

# GUIDE TO IDENTIFYING AND FRAMING ENVIRONMENTAL WAR CRIMES IN UKRAINE – 2ND REVISED EDITION

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CLIMATE COUNSEL

# GUIDE TO IDENTIFYING AND FRAMING ENVIRONMENTAL WAR CRIMES IN UKRAINE

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‘Existing law, if properly implemented and respected,  
provide[s] adequate protection’ to the natural environment.

– ICRC Legal Expert Antoine Bouvier<sup>1</sup>

\* \* \*

## I. INTRODUCTION

1. The purpose of this guide (the ‘Guide’) is to provide Ukraine’s Special Ecological Prosecution Office (‘SEPO’)—a semi-independent division within Ukraine’s Office of the Prosecutor-General (‘OPG’)—with a succinct, self-contained, and practical resource for *initially* identifying, framing, and prioritizing potential cases of war crimes that may target or seriously impact the natural environment (‘Environmental War Crimes’ or ‘EWCs’).<sup>2</sup> The Guide is based on existing conventional and customary international humanitarian law (‘IHL’) applicable to domestic cases by way of the Criminal Code of Ukraine (‘CCU’);<sup>3</sup> this is briefly explained in Section II. Section III explains how to understand and use the Guide to best effect. Section IV—the heart of the matter—covers the various ways in which existing IHL affords protection to the natural environment in times of armed conflict and demonstrates how some (but not all) such *prohibitions* translate into specific *crimes*. (Note: When applying IHL, it is important to appreciate the distinction between a prohibition and a crime). Ultimately, the Guide will allow SEPO to identify any actionable fact patterns and categorize them as EWCs.

## II. APPLICABLE LAW

2. IHL: IHL is a set of rules that seeks to regulate and limit the humanitarian consequences of armed conflict.<sup>4</sup> Its primary purpose is to restrict the means and methods of warfare that parties to a

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<sup>1</sup> Introductory comments to ‘Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict’, *International Review of the Red Cross*, No 311, 30 April 1996. *Nb.* Mr Bouvier made this comment more than *thirty* years ago. In his view, the main issue was ‘better implementation of existing international obligations’, and therefore ‘emphasis should henceforth be placed on seeking new mechanisms and putting the existing means into effect’. *Ibid.*

<sup>2</sup> This Guide was compiled by Climate Counsel’s legal team under the leadership of Richard J Rogers (Executive Director). It was reviewed by various external experts including Fabricio Guariglia and Tamar Tomashvili of the International Development Law Organization, Dmytro Koval of Truth Hounds, Kate Mackintosh of UCLA’s Promise Institute for Human Rights, Beatrice Hamilton of Stanford Law School, Maksym Popov of the OPG, Wayne Jordash and Donna Cline of Global Rights Compliance, and Gabrielle McIntyre of LexCollective.

<sup>3</sup> In addition to the various IHL instruments cited in detail below, the Guide is supported by a number of secondary sources. See ICRC, Treaties, States Parties, and Commentaries Database; ICRC, Customary IHL Database; ICRC, Nils Melzer, ‘International Humanitarian Law: A Comprehensive Introduction’, July 2022 (the ‘ICRC IHL Introduction’); ICRC, ‘Guidelines on the Protection of the Environment in Times of Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment Under International Humanitarian Law, with Commentary’, September 2020 (the ‘ICRC Guidelines on IHL and the Environment’), USAID, Ukraine Supreme Court, NSJU, and GRC, ‘Benchbook on the Adjudication of International Crimes’, June 2023 (the ‘Benchbook’). *Nb.* In arriving at actual legal determinations, ultimate reference should be made to the specific IHL treaty provisions that bind Ukrainian courts.

<sup>4</sup> In addition to custom, IHL is comprised of (and probably best known for) a number of key conventions dating back to the late-19th Century. The ‘Hague Conventions’ contain rules regulating the means and methods of warfare, conduct of hostilities, and occupation (the ‘Law of the Hague’; as opposed to the ‘Law of Geneva’, which primarily governs the

conflict may employ and to ensure the protection of the civilian population, objects, areas, and institutions (as well as the humane treatment of persons who are not, or no longer, taking part in hostilities). Fundamentally, IHL is based on the tension between considerations of military necessity and humanity. This delicate balance is underpinned by a number of core principles. As explained in detail below, these principles broadly extend to the protection of the natural environment—both as a *civilian object* and as *enemy property*. The environment is also protected indirectly by the various IHL rules on prohibited weapons. Many IHL prohibitions related to the protection of the natural environment have been ‘criminalized’ in Ukraine as EWCs.<sup>5</sup>

3. For present purposes, the most relevant IHL treaties are the four Geneva Conventions of 1949 (‘GCs’), their First Additional Protocol of 1977 (‘API’), the Regulations annexed to The Hague Convention (No IV) of 1907 (‘HRIV’), as well as a number of treaties governing the use of certain weapons.<sup>6</sup> Relevant customary IHL—which both assists in the interpretation of conventional provisions and is itself an independent source of law—is set out in the ICRC Customary IHL Study.<sup>7</sup> Not all of the IHL *prohibitions* stated in these materials are war crimes - only those violations that either (i) fall within the grave-breaches regime or (ii) are otherwise recognised by customary international law as serious violations, are considered war crimes and give rise to individual criminal responsibility.
4. Article 438: Under Ukrainian law, Article 438 of the CCU – which defines ‘Violations of the Laws and Customs of War’ under Chapter XX on ‘Criminal Offenses Against Peace, Security of Mankind, and International Legal Order’ – includes all *serious violations of IHL*. Therefore, in Ukraine, all those war crimes firmly rooted in international instruments ratified by Ukraine’s parliament may be prosecuted, which includes (i) conventional IHL as grave breaches and (ii) customary IHL as other serious violations.<sup>8</sup>

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protection of war victims). The Geneva Conventions and their Additional Protocols are at the core of IHL. Notably, GCIV affords protection to civilians, including in occupied territory. It concerns the general protection of populations against certain consequences of war, without addressing the conduct of hostilities, as such, which was later examined in the Additional Protocols of 1977. They strengthen the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts and place limits on the way wars are fought. *See generally* ICRC, History of the ICRC.

<sup>5</sup> For present purposes, ‘criminalization’ refers to the *mechanism* by which IHL violations are penalized under domestic criminal law (‘penal repression’). In Ukraine, that mechanism is CCU Article 438, which criminalizes all serious violations of IHL (including but not limited to grave breaches of the GCs and API). *Nb.* In addition to its main normative aims (the protection of persons/objects and the limitation of means/methods), IHL has a crucial procedural aspect: ‘It also sets out mechanisms designed to ensure compliance [with IHL rules]. Of these, the prevention and, if necessary, repression of serious violations are particularly important. Under IHL, the perpetrators bear individual responsibility for the violations they commit, and those guilty of serious violations must be prosecuted and punished.’ ICRC Advisory Service on IHL, ‘Obligations in Terms of Penal Repression’. In terms of legislation, ‘incorporating punishments into domestic law for violations of [IHL] involves two problems: the definition of the criminal offense (the method of criminalization) and the form and the place in which it is to be introduced into the legal system.’ ICRC Advisory Service on IHL, ‘Method of Incorporating Punishment Into Criminal Law’.

<sup>6</sup> *See* ICRC, Treaties and States Parties Database (Ukraine).

<sup>7</sup> *See, e.g.*, ICRC, Customary IHL Study, Rule 156 (on the ‘Definition of War Crimes’).

<sup>8</sup> *See generally* Benchbook (which, among other things, provides detailed analysis on the ‘Applicability [of War Crimes] under Article 438 of the CCU’); *see also* OPG/SEPO, ‘Protecting the Natural Environment During International Armed Conflict Under the Criminal Code of Ukraine: Position Paper on Applicable Law’; *see also* ICRC Customary IHL Study, Rule 156 – Definition of War Crimes (‘Serious violations of international humanitarian law constitute war crimes.’) These include: (i)

5. Rome Statute: Internationally, since 1998, serious violations of IHL have been *restated* in one place: Article 8 of the Rome Statute of the International Criminal Court ('ICC'), which provides both a useful catalogue of these established war crimes as well as their specific elements.<sup>9</sup> In Ukraine, which has not ratified the Rome Statute, Article 8 serves as a practical tool for Ukrainian prosecutors: This is because CCU Article 438 criminalizes all serious violations of IHL and all of those violations are set out in Article 8 of the Rome Statute. Accordingly, SEPO prosecutors and investigators (hereafter collectively 'prosecutors') may look to the Rome Statute to determine which violations are generally recognized as war crimes *and* what the legal elements of those crimes are.
  
