco, Ricaurte, and Barbacoas Municipalities (Nariño); Case 04 - Territorial Situation in the Urabá Region; Case 05 - Territorial Situation of the Northern Cauca and Southern Cauca Valley Regions.



relation to the environment and indigenous peoples' rights. The process of reconciliation and the peacebuilding project in Putumayo must account for the past violence and crimes committed towards its civilian population, but particularly, it must recognize the impact on the regions' indigenous groups and their territories. JEP can be an important mechanism to address the environmental destruction related to the armed conflict by contributing to legal restoration for victims but also to advance laws on environmental protection during and after the armed conflict.

### Armed Conflicts, Peacebuilding and Nature Conservation under International Law

From an international legal perspective, environmental damage occurring in relation to armed conflict lacks comprehensive protection, and applicable rules and principles may be found in different branches of international law. IHL is the branch of international law specifically designed to regulate warfare and it is applied as *lex specialis* in times of armed conflict. This means that IHL rules may prevail above the rules from other more general branches of international law that also apply in peacetime, such as international environmental law and human rights law. As the IHL rules lack adequate environmental protection, environmental protection could be lawfully halted during armed conflict. Furthermore, most of the rules of IHL only apply in the context of *international* armed conflicts involving two or more sovereign states<sup>2</sup> and not in internal armed conflict, such as the Colombian one. However, common article 3 of the four Geneva Conventions<sup>3</sup> and the 1977 Additional Protocol II to

the four Geneva Conventions,<sup>4</sup> which apply during internal armed conflicts, contain some basic rules but are not applicable to environmental damage. Colombia has been party to both the four Geneva Conventions and the Additional Protocol II since 1995.<sup>5</sup> Through practice, in particular by the international criminal courts, hybrid criminal courts and national courts, the application of many IHL rules have also been extended to internal armed conflicts as customary international law. The International Committee of the Red Cross (ICRC) has confirmed this trend in its humanitarian customary law study of 2005 by acknowledging that most customary humanitarian legal rules are considered applicable to both international and internal armed conflicts (Henckaerts & Doswald-Beck, 2005). Important differences persist between these two types of armed conflicts, such as combatant privileges with lawful rights to use lethal violence in accordance with IHL which are only relevant in international armed conflicts (Akanke, 2012). Still, authorities in power are encouraged by article 5(6) Additional Protocol II to grant amnesty to persons that have participated in internal armed conflicts (if they have respected IHL rules).

IHL rules are deemed inadequate in addressing environmental concerns (Sjöstedt, 2020; Fleck, 2017; Fleck, 2013; Bothe, 2010). Historically, IHL has not been concerned with environmental protection and only in the aftermath of the Vietnam War has wartime environmental damage received international attention as warranting specific protection. The intentional targeting of the environment as part of the US warfare in Vietnam, which included the extensive use of Agent Orange, showed how this damage led to long-term implications not only on the environment itself but also on public health, resulting in birth defects, cancer, and other health problems (Westing, 2012). As a result, the ENMOD Convention<sup>6</sup> and the 1977 Additional Protocol I were adopted. The ENMOD

2 For instance, the twelve Hague Conventions from 1899 and 1906, the Geneva Gas Protocol from 1925 and the four Geneva Conventions of 1949 are only applicable in international armed conflicts.

3 International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75

UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

4 International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

5 See the ICRC website, [https://ihl-atabases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=CO](https://ihl-atabases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=CO)

6 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification



Convention has a restricted application scope as it only prohibits the modification of environmental forces as a weapon and does not protect the environment as such. These types of modification techniques are rarely employed during armed conflict. Thus, it adds little to environmental protection in relation to the Colombian conflict. The 1977 Additional Protocol I included two specific environmental provisions, namely articles 35(3) and 55 protecting the natural environment from 'widespread, long-term and severe damage'. It remains unclear what type of damage this refers to but evidently the provision only protects against extreme environmental destruction. So far, articles 35(3) and 55 have never been applied in any concrete case despite numerous armed conflicts that have caused massive environmental damage, and up to now there is no agreed definition of what constitutes 'widespread, long-term and severe' damage. Even though the Additional Protocol I—as opposed to Additional Protocol II—only applies to international armed conflicts, it could be argued that a similar level of protection should also apply in times of internal armed conflicts as customary international law (ICRC, 2020b; UNGA, 2019).<sup>7</sup> In this context, JEP could contribute to the definition of widespread, long-term and severe damage by applying these articles as customary law in relation to the Colombian conflict. In Case 02,8 in which the environment has already been confirmed as a victim of the conflict, the multiple actions that have been carried out that intentionally, accidentally, or negligently cause damage and alterations to the environment, with temporary or permanent impact, could be regarded as part of this definition. Such interpretation would capture a contemporary view of the environment that takes into account scientific knowledge on how destruction of ecosystems can have unforeseeable consequences that can accelerate when exacerbated by climate change.

