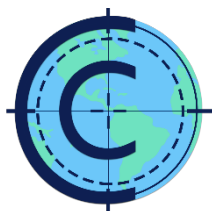


GUIDE TO IDENTIFYING AND FRAMING ENVIRONMENTAL WAR CRIMES IN UKRAINE – REVISED EDITION

10 August 2023



CLIMATE COUNSEL

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

– ICRC Legal Expert Antoine Bouvier¹

I. INTRODUCTION

1. The primary purpose of this guide (the ‘Guide’) is to provide the Office of the Prosecutor General (‘OPG’) of Ukraine 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’).² Additionally, the Guide seeks to identify areas in which the OPG may coordinate and cooperate with the Office of the Prosecutor (‘OTP’) of the International Criminal Court (‘ICC’) and other strategic partners. The Guide is largely based on two publications of the International Committee of the Red Cross (‘ICRC’).³ As the Guide’s rich source materials, these two detailed documents should be readily and repeatedly consulted for a more comprehensive analysis of the various issues that follow.⁴
2. In short, the Guide explains the various ways in which international humanitarian law (‘IHL’) *potentially* protects the natural environment in times of armed conflict – under Ukrainian law and the Rome Statute of the ICC. Section II briefly deals with the applicable law, while Section III addresses the heart of the matter: how IHL’s comprehensive protection regime translates into five specific and varied categories of theoretical environmental protection. Sections IV and V cover initial framing methodology and preliminary evidence collection, respectively. The Guide is deliberately conversational in tone and takes the form of an annotated glossary with certain key terms and concepts heading concise paragraphs (with copious reference to the underlying ICRC source material, which itself is deeply grounded in primary IHL sources and much additional commentary). Annexes include: (i) a summary chart of the various IHL protection

¹ 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 initially 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.*

² 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, Kate Mackintosh of UCLA’s Promise Institute for Human Rights, Maksym Popov of the OPG, Dmytro Koval of Truth Hounds, and Beatrice Hamilton of Stanford Law School.

³ See Nils Melzer, ‘International Humanitarian Law: A Comprehensive Introduction’, *International Committee of the Red Cross*, July 2022 (the ‘ICRC IHL Introduction’); ‘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’, *International Committee of the Red Cross*, September 2020 (the ‘ICRC Guidelines on IHL and the Environment’). See also ‘Domestic Implementation of International Humanitarian Law in Ukraine’, *Global Rights Compliance*, February 2021 (the ‘GRC Domestic Implementation Guide’).

⁴ *Nb.* The OPG should keep in mind that the ICRC source-material itself is not controlling legal authority and instead amounts to ‘soft law’. Therefore, in arriving at any actual legal determinations, ultimate reference should be made to the specific IHL treaty provisions that bind Ukrainian courts.

categories, (ii) the applicable ICRC rules related to the natural environment ('ICRC Rules'), and (iii) specific Ukrainian, IHL, and international criminal law ('ICL') provisions.

3. Initially, the Guide seeks to identify any actionable fact patterns among the OPG's vast trove of existing material/casefiles. At the beginning of 2023, the facts on the ground appear to support – and the Ukrainian authorities appear to be focused on – the following general areas: (i) direct damage to natural resources such as forests, croplands, freshwater sources, and marine systems; (ii) direct damage to infrastructure such as oil depots, dams, nuclear reactors, and electricity grids; and (iii) indirect damage from fires and fugitive pollutant emissions.⁵ The OTP is also conducting its own investigations. Once plausible cases from among these areas have been identified and once efforts between the OPG and the OTP have been properly coordinated, further evidentiary assessment and analysis (beyond the scope of this Guide) will be necessary to build cases for prosecution. While the authors acknowledge certain limitations and unresolved debates, it is hoped that the OPG and the OTP can take full advantage of existing legal avenues.

II. APPLICABLE LAW

4. Signpost: At the outset, an appreciation of the interaction of domestic and international law is crucial: what applies, what does not apply, and what may provide useful interpretive guidance.
5. Constitution of Ukraine: Compliance with the constitution is paramount. Two important issues are notable here. First, '[i]nternational treaties that are in force, agreed to be binding by the *Verkhovna Rada* of Ukraine, are part of the national legislation of Ukraine'.⁶ Additionally, the constitution clearly enshrines the principle of legality,⁷ which is a fundamental norm of international human rights law.⁸
6. Criminal Code of Ukraine: Both the applicability of international law and the principle of legality are reinforced by the code.⁹ With regard to the former – specifically, the 'Violation of the Laws and Customs of War' – Article 438 sets the stage:

Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, use of means of warfare prohibited by international law, or any other violations of laws and customs of warfare recognised by international instruments consented to as binding by the

⁵ This is based on a review of material in the public domain and preliminary interactions with OPG representatives. See, e.g., Jeff Stein and Michael Birnbaum, 'The War in Ukraine is a human tragedy; it's also an environmental disaster', *The Washington Post*, 13 March 2023.

⁶ Constitution of Ukraine, 28 June 1996 (the 'Constitution'), Article 9; see also, Article 85 ('The authority of the *Verkhovna Rada* of Ukraine include: [...] granting consent – by adopting a law – to the binding nature of international treaties of Ukraine and denouncing international treaties of Ukraine; [...].')

⁷ Constitution, Articles 29, 57, 58, 64.

⁸ See footnote 19, *infra*.

⁹ Criminal Code of Ukraine, 1 September 2001 (the 'CCU'), Article 3.

Verkhovna Rada [Parliament] of Ukraine, and also giving an order to commit any such actions, – shall be punishable by imprisonment for a term of eight to twelve years. [...] ¹⁰

On its face, Article 438 criminalizes the following activity:

- the three expressly listed offences (cruel treatment, deportation, and pillage);
- the use of means of warfare prohibited by international law;
- any other violations of laws and customs of warfare recognised by international instruments consented to as binding by the *Verkhovna Rada* of Ukraine.¹¹

It is unknown to the authors of the Guide why only three specific offences were chosen for criminalization and why a meaningful distinction between prohibited means and methods of warfare was made by Article 438's drafters.¹² In any case, as 'international law' is generally understood to encompass both treaty and custom,¹³ the criminalization of prohibited means may be broadly construed to include custom. On the other hand, the criminalization of any prohibited methods must be rooted in international instruments ratified by Ukraine's Parliament.¹⁴

7. International Humanitarian Law: IHL, also known as the law of war (or *jus in bello*), is a set of rules that seeks to limit the humanitarian consequences of armed conflicts.¹⁵ Like any other body of international law, IHL can be found in three distinct sources: treaties, custom, and the general principles of law.¹⁶ IHL treaties include the four Geneva Conventions of 1949 ('GCs') and their additional protocols, as well as treaties governing the use of certain weapons. IHL sets out the rules applicable to parties to a conflict, and the most serious violations of these rules are war crimes. Given the text of CCU Article 438, serious violations of the GCs and Additional Protocol (I) of 1977 ('API') – known as 'grave breaches' – will be key.¹⁷ As discussed below in Section III, these provisions provide various levels of protection to the natural environment.¹⁸ Moreover,

¹⁰ Article 438 of the CCU falls under Chapter XX on 'Criminal Offences Against Peace, Security of Mankind, and International Legal Order'. For present purposes, it is assumed that no definitive interpretations of this provision have been made by the OPG or any other organ of the Ukrainian justice system. *Nb.* It has been determined by the OPG that the official English translation of Article 438 (contained in the version found on the *Verkhovna Rada* website) is a significantly inaccurate rendering of the original Ukrainian text. Therefore, a more accurate in-house translation prepared by a native Ukrainian speaker employed by GRC – and provisionally approved by the OPG – is used here. *See* GRC, 'The Domestic Implementation of International Humanitarian Law in Ukraine (updated)', February 2021 (the 'GRC Domestic Implementation Guide'). The OPG has requested a new and improved official English translation from the *Verkhovna Rada*. Once that version is completed, the Guide will be updated accordingly.

¹¹ Due to Ukraine's unique implementation method, this guide will focus primarily on treaty law. *See generally* GRC Domestic Implementation Guide; *see also* ICRC IHL Introduction, pages 289–290.

¹² *See* para 19 *infra* (regarding the distinction between means and methods of warfare); *see also* GRC Domestic Implementation Guide, page 35.

¹³ *See* para 7, *infra* (regarding the sources of international law); *see also* GRC Domestic Implementation Guide, page 35.

¹⁴ *See* para 8, *infra* (regarding the permissible use of custom under Article 438).

¹⁵ ICRC IHL Introduction, page 17.

¹⁶ ICRC IHL Introduction, pages 21–26. In addition, case-law, doctrine, and (in practice) 'soft law' play an increasingly important role in the interpretation of individual rules of IHL. *Ibid.*, page 21; *see also ibid.*, page 25.

¹⁷ *See* ICRC IHL Introduction, page 289 ('Serious violations of IHL are considered war crimes punishable under international criminal law. This essentially includes any violations described as "grave breaches" of the 1949 Geneva Conventions and Additional Protocol I, and other serious violations of IHL recognized as war crimes in the Rome Statute or in customary law.') *Nb.* Ukraine has ratified the GCs and API. *See* ICRC IHL Databases: Treaties and States Parties.

¹⁸ *See* paras 20 *et seq.*, *infra*. Subject to various conditions, harming the natural environment may amount to a grave breach. *Ibid.*

IHL (as the substantive basis for any potential prosecutions envisaged by this Guide) also interacts with other bodies of law, in particular criminal law and human rights law.¹⁹

8. Customary International Law: In the IHL context, custom is understood as ‘general state practice (*usus*) accepted as law (*opinio juris*)’.²⁰ Such practice ‘exists alongside treaty law and independently of it’.²¹ However, given the complexities related to incorporating customary international law (‘CIL’) into Ukraine’s domestic system and the particular phrasing of Article 438,²² it is assumed for present purposes that:

- CIL with respect to prohibited means is specifically criminalized;²³
- CIL with respect to prohibited methods is not criminalized (unless the prohibitions are included in international instruments consented to as binding by the *Verkhovna Rada*);²⁴
- CIL may be generally used to interpret the international instruments binding on Ukraine, such as the GCs and API;²⁵
- CIL may not be used to incorporate new crimes into the Ukrainian legal system, such as crimes against humanity, because they are not contained in any international instruments ratified by Ukraine’s parliament.²⁶

While the OPG will be constrained as set out above, the OTP will be limited to applying CIL to its own cases pursuant to Articles 8 and 21 of the Rome Statute (and related jurisprudence).²⁷ In any case, CIL has much to say about the protection of the natural environment.²⁸

¹⁹ ICRC IHL Introduction, pages 27–32. For example, the principle of legality must be respected when applying IHL within Ukraine’s criminal law system. *See* footnotes 6–8, *supra*. *Nb.* The same relationship would apply to any body of law acting as the basis for the prosecution of international crimes (such as CIL and/or the Rome Statute). *See* paras 8, 10, *infra*.

²⁰ ICRC IHL Introduction, pages 21–22.

²¹ ICRC IHL Introduction, pages 21–22.

²² *See* GRC Domestic Implementation Guide, pages 35–36.