6. Interpretation: Notably, guidance on the interpretation of IHL *can and should* be given by states themselves 'as the legislators of international law'.<sup>10</sup> In this spirit, SEPO should resolve or clarify any legal issues in favor of maximum protection of the natural environment within the bounds of existing IHL and domestic criminal law. When navigating between the letter of the law and its practical application, prosecutors should appreciate that 'interpretation is undoubtedly an important way in which IHL develops'.<sup>11</sup> IHL is not a static or doctrinaire body of law. Rather, it was and is expected to *evolve* (or be clarified) through state actors interpreting and applying the provisions.<sup>12</sup> What follows is a blueprint for such action.

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grave breaches of the GCs and API; (ii) war crimes as specified under Article 8 of the Rome Statute; and (iii) other war crimes in customary IHL. *Ibid* (commentary); see also ICRC, Explanatory Note, 'What are "serious violations of international humanitarian law"?'; ICRC IHL Introduction, page 289. *Nb.* The OPG, SEPO, Ukraine's Supreme Court and National School of Judges, Ukrainian jurists and commentators, and all domestic and international strategic partners are in agreement on this key issue.

<sup>9</sup> Thus, by simply applying those EWCs restated at Article 8 of the Rome Statute, SEPO prosecutors may rest assured they are on firm legal footing domestically – without any need for additional analysis regarding applicable law. See generally Benchbook; see also Rome Statute, Article 8(2)(a) and (b); ICC Elements of Crimes; Plenary of the High Specialized Court of Ukraine for Civil and Criminal Cases, Decree, 19 December 2014, No 13, On the Application of International Treaties of Ukraine by Courts in the Administration of Justice, Section 16 (permitting reference to 'the international legal norms that outline the elements of the crime' applicable under CCU Article 438). In effect, such an understanding will permit the (*de facto* but not *de jure*) application of Article 8 of the Rome Statute. With respect to Article 438, the close relationship between the IHL treaties ratified by Ukraine and the (currently non-ratified) Rome Statute is essential to understanding and applying EWCs, which are rooted in conventional and customary IHL (re)codified by the Rome Statute.

<sup>10</sup> ICRC IHL Introduction, page 25.

<sup>11</sup> See Cordula Droege and Eirini Giorgou, 'How International Humanitarian Law Develops', *International Review of the Red Cross* (2022), 104 (920-921), 1798–1839, at 1820; see also Michael Schmitt, 'Normative Architecture and Applied International Humanitarian Law', *International Review of the Red Cross* (2022), 104 (920-921), 2097–2110.

<sup>12</sup> See Droege and Giorgou, *op cit* at 1820 ('In sum, interpretation is undoubtedly an important way in which IHL develops. As all international law, it is a living instrument. Unlike national legislation, international treaties are not easily adopted or amended, and so their understanding – and that of customary law in parallel – is shaped over time by their application and interpretation in the practice of States, their armed forces, their courts, and other actors.') *Nb.* The provisions of other bodies of law that protect the natural environment (international environmental law and international human rights law, for example) continue to apply in armed conflict. See, e.g., International Law Commission, 'Principles on Protection of the Environment in Relation to Armed Conflicts', UNGA Res 77/104, Annex, 7 December 2022 (the 'PERAC Principles'), Principles 13 and 14; United Nations Environment Programme, 'Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law', 2009.

### III. HOW TO UNDERSTAND AND USE THE GUIDE

7. Overall Framing Methodology: The Guide is based on the following propositions:
- a. SEPO prosecutors should understand the natural environment expansively to include everything that exists or occurs naturally.
  - b. SEPO prosecutors should also be aware of the three *general* categories of IHL protection for the natural environment ('Category' or 'Categories'):
    - (i) *Category 1*: The natural environment is protected as a *civilian object*—unless and until it becomes a legitimate military objective—by the IHL rules on targeting as set out in API.<sup>13</sup> For practical purposes, there are four sub-categories here:
      - a. when the environment is the direct object of the attack;
      - b. when the environment suffers incidental, disproportionate (excessive) harm (Please note that this approach is not uncontroversial, see paragraph 32 for an alternative approach);
      - c. when the environment suffers incidental harm that amounts to widespread, long-term, and severe damage;
      - d. when the object of the attack is a work or installation containing dangerous forces (such as a dam or nuclear facility).
    - (ii) *Category 2*: The natural environment is protected by IHL rules on *enemy property* as set out in GCIV and HRIV.<sup>14</sup> For practical purposes, there are two sub-categories here:
      - a. when the natural resources are taken without consent in an occupied territory;
      - b. when the environment is harmed in an occupied territory.
    - (iii) *Category 3*: The natural environment is directly and indirectly protected by the various IHL rules on *prohibited weapons*.
  - c. Finally, SEPO prosecutors should appreciate that CCU Article 438 only criminalizes *serious violations of IHL*; any lesser violations falling outside of that list will not amount to war crimes. As noted above, the Rome Statute Article 8 provides a list of these serious violations of IHL.

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<sup>13</sup> API strengthens the protection of victims of international armed conflicts and places limits on the way wars are fought by specifically addressing the conduct of hostilities. *See* fn 4, *supra*.

<sup>14</sup> GCIV and HRIV afford protection to civilians, including in occupied territory; they concern the general protection of populations against certain consequences of war, without addressing the conduct of hostilities, as such. *See* fn 4, *supra*.

8. Environmental Damage: The type and scale of environmental damage that would need to be established by prosecutors is set out in the elements of each EWC (these are most easily obtained from the Rome Statute Article 8 and ICC Elements of Crimes). This ranges from:
  - a. *No damage*. This standard applies when the environment was targeted directly (the object of the attack) and it was not at the time a military object ('Attacking Civilian Objects'). No damage is required to prove the offense.
  - b. *Excessive damage*. This standard applies when the attack was directed against a military objective and the environment suffered incidental harm ('Indiscriminate/Disproportionate Attack'). In such cases, the prosecution must demonstrate that the damage would be clearly excessive in relation to the concrete and direct military advantage anticipated (the proportionality test), and the requisite knowledge. In terms of the threshold of harm required, note the alternative approach in paragraph 32.
  - c. *Extensive and wanton destruction or appropriation*. This standard, as well as lesser degrees thereof, applies when enemy property was the subject of the offense (the EWCs covering appropriation, destruction, and/or seizure).
  - d. *Widespread, long-term, and severe environmental damage*. This standard applies when the attack was directed against a military objective and the environment suffered very serious incidental harm ('Indiscriminate/Disproportionate Attack'). In such cases, the prosecution should argue that such level of damage would always be clearly excessive in relation to the concrete and direct military advantage anticipated (the proportionality test is subsumed).
9. Section IV: The three Categories are explained in much greater detail below in Section IV. For each Category, the Guide presents: (i) a comprehensive discussion of the relevant IHL prohibitions; (ii) a summary chart setting out the specific EWCs applicable in Ukraine along with their underlying IHL sources and corresponding ICC elements; and (iii) a brief note on any relevant clarifications, caveats, or concerns. For ease of reference, the three summary charts are consolidated at the end of the Guide (Annex A – Summary Chart on EWCs).
10. Pleading: SEPO prosecutors will ultimately need to properly plead EWCs in the formal charging document required under Chapter 22 of Ukraine's Criminal Procedure Code ('CPC'): the 'Notice of Suspicion'. For present purposes, the crucial information required by that document is the correct 'legal qualification', which will be CCU Article 438 in general and the specific EWC in particular. (For Ecocide, the legal qualification will be CCU Article 441). A proposed initial charging template is provided at the end of the Guide (Annex B – Template Notice of Suspicion).

11. Interpretation: In terms of the inevitable interpretation that must be done, SEPO should ensure that its specific goals align with broader OPG policies – in particular, those of the War Crimes Unit. In that regard, while IHL has been applied and clarified over the decades by way of international criminal law ('ICL') and the domestic approaches of many states, SEPO prosecutors are under no obligation to follow the paths of international criminal tribunals or other domestic courts. Of course, where such reliance would serve SEPO's interests, its prosecutors can and should make the most of ICL and/or other domestic case law. However, Ukrainian prosecutors should feel free to apply IHL in novel and creative ways – providing this does not offend the principles of legality. But SEPO should always be mindful that the positions prosecutors advocate for cases against Russian defendants may apply equally to Ukrainian combatants. When it comes to interpretation, prosecutors should be consistent, flexible, and fair.
  
12. How To Frame: When ultimately dealing with concrete factual situations resulting in damage to the natural environment, the following process should prove useful:
  - a. *The Category*: Prosecutors should first determine whether the natural environment was: (i) targeted directly or (where not targeted directly) was incidentally damaged in an attack (Category 1); (ii) appropriated, destroyed, and/or seized by the enemy (Category 2); and/or (iii) damaged by the use of prohibited weapons (Category 3). This will lead prosecutors to the appropriate general Category (or Categories). Prosecutors should keep in mind that not all harm to the natural environment will be criminal. Certain damaging military actions may be legally permissible including, for example, damage as a result of direct hostilities, through target practice to calibrate weapons, or through the setting up of camps or other necessary installations. As with all war crimes, understanding the context will be crucial.
  - b. *The Specific Offence*: Next, prosecutors should choose the most appropriate specific offense(s) (from within the Category) as indicated in the summary charts below at paras 29, 40, and 45.
  - c. *The Elements*: Finally, prosecutors should preliminarily analyze the facts against the legal elements of the specific offense(s) – which are conveniently compiled in the Rome Statute – with references to any underlying IHL rules and/or relevant case law.