General rules of IHL protecting civilians and civilian objects also provide environmental protection during armed conflict. These rules consist of the rule of military necessity as well as the principles

of distinction, proportionality, and precaution. They apply in international as well as internal armed conflicts. The general rules are an important cornerstone as the environment is presumed to be civilian in character (ICRC, 2020b). Tangible parts of the environment, such as forests, fields, rivers, farmland, animals, crops, and freshwater resources as well as environmental components of more abstract character, including the atmosphere, ecosystems, ozone layer, or biodiversity are protected from direct attacks, as long as they do not represent 'military objectives' (Sjöstedt, 2020). A military objective is defined as an object that if destroyed or captured 'offers a definite military advantage'.<sup>9</sup> A military advantage means that the attack must weaken the military forces of the enemy based on the available information at the time of the attack. Therefore, the environment, or a part of it, can become a military objective depending on the circumstances. For instance, a river that is used for military transport and communication or a protected area used as a hiding place could become a military target (Sjöstedt, 2013). In addition, even when the environment is protected as a civilian object under the general rules of IHL, a substantial amount of collateral damage is permitted as long as it does not outweigh the military advantage anticipated at the time for an attack in accordance with the proportionality principle. Moreover, in case of launching an attack the feasible precautionary measures must be undertaken to minimise harm to the environment (Sjöstedt, 2020).

The legality assessment under the principles of proportionality and precaution may be tricky, in particular if a long time has passed since the attack. For instance, an oil pipeline may constitute a military objective and attacking it, even if it leads to an oil spill of more than 3 million barrels into Colombian soils and rivers, could be regarded as lawful as long as the damage is proportionate in comparison to the military advantage. Here again, JEP could choose an evolutionary interpretation of the rules of IHL that considers international environmental law. Even if IHL rules have precedence over international environmental law, environmental legal principles could still inform the application of IHL and require parties to an armed conflict to take precautions to avoid certain types of environmental damage. These precautions could consist of the attacker having to collect data on the environmental surroundings

Techniques of 18 May 1977: 1108 U.N.T.S. 151 (ENMOD Convention).

7 See ICRC (2020b), Rules 1, 2 and particularly 13 encouraging parties to non-international armed conflict to apply specific environmental protection obligations; see also Draft Principle 13 of the Draft Report of the International Commission (2019) (UN Doc. A/CN.4/L.930/Add.1).

8 Case 02 - Territorial Situation of the Tumaco, Ricaurte, and Barbacoas Municipalities (Nariño).

9 See in article 52(2) of Additional Protocol I for the full definition.



in order to map out rivers, underground aquifers, sensitive environmental areas, and endangered species that may be threatened by the military activities (Sjöstedt, 2020; Hulme, 2010). Rule 44 of the Customary Law Study by the ICRC stated in fact that the lack of scientific certainty with regards to the environmental effects of a military operation does not absolve a party in a conflict from taking all feasible precautions (Henckaerts & Doswald-Beck, 2005).<sup>10</sup> In the Colombian armed conflict, the parties would have obligations to collect information on how to avoid or minimise leakages if attacking a target containing crude oil, to consider alternative weaponry that reduces the risk of environmental damage, to avoid protected areas, etc. (Sjöstedt, 2020; Droegge & Tougas 2013; Hulme, 2005). This could also include considerations regarding future generations. Such a reading of the general protection rules could be applied in Case 02 and Case 0511 to prevent IHL rules from permitting environmental damage that has adverse and uncertain consequences that could even be irreparable. JEP could help clarify the vagueness of the rules relating to environmental protection under IHL and, thereby, strengthen protection.

Besides the general rules of protection, the environment is indirectly protected under other IHL rules, such as the protection of objects indispensable for the civilians' survival.<sup>12</sup> In an armed conflict, the attack, destruction, or removal of 'food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works'<sup>13</sup> is prohibited. As most of these objects are all dependant on a fertile and healthy environment, the articles indirectly protect the environment as well and materialise the notion of human dependence on the environment (Sjöstedt, 2020). The protection of objects indispensable to civilians prohibits practices like targeting water supply systems and crops with the intention of denying them their use. The increasingly recognised right to a healthy environment may also have implication on how rules protecting objects

indispensable to civilian populations should be applied. Furthermore, there are specific obligations under international law to minimise their indiscriminate effects also to the environment.<sup>14</sup>