²³ *See* GRC Domestic Implementation Guide, page 36 (‘[...] Article 438 only encompasses [CIL] prohibitions with regard to the violations of the rules related to the means of warfare (“use of means of the warfare prohibited by international law”).’); *ibid*, page 63 (‘[...] Article 438 generally criminalises the use of means of warfare through reference to any prohibition contained in international law (thereby encompassing both international treaties and customary international law) [...].’)

²⁴ *Nb.* Given the somewhat peculiar phrasing of Article 438, it would be more accurate to say that CIL with respect to prohibited methods is criminalized only to the extent that such customary prohibitions have also been ‘recognized by international instruments’ ratified by Ukraine’s parliament; in other words, only to the extent that CIL regarding methods has been codified as treaty law. *See* GRC Domestic Implementation Guide, page 36 (‘Article 438 does not encompass customary international law prohibitions regulating the methods of warfare [...].’); *ibid*, page 63 (Article 438 ‘takes a narrower approach to the other violations of the ‘laws and customs of war’, in other words, violations of methods of warfare. In the case of violations of methods of warfare, only those contained in international treaties ratified by Ukraine are included, and not those that are recognised by [CIL].’); *ibid*, pp 35–36 (‘Such an approach, however, may also present a number of obstacles to the effective criminalisation and prosecution, including a specific preclusion of penal sanction arising directly from the evolution of customary international humanitarian law which has not yet been codified in a treaty ratified by Ukraine.’)

²⁵ *See generally* ICRC Customary IHL Rules.

²⁶ *See generally* GRC Domestic Implementation Guide. *Nb.* At some point, Ukrainian courts may choose to formally develop a broader role for custom. To date, at least one Supreme Court judge has informally suggested that the phrase ‘violating the laws and customs of war’ in CCU Article 438 should be defined with reference ‘to the contractual and customary international humanitarian law’. Ukraine Supreme Court, Plenary Session on Treaty Interpretation (<https://supreme.court.gov.ua>).

²⁷ *See* footnote 83, *infra*.

²⁸ *See generally* ICRC Guidelines on IHL and the Environment; *see also* ICRC Customary IHL, Rules 43–45; *see also* Draft Principles on Protection of the Environment in Relation to Armed Conflicts, International Law Commission, 2022 (the ‘ILC Draft Principles’), Principles 14 and 13.

9. Primacy of States: Guidance on the interpretation of IHL *can and should* be given by states themselves ‘as the legislators of international law’.²⁹ This follows from states’ ‘primary responsibility for prosecuting IHL violations’.³⁰ Whenever possible, such violations ‘should be prosecuted and adjudicated through national institutions and procedures, with international mechanisms generally playing a subsidiary and complementary role, activated only in cases where national accountability mechanisms fail to function effectively’.³¹ With such primacy foremost in mind, the following sections explain how the OPG can fulfill its duty.

10. Rome Statute: As Ukraine has not yet ratified the Rome Statute (despite declarations permitting its applicability on Ukrainian territory by the ICC Prosecutor), it is assumed for present purposes that the Rome Statute should not be applied directly by the OPG.³² Nevertheless, as Article 8 (on ‘War Crimes’) of the Rome Statute is, for the most part, a codification of existing IHL, the specific formulations and elements of certain Rome Statute crimes may be helpful as interpretive tools.³³ In particular, Articles 8(2)(a) and (b) apply to international armed conflicts such as the current one between Russian and Ukraine.

11. Complementarity: This principle – a perennial concern of the ICC and others³⁴ – reflects [(among other things)]: (i) ‘the onus on states to do their duty under international and national law to investigate and prosecute alleged serious crimes’; (ii) ‘the hierarchy between the ICC and domestic criminal justice systems’; and (iii) a collaborative and ‘managerial approach’ to the problem of mass criminality that ‘recognizes that the response of the international community will need to be multifaceted and complementary’ (i.e. ‘complementarity as burden-sharing’).³⁵ For present purposes, so-called ‘positive complementarity’ is understood by the OTP and others as an effort to ensure effective and efficient coordination of environmental accountability efforts where domestic authorities are clearly willing and able to address crimes in conjunction with international actors like the ICC and third states. While Ukraine retains the primary authority to

²⁹ ICRC IHL Introduction, page 25.

³⁰ ICRC IHL Introduction, pages 267–292; ICRC Guidelines on IHL and the Environment, Rule 26, page 103; *see also* GRC Domestic Implementation Guide, pages 35–39.

³¹ ICRC IHL Introduction, page 293.

³² Constitution, Article 124 (‘Ukraine may recognize the jurisdiction of the International Criminal Court as provided for by the Rome Statute of the International Criminal Court (paragraph six of Article 124 becomes effective from June 30, 2019).’) *Nb.* Arguments have been advanced for the direct application of the Rome Statute in Ukraine consistent with CCU Article 438 and domestic jurisprudence. *See, e.g.*, Truth Hounds, ‘Sources of interpretation of Article 438 (on the example of a war crime in the form of torture)’, undated. CC presently takes no position on this view.

³³ *See generally* GRC, Ukraine and the International Criminal Court, April 2021.

³⁴ *See* Rome Statute, preambular paras 4, 6, 10 and Articles 1, 17; ICC-OTP, ‘Policy Paper on Preliminary Examinations’, November 2013, paras 100–103; ICC, Assembly of States Parties, Twentieth Session, Strengthening the International Criminal Court and the Assembly of States Parties, Resolution ICC-ASP/20/Res.5, 9 December 2021, paras 132–142. *Nb.* A dedicated ‘Bureau’ on complementarity exists within the ASP to address these and other issues. *See, e.g.*, ICC, Assembly of States Parties, Twentieth Session, The Hague, 6–11 December 2021, Report of the Bureau, Document No ICC-ASP/20/22, 6 December 2021, paras 2, 6, 41, 47, 52–53. *See also* GRC, Ukraine and the International Criminal Court, April 2021, paras 51, 52, 101, 199.

³⁵ Paul Seils, ICTJ, ‘Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes’, 2016; Rod Rastan, ‘Complementarity: Contest or Collaboration?’, in Morten Bergsmo (ed), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl, Oslo, 1 August 2010; Yahli Shereshevsky, ‘The Unintended Negative Effect of Positive Complementarity’, *National Prosecution of International Crimes: Legislation and Cases*, *Journal of International Criminal Justice* 18 (2020), 1017–1042.

identify, investigate, and prosecute certain crimes domestically, it has also invited and encouraged collaboration in these efforts from the OTP and other strategic partners. Accordingly, this Guide takes due account of a burden-sharing process well underway and driven by a concert of justice-sector actors.³⁶

III. PROTECTION OF THE NATURAL ENVIRONMENT IN ARMED CONFLICT

12. Signpost: In order to understand how IHL protects the natural environment in armed conflict, it is first and foremost necessary to understand how IHL applies to the conduct of hostilities in general: its stated purpose, fundamental balance, core principles, and various restrictions³⁷ (on both methods and means of warfare³⁸). It will then be useful to understand how IHL specifically conceives of, and deals with, the natural environment within this general framework. Finally, and crucially, it will be demonstrated how IHL divides its comprehensive regime of environmental protection into five distinct categories. Step-by-step, it will become clear that (despite certain common misperceptions) IHL (i) acknowledges a broad notion of the natural environment, (ii) affords due regard to its civilian character, and (iii) imposes a number of robust obligations with respect to its protection.

A. The Conduct of Hostilities

13. IHL Purpose: The primary purpose of IHL is to restrict the means and methods of warfare that parties to a 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).³⁹ This goal extends to the protection of the natural environment.⁴⁰
14. Balance: Fundamentally, IHL is based on a balance between considerations of military necessity and humanity. On the one hand, IHL recognizes that, in order to overcome an adversary in wartime or to weaken its capacity, it may be militarily necessary to cause death, injury, and destruction. On the other hand, IHL also makes clear that military necessity does not give

³⁶ See US Department of State ('DOS'), 'Joint Statement from the European Union, the United States, and the United Kingdom on the establishment of the Atrocity Crimes Advisory Group (ACA) for Ukraine', 25 May 2022; various public statement since then of Beth Van Schaack, US Ambassador-at-Large for Global Criminal Justice, DOS Office of Global Criminal Justice.

³⁷ ICRC IHL Introduction, page 52.

³⁸ ICRC IHL Introduction, Chapter 3, Section IV, page 104 ('Based on the universal recognition that "the right of the Parties to the conflict to choose methods or means of warfare is not unlimited," modern IHL has developed an extensive body of rules prohibiting or regulating the development, possession and use of certain weapons (*means of warfare*) and prohibiting or restricting the ways in which such weapons can be used or hostilities can be conducted (*methods of warfare*). The distinction between "means" and "methods" of warfare is important because any weapon (means) can be used in an unlawful manner (method), whereas the use of weapons that have been prohibited because of their inherent characteristics is unlawful regardless of the manner in which they are employed.')

³⁹ ICRC IHL Introduction, page 17.

⁴⁰ See ICRC Guidelines on IHL and the Environment.

belligerents *carte blanche* to wage unrestricted war; rather, considerations of humanity impose certain limits on the means and methods of warfare.⁴¹ Therefore, as a first-order concern, only militarily necessary attacks are permitted. This balancing exercise encompasses the protection of the natural environment.⁴²

15. Core Principles: The balance between military necessity and humanity is struck by a number of core principles:⁴³

- *Principle of Distinction*: ‘The cornerstone of IHL is the principle of distinction. [...] [P]arties to an armed conflict must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”.’⁴⁴ The Principle of Distinction prohibits both direct and indiscriminate attacks against civilians and civilian objects. Indiscriminate attacks are those ‘which are of a nature to strike military objectives and civilians and civilian objects without distinction, either because they are not or cannot be directed at a specific military objective or because their effects cannot be limited as required by IHL’.⁴⁵ The Principle of Distinction ‘also entails a duty to prevent erroneous targeting’.⁴⁶
- *Principle of Precaution*: In order to ‘minimize the infliction of incidental death, injury and destruction on [protected] persons and objects’, ‘IHL requires that, “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”. This applies both to the attacking party, which must do everything feasible to avoid inflicting incidental harm as a result of its operations (precautions in attack), and to the party being attacked, which, to the maximum extent feasible, must take all necessary measures to protect the civilian population under its control from the effects of attacks carried out by the enemy (precautions against the effects of attack).’⁴⁷
- *Principle of Proportionality*: ‘Where the infliction of incidental harm on civilians or civilian objects cannot be avoided, it is subject to the principle of proportionality. Accordingly, those who plan or decide on an attack must refrain from launching, or must suspend, “any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to

⁴¹ ICRC IHL Introduction, pages 17–18.

⁴² See ICRC Guidelines on IHL and the Environment.

⁴³ ICRC IHL Introduction, page 18.

⁴⁴ ICRC IHL Introduction, page 18 (quoting API, Article 48); see also *ibid*, Chapter 3.

⁴⁵ ICRC IHL Introduction, page 86 (citing API, Article 51(4) and (5)).