Once this initial framing process is complete and a decision has been taken to proceed, prosecutors may formally plead the charges in the Notice of Suspicion.

13. Further Reading: While the Guide itself provides all the basic primary sources necessary for preliminary framing, SEPO prosecutors may wish to consult additional material as their legal knowledge increases and as they proceed with more deeply analyzing the facts of actual cases. In this regard, references to potentially useful documents – including the ICRC Guidelines on



IHL and the Environment, the International Law Commission Principles on Protection of the Environment in Relation to Armed Conflicts, and other secondary sources—is provided at the end of the Guide (Annex C – Bibliography).

## IV. PROTECTION OF THE NATURAL ENVIRONMENT IN ARMED CONFLICT

### A. The Natural Environment Is Civilian in Character

14. The natural environment should be understood in the ‘widest sense possible’ to mean: ‘everything that exists or occurs naturally’.<sup>15</sup> Prosecutors should have little difficulty here, as the determination will almost always be self-evident.<sup>16</sup>
15. More specifically, and more legally, the natural environment is a *civilian object* under IHL.<sup>17</sup> Under IHL, civilian objects are defined negatively: whatever is not a military objective is a civilian object. According to API Article 52:
  1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
  2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
  3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.<sup>18</sup> Thus, under existing IHL, the natural environment should be considered a civilian object<sup>19</sup> – unless and

<sup>15</sup> ICRC Guidelines on IHL and the Environment, para 16. Such an understanding is both ‘in line with the meaning states have given it in the context of IHL’ and ‘accords with the fact that the notion of the “natural environment” may evolve over time’. ICRC Guidelines on IHL and the Environment, para 17. The ICRC first clarified its positions on the natural environment in the mid-1990s. See Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, International Review of the Red Cross, No 311, 30 April 1996.

<sup>16</sup> *Nb.* As the former US Supreme Court Justice Potter Stewart put it when defining hard-core pornography in 1964: ‘I know it when I see it.’ *Jacobellis v Ohio* (1964).

<sup>17</sup> See generally ICRC Customary IHL Study, Rule 44 (‘Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. [...]’)

<sup>18</sup> See also ICRC Customary IHL Study, Rule 9 (on Definition of Civilian Objects).

<sup>19</sup> In addition to meeting the conventional definition, the natural environment is generally recognized as civilian in character by the ICRC, the International Law Commission (‘ILC’), and others. See, e.g., ICRC Guidelines on IHL and the Environment, para 18 (‘Therefore, all parts or elements of the natural environment are civilian objects, unless some become military objectives [...] according to the normal rule—that is, if, by their nature, location, purpose or use, they make an effective contribution to military action and their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’); ILC PERAC Principles, Commentary to Principle 13 (General protection of the environment during armed conflict) and Principle 14 (Application of the law of armed conflict to the environment). Notably, the ICRC—based on a reading of the drafting history of API, among other things—takes the position that the natural environment should be understood in the ‘widest sense possible’ to mean: ‘everything that exists or occurs naturally’. ICRC Guidelines on IHL and the Environment, para 16. Such an understanding is both ‘in line with the meaning states have given it in the context of IHL’ and ‘accords with the fact that the notion of the “natural environment” may evolve over time’. ICRC

until it becomes a military one—and protected as such.<sup>20</sup> In understanding IHL’s various prohibitions, prosecutors should keep in mind that not all of them amount to war crimes; rather (as discussed above and set out below), only serious violations of IHL are formally criminalized by CCU Article 438. Nevertheless, an understanding of the underlying IHL prohibitions—many of which are reflected/embedded in the elements of EWCs—is useful.

## B. The Three Categories of Protection

### 1. *Category 1: Environment as Civilian Object by IHL Rules on Targeting*

#### *a. The Natural Environment is a Specially-Protected Civilian Object*

16. As well as protecting the environment as a civilian object, API identifies the natural environment as a specially-protected civilian object. According to Article 35(3): ‘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.’ Moreover, Article 55 states IHL’s specific ‘protection of the natural environment’:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisals are prohibited.

These prohibitions protect the natural environment as a specially-protected civilian object.<sup>21</sup>

#### *b. The Natural Environment is Generally Protected by the Principles of Distinction, Proportionality, and Precaution*

17. The *Principle of Distinction* as it relates to civilian objects is stated clearly at API Article 48:

In order to ensure respect for and protection of [...] civilian objects, the Parties to the conflict shall at all times distinguish [...] between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

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Guidelines on IHL and the Environment, para 17. The ICRC first clarified its positions on the natural environment in the mid-1990s. See Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, International Review of the Red Cross, No 311, 30 April 1996.

<sup>20</sup> In particular and as demonstrated below, IHL affords protection to the natural environment in the following five ways: (i) as a specially-protected object itself; see ICRC Guidelines on IHL and the Environment, Rules 1–4; (ii) by the principles of distinction, proportionality, and precautions; see ICRC Guidelines on IHL and the Environment, Rules 5–9; (iii) by the rules on enemy property; see ICRC Guidelines on IHL and the Environment, Rules 13–15; (iv) by the rules on specially-protected objects other than the natural environment; see ICRC Guidelines on IHL and the Environment, Rules 10–12; and (v) by rules on specific weapons; see ICRC Guidelines on IHL and the Environment, Rules 19–25.

<sup>21</sup> See ICRC Customary IHL Study, Rules 43–45 (under Chapter 14. The Natural Environment), Rule 147 (on Reprisals Against Protected Objects).

Thus, as clarified by API Article 52(1): ‘Civilian objects shall not be the object of attack or of reprisals.’<sup>22</sup> The principle is further developed by prohibiting indiscriminate attacks in all cases. According to API Article 51(4):

Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

These prohibitions protect the natural environment as a general civilian object.<sup>23</sup>

18. The *Principle of Proportionality* holds that (indiscriminate) attacks resulting in excessive incidental damage in relation to military advantage are disproportionate. This prohibition is defined by API Article 51(5)(b) which states that ‘an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’ is ‘to be considered as indiscriminate’. This prohibition protects the natural environment as a general civilian object.<sup>24</sup> In terms of the threshold of harm required, note the alternative approach in paragraph 32.

19. The *Principle of Precaution* is set out in API Article 57:

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
  - (a) those who plan or decide upon an attack shall:
    - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
    - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
    - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; [...]

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<sup>22</sup> *Nb.* Additionally, the Principle of Distinction provides particular protection for specific categories of civilian objects: the natural environment (discussed above at para 16) and cultural property, works and installations containing dangerous forces, and objects indispensable to the survival of the civilian population (discussed below at para 20).

<sup>23</sup> See ICRC Customary IHL Study, Rules 7–10 (under Chapter 2. Distinction between Civilian Objects and Military Objectives), Rules 11–13 (under Chapter 3. Indiscriminate Attacks).

<sup>24</sup> See ICRC Customary IHL Study, Rule 14 (on Proportionality in Attack).

The principle is further clarified by the remainder of API Article 57 and API Article 58.<sup>25</sup> These prohibitions protect the natural environment as a general civilian object.<sup>26</sup>

*c. The Natural Environment is Indirectly Protected by Rules on Other Specially-Protected Civilian Objects*

20. Additionally, the Principle of Distinction (described above) provides protection to specific civilian objects other than the natural environment, which may provide direct or indirect protection to the environment. Most importantly for present purposes:

a. *Works and installations containing dangerous forces* (dams, dykes, nuclear-electrical generating stations) and other installations located at or in their vicinity are specially protected by API Article 56(1);<sup>27</sup>

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<sup>25</sup> See also API Article 57(2)(b) ('an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;'); Article 57(3) ('When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.');

Article 58 ('The Parties to the conflict shall, to the maximum extent feasible: (a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) avoid locating military objectives within or near densely populated areas; (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.')

<sup>26</sup> See ICRC Customary IHL Study, Rules 15-21 (under Chapter 5. Precautions in Attack), Rules 22-24 (under Chapter 6. Precautions against the Effects of Attacks).

<sup>27</sup> API Article 56(1) ('Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.')

See also API, Articles 56(2)-(5) ('2. The special protection against attack provided by paragraph 1 shall cease: (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support; (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support; (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support. 3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces. 4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals. 5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.');

see also ICRC Customary IHL Study, Rule 42 (on Works and Installations Containing Dangerous Forces); ICRC Guidelines on IHL and the Environment, para 162 ('[...] The ICRC furthermore recommends that these rules be applied to other installations containing dangerous forces, such as chemical plants and petroleum refineries. For example, in 2017 shelling by parties to the conflict in Ukraine around large water-treatment facilities storing liquified chlorine gas prompted experts to raise concerns that the release of toxic gas could kill anyone within 200 metres and cause severe health consequences for those within a radius of 2.4 km; by the same logic, animals (which form part of the natural environment) would have been impacted. In any case, any attack against other types of works and installations such as chemical plants and petroleum refineries that have become military objectives remain governed by the rules of proportionality and precautions, the application of which will require that the foreseeable effects of such an attack are taken into account.')