Furthermore, Colombia has an obligation to remove landmines as soon as possible according to the Anti-Personnel Mine Ban Convention<sup>15</sup> to which it is party. Such an effort to clear areas contaminated with mines could be an important step to ensure the safe return to the territory of civilians and pave the way for the peace process. This obligation applies also to indigenous territories, although remedial measures need to be undertaken with prior consultation and in cooperation with the concerned indigenous population according to Draft Principle 5(2) adopted by the International Law Commission. Furthermore, Colombia is under the obligation to safeguard the special relationship that indigenous peoples have with their environment.<sup>16</sup> Draft Principle 5 has helped advance customary international law to ensure the protection of the environment, of indigenous land, and also the participation of indigenous people in the peace process to restore land. The involvement of indigenous peoples in JEP is an important step towards confirming the importance of respecting indigenous rights in times of armed conflict as well as in the post-conflict. This involvement may also be important to the protection of the environment as such in a post-conflict setting because territories inhabited by indigenous peoples are often better protected from environmentally harmful activities, even better than protected areas managed by states (IPBES, 2019; Sjöstedt, 2019).

Many states agree that there are important indications to advocate for stronger environmental protection in relation to armed conflicts. However, given the complexity and unwillingness of states to re-negotiate IHL rules, it is unlikely that a new legal instrument will be adopted to enhance environmental protection in warfare. Therefore, case law plays a key role to improve and develop protection by applying a progressive interpretation of the existing rules. The environment is consistently being referred to as a victim by the international community, most

<sup>10</sup> The ICRC combined the precautionary approach originating from international environmental law with the principle of precaution under IHL in Rule 44 in the Customary International Humanitarian Law Study.

<sup>11</sup> Case 05 - Territorial Situation of the Northern Cauca and Southern Cauca Valley Regions.

<sup>12</sup> See Article 54 Additional Protocol I and Article 14 of Protocol II.

<sup>13</sup> This list is included in the more detailed article 54 of the Additional Protocol I but is likely to apply to similar objects in a non-international armed conflict.

<sup>14</sup> See Rule 24 ICRC Environmental Guidelines.

<sup>15</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.

<sup>16</sup> See the Advisory Opinion of the African Commission on Human and Peoples' Rights on the UN Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights (2007).



recently by the President of the ICRC who stated in the foreword to the new ICRC Environmental Guidelines that '[t]he environment can no longer remain a silent casualty of war' (ICRC, 2020b). The view that the environment can be a legal subject with rights has already been confirmed in several court cases in Colombia. The Supreme Court of Justice recognized the Amazon as an entity subject to rights in 2018. The decision was based on the principles of solidarity and intergenerational equity which are considered as international customary environmental legal principles.<sup>17</sup> It is therefore natural that the environment be recognised as a victim. In this regard, JEP has an opportunity to actually make a significant contribution to what being a victim actually means for the environment in Case 02. Also, human rights law and international environmental law could be helpful to provide a further international legal basis to address the environment. These bodies of law have adopted a more profound perception of environmental protection that contemplates the importance of ensuring a healthy environment for longer than just the immediate moment during and after an attack in order to fulfil fundamental and absolute rights such as the right to life. Even though IHL prevails as *lex specialis*, international human rights law as well as international environmental law still apply during armed conflict and can complement IHL. For instance, the human right to water could have implications on the legality of acts that have led to the pollution of ground water and rivers, such as blowing up oil pipelines or releasing mercury in connection with gold extraction, even if the acts are not prohibited under IHL. Even if human rights law is not applicable to non-state actors such as the FARC, there is increasing advocacy for the case of non-state actors who control territory and carry out de facto state functions to be bound by human rights law (Hulme, 2017). JEP could apply human rights law in the FARC-controlled areas to address acts that are not dealt with in IHL rules but cause environmental damage that have substantial impact for local populations in violation of their human rights. In relation to the armed conflict in Colombia, such an interpretation could prohibit the blowing up of oil pipelines, spraying with glyphosate, illicit crops, illegal logging, illegal mining, bombing,

hunting animals, and setting up camps or open trails in protected areas.

### **The International Criminal Court Jurisdiction, the Environment and the Armed Conflict in Colombia**

The IHL rules discussed above do not in themselves provide the basis for international criminal liability of individuals, which is dependent on the codification of those rules as international crimes, such as war crimes. International crimes are coupled with universal jurisdiction meaning that an individual committing such crimes can be tried by any domestic criminal court. They also fall under the jurisdiction of an international criminal court or tribunal, such as the International Criminal Court (ICC). The four crimes that currently fall under the jurisdiction of the ICC are genocide, crimes against humanity, war crimes and the crime of aggression (ICC, 1998, art 5). Therefore, at present the scope for the prosecution of environmental crimes before the ICC is very limited, given that the Rome Statute (ICC, 1998)<sup>18</sup> primarily only recognises the court's jurisdiction for certain instances of environmental damage in the context of an armed conflict falling under the definition of war crimes. It should be noted that Colombia ratified the Rome Statute on 5 August 2002 and upon ratification it declared that it would not accept the jurisdiction of the ICC with respect to war crimes for a period of seven years from the date of ratification, that is, it would only accept the court's jurisdiction for war crimes committed after 1 November 2009 (ICC-OTP, 2012). This means that the ICC has jurisdiction over crimes against humanity and genocide committed in Colombian territory or by its nationals since 1 November 2002, and for war crimes from 1 November 2009 onwards (ibid).