⁴⁶ ICRC IHL Introduction, pages 100–101; see also *ibid*, page 103 (‘Even after an attack has commenced, it must be canceled or suspended should it become apparent that the target was mistakenly regarded as a military objective [...].’) *Nb*. This is not to be confused with issues of ‘mistake of fact’ or ‘mistake of law’ under the rubric of ‘individual criminal responsibility’. *Ibid*, pages 288–289.

⁴⁷ ICRC IHL Introduction, pages 18–19 (quoting API, Article 57(1)); see also *ibid*, Chapter 3.III.2–4.

civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.⁴⁸

- *Prohibition of Unnecessary Suffering*: ‘IHL not only protects civilians from the effects of hostilities, it also prohibits or restricts means and methods of warfare that are considered to inflict unnecessary suffering or superfluous injury on combatants. [...] Accordingly, in the conduct of hostilities, it is prohibited “to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”’.⁴⁹

Therefore, attacks permitted by military necessity are nevertheless *significantly constrained* by the Principles of Distinction, Precaution, and Proportionality and the Prohibition of Unnecessary Suffering.⁵⁰ The three principles directly apply to the protection of the natural environment, while the prohibition may apply where damage to the natural environment has a clear and direct impact on protected persons.⁵¹

16. Military Objectives and Civilian Objects: The Principle of Distinction ‘provides that attacks must be strictly limited to military objectives and that civilian objects may not be the object of attacks or reprisals.’⁵² In order to qualify as a military objective, the following criteria must be met:

- by way of the object’s nature, location, purpose, or use, it must contribute effectively to the adversary’s military action;
- the object’s destruction, capture, or neutralization must offer the attacker a definite military advantage; and
- such advantage must be assessed ‘in the circumstances ruling at the time’.⁵³

⁴⁸ ICRC IHL Introduction, page 19 (quoting API, Article 51(5)(b) and 57(2)(a)(iii) and (b)); *see also ibid*, Chapter 3.III.1.

⁴⁹ ICRC IHL Introduction, pages 19–20 (quoting API, Article 35(2)); *see also ibid*, Chapter 3.V.1.

⁵⁰ *Nb*. A fifth core principle of IHL – the *Duty of Humane Treatment* – applies to prisoners of war and is therefore not relevant to present purposes. ICRC IHL Introduction, page 20; *see also ibid*, Chapters 4–6.

⁵¹ *See* Section III.C (‘The Five Categories of Protection and Their Practical Mechanics’), *infra*.

⁵² ICRC IHL Introduction, pages 91–92 (‘Civilian objects are *negatively* defined as all objects that are not military objectives. Military objectives, in turn, are defined as “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.” If there is any doubt whether an object normally used for civilian purposes [...] is being used to make an effective contribution to military action, it is presumed not to be so used.’)

⁵³ ICRC IHL Introduction, page 92.

Objects simultaneously used for civilian and military purposes—so-called ‘dual-use objects’—can be particularly problematic in terms of crafting a strong prosecution case.⁵⁴ Here, IHL protects the natural environment by treating it, *generally*, as a civilian object.⁵⁵

17. Specially Protected Objects: Moreover, the Principle of Distinction provides particular protection for four specific categories of civilian objects:

- cultural property;
- works and installations containing dangerous forces;
- objects indispensable to the survival of the civilian population; and
- the natural environment, as such.⁵⁶

These specific protections apply in addition to the more general ones.⁵⁷ Thus IHL also protects the natural environment by treating it, *specifically*, as a specially-protected civilian object.⁵⁸

18. Indiscriminate and Disproportionate Attacks: ‘Particularly devastating examples of *indiscriminate attacks* are the so-called “carpet bombing” campaigns of World War II, in which entire areas containing both military objectives and civilians and civilian objects were treated as a single military objective and attacked without distinction. Another example [...] [—commonly understood as *disproportionate attacks*—] are those which may be expected to cause incidental harm to civilians or civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.’⁵⁹ IHL protects the natural environment in this regard by treating it, *generally*, as civilian in character.⁶⁰

19. Method and Means: The methods of warfare refer to way in which conflict is conducted: the manner of operations.⁶¹ IHL protects the natural environment variously in this regard as discussed

⁵⁴ ICRC IHL Introduction, pages 92–93 (‘In practice, almost any civilian object can be used for military purposes and can therefore be a military objective for the duration of such use. [...] Typical examples of objects that might become “dual-use” objects are logistical infrastructure (roads, bridges, railways, ports and airports), power plants, and electricity and communication networks. To the extent that a specific dual-use object makes an “effective contribution” to the enemy’s military action and its destruction, neutralization or capture offers a definite military advantage, it qualifies as a military objective regardless of its simultaneous civilian use. The negative impact that an attack against a dual-use object is expected to have on the civilian population is not relevant for its categorization as a military objective, but must be taken into account in the proportionality assessment. Accordingly, an attack against a dual-use object qualifying as a military objective would be unlawful if it may be expected to cause incidental civilian harm that would be excessive in relation to the concrete and direct military advantage anticipated.’)

⁵⁵ See ICRC Guidelines on IHL and the Environment.

⁵⁶ ICRC IHL Introduction, pages 93–97.

⁵⁷ ICRC IHL Introduction, pages 96–97.

⁵⁸ See ICRC Guidelines on IHL and the Environment.

⁵⁹ ICRC IHL Introduction, page 86 (emphasis added).

⁶⁰ See ICRC Guidelines on IHL and the Environment.

⁶¹ ICRC IHL Introduction, pages 104–105 (‘Prohibited methods of warfare primarily affecting the civilian population and civilian objects [...] include most notably: the prohibition of direct attacks against civilians and civilian objects, cultural property, and installations containing dangerous forces; the prohibition of indiscriminate attacks; [...] the prohibition of methods causing widespread, long-term and severe damage to, or involving the hostile manipulation of, the natural environment; [...]’—among others.); see also GRC Domestic Implementation Guide, page 36 (‘methods’ are ‘the way weapons are used and the general conduct of all those engaged in the armed conflict, such as the prohibition of attacking civilians’).

above. The means of warfare refer to the particular weapons employed during operations.⁶² IHL protects the natural environment in this regard by way of a number of specific prohibitions.⁶³

B. How IHL Comprehends and Protects the Natural Environment

20. Notion: The notion of the ‘natural environment’ for the purposes of IHL is not defined in API or its negotiating history, and there are different views on its precise meaning.⁶⁴ In any case, the ICRC – based on a reading of the drafting history of API, among other things – takes the position that the term should be understood in the ‘widest sense possible’⁶⁵ to mean: ‘everything that exists or occurs naturally’.⁶⁶ Notably, 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’.⁶⁷ This understanding is roughly thirty-years old and, according to the ICRC, includes the following key aspects:

- the Principles of Distinction and Proportionality provide protection to the natural environment;
- destruction of the natural environment not justified by military necessity violates IHL and, under certain circumstances, is punishable as a grave breach;
- the general prohibition on destroying civilian objects, unless such destruction is justified by military necessity, also protects the natural environment;
- care shall be taken in warfare to protect and preserve the natural environment; and
- 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 and thereby prejudice the health or survival of the population.⁶⁸

⁶² ICRC IHL Introduction, page 111 (‘IHL also prohibits the use of weapons that are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment. As we have seen [...], that prohibition has a relatively high threshold. In particular, it may be argued that nuclear weapons should be outlawed because they almost inevitably would have to be expected to cause damage that is “widespread, long-term and severe.”’); *see also* GRC Domestic Implementation Guide, page 36 (‘means’ refers to ‘the use of certain prohibited weapons’).

⁶³ *See* ICRC Guidelines on IHL and the Environment.

⁶⁴ ICRC Guidelines on IHL and the Environment, para 16.

⁶⁵ ICRC Guidelines on IHL and the Environment, para 16.

⁶⁶ ICRC Guidelines on IHL and the Environment, para 16 (This would include ‘the general hydrosphere, biosphere, geosphere and atmosphere (including fauna, flora, oceans and other bodies of water, soil and rocks). The natural environment moreover includes natural elements that are or may be the product of human intervention, such as foodstuffs, agricultural areas, drinking water and livestock.’)

⁶⁷ ICRC Guidelines on IHL and the Environment, para 17.

⁶⁸ *Nb.* Some of the key principles relied upon by the ICRC Guidelines on IHL and the Environment date back (at least) to the mid-1990s. *See, e.g.,* 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 (setting out ‘a summary of the existing applicable international rules which must be known and respected by members of the armed forces’). This document notes (among other things): ‘(4) [...] the general principles of international law applicable in armed conflict—such as the principle of distinction and the principle of proportionality—provide protection to the environment. In particular, only military objectives may be attacked and no methods or means of warfare which cause excessive damage shall be employed. Precautions shall be taken in military operations as required by international law. [...] (8) Destruction of the environment not justified by military necessity violates [IHL]. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law. (9) The general prohibition on destroying civilian objects, unless such destruction is justified by military necessity, also protects the environment. [...] (11) Care shall be taken in warfare to protect and preserve the natural environment. It is prohibited to employ methods or means of warfare which are intended, or may be expected,

The ICRC's rather expansive notion (if not its practical implementation) is in no way a novel one.

21. Civilian Character: The natural environment is generally recognized as civilian in character by the ICRC, the International Law Commission ('ILC'), and others. '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.'⁶⁹ While there is some debate on this position, especially regarding so-called 'anthropocentric' and 'intrinsic' approaches,⁷⁰ it is the ICRC's firm view that 'there is no "grey zone" in which a part of the natural environment is neither a military objective nor a civilian object'.⁷¹

22. Comprehensive Protection Regime: Based on all the above, IHL *theoretically* provides the natural environment with robust protection by way of both general and specific measures.⁷² For present purposes it will be useful to understand this broad regime as divided into five distinct categories:
 - *Category 1* – General protections provided to all parts of the natural environment as civilian objects by the principles of distinction, proportionality, and precautions;
 - *Category 2* – General protections provided to all parts of the natural environment as civilian objects by the rules on enemy property;
 - *Category 3* – General protections provided by the rules on specially-protected objects other than the natural environment;
 - *Category 4* – Specific protections provided to the natural environment as such, that is, as a specially-protected object itself;
 - *Category 5* – General protections provided to the natural environment by specific rules on prohibited weapons.

to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population.' (citing GCIV, Articles 53, 147; API, Articles 35, 48, 52, 55, 57).

⁶⁹ ICRC Guidelines on IHL and the Environment, para 18; *see also* Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law, ICRC (Cambridge 2009) and updated online versions (the 'ICRC Customary IHL Rules'); *ibid*, Volume II. Specifically Protected Persons and Objects, Chapter 14. The Natural Environment: Rule 43. Application of General Principles on the Conduct of Hostilities to the Natural Environment; Rule 44. Due Regard for the Natural Environment in Military Operations; Rule 45. Causing Serious Damage to the Natural Environment. *Nb.* This position is seconded by the ILC, which takes the view that 'the environment is inherently civilian in nature and *therefore benefits from the rules governing civilian objects*'. ILC Draft Principles, Principle 14 – Application of the law of armed conflict to the environment, Commentary (emphasis added); *see also ibid*, Principle 13 – General protection of the environment during armed conflict, Commentary ('Paragraph 3 [of Principle 13] [...] underlines the inherently civilian nature of the environment.') (citing ICRC Customary IHL Rule 43).