(internal citations omitted).

b. *objects indispensable to the survival of the civilian population* (such as natural food and/or water sources) are specially protected by API Article 54;<sup>28</sup>

c. *cultural property* (strictly defined) is specially protected by API Article 53.<sup>29</sup>

As described in greater detail by the ICRC, these prohibitions may directly or indirectly protect the natural environment as it relates to the particular specially-protected civilian object.<sup>30</sup> Notably, with regard to works and installations containing dangerous forces, the special protection provided by Article 56 only applies when a dam (or other such work/installation) is a military target; otherwise, it is treated as a normal civilian object under Article 52.<sup>31</sup>

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<sup>28</sup> API, Article 54 (1. Starvation of civilians as a method of warfare is prohibited. 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive. 3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party: (a) as sustenance solely for the members of its armed forces; or (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement. 4. These objects shall not be made the object of reprisals. 5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.); *see also* ICRC Customary IHL Study, Rule 53 (on Starvation as a Method of Warfare), Rule 54 (on Attacks against Objects Indispensable to the Survival of the Civilian Population).

<sup>29</sup> API, Article 53 ('Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals.');

*see also* Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, Articles 1-4, 16, 17, 28 and its Second Protocol, Articles 6, 10, 12, 13, 15; ICRC Customary IHL Study, Rules 38-41 (under Chapter 12. Cultural Property).

<sup>30</sup> On the prohibitions regarding *works and installations containing dangerous forces*, *see* ICRC Guidelines on IHL and the Environment, para 164 ('First, from a practical standpoint, any release of dangerous forces capable of causing severe losses among the civilian population is also likely to damage the natural environment in which the population lives, so by requiring that such a release be avoided [...] or is prohibited [...], the natural environment benefits from indirect protection. For example, the attacks on the German hydroelectric dams of Eder and Mohne in May 1943 killed 1300 people, but also damaged 3000 hectares of cultivated land and killed 6500 livestock, both of which constituted parts of the natural environment.');

*ibid*, para 165 ('Second, and of significance for the legal criterion of "severe losses among the civilian population," the natural environment and the health of the civilian population may be intrinsically interlinked, and damage to the natural environment caused by the release of dangerous forces may also have fatal consequences for the civilian population. For example, the release of nuclear energy would involve the contamination of surrounding land and water supplies with radioactive particles and the dispersal of dirt and soot affecting the atmosphere and climate. This would be likely to have a severe impact on farming and food production, potentially putting communities at risk of starvation. [...].') On the prohibitions regarding *objects indispensable to the survival of the civilian population*, *see ibid*, para 149 (The natural environment 'can suffer significant degradation when objects indispensable to the survival of the civilian population are targeted'); *ibid*, para 150 ('Certain objects indispensable to the survival of the civilian population are expressly identified by the ICRC's 1987 commentary on Article 55 of [API] as parts of the natural environment: foodstuffs, agricultural areas, drinking water, and livestock. These are thus directly protected by this rule.')

On the prohibitions regarding *cultural property*, *see ibid*, para 173 ('Direct protection is afforded to the natural environment when an object forming part of the natural environment qualifies as cultural property. [...]. [While] the natural environment will not generally qualify as cultural property, [...] the possibility that a part of the natural environment, such as a tree of particular importance, may qualify as cultural property was envisaged at the Diplomatic Conference leading to the adoption of the 1954 [Hague] Convention. [...].')

*ibid*, para 174 ('Parts of the natural environment, such as specific mountains, forests or islands, may also have, independently of their cultural value, a certain spiritual significance and be considered as sacred by a particular population. They may in such cases qualify as places of worship [...], provided they constitute the cultural or spiritual heritage of peoples.')

<sup>31</sup> *See* Michael Schmitt, United States Military Academy (West Point), 'Attacking Dams - Part II: The 1977 Additional Protocols', 2 February 2022 ('If no military objective is the object of attack, the API Article 52 prohibition on attacking civilian objects would bar attack altogether. Article 56 only applies when either the dam qualifies as a military objective or there are military objectives on or near it. The Korean War strike on the *Hwachon* hydroelectric dam complex exemplifies an attack on a dam that qualifies as a military objective during an international armed conflict. US Navy aircraft struck the dam in 1951 because North Korea could use it to block the advance of UN forces by flooding the valley downstream. North Korea could also close the dam's gates to lower the downstream water level, thereby making river crossing possible to attack the UN forces' flanks.

*d. Criminalization: Conventional Law, Custom, Rome Statute*

21. Many of the foregoing IHL prohibitions are criminalized as *grave breaches*<sup>32</sup> under API Article 85 (and thus war crimes). The most important grave breaches for present purposes are AP1 Article 85(3)(b) on *indiscriminate/disproportionate attacks*<sup>33</sup> and AP1 Article 85(3)(c) on *works and installations containing dangerous forces* (dams, dykes, nuclear-electrical generating stations).<sup>34</sup> (Less important, but worth noting, is AP1 Article 85(4)(d) on cultural property.<sup>35</sup>)
22. The human harm requirement under API Article 85(3) – namely, that the criminalized act actually causes death or serious injury to body or health (human harm element)<sup>36</sup> – has evolved through custom and is no longer required.<sup>37</sup>
23. With respect to Article 85(3)(b) *indiscriminate/disproportionate attacks*, it is necessary to do a proportionality assessment. This is defined in Article 57(2)(a)(iii):

those who plan or decide upon an attack shall ... refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

This is the general proportionality test applicable to all attacks which are not specifically directed at civilians or civilian objects, but nonetheless cause incidental damage.

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In customary international law, a dam that qualifies as a military objective may be attacked subject to the rule of proportionality and the requirement to take precautions in attack (these rules also appear in Articles 51, 52, and 57 of [API]). However, Article 56 goes further. It bars attack despite full compliance with these rules. In other words, it imposes an absolute standard, not a relative one like the proportionality rule. Yet, it does so in a somewhat limited fashion.)

<sup>32</sup> *Nb.* A 'grave breach' is a particularly serious violation of IHL; it is special in the sense that it both requires states to criminalize it domestically and attracts universal jurisdiction. *See* ICRC, IHL Introduction, p 38.

<sup>33</sup> API, Article 85(3)(b) ('launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)').

<sup>34</sup> API, Article 85(3)(c) ('launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2(a)(iii)').

<sup>35</sup> API, Article 85(4)(d) ('4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: [...] (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives; [...]'); *see also* Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, Articles 1–4, 16, 17, 28 and its Second Protocol, Articles 6, 10, 12, 13, 15.

<sup>36</sup> API, Article 85(3) ('[T]he following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: [...]')

<sup>37</sup> The human harm requirement under the grave breaches ('causing death or serious injury to body or health') has been removed from the customary formulations; this change is reflected in Rome Statute, Article 8(2)(b)(iv).

24. Therefore, in determining whether an attack causing harm to the environment was disproportionate to the military advantage anticipated, it is necessary to weigh the damage to the environment (and other civilian objects) against the reasonably anticipated direct and concrete military advantage. If the harm is excessive, the attack will amount to a war crime. If the harm is not excessive, it will not amount to a war crime. In terms of the threshold of harm required, note the alternative approach in paragraph 32.
25. Notably, due to the specific protection afforded to the natural environment under Articles 35(3) and 55(1), in the rare cases where the harm to the environment is ‘widespread, long-term and severe’, it should be considered excessive (disproportionate) by that fact alone.<sup>38</sup> In other words, the military advantage anticipated from the launching of such an attack can *never* outweigh that level of damage – it will always amount to a war crime.

\* \* \*

26. In practice, to identify the relevant legal definitions and legal elements, prosecutors may simply refer to the Rome Statute. In 1998, the drafters of the Rome Statute codified the *serious violations* (grave breaches and customary formulations) relating to *indiscriminate/disproportionate attacks* into a singular war crime. This is restated in Rome Statute Article 8(2)(b)(iv):

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

This article encapsulates the relevant API prohibitions (discussed above) into a single composite and comprehensive offense.

27. With respect to direct attacks on the environment, these are covered by Article 8(2)(b)(ii) of the Rome Statute.

Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

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<sup>38</sup> See ICRC Customary IHL Study, Rule 45 (“The difference between [Rule 45 of the ICRC Customary IHL Study] and the rule requiring the application to the environment of the general rules of [IHL] applicable to civilian objects (see ICRC Customary IHL Study, Rule 43) is that [Rule 45] is *absolute*. If widespread, long-term and severe damage is inflicted [...], it is not relevant to inquire into whether this behavior or result could be justified on the basis of military necessity or whether incidental damage was excessive. It was for this reason that the expression in Additional Protocol I “widespread, long-term and severe” sets such a high threshold.”) (emphasis added).