In 2016, the ICC Office of the Prosecutor (OTP) published a policy paper on case selection and prioritization which highlighted the inclination of the OTP to prosecute international crimes involving illegal natural resource exploitation, land grabbing and environmental damage (ICC-OTP, 2016, paras. 7, 40 & 41). However, the OTP policy paper could not expand the court's jurisdiction over environmental crimes or 'ecocide' which is dependent on an amendment to the ICC Statute by the state parties and the policy paper is only an internal

<sup>17</sup> Also, in ruling T-622-16 of the Constitutional Court, the Atrato river was recognized as a legal subject with rights to protection and restoration by the Colombian State and the ethnic communities.

<sup>18</sup> Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

policy document. Still, the OTP policy paper is highly significant in that it emphasises the seriousness of environmental damage in the context of the existing crimes under the Rome Statute as part of the OTP's policy of case selection and prioritisation (Pereira, 2020; Mistura, 2018). In particular, it recognises that land grabbing, illegal exploitation of natural resources and destruction of the environment are a 'serious crime under national law.' (ICC-OTP, 2016, para. 7) (emphasis added). It also states that 'the Office will give particular consideration to prosecuting *Rome Statute crimes*' (emphasis added) that are committed through the 'destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land' (ibid).

The ICC OTP 2016 Policy Paper guides the prosecutor to assess the gravity of the crime as a key case selection criterion in 'a given situation' which should reflect a 'concern to the international community as a whole' (ibid, para. 35). In particular, the factors that will guide the ICC prosecutor include the 'scale, nature, manner of commission, and impact of crimes' (ibid, paras. 32 & 37). The way a crime was committed is to be assessed, inter alia, on whether it results in 'the destruction of the environment or protected objects' (ibid, para. 41). This suggests that the ICC prosecutor's discretion is not absolute. Indeed, it is in the assessment of the gravity of the offence that the ICC Prosecutor's 2016 Policy Paper will prove to be particularly influential, given the emphasis that it places on crimes committed by means of, or resulting in, the 'destruction of the environment' and leading to 'environmental damage inflicted on affected communities' as particularly serious crimes (ibid, paras. 13-14). However, the impact of the ICC OTP 2016 Policy Paper is likely to be limited as it is only 'an internal document of the Office and, as such, it does not give rise to legal rights' (ibid, para. 2).

The situation in Colombia has been under preliminary examination by the OTP since June 2004.<sup>19</sup> The OTP has received over 229 national communications pursuant to Article 15 of the Rome Statute in relation to the situation in Colombia (ICC-OTP, 2018). However, to date the OTP has not started investigations relating to the situation in Colombia due to the application of the complementarity principle, that is, the ICC should only exercise its jurisdiction when States are unable or unwilling to

prosecute (ICC, 1998, Preamble, para. 10 & art. 1). So far—and particularly after the creation of JEP in 2016—the OTP is satisfied that JEP and the Colombian courts are demonstrating a willingness and ability to bring to justice the state and non-state actors linked to the armed conflict in Colombia in line with the standards and principles of international criminal law.<sup>20</sup> This situation may change, however, in light of political developments and the ongoing operational activities of JEP.<sup>21</sup> In addition, the OTP has expressed concerns regarding the compatibility of the legislation implemented in the creation of JEP with the Rome Statute and customary international law.<sup>22</sup> Despite this, the current ICC Prosecutor, Ms. Fatou Bensouda, has recently announced that the OTP was considering ending its ongoing preliminary examinations on the situation in Colombia 'subject to certain benchmarks being fulfilled'.<sup>23</sup>

19 For a list of all cases currently under preliminary examinations by the OTP, see: <https://www.icc-cpi.int/pages/pe.aspx> [1/12/ 2020].

20 See ICC-OTP (2019) Report on Preliminary Examinations. The OTP noted in 2019 that 'The Colombian authorities appear to have made progress towards the fulfilment of their duty to investigate and prosecute conduct amounting to war crimes and crimes against humanity under the Rome Statute, and thereby also addressing the forms of conduct underlying the potential cases identified by the Office' (ibid, para. 132).