⁷⁰ ICRC Guidelines on IHL and the Environment, paras 19–21.

⁷¹ ICRC Guidelines on IHL and the Environment, para 21.

⁷² ICRC Guidelines on IHL and the Environment, page 19 (subheading).

The overall logic of this general regime stems from the IHL principles relevant to the conduct of hostilities discussed above. The same logic is embedded in the five component categories of environmental protection, which are next addressed in greater detail.

C. The Five Categories of Protection and Their Practical Mechanics

23. Signpost: The mechanics of each category are now addressed in turn—with corresponding paragraphs on rules, sources, domestic criminalization (including proposed elements), ICC criminalization, and generic fact patterns. The ICRC Rules—relied upon throughout this section and stated in full at Annex II—are a collective ‘restatement of [IHL] as it stands in the eyes of the ICRC’.⁷³ ICRC Rule 1 identifies the overarching obligation to provide ‘due regard’ for the natural environment during military operations and sets the general tone for the various categories that follow. As pointed out below, some categories interact and overlap in certain ways. Accordingly, the OPG should not be overly constrained by any individual category but rather seek to find the best solution given the actual facts. The categories are analytical aids and not firm prescriptions.

*Category 1 – General Protections Provided to All Parts of the Natural Environment as Civilian in Character*⁷⁴

24. Rules: This category, governed by ICRC Rules 5–9,⁷⁵ potentially provides broad protection to the natural environment in cases of: (i) indiscriminate attacks; that is, attacks of such a nature to strike military objectives and the natural environment without distinction; (ii) attacks causing excessive incidental damage to the natural environment in relation to the anticipated military advantage; and/or (iii) operations that fail to take feasible precautions to avoid, and in any event to minimize, any incidental damage to the natural environment.⁷⁶
25. Source: Each of these rules reflects a clear obligation set out in API.⁷⁷

⁷³ ICRC Guidelines on IHL and the Environment, para 12.

⁷⁴ ICRC Guidelines on IHL and the Environment, Part II, Section 1.

⁷⁵ See Annex II, *infra*.

⁷⁶ ICRC Guidelines on IHL and the Environment, para 95; see also ICRC Customary IHL, Rules 7–24. *Nb.* ‘Articles 35(3) and 55 of Additional Protocol I [...] prohibit only those attacks which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment. By comparison, the general rules affording protection to civilian objects, including any part of the natural environment that is not a military objective, may, depending on the circumstances, render unlawful an attack which would cause damage to the natural environment of lesser gravity or magnitude.’ ICRC Guidelines on IHL and the Environment, para 97.

⁷⁷ For Rule 5, see ICRC Guidelines on IHL and the Environment, para 98 (‘The rule [...] is codified more generally in Articles 48 and 52(2) of the 1977 Additional Protocol I.’); see also ICRC Customary IHL, Rule 43. For Rule 6, see ICRC Guidelines on IHL and the Environment, para 106 (‘Its wording mirrors Article 51(4) of the 1977 Additional Protocol I.’); see also ICRC Customary IHL, Rule 43. For Rule 7, see ICRC Guidelines on IHL and the Environment, para 114 (‘The principle of proportionality is codified more generally in Article 51(5)(b) of the 1977 Additional Protocol I.’); see also ICRC Customary IHL, Rules 43 and 45. For Rule 8, see ICRC Guidelines on IHL and the Environment, para 123 (‘The principle of precautions in attack is codified more generally in Article 57 of the 1977 Additional Protocol I.’); see also ICRC Customary IHL, Rule 44. For Rule 9, see ICRC Guidelines on IHL and the Environment, para 138 (‘It reflects the obligation set forth in Article 58(c) of

26. Criminalization in Ukraine: For this category, Article 85(3)(b) of API provides an applicable grave breach, namely *indiscriminate attacks affecting civilian objects*:

[T]he following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: [...] 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 [...].⁷⁸

A reasonable formulation of the basic elements of such a war crime could be the following:

- launching an indiscriminate attack affecting the natural environment (i.e., a civilian object);
- in the knowledge that such attack will cause excessive – in relation to the concrete and direct military advantage anticipated – loss of life, injury to civilians, or damage to civilian objects;
- actually causing death or serious injury to body or health; and
- committed willfully, in violation of the relevant provisions of API.⁷⁹

27. Criminalization at the ICC: This category is arguably criminalized by the *second prong* of Article 8(2)(b)(iv) of the Rome Statute ('excessive incidental damage to civilian objects'),⁸⁰ and the key element (for present purposes) is defined as follows:

The attack was such that it would cause incidental [...] damage to civilian objects [the natural environment] [...] and that such [...] damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁸¹

The main advantage of the Rome Statute formulation compared to API Article 85(3)(b) is that the former does not require 'actually causing death or serious injury to body or health'.⁸² Additionally, Article 8(2)(b) of the Rome Statute specifically refers to 'the laws and *customs* applicable in international armed conflict' (emphasis added); therefore, any *applicable* CIL would apply.⁸³

the 1977 Additional Protocol I.); see also ICRC Customary IHL, Rule 22. *Nb.* Each Rule has also been established as a norm of CIL applicable in both international and non-international armed conflicts. *Ibid.*

⁷⁸ API, Article 85(3)(b).

⁷⁹ This proposed formulation is taken directly from the text of API, Article 85(3)(b) with the set-off in the second element taken from the text of API, Article 57(2)(a)(iii), to which Article 85(3)(b) explicitly refers.

⁸⁰ *Nb.* Article 8(2)(b)(iv) criminalizes *three distinct categories* of 'incidental' harm: (i) civilian death/injury, (ii) damage to civilian objects, and (iii) widespread, long-term, and severe damage to the natural environment. See ICC Elements of Crimes, Article 8(2)(b)(iv), 'War crime of excessive incidental death, injury, or damage'. See also Steven Freeland, 'Addressing the intentional destruction of the environment during warfare under the Rome statute of the international criminal court', Doctoral Thesis, Maastricht University, 2015, p 205 ('As can be seen, the article specifies three "variants of the offence" – relating to (i) incidental loss of life or injury to civilians; (ii) damage to civilian objects; or (iii) damage to the natural environment.') (citing Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, 3d Ed, 2014, p 493). The second prong/variant – relevant for present purposes – does not require serious injury to body or health under the Rome Statute formulation. Cf. footnote 115, *infra*.

⁸¹ ICC Elements of Crimes, Article 8(2)(b)(iv), 'War crime of excessive incidental death, injury, or damage'. See also para 21, *supra*.

⁸² API, Article 85(3)(b).

⁸³ *Nb.* The text of Article 8(2)(b) clearly gives the OTP the ability to apply customary IHL to substantive matters relevant to international armed conflict. On the question of CIL's broader application at the ICC (for example, with regard to modes of liability or other issues unrelated to substantive IHL), Article 21 of the Rome Statute on 'applicable law' and any related jurisprudence would be controlling. In any case, a detailed discussion on this point is beyond the scope of this Guide.

28. Generic Fact Pattern: For example, this category might apply where a fuel depot or a commercial agriculture or food-storage facility is targeted indiscriminately and the resulting damage—from fires, soil and/or groundwater contamination, pollutant emissions, etc—is excessive and leads to death or serious injury to human health (but only in the API scenario).

Category 2 – General Protections Provided to All Parts of the Natural Environment as Civilian Objects by the Rules on Enemy Property⁸⁴

29. Rules: This category, governed by ICRC Rules 13–15,⁸⁵ provides protection to the natural environment in cases of direct attacks on the natural environment, including pillage, destruction, and/or seizure (in occupied territory) of protected property, including the natural environment.⁸⁶
30. Source: Each of these rules reflects a clear obligation set out in the Geneva Conventions.⁸⁷
31. Criminalization in Ukraine: For this category, the Geneva Conventions (I, II, and IV) provide an applicable grave breach, namely *extensive destruction or appropriation of protected property unjustified by military necessity*:

Grave breaches [...] shall be those involving any of the following acts, if committed against persons or property protected by the Convention: [...] extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.⁸⁸

A reasonable formulation of the basic elements of such a war crime could be the following:

⁸⁴ ICRC Guidelines on IHL and the Environment, Part II, Section 3.

⁸⁵ See Annex II, *infra*.

⁸⁶ ICRC Guidelines on IHL and the Environment, para 176 ('With regard to the relationship between this rule and other rules, it is important to note at the outset that "imperative military necessity" may not be invoked on the basis of this rule to justify the destruction of—or other damage to—parts of the natural environment when such destruction or damage would be prohibited by other rules. In particular, destruction carried out by attack is governed by the rules on attack (see Rules 5 to 8 of the present Guidelines); imperative military necessity cannot allow an object that does not constitute a military objective to be attacked. Nor does it allow the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (Rule 2 of the present Guidelines). Similarly, destruction of parts of the natural environment that would qualify as objects indispensable to the survival of the civilian population is restricted by the specific protection afforded to such objects (Rule 10 of the present Guidelines).'); see also *ibid*, para 177 ('Contrary to the prohibition of widespread, long-term and severe damage to the natural environment, this rule prohibits any destruction of property of an adversary, including any part of the natural environment (and notably, natural resources), not required by imperative military necessity, regardless of whether the damage reaches the widespread, long-term and severe threshold.');

⁸⁷ ICRC Guidelines on IHL and the Environment, paras 175 (GCIV, Article 53), 181 (GCIV, Article 33(2)), and 187 (GCIV, Articles 53 and 55). *Nb.* Each Rule has also been established as a norm of customary international law applicable in both international and non-international armed conflicts. ICRC Guidelines on IHL and the Environment, paras 175, 181, 187; see also ICRC Customary IHL, Rules 43, 51, 52.

⁸⁸ GCI, Article 50; GCII, Article 51 (identical to previous); GCIV, Article 147 (identical, in material part, to previous).

- extensive destruction or appropriation of property protected by the GCs (including the natural environment) and/or ‘pillage of national treasures’ (as a distinct feature of Ukrainian law⁸⁹);
 - not justified by military necessity; and
 - carried out unlawfully and wantonly.⁹⁰
32. Criminalization at the ICC: This category is criminalized variously by Articles 8(2)(a)(iv),⁹¹ 8(2)(b)(ii),⁹² 8(2)(b)(xiii),⁹³ and 8(2)(b)(xvi) of the Rome Statute.⁹⁴ A principal advantage here is the broader range of criminal options provided generally by Article 8(2)(b) ([o]ther serious violations of the laws and customs applicable in international armed conflict’), as opposed to a strictly grave-breach formulation, as well as Article 8(2)(b)’s specific reference to custom.⁹⁵
33. Generic Fact Pattern: For example, this category might apply where: (i) forests or natural water sources are targeted directly without military justification and result in extensive damage; or (ii) where natural resources have been appropriated by occupying forces and used in violation of the principles of usufruct.