28. Accordingly, *all* of API’s key prohibitions with respect to the natural environment are reflected in existing war crimes.<sup>39</sup>

*e. Criminalization in Ukraine*

29. As discussed above, Ukraine has criminalized all serious violations of IHL. The foregoing IHL prohibitions have been ‘criminalized’ under CCU Article 438 as the following two Rome Statute war crimes:

War Crime	IHL Source / OPG Jurisdiction	ICC Elements <sup>40</sup>
Attacking Civilian Objects	<p>This is a serious violation of IHL pursuant to API, Art 52(1).</p> <p>The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 7, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 671–674, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(b)(ii):</p> <ol style="list-style-type: none"> <li>1. The perpetrator directed an attack.</li> <li>2. The object of the attack was civilian objects, that is, objects which are not military objectives.</li> <li>3. The perpetrator intended such civilian objects to be the object of the attack.</li> </ol> <p>See Benchbook. paras 675–688, for supporting ICL case law.</p>
Indiscriminate / Disproportionate Attack	<p>This is a serious violation of IHL pursuant to API, Arts 35(3), 55(1), 57(2)(a)(iii); and 85(3)(b).</p> <p>The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 14, 43–45, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 689–694, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(b)(iv):</p> <ol style="list-style-type: none"> <li>1. The perpetrator launched an attack.</li> <li>2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.</li> <li>3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.</li> </ol> <p>See Benchbook. paras 695–716, for supporting ICL case law.</p>

*f. Clarifications, Caveats, and Concerns*

<sup>39</sup> Any protections afforded by the rules on specially-protected objects other than the natural environment are equally captured by the same two serious violations of IHL. Therefore, any academic/scholarly concerns regarding Article 8’s limitations in this regard are misguided.

<sup>40</sup> *Nb.* Two additional elements are common to all war crimes in international armed conflicts: ‘1. The conduct took place in the context of and was associated with an international armed conflict. 2. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.’



30. Category 1's protection under the two EWCs in the above table can be summarized as follows:
- a. as a general civilian object, the natural environment can *never* be intentionally targeted directly or made the object of reprisals (an absolute prohibition)';
  - b. if and when the natural environment becomes a legitimate military objective, it cannot be incidentally damaged *excessively* in relation to the concrete and direct overall military advantage anticipated (a qualified prohibition);
  - c. the natural environment can *never* be incidentally subjected to widespread, long-term, and severe damage (an absolute prohibition); such damage is by definition 'clearly excessive'.

Any protections offered to the natural environment by the rules on other specially-protected objects – those containing dangerous forces (dams, dykes, nuclear-electrical generating stations), those necessary for the survival of the civilian population (natural food or water sources), or those properly understood as cultural objects – are contained in the two EWCs in the table above (and others discussed below).<sup>41</sup>

31. For the EWC of 'Attacking Civilian Objects', no damage to the natural environment is required. The objective (*actus reus*) elements are simply the attack itself and the civilian nature/non-military objective of the target; while in terms of the subjective (*mens rea*) element, the perpetrator must have intended to carry out the attack.
32. For the EWC of 'Indiscriminate/Disproportionate Attack', the analysis required is more complex.<sup>42</sup> Any incidental environmental damage will need to be understood in light of the natural environment's specially-protected status (under both conventional and customary IHL) as described above at paragraphs 21–25. Therefore:
- a. Regular incidental environmental damage (harm that does not meet the widespread, long-term, and severe threshold) is subject to the proportionality assessment. This applies to any attack which is not directed at the environment, but causes incidental harm to the environment (and possibly other civilian objects);

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<sup>41</sup> See paras 29, 40, *infra*.

<sup>42</sup> *Nb.* The ICC Elements provide two specific clarifications for this offense. See Element 2, Footnote 36 ('The expression "concrete and direct overall military advantage" refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. [...]'); Element 3, Footnote 37 ('As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.')

- b. when incidental environmental damage reaches the widespread, long-term, and severe threshold, that damage should be considered *ipso facto* disproportionate (and should be deemed so as a matter of law) to the military advantage anticipated.<sup>43</sup> While those three terms – widespread, long-term, and severe – are neither defined by IHL nor clarified by jurisprudence, the drafting history of the ENMOD Convention (which uses similar terminology) may provide useful interpretive guidance.<sup>44</sup> Moreover, the ICRC Guidelines on IHL and the Environment provide a number of clarifications on the interpretation of each individual term.<sup>45</sup> SEPO should make its own determinations in line with its own policy goals, those of the OPG, and the principle of legality.

Please note that there is an alternative approach, under which incidental damage to the natural environment resulting from an attack on a military object will only amount to an EWC if the environmental harm rises to the level of ‘widespread, long-term, and severe’. However, under this view, if civilian objects other than the natural environment are harmed during an attack, then any damage caused to the natural environment in the same attack may be considered when determining the overall excessiveness of the incidental harm. Other limiting caveats may apply. While this approach is more restrictive, some suggest that it better reflects the current state of ICL and therefore may be a safer position for the purposes of litigation.

33. Works or installations containing dangerous forces will almost always be considered civilian objects, in which case they are covered by the EWC of ‘Attacking Civilian Objects’ (and/or the EWC of ‘Destroying or Seizing Enemy Property’, discussed below). However, the EWC of ‘Indiscriminate/Disproportionate Attack’ applies where (i) such works or installations are military objectives, for example, where an attack upon them would give a concrete and direct military advantage as in the case of ‘dam-busting’<sup>46</sup> or (ii) in cases of attacks against military objectives located at or in the vicinity of such works result in excessive incidental civilian casualties or damage.<sup>47</sup>
34. In cases where the destruction of natural food and/or water sources (as parts of the natural environment) are accompanied by the intention of the perpetrator to starve the civilian

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<sup>43</sup> See ICRC Customary IHL Study, Rule 45; see para 16, *supra*.

<sup>44</sup> See ICRC Guidelines on IHL and the Environment, paras 51–53

<sup>45</sup> See ICRC Guidelines on IHL and the Environment, paras 54–55 (generally), paras 56–60 (on ‘widespread’), paras 61–66 (on ‘long-term’), paras 67–72 (on ‘severe’), and paras 73–75 (on ‘damage to the natural environment’ more broadly).

<sup>46</sup> As noted above, the special protection provided by API Article 56 only applies when a dam (or other such work/installation) is a military target; otherwise, it is treated as a normal civilian object under API Article 52. See Schmitt, *supra* at fn 31. *Nb.* ‘Dam-busting’ has long been employed as a method of warfare, with the resulting flooding used to stop troop advancements or neutralize military targets. See ICRC Guidelines on IHL and the Environment, paras 113, 164 (noting the Allied bombing of Germany’s Möhne and Eder dams in 1943).

<sup>47</sup> See ICRC, CIHL Study, Rule 156, Commentary.

population), the natural environment may benefit from indirect protection.<sup>48</sup> But SEPO prosecutors should note that this is not strictly an EWC. Moreover, the specific war crime covering defined cultural property will not likely apply to the natural environment, which is not clearly a ‘historic monument’.<sup>49</sup> Again, this cannot be considered an EWC in any practical sense. Nevertheless, the two general EWCs set out in the chart above provide sufficient protection for natural food and/or water sources as well as any part of the natural environment considered to be culturally significant in Ukraine.

35. In terms of pleading the correct charges, the offenses may be simply stated as one of the two EWCs listed in the table above. In developing the specific contours of the offenses for purposes beyond pleading, further reference to the underlying API source material may be useful.<sup>50</sup>

## ***2. Category 2: The Natural Environment is Protected by the Rules on Enemy Property***

### *a. The Relevant IHL Prohibitions Are Found in the GCs and HRIV*

36. Enemy property – which is protected against destruction, appropriation, and/or seizure when the adversary controls or occupies territory – includes the natural environment and natural resources.<sup>51</sup>
37. In cases of hostilities, with respect to property protected by the Geneva Conventions, it is a grave breach to ‘wilfully caus[e] great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out

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<sup>48</sup> *Nb.* The elements of the war crime of ‘Starvation as a Method of Warfare’ are defined by Rome Statute, Article 8(2)(b)(xxv) (‘1. The perpetrator deprived civilians of objects indispensable to their survival. 2. The perpetrator intended to starve civilians as a method of warfare. [...]’) See Benchbook, paras 864–877, for supporting ICL case law; *ibid*, paras 860–863, for analysis on ‘Applicability under Article 438 of the CCU’.

<sup>49</sup> *Nb.* The elements of the war crime of ‘Attacking Protected Objects’ are defined by Rome Statute, Article 8(2)(b)(ix) (1. The perpetrator directed an attack. 2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives. 3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.’) See Benchbook, paras 733–748, for supporting ICL case law; *ibid*, paras 727–732, for analysis on ‘Applicability under Article 438 of the CCU’. See also ICRC Guidelines on IHL and the Environment, Rule 12 – Prohibitions Regarding Cultural Property, paras 166 *et seq*.