21 On the basis of the ICC-OTP's approach to positive complementarity, it notes that it will continue to evaluate the situation in Colombia '[o]n the basis of the available information, and without prejudice to other possible crimes within the jurisdiction of the Court which may be identified in the future' (ICC-OTP, 2019). It should be noted that recent political developments in Colombia could undermine the functioning of JEP, and if so, this could ultimately lead to the start of investigations by the OTP and to the exercise of ICC jurisdiction in relation to the situation in Colombia; see Alsema (2020).

22 In its 2017 Preliminary Examinations report the ICC-OTP noted that 'The OTP's review of the legislation adopted by the Colombian Congress found that four aspects of the SJP legislative framework may raise issues of consistency or compatibility with customary international law and the Rome Statute, namely: the definition of command responsibility, the definition of "grave" war crimes, the determination of "active or determinative" participation in the crimes, and the implementation of sentences involving "effective restrictions of freedoms and rights"' (ICC-OTP, 2017).

23 See Presentation of the 2019 Annual Report on Preliminary Examination Activities, Eighteenth Session of the Assembly of States Parties Opening Remarks by Ms. Fatou Bensouda, Prosecutor of the International Criminal Court. It should be noted that the ICC prosecutor held a mission to assess the situation in Colombia in January 2020; see ICC-OTP (2020).



## The ICC Jurisdiction Over Environmental Damage in the Context of the Armed Conflict in Colombia

As was noted above, the ICC does not currently have jurisdiction over ecocide or transnational environmental crimes in the peacetime context. It should be noted that war crimes under Article 8(2)(b)(iv) of the Rome Statute adopts an eco-centric formulation that requires an international attack to be committed with the knowledge that it would cause 'widespread, long-term and severe *damage to the environment* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' (emphasis added). It should be noted that Article 8(2)(b)(iv) of the Rome Statute is similar to the grave breach provision of Article 85(3)(b) of Additional Protocol I which was discussed above, except for the fact that it includes 'widespread, long-term and severe damage to the environment', whereas the Additional Protocol I does not; and it states that loss or damage must be 'clearly' excessive, while the Additional Protocol I does not (Triffterer & Ambos, 2018, 245).

Although the ICC statute does not define 'damage to the environment', some guidance is found in other international agreements, even though one of the shortfalls of many international environmental agreements is that they generally fail to define environmental damage (Pereira, 2015). It is in the context of war crimes that the ICC OTP 2016 Policy Paper is expected to be particularly influential in pressing the court to adjudicate over crimes committed through environmental means and illegal resource exploitation (Pereira, 2020). It is possible that the court will come to clarify not only the scope of 'environmental' war crime under Article 8(2)(b)(iv), but also whether the illegal exploitation of natural resources in conflict situations—such as illegal logging or the destruction and trafficking of endangered species—could amount to 'pillaging' and therefore to a war crime under Article 8(2)(b)(xvi) (van den Herik & Dam-de Jong, 2011). The clarification by the court on this question would be particularly significant in light of a string of Security Council Resolutions recognizing the interconnections between the exploitation of natural resources and armed conflicts, including in the contexts of the conflicts in Sierra Leone and the Democratic Republic of Congo.<sup>24</sup> In the Colombian context, the decision rendered by the

Medellín Justice and Peace Law (Ley de Justicia y Paz-JPL) Tribunal against three paramilitaries highlighted a strategy of appropriation and control of indigenous territories and natural resources as part of a systematic, generalised and/or repetitive criminal pattern of forced displacement committed by the Pacifico-Héroes de Chocó bloc of the United Self-Defences of Colombia (Autodefensas Unidas de Colombia-AUC) against the Afro-Colombian and indigenous communities (ICC-OTP, 2017, para. 137). As noted above, the armed conflict significantly affected deforestation in the country with cattle ranching and illegal timber extraction among its main causes (Morales, 2017). Despite this, there is still a lack of developed jurisprudence examining the connections between international crimes and natural resources, and currently no systematic jurisprudence regarding pillage of natural resources (Gilbert 2018, 106; Radics & Bruch 2017).<sup>25</sup>

Yet because Article 8(2)(b)(iv) and Article 8(2)(b)(xvi) only apply in cases where environmental damage occurs in the course of an international armed conflict, they effectively preclude cases where environmental damage occurs during peacetime or in the course of a non-international conflict (Mwanza, 2018; Pereira, 2020), as is the case of the armed conflict in Colombia. Significantly though, Article 8(2)(e)(v) of the Rome Statute enables the ICC to prosecute 'pillaging of town or place, even when taken by assault' for violations of laws and customs in armed conflicts that are not international. Moreover, one important development in this context is the work of the International Law Commission's Special Rapporteur Ms. Marie G. Jacobsson who has addressed certain questions related to the protection of the environment in non-international armed conflicts focusing on how international rules and practices concerning natural resources may enhance the protection of the environment during and after such conflicts.<sup>26</sup> Therefore, there is a limited legal basis for the ICC OTP to investigate

<sup>24</sup> See Resolution 1306 (2003) concerning the illicit trade in diamonds during the conflict in Sierra Leone; and

Resolutions 1457 (2003), 1856 (2008) and 1952 (2010) concerning the DRC. See *ibid*.