*Category 3 – General Protections Provided by the Rules on Specially-Protected Objects Other than the Natural Environment*⁹⁶

34. Rules: This category, governed by ICRC Rules 10–12,⁹⁷ potentially provides protection to the natural environment in cases of attacks on food or water sources, facilities containing dangerous forces (like dams and nuclear power plants), and important cultural objects.
35. Source: Each of these rules reflects a clear obligation set out in API.⁹⁸
36. Criminalization in Ukraine: Regarding Rule 10, attacks on natural food/water sources, the same protection scheme described above with respect to the natural environment as a civilian object (Rule 13) might apply.⁹⁹ Regarding Rule 11, Article 85(3)(c) of API provides the applicable grave breach, namely *attacks against works or installations containing dangerous forces*:

⁸⁹ *Nb.* Article 438 of the Ukraine Criminal Code explicitly criminalizes ‘pillage of national treasures on occupied territories’ (emphasis added), which naturally falls into this IHL category.

⁹⁰ This proposed formulation – with the exception of the language on ‘national treasures’ (*see ibid*) – is taken directly from the text of GCI, Article 50, which is identical in all material respects to GCII, Article 51 and GCIV, Article 147.

⁹¹ *See* ICC Elements of Crimes, Article 8(2)(a)(iv), ‘War crime of destruction and appropriation of property’.

⁹² *See* ICC Elements of Crimes, Article 8(2)(b)(ii), ‘War crime of attacking civilian objects’. *See also* para 21, *supra*.

⁹³ *See* ICC Elements of Crimes, Article 8(2)(b)(xiii), ‘War crime of destroying or seizing the enemy’s property’.

⁹⁴ *See* ICC Elements of Crimes, Article 8(2)(b)(xvi), ‘War crime of pillaging’.

⁹⁵ *See* footnote 83, *supra*.

⁹⁶ ICRC Guidelines on IHL and the Environment, Part II, Section 2.

⁹⁷ *See* Annex II, *infra*.

⁹⁸ ICRC Guidelines on IHL and the Environment, paras 147 (API, Article 54(2)), 157 (API, Article 56(1)), and 166 (API, Article 53). *Nb.* Each Rule has also been established as a norm of CIL applicable in both international and non-international armed conflicts. ICRC Guidelines on IHL and the Environment, paras 147, 157, 166; *see also* ICRC Customary IHL, Rules 38, 42, 54.

⁹⁹ *See* para 31, *supra*.

[T]he following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: [...] 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 [...].¹⁰⁰

A reasonable formulation of the basic elements of such a war crime (Rule 11) could be the following:

- launching an attack against works or installations containing dangerous forces;
- in the knowledge that such attack will cause excessive – in relation to the concrete and direct military advantage anticipated – loss of life, injury to civilians, or damage to the natural environment (i.e., a civilian object);
- actually causing death or serious injury to body or health; and
- committed willfully, in violation of the relevant provisions of API.¹⁰¹

Regarding Rule 12, Article 85(4)(d) of API provides the applicable grave breach, namely *attacks against the cultural or spiritual heritage of peoples*:

[T]he following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol: [...] making the clearly-recognized historic monuments [...] or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement [...] the object of attack, causing as a result extensive destruction thereof [...] and when such historic monuments [...] and places of worship are not located in the immediate proximity of military objectives [...].¹⁰²

A reasonable formulation of the basic elements of such a war crime (Rule 12) could be the following:

- making any part of the natural environment recognized as culturally or spiritually significant the object of attack;
- causing extensive destruction such object;
- where the adverse party has not used such object in support of its military effort;
- where such object is not located in the immediate proximity of military objectives; and
- committed willfully, in violation of the relevant provisions of API.¹⁰³

37. Criminalization at the ICC: Rule 10 is arguably criminalized by Article 8(2)(b)(xxv) of the Rome Statute,¹⁰⁴ while Rules 11 and 12 do not appear to be specifically addressed. The advantage here is Article 8(2)(b)'s specific reference to custom.¹⁰⁵

¹⁰⁰ API, Article 85(3)(c); *see also* API, Article 56 (setting out the specific 'protection of works and installations containing dangerous forces').

¹⁰¹ This proposed formulation is taken directly from the text of API, Article 85(3)(c), with the set-off in the second element taken from the text of API, Article 57(2)(a)(iii), to which Article 85(3)(c) explicitly refers.

¹⁰² API, Article 85(4)(d).

¹⁰³ This proposed formulation is taken directly from the text of API, Article 85(4)(d), with the third element taken from the text of API, Article 53(b), to which Article 85(4)(d) explicitly refers.

¹⁰⁴ *See* ICC Elements of Crimes, Article 8(2)(b)(xxv), 'War crime of starvation as a method of warfare'.

¹⁰⁵ *See* footnote 83, *supra*.

38. Generic Fact Pattern: For example, this category might apply where: (i) natural water sources are targeted directly without military justification and result in extensive damage ; (ii) excessive attacks on dams or nuclear power plants result in actual human harm; and/or (iii) attacks on portions of the natural environment considered to be culturally significant result in extensive damage.

Category 4 - Specific Protections Provided to the Natural Environment as Such (as a Specially-Protected Object)¹⁰⁶

39. Rules: This category, governed by ICRC Rules 2–4,¹⁰⁷ potentially provides specific protection in the extreme and rare cases of: (i) widespread, long-term, *and* severe damage to the natural environment; (ii) the natural environment’s use as a weapon (a means of warfare); or (iii) reprisals against the natural environment.¹⁰⁸
40. Source: Rule 2 reflects concrete obligations embodied in API, Articles 35(3) and 55(1).¹⁰⁹ Rule 3 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).¹¹⁰ Rule 4 reflects a clear obligation embodied in API, Article 55(2).¹¹¹
41. Criminalization in Ukraine: Despite explicit references to ‘widespread, long-term and severe damage to the natural environment’ in API,¹¹² there is no criminalization of that prohibition by API’s grave-breach provision (Article 85). Therefore, given the constraints of CCU Article 438, there does not appear to be a clear path to criminality of this category in Ukraine’s domestic legal regime. Nevertheless, some experts have suggested that the prohibitions contained in API Articles 35(3) and 55(1) may be seen as criminalized under Ukrainian law by adopting a ‘creative approach’.¹¹³ In Climate Counsel’s view, this approach is unnecessary. As described in the preceding sections, IHL *theoretically* provides robust legal protection to the natural environment

¹⁰⁶ ICRC Guidelines on IHL and the Environment, Part I.

¹⁰⁷ See Annex II, *infra*.

¹⁰⁸ See footnote 86, *supra*, with regard to the relationship/interaction between this category and others.

¹⁰⁹ ICRC Guidelines on IHL and the Environment, para 47; see also ICRC Customary IHL, Rule 45.

¹¹⁰ ICRC Guidelines on IHL and the Environment, para 84; see also ENMOD Convention.

¹¹¹ ICRC Guidelines on IHL and the Environment, paras 89–90. *Nb.* Each Rule, in some respect, has also been established as a norm of CIL applicable in both international and non-international armed conflicts. ICRC Guidelines on IHL and the Environment, paras 42, 47, 76, 91; see also ICRC Customary IHL, Rules 44, 45, 147.

¹¹² API, 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.’); API, Article 55 (‘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.’)

¹¹³ For example, some have sought to ‘read’ the Article 35(3) prohibition into the Article 85 proscription. In Climate Counsel’s view, this is both untenable as a matter of law under Ukraine’s Constitution and unhelpful as a practical matter given the protections afforded by Categories 1–3.

in various other ways. Notably, any conduct that meets Rule 2’s high threshold would likely be covered by the much less stringent frameworks of Categories 1–3.¹¹⁴

42. Criminalization at the ICC: A version of Rule 2 is criminalized by the *third prong* of Article 8(2)(b)(iv) of the Rome Statute (‘widespread, long-term, and severe damage to the natural environment’),¹¹⁵ whereas Rules 3 and 4 do not appear to be specifically addressed. Given the fact that the third prong of Article 8(2)(b)(iv) is the sole instance in which the Rome Statute *explicitly* mentions the ‘natural environment’, it has been erroneously considered by certain commentators to be the only avenue for environmental recourse under Article 8. Again, as above with respect to API, such a view is incorrect. The Rome Statute provides for several instances of environmental protection beyond the third prong of Article 8(2)(b)(iv). In fact, at least six distinct articles (one of which contains two relevant sub-prongs) which might apply to the natural environment have been identified in this Guide. That said, if conduct meets the high threshold of ‘widespread, long-term and severe damage’, the OTP could and should address such conduct accordingly under the Rome Statute.¹¹⁶
43. Generic Fact Pattern: Examples of facts that might fit this category include the use of ‘agent orange’ by US forces in the Vietnam War and the burning of Kuwaiti oil fields by Iraqi forces in the First Gulf War. To date, no environmental damage of such magnitude has been identified in Ukraine.

¹¹⁴ See, e.g., ICRC Guidelines on IHL and the Environment, para 111 (‘An attack which is intended, or may be expected, to cause “widespread, long-term and severe” damage to the natural environment, of the kind prohibited by Articles 35(3) and 55 of Additional Protocol [...] is precisely an attack which cannot be “limited as required by IHL” and, therefore, will simultaneously violate the prohibition of indiscriminate attacks [per Rule 6.C].’) *Nb.* The OPG should keep in mind that, under IHL, the natural environment itself is civilian in nature and cannot be attacked, unless it becomes a legitimate military objective. Therefore, all IHL prohibitions against attacks on civilian objects contained in API could arguably be applied *mutatis mutandis*.

¹¹⁵ See ICC Elements of Crimes, Article 8(2)(b)(iv), ‘War crime of excessive incidental death, injury, or damage’. See also ICRC Guidelines on IHL and the Environment, para 313 (‘This provision is the first to establish individual liability for an international crime that harms the natural environment as such, without requiring that harm be caused to human beings for liability to be triggered.’) *Nb.* The Rome Statute formulation on widespread, long-term, and severe environmental damage—Article 8(2)(b)(iv)’s *third* prong—appears to be out of synch with IHL in that it adds an additional proportionality test where none is required. In fact, while footnote 36 of the ICC Elements of Crimes indicates that such ‘proportionality requirement [is] inherent in determining the legality of any military activity undertaken in the context of an armed conflict’, under customary IHL widespread, long-term, and severe damage to the natural environment is prohibited ‘regardless of considerations of military necessity or proportionality’—thus the rule’s ‘high threshold of damage’. ICRC Guidelines on IHL and the Environment, para 49. See also ICRC Customary IHL, Rule 45 (‘The difference between this rule and the rule requiring the application to the environment of the general rules of international humanitarian law applicable to civilian objects (see Rule 43) is that *this rule is absolute*. If widespread, long-term and severe damage is inflicted, or the natural environment is used as a weapon, 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). *Cf.* footnote 80, *supra* (re Article 8(2)(b)(iv)’s *second* prong, for which the proportionality test is indeed inherent per the qualification at footnote 36 of the ICC Elements of Crimes).