<sup>50</sup> See generally ICRC Guidelines on IHL and the Environment.

<sup>51</sup> See ICRC Guidelines on IHL and the Environment, para 178 (‘The customary rule protecting the natural environment from destruction flows, among other things, from Article 23(g) of the 1907 Hague Regulations and Article 53 of the Fourth Geneva Convention, which apply to the property of an adversary. The property of an adversary is defined broadly, as described by the ICRC’s 1958 commentary on Article 53 of the Fourth Geneva Convention (in the context of occupied territory): “[T]he prohibition covers the destruction of all property (real or personal), whether it is the private property of protected persons (owned individually or collectively), State property, that of the public authorities (districts, municipalities, provinces, etc.) or of co-operative organizations.” [FN414: Pictet (ed), Commentary on the Fourth Geneva Convention, 1958, p 301.] Different parts of the natural environment could conceivably be any such type of property.’)

unlawfully and wantonly'.<sup>52</sup> Additionally, pillage and reprisals against protected persons and their property are prohibited.<sup>53</sup>

38. In cases of occupation, GCIV Article 53 provides the starting point:

[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

An Occupying Power 'may not requisition foodstuffs [or] articles [...] available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account'.<sup>54</sup> Moreover, under the Hague (IV) Regulations of 1907: (i) 'Private property cannot be confiscated.'<sup>55</sup> (ii) 'Pillage is formally forbidden.'<sup>56</sup> (iii) 'An army of occupation can only take possession of [...] generally, all movable property belonging to the State which may be used for military operations.'<sup>57</sup> Crucially, an Occupying Power is required to hold public property in trust, pursuant to the principle of usufruct.<sup>58</sup>

39. These prohibitions protect the natural environment as enemy property.<sup>59</sup> To summarize, the natural environment as enemy property cannot be intentionally destroyed, appropriated, or seized – subject to imperative military necessity (a qualified prohibition).<sup>60</sup>

### *b. Criminalization in Ukraine*

40. All of the foregoing IHL prohibitions concerning enemy property amount to *serious violations of IHL* and, as such, have been criminalized under CCU Article 438 as the following war crimes:

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<sup>52</sup> GCI, Article 50; GCII, Article 51; GCIV, Article 147.

<sup>53</sup> GCIV, Article 33; *see also* Hague (IV) Regulations, Articles 23 ('In addition to the prohibitions provided by special Conventions, it is especially forbidden [...] (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; [...].'); Article 28 ('The pillage of a town or place, even when taken by assault, is prohibited.')

<sup>54</sup> GCIV, Article 55; *see also ibid* ('To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. [...] Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods. The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.')

<sup>55</sup> Hague (IV) Regulations, Article 46; *see also ibid* ('[P]rivate property [...] must be respected.')

<sup>56</sup> Hague (IV) Regulations, Article 47.

<sup>57</sup> Hague (IV) Regulations, Article 53.

<sup>58</sup> *See* Hague (IV) Regulations, Article 55 ('The occupying State shall be regarded only as administrator and usufructuary of public [...] real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.')

<sup>59</sup> *See* ICRC Customary IHL Study, Rules 50-52 (under Chapter 16. Destruction and Seizure of Property), Rule 147 (on Reprisals Against Protected Objects).

<sup>60</sup> *See generally* ICRC Guidelines on IHL and the Environment, paras 175-197.

War Crime	IHL Source / OPG Jurisdiction	ICC Elements <sup>61</sup>
Destruction and Appropriation of Property	<p>This is a serious violation of IHL pursuant to GCI, Art 50; GCII, Art 51; GCIV, Art 147.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 581–584, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(a)(iv):</p> <ol style="list-style-type: none"> <li>1. The perpetrator destroyed or appropriated certain property.</li> <li>2. The destruction or appropriation was not justified by military necessity.</li> <li>3. The destruction or appropriation was extensive and carried out wantonly.</li> <li>4. Such property was protected under one or more of the Geneva Conventions of 1949.</li> <li>5. The perpetrator was aware of the factual circumstances that established that protected status.</li> </ol> <p>See Benchbook, paras 585–600, for supporting ICL case law.</p>
Destroying or Seizing Enemy Property	<p>This is a serious violation of IHL pursuant to HRIV, Art 23(g).</p> <p>The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 50, 51, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 620–623, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(b)(xiii):</p> <ol style="list-style-type: none"> <li>1. The perpetrator destroyed or seized certain property.</li> <li>2. Such property was property of a hostile party.</li> <li>3. Such property was protected from that destruction or seizure under the international law of armed conflict.</li> <li>4. The perpetrator was aware of the factual circumstances that established the status of the property.</li> <li>5. The destruction or seizure was not justified by military necessity.</li> </ol> <p>See Benchbook, paras 624–640, for supporting ICL case law.</p>
Pillaging	<p>This is a serious violation of IHL pursuant to HRIV, Art 28.</p> <p>The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 52, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 601–605, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(b)(xvi):</p> <ol style="list-style-type: none"> <li>1. The perpetrator appropriated certain property.</li> <li>2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.</li> <li>3. The appropriation was without the consent of the owner.</li> </ol> <p>See Benchbook, paras 606–619, for supporting ICL case law.</p>

### *c. Clarifications, Caveats, and Concerns*

41. Given the comprehensive protections afforded to the natural environment in cases of targeting/attack (under the previous category), the three specific EWCs in this category will typically apply in cases where natural resources have been taken by a hostile party without military justification. In Ukraine, the primary utility of this category will be in the protection of natural resources and nature reserves from inappropriate exploitation due to commercial activity in territory under occupation.

<sup>61</sup> *Nb.* Two additional elements are common to all war crimes in international armed conflicts: ‘1. The conduct took place in the context of and was associated with an international armed conflict. 2. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.’

42. In terms of the level of damage required, each offense provides specific objective (*actus reus*) elements: (i) extensive and wanton destruction or appropriation for the offense of ‘Destruction and Appropriation of Property’; (ii) destruction (unqualified by any particular standard) or seizure for the offense of ‘Destroying or Seizing Enemy Property’; and (iii) appropriation (unqualified by any particular standard) for the offense of ‘Pillaging’.<sup>62</sup> In all three cases, the assessment requires a balancing against ‘military necessity’.
43. Regarding ‘pillage’ (as a generic term and in the sense contemplated by CCU Article 438), prosecutors should further consult existing analysis by Ukrainian scholars, jurists, and courts.<sup>63</sup> An apparent domestic requirement that the target must be ‘national treasures’ can and should be interpreted broadly to include natural resources.<sup>64</sup>

### ***3. Category 3: The Natural Environment May Be Protected by the Rules on Prohibited Weapons***

#### *a. The Relevant IHL Prohibitions Are Found in Various Sources*

44. The *Prohibition of Unnecessary Suffering*, stated at API Article 35(2) (which sets out the ‘basic rules’ on the ‘methods and means of warfare’), holds: ‘It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.’ Moreover, Article 23 of the Hague (IV) Regulations of 1907: ‘In addition to the prohibitions provided by special Conventions, it is especially forbidden: (a) To employ poison or poisoned weapons; [...] (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering; [...]’<sup>65</sup> While these IHL prohibitions are notably civilian-centric in their purview, they nevertheless afford additional protection to the natural environment—directly and/or indirectly depending on the particular weapon employed.<sup>66</sup>

<sup>62</sup> *Nb.* The ICC Elements provide a specific clarification for this offense. See Element 2, Footnote 47 (‘As indicated by the use of the term “private or personal use”, appropriations justified by military necessity cannot constitute the crime of pillaging.’)

<sup>63</sup> See SEPO Position Paper on Applicable Law, *op cit* (citing various Ukrainian jurists and legal scholars).

<sup>64</sup> See National Academy of Legal Sciences of Ukraine National University, Criminal Code of Ukraine, Scientific and Practical Commentary, Volume 2, Special Part, various authors, 2013, page 987, para 7 (‘The subject of these actions is property of cultural or other national value. The definition of cultural values and their special international legal protection is provided for by the Convention on the Protection of Cultural Values in the Event of Armed Conflict dated May 14, 1954.’)