<sup>25</sup> Regarding ICC jurisprudence see in particular The Prosecutor v. Bosco Ntaganda Situation: Situation in the Democratic Republic of the Congo, Trial Chamber vi, 08 July 2019; Appeals Chamber, Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo, 8 June 2018, ICC-01/05-01/08; Trial Chamber III Situation in the Central African Republic in the Case of the Prosecutor V. Jean-Pierre Bemba Gombo, 21 March 2016, ICC-01/05-01/08-3343.

<sup>26</sup> See: [https://legal.un.org/ilc/guide/8\\_7.shtml](https://legal.un.org/ilc/guide/8_7.shtml), para. 64, [1/12/2020].



the war crime of pillage of natural resources in the context of the internal armed conflict in Colombia on the basis of Article 8(2)(e)(v) of the Rome Statute, even though the OTP's preliminary examinations of the situation in Colombia since 2004 have not assessed cases involving environmental damage in the context of the internal armed conflict in Colombia to date.<sup>27</sup>

Beyond the context of war crimes, and until there is a formal amendment to the ICC Statute to extend the court's jurisdiction, the only other possible avenues for prosecution of environmental damage before the ICC would be in the context of genocide and crimes against humanity. The potential ICC prosecution for crimes against humanity and genocide is particularly significant as those crimes do not need to be committed in the context of an international (or internal) armed conflict.

The Rome Statute defines crimes against humanity as acts committed as part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack' and includes murder, extermination, 'or other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health' (ICC-OTP, 1998, art. 7), which could include for example water contamination to kill a civilian population. But, to what extent could environmental damage amount to a crime against humanity under the Rome Statute? Firstly, as per Article 7(1)(k) of the Rome Statute, the attack to the environment would need to endanger human health in order to be recognized as a crime against humanity, thus it would leave the environment as such without effective legal protection. Moreover, the Rome Statute requires that the attack be 'widespread or systematic'. This certainly limits the scope of this provision as many instances of environmental damage would not meet this condition (Pereira, 2020; Gray 1996). As for the requirement that the act has to be directed at a civilian population, when the continuous and foreseeable result of the extraction

produces severe environmental damage which kills local populations, a policy to continue such extraction becomes tantamount to an official policy to carry out attacks against a civilian population (Sharp, 1999, 239). According to Article 7(2)(a) of the Rome Statute, this act must be pursuant to 'a State or organizational policy' to commit such attack. The policy does not need to emanate from the state since non-state actors such as the paramilitary and militia groups operating in Colombia who exercise de facto power can constitute the entity behind an organizational policy (Triffterer & Ambos 2018, 246). With respect to the mental element requirement, 'knowledge of the attack' is the mens rea needed for the establishment of the crime against humanity under Article 7 of the Rome Statute. This appears to encompass acts committed not only with intention but also with recklessness, which tends to be the case with a considerable number of environmental offences. Yet the ability of the OTP to prosecute crimes against humanity committed via reckless acts appears to be limited considering the history of negotiations of the Rome Statute (Schabas, 2011, 236).

In its preliminary examinations, the OTP has noted a number of instances of crimes against humanity committed against indigenous communities in the context of the armed conflict in Colombia falling under the ICC jurisdiction. This includes the forceable transfer of populations, including indigenous people, as a possible crime against humanity (ICC-OTP, 1998, art. 7(1)(d)). The internal forced migration in Colombia has led to land grabbing in protected areas and significant environmental degradation (Morales, 2017). The ICC OTP notes that armed groups including FARC, ELN and paramilitaries have been identified as the main perpetrators of forced displacement in Colombia (ICC-OTP, 2012) and stated that there are 'reasonable basis to believe that these groups have caused displacement for various reasons, including the expansion of their strategic military presence, securing access routes, and establishing zones of political influence' (ibid, para. 61). Furthermore, projects have been implemented with brutal forced displacement, mass violence and selected killings of indigenous and Afro-Colombian communities as their territories are regarded as strategically important for armed groups involved in narcotics production and trafficking, as well as in the context

<sup>27</sup> The preliminary examinations relating to war crimes committed after 1 November 2009 relate to violations of article 8(2)(c)(i); article 8(2)(e)(i); article 8(2)(c)(i); article 8(2)(c)(ii); article 8(2)(c)(iii); article 8(2)(e)(vi); and article 8(2)(e)(vii) of the Rome Statute. See ICC/OTP (2014), para. 110. Furthermore, the 2011 Decree no. 4.633 also known as the 'Law of the Victims' (Ley de Víctimas) provides the legal basis for the right to reparation of indigenous people and communities for violations of their rights to land and natural resources in the context of the armed conflict in Colombia. See Titles III, IV and V of the 2011 Decree no. 4.633.