¹¹⁶ *Nb.* Relying on CIL for guidance, the OTP would be free in such cases to pursue a progressive interpretation of any of the three constituent terms of Article 8(2)(b)(iv)’s third prong—widespread, long-term, and/or severe—each of which is arguably in need of updating ‘in tandem with state practice and legal opinion’. ICRC IHL Introduction, page 22; see also, e.g., Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text, June 2021 (where these terms are defined more reasonably than previous and outmoded IHL formulations).

Category 5 – General Protections Provided to the Natural Environment by Specific Rules on Prohibited Weapons¹¹⁷

44. Rules: This category, governed by ICRC Rules 19–25,¹¹⁸ *potentially* provides protection to the natural environment with respect to the use of clearly prohibited means of warfare, namely: poison or poisoned weapons,¹¹⁹ biological weapons,¹²⁰ chemical weapons,¹²¹ certain herbicides,¹²² incendiary weapons,¹²³ landmines,¹²⁴ and explosive war remnants, including unexploded cluster munitions.¹²⁵ As noted above, such protection would only apply where any damage to the natural environment has a clear and direct impact on protected persons.¹²⁶
45. Source: None of these rules are *explicitly* rooted in the grave breaches provisions of the GCs or API. However, most of them have been established as norms of CIL applicable in both international and non-international armed conflicts,¹²⁷ and all are governed by various specific treaties and instruments.¹²⁸
46. Criminalization in Ukraine: For this category, Article 438 broadly criminalizes ‘the use of means of warfare prohibited by international law’ (thereby encompassing both international treaties *and* customary international law, as noted above). More specifically, the Geneva Conventions (I, II, and IV) *arguably* provide an indirectly applicable grave breach, namely *willfully causing great suffering or serious injury to body or health*:

Grave breaches [...] shall be those involving any of the following acts, if committed against persons or property protected by the Convention: [...] willfully causing great suffering or serious injury to body or health [...], not justified by military necessity and carried out unlawfully and wantonly.¹²⁹

A reasonable formulation of the basic elements of such a war crime could be the following:

- willfully causing great suffering or serious injury to body or health (by way of the particular prohibited means employed);

¹¹⁷ ICRC Guidelines on IHL and the Environment, Part III.

¹¹⁸ See Annex II, *infra*.

¹¹⁹ ICRC Guidelines on IHL and the Environment, Rule 19, page 85.

¹²⁰ ICRC Guidelines on IHL and the Environment, Rule 20, page 87.

¹²¹ ICRC Guidelines on IHL and the Environment, Rule 21, page 89.

¹²² ICRC Guidelines on IHL and the Environment, Rule 22, page 91.

¹²³ ICRC Guidelines on IHL and the Environment, Rule 23, page 94.

¹²⁴ ICRC Guidelines on IHL and the Environment, Rule 24, page 96.

¹²⁵ ICRC Guidelines on IHL and the Environment, Rule 25, page 100.

¹²⁶ See para 15, *supra*.

¹²⁷ ICRC Guidelines on IHL and the Environment, paras 218, 225, 233, 241, 252. *Nb.* Rules 24 and 25 do not appear to have reached customary status. ICRC Guidelines on IHL and the Environment, paras 262, 281.

¹²⁸ *Ibid.*

¹²⁹ GC I, Article 50; see also GCII, Article 51 (*ditto*); GCIV, Article 147 (*ditto*). *Nb.* As this grave breach is rooted in the GCs – and not in API – it is not customarily understood to apply to the conduct of hostilities. Pursuant to Article 4 of GCIV, it applies to treatment of persons in the hands of a party of which they are not nationals (in other words, to persons in captivity or occupied territory). Therefore, the OPG should tread cautiously here when formulating any potential arguments.

- not justified by military necessity; and
- carried out unlawfully and wantonly.¹³⁰

The OPG should be aware that this category – included here for the sake of completeness – may be difficult to apply in practice and may not provide any *direct* protection to the natural environment as such.

47. Criminalization at the ICC: Rule 19 is clearly criminalized by Article 8(2)(b)(xvii) of the Rome Statute,¹³¹ and Rule 21 is clearly criminalized by Article 8(2)(b)(xviii),¹³² while Rules 20 and 22–25 do not appear to be covered.
48. Generic Fact Pattern: Factual scenarios related to this category will be self-evident depending on the prohibited means employed. None have been seen to date in the current conflict.

D. Applicable Non-IHL Protection Regimes

49. Signpost: As described above in Sections III.A and III.B, IHL provides an ideal conceptual framework for the protection of the natural environment in times of armed conflict. However, as described in Section III.C, this framework has been implemented in different and limited ways under both Article 438 of the CCU and Article 8 of the Rome Statute. In both scenarios – given the unique constraints and limitations discussed above – certain gaps exist between IHL’s theoretical ideals (as conceived) and its practical realities (as applied). Nevertheless, some of these gaps may be filled by bodies of law other than IHL,¹³³ namely: domestic criminal law, crimes against humanity under the Rome Statute, and/or international human rights law (‘IHRL’). In other words, it is not only war crimes that may provide protection to the natural environment in times of armed conflict.¹³⁴ Often, there will be a permissible and complementary degree of overlap between and among IHL and other legal regimes; in other instances, these bodies of law may come into

¹³⁰ This proposed formulation – with the exception of the language on ‘national treasures’ (*see ibid*) – is taken directly from the text of GCI, Article 50, which is identical in all material respects to GCII, Article 51 and GCIV, Article 147.

¹³¹ See ICC Elements of Crimes, Article 8(2)(b)(xvii), ‘War crime of employing poison or poisoned weapons’.

¹³² See ICC Elements of Crimes, Article 8(2)(b)(xviii), ‘War crime of employing prohibited gases, liquids, materials or devices’.

¹³³ See ICRC Guidelines on IHL and the Environment, para 4. (‘In manifestation of this concern [the damage wrought by armed conflict on the natural environment], States have continued to develop bodies of international law, including international humanitarian law (IHL), international environmental law, international human rights law, international criminal law and the law of the sea to bolster protection of the natural environment.’); *ibid*, page 20 (‘In addition to rules of IHL, other rules of international treaty and customary law protecting the natural environment (including rules of international environmental law, international human rights law, the law of the sea and international criminal law) may continue to apply during international and non-international armed conflicts.’)

¹³⁴ See ICRC IHL Introduction, pp 26–27 (‘IHL is that body of international law which governs situations of armed conflict. As such, it must be distinguished from other bodies of international law, particularly those that may apply at the same time as IHL, but which have a different object and purpose. The most important frameworks to be discussed in this context are: [...] (2) international human rights law; (3) international criminal law; [...]. It should be noted that, depending on the situation, other branches of international law, while not specifically discussed here, may be relevant as well. They include [...] environmental law and [others], to name but a few.’)

conflict.¹³⁵ In the latter situation, the identification of an actual conflict will be highly fact-specific, and its resolution should be determined on a case-by-case basis.¹³⁶ In exploring any such alternative (gap-filling) non-IHL avenues—none of which provide any independent source of law for the purposes of criminalization discussed above—the OPG would need to consult and potentially partner with other actors such as the OTP and/or civil-society organizations.

50. Domestic Law: CCU Article 441 explicitly criminalizes the purely domestic offense of ‘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.¹³⁷

While domestic criminal law continues to remain in force during times of armed conflict, considerations of its interaction with IHL—for example, possible conflict under the *lex specialis* principle¹³⁸—may limit the availability and/or scope of any domestic prosecutions. Given the novelty and potential complexity of the issue in the current context, the OPG has commissioned the preparation of a separate and more detailed position paper. For present purposes, suffice it to say that instances of environmental harm not otherwise permitted under Ukraine’s IHL regime and satisfying the elements of Article 441 may be initially framed as the domestic crime of Ecocide. The OPG would presumably have considerable creative leeway here, albeit within the confines of existing Ukrainian criminal law and procedure (including any rules on cumulative charging)—and with the final caveat that any successful prosecution would be highly fact-specific.

51. Crimes Against Humanity: At the ICC, crimes against humanity (which are not recognized by the CCU) are governed by Article 7 of the Rome Statute, which makes no reference to the natural environment. However, according to the OTP’s 2016 Policy Paper on Case Selection and Prioritization, ‘[t]he *manner* of commission of the crimes may be assessed in light of, *inter alia*, [...]’

¹³⁵ See ICRC Guidelines on IHL and the Environment, para 40 (For example, ‘it is widely recognized that human rights law provisions applicable in armed conflict complement the protection afforded by IHL. The interplay between humanitarian and [IHL] is such that in some cases both legal regimes will apply simultaneously, with determinations on the exact nature of their relationship having to be made on a case-by-case basis depending on the circumstances at hand. [...] When both IHL and [IHL] regulate a particular issue, a comparison between their provisions may reveal certain differences. Where that happens, it is necessary to determine whether the difference amounts to an actual conflict between the norms in question. If there is no conflict, the ICRC has elsewhere sought to interpret the different norms with a view to harmonization. Where there is a real conflict between the respective norms, resort must be had to a principle of conflict resolution such as *lex specialis derogat legi generali*, by which a more specific legal norm takes precedence over a more general one.’)

¹³⁶ *Ibid*; see also Helen Duffy, ‘Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication’, in Ziv Bohrer, Janina Dill, Helen Duffy, and Marxsen Peters (ed), *Law Applicable to Armed Conflict* (Cambridge University Press, 2020).

¹³⁷ *Nb.* The OPG may wish to seek any helpful interpretive guidance from other domestic jurisdictions with similar laws. See, e.g., ICRC Customary IHL, Practice Related to Rule 45 (discussing the legislation of Armenia, Belarus, Kazakhstan, Kyrgyzstan, Republic of Moldova, Russian Federation, Tajikistan, and Viet Nam).

¹³⁸ As noted above, while Ukraine’s domestic laws on environmental protection continue to apply during international armed conflict, the more specific tests of what constitutes environmental war crimes will be determined by IHL (as the *lex specialis* specifically regulating such situations). See ICRC IHL Introduction, p 29 (In cases of conflict between IHL and other bodies of law, ‘the respective provisions are generally reconciled through the *lex specialis* principle, which states that the law more specifically crafted to address the situation at hand (*lex specialis*) overrides a competing, more general law (*lex generalis*).’) At present, there does not appear to be any general conflict between the two legal regimes. That said, specific instances will need to be assessed on a case-by-case basis. The forthcoming position paper will provide much more clarity on this issue.

crimes committed by means of, or resulting in, the destruction of the environment [...].¹³⁹ Moreover: '[t]he *impact* of the crimes may be assessed in light of, *inter alia*, [...] the [...] environmental damage inflicted on the affected communities' with 'particular consideration [given] to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment'.¹⁴⁰ In other words, the OTP can and should consider contextual information on environmental destruction with regard to both the 'manner' and 'impact' aspects of the larger 'gravity' assessment—in relation to the commission of both Article 7 and Article 8 crimes. The OPG will be in a strong position to strategically encourage the OTP to finally implement the latter's stated environmental policy with respect to the prevailing facts.