<sup>65</sup> See also ICRC Customary IHL Study, Rules 70–71 (under Chapter 20. General Principles on the Use of Weapons), Rule 72 (on Poison), Rule 73 (on Biological Weapons), Rules 74–76 (under Chapter 24. Chemical Weapons), Rules 84–85 (under Chapter 30. Incendiary Weapons). *Nb.* Additionally, the natural environment itself may not be used as a weapon. See Customary IHL Study, Rule 45. This prohibition is mainly rooted in the 1976 ENMOD Convention and, therefore, largely irrelevant for present purposes as it relates to the hostile use of environmental modification techniques (a specific form not seen in the current conflict). See ICRC Guidelines on IHL and the Environment, paras 76 *et seq.*

<sup>66</sup> See ICRC Guidelines on IHL and the Environment, Rules 19–25. IHL prohibitions against the use of certain weapons (poison, poison weapons, biological weapons, chemical weapons, herbicides, incendiary weapons, landmines, and/or explosive

*b. Criminalization in Ukraine*

45. Some (but not all) of the foregoing IHL prohibitions amount to *serious violations of IHL* and, as such, have been ‘criminalized’ under CCU Article 438 as the following war crimes:

War Crime	IHL Source / OPG Jurisdiction	ICC Elements <sup>67</sup>
Wilfully Causing Great Suffering	This is a serious violation of IHL pursuant to GCI, Art 50; GCII, Art 51; GCIII, Art 130; GCIV, Art 147.  * * *  <i>See</i> Benchbook, paras 291–296, for analysis on ‘Applicability under Article 438 of the CCU’.	Rome Statute, Article 8(2)(a)(iii):  1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.  2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.  3. The perpetrator was aware of the factual circumstances that established that protected status.  <i>See</i> Benchbook, paras 297–310, for supporting ICL case law.
Employing Poison or Poisoned Weapons	This is a serious violation of IHL pursuant to HRIV, Art 23(a).  The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 72, 156.  * * *  <i>See</i> Benchbook, paras 841–844, for analysis on ‘Applicability under Article 438 of the CCU’.	Rome Statute, 8(2)(b)(xvii):  1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.  2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.  <i>See</i> Benchbook, paras 845–852, for supporting ICL case law.
Employing Prohibited Gases, Liquids, Materials, or Devices	This is a serious violation of IHL pursuant to 1925 Geneva Protocol.  The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 73–76, 156.  * * *  <i>See</i> Benchbook, paras 841–844, for analysis on ‘Applicability under Article 438 of the CCU’.	Rome Statute, Article 8(2)(b)(xviii):  1. The perpetrator employed a gas or other analogous substance or device.  2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties. (ICC Footnote 48: Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.)  <i>See</i> Benchbook, paras 845–852, for supporting ICL case law.

*c. Clarifications, Caveats, and Concerns*

46. This category does not strictly define EWCs. Rather, it may provide direct or indirect environmental protection by prohibiting and further criminalizing the use of certain weapons,

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munition remnants) may protect the natural environment directly or indirectly (through its protection of humans) depending on the type of weapon used and the manner in which the weapon is employed. *See ibid*, paras 217 *et seq*.

<sup>67</sup> *Nb*. Two additional elements are common to all war crimes in international armed conflicts: ‘1. The conduct took place in the context of and was associated with an international armed conflict. 2. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.’

which may –by their very nature– damage the natural environment if employed. However, as these offenses are firmly rooted in the prohibition against harming civilians, no actual environmental damage is required to prove them.<sup>68</sup> Therefore, prosecutors may wish to draw a more direct link to actual environmental damage by only charging offenses in this category in conjunction with one or more from the two categories discussed above. In any case, as there has been no indication of prohibited weapons use impacting the natural environment in the current conflict to date, SEPO prosecutors should simply understand that this category may become relevant at a later stage. It is included now in the Guide for the sake of completeness.

### C. The Domestic Crime of Ecocide Provides Additional Protection

47. In addition to the three categories of protection discussed above, a unique feature of the CCU may provide broad protection to the natural environment. Article 441 defines ‘Ecocide’ as follows:

Mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster, - shall be punishable by imprisonment for a term of eight to fifteen years.

Some clarification on the terminology and elements has been provided by Ukrainian scholars.<sup>69</sup>

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<sup>68</sup> *Nb.* Regarding specifically prohibited weapons, prosecutors should further consult any relevant conventions ratified by Ukraine. *See, e.g.,* [Hague Declaration \(IV,2\) concerning Asphyxiating Gases, 1899](#); [Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods, 1925](#); [Convention on the Prohibition of Biological Weapons, 1972](#); [Convention prohibiting Certain Conventional Weapons \(CCW\), 1980](#), amended Article 1, 2001; [CCW Protocol \(I\) on Non-Detectable Fragments, 1980](#); [CCW Protocol \(II\) prohibiting Mines, Booby-Traps and Other Devices, 1980](#), amended 1996; [CCW Protocol \(III\) prohibiting Incendiary Weapons, 1980](#); [CCW Protocol \(IV\) on Blinding Laser Weapons, 1995](#); [CCW Protocol \(V\) on Explosive Remnants of War, 2003](#); [Convention prohibiting Chemical Weapons, 1993](#); [Anti-Personnel Mine Ban Convention, 1997](#); [Convention prohibiting environmental modification techniques \(ENMOD\), 1976](#) (collected at ICRC, IHL Database, Treaties and States Parties).

<sup>69</sup> *See* National Academy of Legal Sciences of Ukraine National University, *Criminal Code of Ukraine, Scientific and Practical Commentary*, Volume 2, Special Part, various authors, 2013, pages 993–994 (Article 441 – Ecocide) (‘1. The immediate object of this crime is the ecological safety of mankind. 2. The object of the crime may be plant or animal life, the atmosphere, water resources, other environmental objects or the ecosystem as a whole. 3. The objective side of the crime is characterized by: mass destruction of flora and fauna, poisoning of the atmosphere or water resources, as well as the commission of other actions that can cause an ecological disaster. 4. Mass destruction of flora and fauna means the destruction of a large number of plants and/or animals or their complete destruction in a certain area. For example, during the war in Vietnam, in some areas, practically all living things were destroyed by chemical substances. 5. Poisoning of the atmosphere or water resources is their contamination with poisonous or other harmful substances for humans, animals or plants. Water resources include both surface waters (oceans, seas, rivers, lakes, and other water bodies) and underground waters. 6. Other actions should be understood as other harmful actions against animal and plant life, the atmosphere and water resources, or actions against other natural objects (for example, the earth and its subsoil), or against the natural environment in general (on example, destruction of the ozone layer). 7. Each of the specified in Art. 441 of the Criminal Code is characterized by the fact that it can cause an environmental catastrophe. This is of fundamental importance for distinguishing this crime from crimes against the environment (Articles 236-254 of the Criminal Code). An environmental disaster is a particularly severe consequence that



48. Despite its placement in CCU Chapter XX on ‘Criminal Offenses Against Peace, Security of Mankind, and International Legal Order’, Ecocide is a purely domestic crime. As such, like any other domestic crime in times of war, its application is subject to the principle of combatant privilege.<sup>70</sup> In this regard, the relationship between Articles 441 and 438 is as follows: Environmental damage meeting the definition under Article 441 may be prosecuted as Ecocide unless: (i) it is committed by a member of the enemy armed forces who benefits from combatant privilege, and (ii) it does not violate the laws of war applicable in the current international armed conflict.<sup>71</sup>
49. Bringing cases under Article 441 (in addition to Article 438) may have significant added value, not least because Ecocide may describe the nature of the crimes committed more accurately and directly than EWCs. Thus, where prosecutors seek to charge a perpetrator under Article 441, the notice of suspicion should also identify the relevant IHL violation(s), which may be included as a distinct charge or as part of the description of the Ecocide charge.

## V. CONCLUSION

50. To date, ‘there has been little individual accountability for war crimes that concern the natural environment’ directly.<sup>72</sup> The current situation in Ukraine presents an opportunity to narrow this significant gap in the international legal order. The approach suggested in this Guide should be integrated into the OPG’s domestic prosecutorial strategy and, equally, into its complementary relationships with the ICC and other strategic partners. With sufficient effort and coordination,

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must be determined in each specific case, taking into account certain criteria: 1) a large area of territory where adverse changes in the environment have occurred; 2) significant limitation or exclusion of human activity or the life of plants or animals in a certain territory; 3) duration of adverse changes in the surrounding environment or their inevitability; 4) significant negative changes in the ecological system, for example, the disappearance of certain species of animals or plants, changes in the circulation of substances or other biological processes that are important for the ecosystem as a whole. 8. In international criminal law, the term "ecocide" is not officially used. This crime is a violation of the prohibition of intentionally causing damage to the natural environment with wide-ranging, long-term and serious consequences. Such a prohibition, in particular, is provided for in Additional Protocol I to the Geneva Conventions for the Protection of War Victims of 1949 and the Convention on the Prohibition of Military or Any Other Hostile Use of Means of Influence on the Natural Environment of 1976. 9. The crime is considered completed when any of the specified in Art. 441 of the Criminal Code acts that could cause an environmental disaster. This composition of the crime has a special construction, which differs: 1) from typical formal compositions - by the need to practically establish, in addition to the act, also the creation by this act in a specific case of a real danger of consequences in the form of an ecological disaster; 2) from typical material compositions - the occurrence of such consequences is optional for the crime to be recognized as completed. Causing consequences in the form of mass destruction of flora or fauna, poisoning of the atmosphere or water resources, which in a specific case did not and could not cause an ecological catastrophe, is qualified as a crime against the environment. For example, pollution of the sea, which caused the mass death of objects of animal and plant life or other serious consequences, qualifies under Part 2 of Art. 243 of the Criminal Code. 10. The subjective aspect of this crime is intent. 11. The subject of the crime is a person who has reached the age of 16.’)