of newly emerging macro-economic development plans (ibid).<sup>28</sup>

An even higher threshold would be required to link environmental damage with acts of genocide in violation of the UN 1948 Genocide Convention<sup>29</sup> and Article 6 of the Rome Statute, and thus potentially attracting the jurisdiction of the ICC. Even though the implications of this would be significant, there would be several legal challenges for an incident involving environmental damage, illegal natural resource exploitation and land grabbing to be classed as genocide. One evidentiary burden would be to prove certain elements of the crime of genocide which requires specific 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group' (ICC, 1998, art. 6). In particular, even if acts such as 'killing members of the group' (committed via an environmental medium) could in principle meet the *actus reus* element of the crime of genocide, it would still be challenging for the ICC prosecutor to establish that an environmental offence intended to 'destroy a group'. Hence it has been suggested that defining international environmental crimes as crimes against humanity could prove more meaningful in that it covers many of the same acts that would normally fall under the rubric of genocide, but without the higher scientific element of demonstrating a 'specific intent to destroy one ethnic group' (Sharp, 1999).

Although preliminary examinations by the ICC OTP since 2004 do not include allegations of genocidal acts, it is arguable that some of the activities by the Colombian state, paramilitary and militia groups, including the systematic and widespread killings and displacement of indigenous peoples, could warrant investigations for the crime of genocide under Article 6 of the Rome Statute. The connection and inter-dependency between indigenous peoples, their lands and natural resources and their human right to a healthy environment<sup>30</sup> recognized

by the jurisprudence of the Inter-American Court of Human Rights,<sup>31</sup> the JEP judgments to date in Cases 02 and 05,<sup>32</sup> and the progressive judgment of the Colombian Supreme Court on the rights of nature as discussed above, could develop the basis for prosecutions for the crime of genocide (or, eventually, 'ethnocide'), for the destruction of the environment, and the killings and displacement of indigenous groups in the context of the internal armed conflict in Colombia as long as the intent to 'destroy a group' can be established.

### Corporate Accountability for Environmental Damage

Currently, the ICC only has jurisdiction over international crimes committed by individuals, and not by states. But another significant limitation of the Rome Statute is that it currently does not recognise the concept of criminal liability of corporations for international crimes (ICC, 1998, art. 25(1)). Although there were proposals at the Rome Conference that led to the adoption of the Statute to include a regime for criminal liability of legal entities, those proposals were rejected (Megret, 2011, 225). Hence one important limitation of the ICC jurisdiction is that it can exercise little scrutiny over the role of corporations in international crimes.

There is indeed considerable evidence of corporate involvement in financing the armed conflict and orchestrating crimes in Colombia. The ICC OTP noted that Colombia's Attorney General's Office (Fiscalía General de la Nación-FGN) initiated proceedings against businessmen allegedly involved in financing the operations of paramilitary groups

<sup>28</sup> For example, it was noted that in the case of the river basins of Curvarado and Jiguamiando, 3,000 Afro-Colombians were forcibly displaced from their collective territory by paramilitaries, narco-traffickers, and those seeking to acquire lands illegally for plantations and cattle ranching (ibid).

<sup>29</sup> UN Convention on the Prevention and Prohibition of the Crime of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, Article 2.

<sup>30</sup> Inter-American Court of Human Rights, 'The Environment and Human Rights' (State obligations 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) of the American Convention on Human Rights). Advisory Opinion OC-23/17 (15 November 2017). Series A No. 23. Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos: [www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf), para 47, 108. See also for the first time in a contentious case, IACTHR, *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina* (Feb 6, 2020).

<sup>31</sup> On the Inter-American Court of Human Rights addressing violations of indigenous peoples' human rights in the context of extractive industry projects, see *Kichwa Indigenous People of Sarayaku v Ecuador* [2012] Inter-Am Court HR (ser C) No 245; *Saramaka People v Suriname* [2007] Inter-Am Court HR (ser C) No 172; *Sawhoyamaya* [2006] Inter-Am Court HR (ser C) No 146, 73; *Moiwana Community v Suriname* [2005] Inter-Am Court HR (ser C) No 124; *Awasi Tingni* [2001] Inter-Am Court HR (ser C) No 79, 5 [25].