52. International Human Rights Law: 'While IHL regulates the conduct of hostilities and the protection of persons in situations of armed conflict, [IHRL] protects the individual from abusive or arbitrary exercise of power by State authorities.'¹⁴¹ Among many other things, IHRL recognizes 'the right to a clean, healthy and sustainable environment'.¹⁴² (A similar right is recognized by Ukraine's constitution.¹⁴³) Accordingly, victims of environmental harm could attempt to pursue some form of redress through the established human rights monitoring mechanisms of the UN system,¹⁴⁴ in particular: (i) the 'Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (a 'special procedure' with a 'thematic mandate')¹⁴⁵ and/or (ii) the Independent International Commission of Inquiry on Ukraine (an 'independent investigation' of the UN Human Rights

¹³⁹ ICC-OTP, Policy Paper on Case Selection and Prioritization, 15 September 2016, para 40 (citing Rome Statute, Articles 8(2)(b)(ix) and 8(2)(e)(iv)) (emphasis added); see also ICRC Guidelines on IHL and the Environment, footnote 658 ('Regarding [...] the potential that environmental damage could fall within the ambit of crimes against humanity or genocide, see Freeland, Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court, pp 219–226.')

¹⁴⁰ ICC-OTP, Policy Paper on Case Selection and Prioritization, 15 September 2016, para 41 (emphasis added).

¹⁴¹ ICRC IHL Introduction, p 27 ('While there is considerable overlap between these bodies of law, there are also significant differences.'). See *ibid*, pp 28–30 (re 'scope of application', 'scopes of protection and obligation', 'derogability', and 'interrelation'); see also ICRC Advisory Services on International Humanitarian Law, International Humanitarian Law and International Human Rights Law: Similarities and Differences.

¹⁴² UN General Assembly, Seventy-Sixth Session, Resolution 76/300, 'The human right to a clean, healthy and sustainable environment', 28 July 2022, A/RES/76/300 ('Noting also that a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies, 1. *Recognizes* the right to a clean, healthy and sustainable environment as a human right; 2. *Notes* that the right to a clean, healthy and sustainable environment is related to other rights and existing international law; [...].'); see also UN Human Rights Council, Resolution 48/13, 'The human right to a clean, healthy and sustainable environment', 8 October 2021, A/HRC/RES/48/13 (ditto); see also ICRC Guidelines on IHL and the Environment, paras 37–39 ('A number of international human rights treaties expressly articulate a human right to a certain standard of environment. [...] In addition, a number of international human rights treaties entail protection of the environment through other recognized rights. [...] The [UN] Human Rights Council has adopted a number of resolutions on human rights and the environment and has appointed an independent expert to study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. [...].')

¹⁴³ Constitution of Ukraine, Article 50 ('Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right. [...].')

¹⁴⁴ ICRC IHL Introduction, p 294 ('Depending on the type of IHL violation concerned, individual victims may bring individual complaints, including reparation claims, before the judicial and quasi-judicial implementing bodies of universal and regional human rights treaties. From an enforcement perspective, it is important to remember that the *lex specialis* character of IHL does not suspend the applicability of human rights law, but merely determines its interpretation during armed conflicts. Consequently, violations of IHL that also violate human rights law may be pursued through the individual complaints procedures provided under the relevant human rights treaties.')

¹⁴⁵ See UN Human Rights Council, Resolution 46/7, 'Human rights and the environment', 30 March 2021, A/HRC/RES/46/7 ('5. Decides to renew the mandate of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment for a period of three years; [...].')

Council).¹⁴⁶ The OPG will be able to provide assistance to victims and Ukrainian civil-society organizations here, especially in cases that may fall short of satisfying the high evidentiary standards of criminal law.

IV. PRELIMINARY FRAMING METHODOLOGY

53. Signpost: The first and perhaps most crucial steps in any complex war-crimes investigation are properly identifying the relevant facts and (as neatly as possible) framing them within the applicable legal regime. While Environmental War Crimes may present unique challenges given their novelty, as in all such *preliminary* endeavors, it is important to maintain a reasonable measure of flexibility. With these considerations—and the various substantive issues laid out above in Section III—as a point of departure, the following suggestions are meant to provide a simplified approach for determining which analytical category best applies to any particular set of facts. The OPG should keep in mind that certain facts may need to be analyzed under multiple categories. Also, as there is currently no case law to provide guidance in terms of the precise meaning of key terms such as ‘extensive’ damage or ‘excessive’ effects, the OPG will be largely free to advance its own reasonably justified formulations (anticipating robust defense and/or judicial resistance at trial and on appeal). Finally, the framing process may ultimately reveal that some conduct would be more effectively dealt with by other actors such as the OTP (where the facts in question better fit within the Rome Statute’s legal regime) pursuant to considerations of positive complementarity.
54. Categorical Analysis: The following steps provide a deliberately simplified and strictly preliminary approach to the five protection categories discussed in greater detail above. (Be advised that there may be overlap between certain categories, in particular Categories 2/3 and 1/4.)
- a. *Attacks Directly Targeting the Natural Environment*:
- i. *As a General Civilian Object*: Does the evidence suggest that any part of the natural environment has been directly targeted and extensively destroyed or appropriated? If so, analyze the situation preliminarily under the **Category 2** framework.

¹⁴⁶ See UN Human Rights Council, Resolution 49/1, ‘Situation of human rights in Ukraine stemming from the Russian aggression’, 4 March 2022, A/HRC/RES/49/1 (‘11. Decides to urgently establish an independent international commission of inquiry [...] with the following mandate: (a) To investigate all alleged violations and abuses of human rights and violations of international humanitarian law, and related crimes in the context of the aggression against Ukraine by the Russian Federation, and to establish the facts, circumstances and root causes of any such violations and abuses; (b) To collect, consolidate and analyse evidence of such violations and abuses [...] consistent with international law standards, in view of any future legal proceedings; (c) To document and verify relevant information and evidence, including through field engagement, and to cooperate with judicial and other entities, as appropriate; (d) To identify, where possible, those individuals and entities responsible for violations or abuses of human rights or violations of international humanitarian law, or other related crimes, in Ukraine, with a view to ensuring that those responsible are held accountable; (e) To make recommendations, in particular on accountability measures, all with a view to ending impunity and ensuring accountability, including, as appropriate, individual criminal responsibility, and access to justice for victims; [...].’)

- ii. *As a Specially-Protected Object*: Does the evidence suggest that food or water sources, facilities containing dangerous forces (like dams and nuclear power plants), or any part of the natural environment recognized as a culturally significant object has been directly attacked? If so, analyze the situation preliminarily under the **Category 3** framework.

Alternatively, consider the following questions.

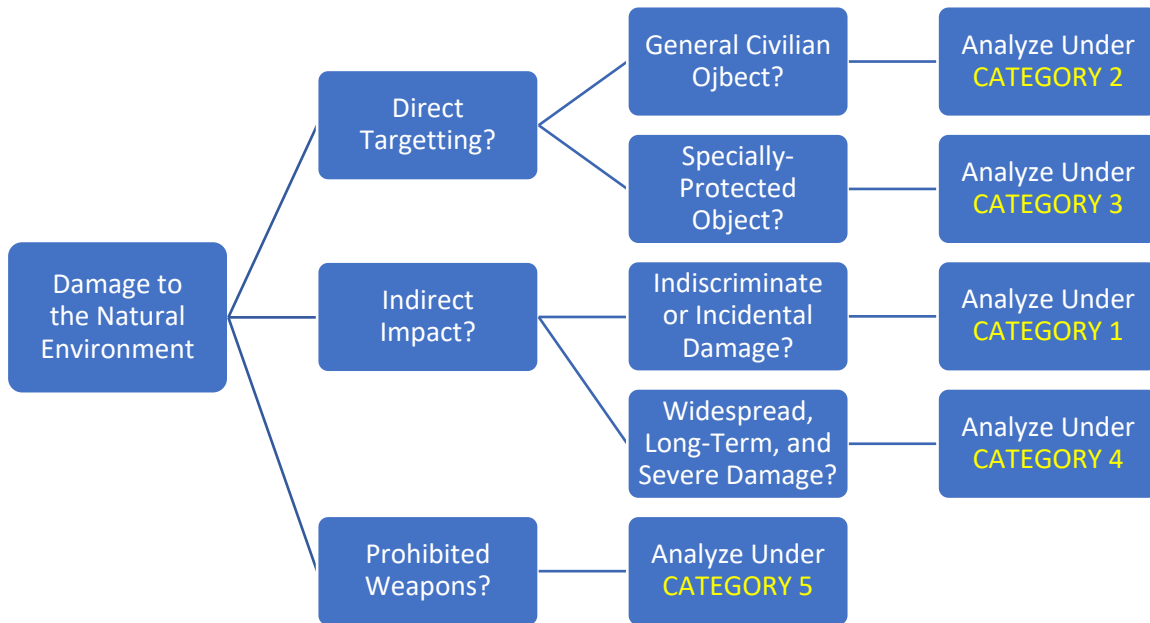
- b. *Attacks Indirectly Impacting the Natural Environment*:
 - i. Does the evidence suggest that an indiscriminate and/or disproportionate attack against a target other than the natural environment has nevertheless incidentally and excessively affected the natural environment? If so, analyze the situation preliminarily under the **Category 1** framework.
 - ii. If the evidence suggests that any such incidental damage to the natural environment has been widespread, long-term, *and* severe, then consider analyzing the situation under the **Category 4** framework (ICC only).

Separately, consider the following question.

- c. *Attacks Using Prohibited Weapons*: Does the evidence suggest that the natural environment may have been affected, directly or indirectly, by the use of any prohibited means of warfare, such as poisoned weapons, biological weapons, chemical weapons, herbicides, or incendiary weapons? If so, analyze the situation preliminarily under the **Category 5** framework.

As with the categories themselves, this suggested framing methodology is meant only as an analytical aid rather than a firm prescription. Further and deeper consideration of the underlying source material referenced in this Guide (and beyond) will be required.

- 55. Flowchart: The following diagram further simplifies the preliminary categorical analysis.



V. CONCLUSION

56. To date, ‘there has been little individual accountability for war crimes that concern the natural environment’.¹⁴⁷ The current situation in Ukraine presents an opportunity to narrow this significant gap in the international legal order. While none of the suggestions contained in this Guide are sure to succeed, they are all worth considering and integrating into the OPG’s domestic prosecutorial strategy and, equally, into its complementary relationships with the OTP and other strategic partners. With sufficient effort and coordination, there is reason to believe that at least some form of accountability for the environmental damage inflicted on Ukraine may be achieved.

* * *

¹⁴⁷ ICRC Guidelines on IHL and the Environment, para 318.

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. It is a member of the **Global Diligence Alliance**.



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ANNEX I

Summary of ICRC Protection Categories

‘Criminalization’ refers to grave breaches of the GCs and API applicable in Ukraine by way of CCU Article 438.