<sup>70</sup> See UCLA School of Law, Promise Institute Europe, Memorandum to OPG on ‘Prosecution of ecocide in the current armed conflict’, 15 September 2023, page 3 (‘In an international armed conflict, members of the armed forces of a party to the conflict have a right to participate in hostilities. This “combatant privilege” has the status of customary international law, and appears in [API] Article 43(2) [...]’); see *ibid*, pages 3–5 for further discussion on combatant privilege.

<sup>71</sup> See generally *ibid*.

<sup>72</sup> ICRC Guidelines on IHL and the Environment, para 318.

there is reason to believe that at least some form of accountability for the environmental damage inflicted on Ukraine may be achieved.

## Annex A – Summary Charts on Environmental War Crimes

### 1. As a Civilian Object, the Natural Environment Shall Not Be the Object of Attack

War Crime	IHL Source / OPG Jurisdiction	ICC Elements
Attacking Civilian Objects	<p>This is a serious violation of IHL pursuant to API, Art 52(1); its customary nature is clarified by CIHL Study, Rules 7, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 671–674, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(b)(ii):</p> <ol style="list-style-type: none"> <li>1. The perpetrator directed an attack.</li> <li>2. The object of the attack was civilian objects, that is, objects which are not military objectives.</li> <li>3. The perpetrator intended such civilian objects to be the object of the attack.</li> </ol> <p>See Benchbook. paras 675–688, for supporting ICL case law.</p>
Indiscriminate or Disproportionate Attack	<p>This is a serious violation of IHL pursuant to API, Arts 35(3), 55(1), 57(2)(a)(iii); and 85(3)(b); its customary nature is clarified by CIHL Study, Rules 14, 43–45, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 689–694, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(b)(iv):</p> <ol style="list-style-type: none"> <li>1. The perpetrator launched an attack.</li> <li>2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.</li> <li>3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.</li> </ol> <p>See Benchbook. paras 695–716, for supporting ICL case law.</p>

### 2. The Natural Environment is Protected by the Rules on Enemy Property

War Crime	IHL Source / OPG Jurisdiction	ICC Elements
Destruction and Appropriation of Property	<p>This is a serious violation of IHL pursuant to GCI, Art 50; GCII, Art 51; GCIV, Art 147.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 581–584, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(a)(iv):</p> <ol style="list-style-type: none"> <li>1. The perpetrator destroyed or appropriated certain property.</li> <li>2. The destruction or appropriation was not justified by military necessity.</li> <li>3. The destruction or appropriation was extensive and carried out wantonly.</li> <li>4. Such property was protected under one or more of the Geneva Conventions of 1949.</li> <li>5. The perpetrator was aware of the factual circumstances that established that protected status.</li> </ol> <p>See Benchbook, paras 585–600, for supporting ICL case law.</p>
Destroying or Seizing Enemy Property	<p>This is a serious violation of IHL pursuant to HRIV, Art 23(g); its customary nature is clarified by CIHL Study, Rules 50, 51, 156.</p>	<p>Rome Statute, Article 8(2)(b)(xiii):</p> <ol style="list-style-type: none"> <li>1. The perpetrator destroyed or seized certain property.</li> <li>2. Such property was property of a hostile party.</li> </ol>

	<p style="text-align: center;">* * *</p> <p>See Benchbook, paras 620–623, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>3. Such property was protected from that destruction or seizure under the international law of armed conflict.</p> <p>4. The perpetrator was aware of the factual circumstances that established the status of the property.</p> <p>5. The destruction or seizure was not justified by military necessity.</p> <p>See Benchbook, paras 624–640, for supporting ICL case law.</p>
Pillaging	<p>This is a serious violation of IHL pursuant to HRIV, Art 28; its customary nature is clarified by CIHL Study, Rules 52, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 601–605, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(b)(xvi):</p> <ol style="list-style-type: none"> <li>1. The perpetrator appropriated certain property.</li> <li>2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.</li> <li>3. The appropriation was without the consent of the owner.</li> </ol> <p>See Benchbook, paras 606–619, for supporting ICL case law.</p>

### 3. The Natural Environment May Be Protected by the Rules on Prohibited Weapons

War Crime	IHL Source / OPG Jurisdiction	ICC Elements
Wilfully Causing Great Suffering	<p>This is a serious violation of IHL pursuant to GCI, Art 50; GCII, Art 51; GCIII, Art 130; GCIV, Art 147.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 291–296, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(a)(iii):</p> <ol style="list-style-type: none"> <li>1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.</li> <li>2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.</li> <li>3. The perpetrator was aware of the factual circumstances that established that protected status.</li> </ol> <p>See Benchbook, paras 297–310, for supporting ICL case law.</p>
Employing Poison or Poisoned Weapons	<p>This is a serious violation of IHL pursuant to HRIV, Art 23(a); its customary nature is clarified by CIHL Study, Rules 72, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 841–844, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, 8(2)(b)(xvii):</p> <ol style="list-style-type: none"> <li>1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.</li> <li>2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.</li> </ol> <p>See Benchbook, paras 845–852, for supporting ICL case law.</p>
Employing Prohibited Gases, Liquids, Materials, or Devices	<p>This is a serious violation of IHL pursuant to 1925 Geneva Protocol; its customary nature is clarified by CIHL Study, Rules 73–76, 156.</p> <p style="text-align: center;">* * *</p> <p>See Benchbook, paras 841–844, for analysis on ‘Applicability under Article 438 of the CCU’.</p>	<p>Rome Statute, Article 8(2)(b)(xviii):</p> <ol style="list-style-type: none"> <li>1. The perpetrator employed a gas or other analogous substance or device.</li> <li>2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties. (ICC Footnote 48: Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.)</li> </ol> <p>See Benchbook, paras 845–852, for supporting ICL case law.</p>

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## Annex B – Template Notice of Suspicion

Pursuant to Article 277 ('Contents of the Written Notice of Suspicion') under Chapter 22 ('Notification of Suspicion') of the Criminal Procedure Code of Ukraine, SEPO prosecutor [INSERT: LAST NAME AND POSITION OF INVESTIGATOR OR PROSECUTOR GIVING NOTICE] hereby provides written notice of suspicion to: [INSERT: LAST NAME, FIRST NAME, PATRONYMIC; DATE AND PLACE OF BIRTH; PLACE OF RESIDENCE; NATIONALITY OF SUSPECT], who is hereby notified of [HIS/HER] suspicion as follows:

Criminal Proceeding Number: [INSERT]

Legal Qualification of the Criminal Offense: [CCU ARTICLE 438 W/ REFERENCE TO UNDERLYING WAR CRIME(S) AND/OR CCU ARTICLE 441]

Contents of the Suspicion: [WITH RESPECT TO THE LEGAL QUALIFICATION, THE CONTENTS ARE OBJECT, OBJECTIVE SIDE, SUBJECT, SUBJECTIVE SIDE] [THIS CAN BE ADJUSTED TO EWCS]

The *object of a criminal offense* has the following features: social relations (the actual object of the criminal offense, which is the target of the crime that violates the normal order of social relations) or the subject of the criminal offense (physical thing) or a victim of a criminal offense.

The *objective side of a criminal offense* has the following features: socially dangerous act; criminal consequences; causal connection between the act and the consequences that have occurred; place, time, method, environment, tools; means of committing a criminal offense.

The *subject of a criminal offense* has the following characteristics: natural person; sanity; age of criminal responsibility; signs of a special subject.

The *subjective side of a criminal offense* has the following features: guilt; motive; purpose; emotional state.

Factual Circumstances: [BRIEF SUMMARY OF THE CRIMINAL OFFENSE(S) INCLUDING TIME, PLACE, AND OTHER MATERIAL CIRCUMSTANCES CURRENTLY KNOWN]

Suspect's Rights: [INSERT]

Signature of Investigator/Prosecutor Named Above: \_\_\_\_\_ Date: \_\_\_\_\_

\* \* \*

## Annex C – Bibliography of Useful Sources

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- ICRC, 'Guidelines on the Protection of the Environment in Times of Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment Under International Humanitarian Law, with Commentary', September 2020;
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\* \* \*

## About the Author

**Climate Counsel** is a non-profit foundation based in the Hague, Netherlands. We are a team of former United Nations lawyers dedicated to environmental and climate justice. With decades of experience at the UN international criminal tribunals, we use our expertise in war crimes and crimes against humanity to tackle the environmental crisis. We investigate situations involving destruction of the natural environment and harm to dependent communities. We litigate on behalf of affected communities to bring perpetrators to justice. We advocate for new ‘ecocide’ laws alongside global partners. Climate Counsel was founded by Richard J Rogers, a UK and US qualified lawyer who was a senior UN legal officer at several UN war crimes tribunals.



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