<sup>32</sup> See <https://www.jep.gov.co/Paginas/inicio.aspx> [1/12/2020].



operating in different regions of Colombia since at least 2002 (icc-otp, 2018, para. 151). For example, in August 2018, the FGN issued an indictment (in Spanish 'resolución de acusación') against 13 executives and employees of the company Chiquita brands (Banadex and Banacol branches) for the alleged agreement ('concierto para delinquir') to finance the Arlex Hurtado paramilitary front which operated in the regions of Urabá and Santa Marta from 1996 to 2004 (ibid). Additionally, in August 2018, the FGN ordered the initiation of an investigation against cattle businessmen from Córdoba, who reportedly acted as links between some businessmen and AUC commanders (ibid, para. 152).

It has been suggested that while the OTP 2016 Policy Paper will not change the ICC's jurisdiction over corporate crimes, it may encourage the prosecution of business officials, which would be an important development from the perspective of business and human rights (Bernaz, 2017). In this vein, corporate 'aiding and abetting' could be part of a framework for holding corporate officers accountable for violations of international criminal law (ibid). Moreover, the International Law Commission has drafted articles on corporate accountability for environmental damage in the context of armed conflicts which may lead to the progressive development and codification of international law in this area.<sup>33</sup>

## Conclusions and Recommendations

It is a daunting task to bring peace to a country where the vast majority of people have grown under the armed conflict and where millions have suffered horrendous injustices. These historic injustices must be recognized, and the events of the past must be dealt with. The Commission for the Clarification of Truth, Coexistence and Non-Repetition (CEV), the Missing Persons Search Unit (UBPD) and JEP have an important role to play in the peacebuilding process. This includes listening to the victims and bringing to justice all sides of the perpetrators who committed these crimes. However, one must ask

to what extent this framework is also able to do justice to the environmental destruction that took place during the armed conflict and that continues to take place at an even larger magnitude in the wake of the peace agreement.

- JEP has a unique window of opportunity here because it opened 'macro' cases where local communities and indigenous groups are the victims. These groups can provide important insights into the social impact and rights violations that took place during the armed conflict, and how they perceived the environmental damages and crimes against nature that took place during the armed conflict.
- JEP could apply the environmental specific articles 35(3) and 55 of the Additional Protocol I (as international customary law) for the first time and contribute to the interpretation of the requirement of widespread, long-term, and severe damage to the environment in a manner that includes damage occurring as a result of conventional warfare in Case 02. Furthermore, JEP could apply the general protection IHL rules in light of human rights law and international environmental law to restrict collateral environmental damage during the armed conflict. It could also apply international human rights law protecting the environment on acts that may not be addressed by IHL but that remain applicable also during armed conflict.
- JEP also has an opportunity to implement Draft Principle 5 of the International Law Commission to ensure respect for indigenous rights, not only during the armed conflict but also in the post-conflict. The representation of local and indigenous people, for instance in Case 02 and Case 05, can be an example on how to address and include the environment as a victim in order to work towards a reconciliation not just among people, but also with the natural environment.
- Addressing the environment as a victim could be a chance for JEP to combine international advocacy encouraging a better legal protection of the environment with the national legal developments taking place in Colombia providing legal rights for parts of the environment. One might hope that this would also carry on outside JEP and into Colombian society in order to address and tackle the contemporary social-ecological conflicts, the ongoing environmental destruction and

<sup>33</sup> See Marie G. Jacobsson, Special Rapporteur, Third Report on the Protection of the Environment in relation to Armed Conflicts, International Law Commission, Sixty-eighth session (2016). See also Pereira (2020) and the ongoing negotiations of the United Nations Draft Business and Human Rights Treaty, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf) [1/12/2020]



violence against those who dare to stand up against the widespread injustices. After all, the environment of Colombia has not only been a victim of the armed conflict, but it is increasingly also a victim of the post-conflict.

- From the perspective of international criminal justice, it is particularly important that JEP is able to reconcile the balancing of political realities in the country with meeting the principles and standards expected under international criminal law.
- In the aftermath of the ICC OTP 2016 Policy Paper, it is pertinent for civil society, NGOs, and other relevant stakeholders to bring to the attention of the OTP via communications instances of environmental damage, illegal natural resource exploitation and land grabbing amounting to war crimes under the Rome Statute committed after 1 November 2009, and to crimes against humanity and genocide committed after Colombia's ratification of the Rome Statute in 2002.
- The ICC OTP should continue to collaborate with JEP and the Colombian authorities and civil society in ensuring the fulfilment of peace and reconciliation, so that reparations, remediation and appropriate punishment are applied for violations of indigenous human rights and environmental degradation in the context of the Colombian armed conflict. In particular, the OTP preliminary examinations (and eventual investigations) should assess and prioritise cases of allegations of war crimes, crimes against humanity or genocide committed in Colombia involving serious environmental damage, illegal natural resource exploitation and land grabbing, in line with the principle of positive complementarity and observing the implementation of the principles of international criminal justice and the Rome Statute.

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