Category 1 - The Natural Environment as Civilian in Character

ICRC RULES	IHL SOURCES	CRIMINALIZATION
Rule 5 - Principle of distinction	API, Articles 48 and 52(2)	Article 85(3)(b) of API provides an applicable grave breach, namely <i>indiscriminate attacks affecting civilian objects</i> .
Rule 6 - Prohibition of indiscriminate attacks	API, Article 51(4)	
Rule 7 - Proportionality in attack	API, Article 51(5)(b)	
Rule 8 - Precautions	API, Article 57	
Rule 8 - Passive precautions	API, Article 58(c)	

GENERIC FACT PATTERN: For example, this category might apply where a fuel depot or a commercial agriculture or food-storage facility is targeted indiscriminately and the resulting damage—from fires, soil and/or groundwater contamination, pollutant emissions, etc—is both excessive and leads to death or serious injury to human health.

Category 2 - The Natural Environment as a Civilian Object

ICRC RULES	IHL SOURCES	CRIMINALIZATION
Rule 13 - Unjustified by military necessity	GCIV, Article 53	An applicable grave breach is provided by GCI, Art 50, GCII, Art 51, and GCIV, Art 147, namely <i>extensive destruction or appropriation of protected property unjustified by military necessity</i> .
Rule 14 - Prohibition of pillage	GCIV, Article 33(2)	
Rule 15 - Prohibition of undue appropriation	GCIV, Articles 53 and 55	

GENERIC FACT PATTERN: For example, this category might apply where: (i) forests or natural water sources are targeted directly without military justification and result in extensive damage; or (ii) where natural resources have been appropriated by occupying forces and used in violation of the principles of usufruct.

Category 3 – Specially-Protected Objects Other than the Natural Environment

ICRC RULES	IHL SOURCES	CRIMINALIZATION
Rule 10 – Objects indispensable to survival Rule 11 – Dangerous forces Rule 12 – Cultural property	API, Article 54(2) API, Article 56(1) API, Article 53	See Category 2. Article 85(3)(c) of API provides the applicable grave breach, namely <i>attacks against works or installations containing dangerous forces</i> . Article 85(4)(d) of API provides the applicable grave breach, namely <i>attacks against the cultural or spiritual heritage of peoples</i> .

GENERIC FACT PATTERN: For example, this category might apply where: (i) natural water sources are targeted directly without military justification and result in extensive damage; (ii) excessive attacks on nuclear power plants result in actual human harm; and/or (iii) attacks on portions of the natural environment considered to be culturally or spiritually significant that result in extensive damage.

Category 4 – Specific Protections Provided to the Natural Environment as Such (as a Specially-Protected Object)

ICRC RULES	IHL SOURCES	CRIMINALIZATION
Rule 2 – Widespread, long-term, and severe damage to the natural environment (NE)	API, Articles 35(3) and 55(1)	N/A. However, a progressive interpretation of API, Article 85(3)(b) may be advocated
Rule 3 – Destruction of the NE as a weapon	N/A	N/A
Rule 4 – Reprisals against the NE	API, Article 55(2)	N/A. However, a progressive interpretation of API, Article 85(3)(b) may be advocated

GENERIC FACT PATTERN: Examples of facts that would fit this category include the use of ‘agent orange’ by US forces in the Vietnam War and the burning of Kuwaiti oil fields by Iraqi forces in the First Gulf War.

Category 5 - General Protections Provided to the Natural Environment by Specific Rules on Prohibited Weapons

ICRC RULES	IHL SOURCES	CRIMINALIZATION
Rule 19–25 – poison or poisoned weapons, biological weapons, chemical weapons, certain herbicides, incendiary weapons, landmines, and explosive war remnants, including unexploded cluster munitions	CIL and various treaties	GCI, Article 50; GCII, Article 51; GCIV, Article 147

GENERIC FACT PATTERN: Factual scenarios related to this category will be self-evident depending on the prohibited means employed.

* * *

ANNEX II

Specific ICRC Rules Related to the Protection of the Natural Environment

Overarching Obligation

Rule 1 – Due regard for the natural environment in military operations: ‘Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment.’

Category 1 – Protection Afforded to the Natural Environment as Civilian in Character

Rule 5 – Principle of distinction between civilian objects and military objectives: ‘No part of the natural environment may be attacked, unless it is a military objective.’

Rule 6 – Prohibition of indiscriminate attacks: ‘Indiscriminate attacks are prohibited. Indiscriminate attacks are those: A. which are not directed at a specific military objective; B. which employ a method or means of combat which cannot be directed at a specific military objective; or C. which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects, including the natural environment, without distinction.’

Rule 7 – Proportionality in attack: ‘Launching an attack against a military objective which may be expected to cause incidental damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.’

Rule 8 – Precautions: ‘In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects, including the natural environment. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects, including the natural environment.’

Rule 9 – Passive precautions: ‘Parties to the conflict must take all feasible precautions to protect civilian objects under their control, including the natural environment, against the effects of attacks.’

Category 2 – Protection Afforded to the Natural Environment as a Civilian Object by the Rules on Enemy Property

Rule 13 – Prohibition of the destruction of the natural environment not justified by military necessity: ‘The destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.’

Rule 14 – Prohibition of pillage: ‘Pillage is prohibited, including pillage of property constituting part of the natural environment.’

Rule 15 – Rules concerning private and public property, including the natural environment, in case of occupation: ‘In occupied territory: (a) movable public property, including objects forming part of the natural environment, that can be used for military operations may be confiscated; (b) immovable public property, including objects forming part of the natural environment, must be administered according to the rule of usufruct; and (c) private property, including objects forming part of the natural environment, must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity.’

Category 3 – Protection Afforded to the Natural Environment by the Rules on Specially Protected Objects Other than the Natural Environment

Rule 10 – Prohibitions regarding objects indispensable to the survival of the civilian population: ‘Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited, including when such objects are part of the natural environment.’

Rule 11 – Prohibitions regarding works and installations containing dangerous forces: ‘A. Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population. B.i. For States party to Additional Protocol I, works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, may 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, subject to the exceptions specified in Article 56(2) of the Protocol. Other military objectives located at or in the vicinity of these works or installations may 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 [...].’

Rule 12 – Prohibitions regarding cultural property: ‘A. Property of great importance to the cultural heritage of every people, including such property which constitutes part of the natural environment, must not

be the object of attack or used for purposes which are likely to expose it to destruction or damage, unless imperatively required by military necessity. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, such property is prohibited. B. For States party to Additional Protocols I and II [...], directing acts of hostility against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, including when these are part of the natural environment, or using them in support of the military effort, is prohibited.'

Category 4 – The Natural Environment as a Specially-Protected Object

Rule 2 – Prohibition of widespread, long-term and severe damage to the natural environment: 'The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited.'

Rule 3 – Prohibition of using the destruction of the natural environment as a weapon: 'A. Destruction of the natural environment may not be used as a weapon. B. For States party to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), the military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party is prohibited.'

Rule 4 – Prohibition of attacking the natural environment by way of reprisal: 'A. For States party to Protocol I Additional to the Geneva Conventions (Additional Protocol I): i. Attacks against the natural environment by way of reprisal are prohibited. ii. Reprisals against objects protected under the Protocol are prohibited, including when such objects are part of the natural environment. B. For all States, reprisals against objects protected under the Geneva Conventions or the Hague Convention for the Protection of Cultural Property are prohibited, including when such objects are part of the natural environment.'

Category 5 – Protection of the Natural Environment Afforded by Rules on Prohibited Weapons

Rule 19 – Prohibition of using poison or poisoned weapons: 'The use of poison or poisoned weapons is prohibited.'

Rule 20 – Prohibition of using biological weapons: 'The use of biological weapons is prohibited.'

Rule 21 – Prohibition of using chemical weapons: 'The use of chemical weapons is prohibited.'

Rule 22 – Prohibition of using herbicides as a method of warfare: ‘The use of herbicides as a method of warfare is prohibited if they: A. are of a nature to be prohibited chemical weapons; B. are of a nature to be prohibited biological weapons; C. are aimed at vegetation that is not a military objective; D. would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation to the concrete and direct military advantage anticipated; or E. would cause widespread, long-term and severe damage to the natural environment.’

Rule 23 – Incendiary weapons: ‘A. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects, including the natural environment. B. For States party to Protocol III to the Convention on Certain Conventional Weapons, it is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons, except when these are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.’

Rule 24 – Landmines: ‘[omitted for now: long and complex]’

Rule 25 – Minimizing the impact of explosive remnants of war, including unexploded cluster munitions: ‘[omitted for now: long and complex]’

* * *

ANNEX III

Laws Related to the Protection of the Natural Environment

A. Ukrainian Law

Criminal Code of Ukraine, Article 438:

1. Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labour, pillage of national treasures on occupied territories, use of means of warfare prohibited by international law, or any other violations of laws and customs of warfare recognised by international instruments consented to as binding by the *Verkhovna Rada* of Ukraine, and also giving an order to commit any such actions, – shall be punishable by imprisonment for a term of eight to twelve years. [...]

B. IHL – Grave Breaches of the Geneva Conventions of 1949 and Protocol I of 1977

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Article 50:

Grave breaches [...] shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Article 51:

[ditto]

Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 147:

Grave breaches [...] shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 85 – Repression of breaches of this Protocol:

[...]

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or

against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- (a) making the civilian population or individual civilians the object of attack;
- (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);
- (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);
- (d) making non-defended localities and demilitarized zones the object of attack;
- (e) making a person the object of attack in the knowledge that he is *hors de combat*;
- (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

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 willfully and in violation of the Conventions or the Protocol:

- (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
- (c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (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, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial. [...]

C. ICL – Rome Statute, Article 8

2. For the purpose of this Statute, “war crimes” means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: [...]

(iii) Willfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; [...]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...]

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; [...]

(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; [...]

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; [...]

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; [...]

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions; [...]

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...]

(v) Pillaging a town or place, even when taken by assault; [...]

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; [...]

* * *

ANNEX IV

Categorical Summary: Reference Table

CAT	SOURCE	ENVIRONMENTAL TARGETING	ENVIRONMENTAL IMPACT	MILITARY BALANCE	HUMAN HARM	MENS REA
1	API, Art 85(3)(b)	Indirect: indiscriminate/incidental	Excessive damage to NE	In relation to concrete and direct military advantage	Death or serious injury to body or health	Willfully + knowledge that will cause damage
2	GCI, Art 50	Direct: general civilian object	Extensive destruction, appropriation, or pillage of NE	Not justified by military necessity	Not required	Unlawfully and wantonly
3a	GCI, Art 50	Direct: specially-protected object: food or water sources	Extensive destruction, appropriation, or pillage of NE	Not justified by military necessity	Not required	Unlawfully and wantonly
3b	API, Art 85(3)(c)	Direct: specially-protected object: works or installations containing dangerous forces	Excessive damage to NE	In relation to concrete and direct military advantage	Death or serious injury to body or health	Willfully + knowledge that will cause damage
3c	API, Art 85(4)(d)	Direct: specially-protected object: part of NE recognized as culturally or spiritually significant	Extensive destruction of NE	Where the adverse party has not used NE in support of its military effort and where NE is not located in the immediate proximity of military objectives	Not required	Willfully

See Prosecutor v Kordić and Čerkez, IT-95-14/2-T, Judgement, 26 February 2001: ‘Extensive’ damage = large scale; ‘Wanton’ = reckless disregard for likelihood of causing damage.

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