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CLIMATE COUNSEL SUBMISSION TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

Maximizing Environmental Protection Under the Rome Statute

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I. INTRODUCTION

1. Climate Counsel hereby submits its initial comments (the 'CC Initial Comments') on the forthcoming policy paper on environmental crimes to be issued by the Office of the Prosecutor ('OTP') of the International Criminal Court ('ICC').[1] Specifically, within the wider ambit of the OTP's invitation for comment, Climate Counsel addresses 'what specific crimes within the Court's jurisdiction should be included in the policy paper'.[2] As indicated in the invitation, Climate Counsel bases its initial positions on 'the Rome Statute and other regulatory instruments of the Court, as well as on applicable environmental treaties, rules of customary international law, and the jurisprudence of other international and national courts'.[3] Where appropriate, reference is made to relevant scholarship. In light of the initial nature of the OTP invitation, this submission is brief.[4] It consists of two main points: (a) Article 8 of the Rome Statute on war crimes can be fully harmonized with existing conventional and customary international humanitarian law ('IHL') as it applies to the natural environment; and (b) Article 7 of the Rome Statute on crimes against humanity provides a sufficient analytical framework to incorporate environmental damage as a criminal means, result, and/or impact.

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1 *See* ICC-OTP Statement, 'The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute', 16 February 2024 ('The Prosecutor of the International Criminal Court […] is pleased to announce a new policy initiative to advance accountability for environmental crimes under the Rome Statute. The Office of the Prosecutor is commencing today a process that will culminate in a comprehensive policy paper on Environmental Crimes, aiming to ensure that it takes a systematic approach to dealing with crimes within the Court's jurisdiction committed by means of, or that result in, environmental damage.')

2 ICC-OTP Statement, 'The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute', 16 February 2024. *Nb*. Climate Counsel takes no position at this early stage on 'how to understand and apply the applicable modes of participation in those crimes; best practices for investigating and prosecuting crimes that can be committed by means of or that result in environmental damage; and how to consider environmental crimes when putting into practice the principle of complementarity and engaging in international cooperation'. *Ibid*.

3 ICC-OTP Statement, 'The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute', 16 February 2024.

4 The current international armed conflict in Ukraine has provided a kind of incubator (if not yet a proving ground) for many of the issues addressed below. In this context, Climate Counsel has prepared the 'Guide to Identifying and Framing Environmental War Crimes in Ukraine', 2d Rev Ed, 8 March 2024 (the 'CC Guide'). Download the Guide here: https://www.climatecounsel.org/warcrimes

2. Regarding war crimes: (a) conventional and customary IHL recognize a wide range of robust environmental protections; (b) as a matter of law, the various war crimes contained in Article 8 of the Rome Statute *can* fully accommodate existing IHL prohibitions; and (c) as a matter of policy, the OTP *should* aim for maximum environmental protection within the bounds of established international criminal law ('ICL').

3. Regarding crimes against humanity, the OTP's 2016 policy paper provides a strong starting point. However, under its current leadership, the OTP should endeavor to fully operationalize what was stated but never actually implemented. Many previously submitted Article 15 communications—by Climate Counsel, Global Diligence, and others—provide useful roadmaps. Again, the OTP *can* and *should* aim for maximum environmental protection within the bounds of established ICL.

II. ENVIRONMENTAL WAR CRIMES UNDER ARTICLE 8 OF THE ROME STATUTE

A. Conventional and Customary IHL Recognize a Wide Range of Robust Environmental Protections

4. For almost half a century, IHL's approach to the natural environment has advanced at something of a snail's pace through the world's established penal systems (both domestic and international). With the adoption of the First Additional Protocol ('API') to the Geneva Conventions in 1977,[5] environmental damage was prohibited but not clearly criminalized.[6] In 1994, the International Committee of the Red Cross ('ICRC') issued its first set of environmental IHL guidelines for members of the armed forces.[7] In 1998, the Rome Statute included the first explicit reference to the natural environment as the obvious subject of an international crime.[8] In 2005, the ICRC Customary IHL Study broke new ground by announcing the crystallization of three important environmental rules.[9] In 2020, based in part on those customary pronouncements and subsequent state practice, the ICRC issued a second edition of its guidelines.[10] The 2022 principles of the International Law Commission ('ILC') seconded the ICRC.[11] And reams of pages have been published on these topics over the years by a wide range of commentators; a 2023 issue of the International Review of the Red Cross (weighing-in at 600 pages) is the most recent example.[12] Collectively, this vast body of law, commentary, and scholarship has raised many questions but fewer answers. And while many of the details are hotly debated, it is clear that in

5 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977.
6 *See* CC Guide, paras 21–25.
7 ICRC, 'Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict', 30 April 1996, International Review of the Red Cross, No 311 (as a follow-up to the International Conference for the Protection of War Victims of 1993).
8 Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force on 1 July 2002, United Nations Treaty Series, vol 2187, no 38544.
9 ICRC, 'Customary International Humanitarian Law Volume I: Rules', Jean-Marie Henckaerts & Louise Doswald-Beck (Cambridge 2005), Rules 43–45.
10 ICRC, 'Guidelines on the Protection of the Natural Environment in Armed Conflict', September 2020.
11 ILC, 'Principles on protection of the environment in relation to armed conflicts', Resolution adopted by the General Assembly on 7 December 2022, 77/104. Protection of the environment in relation to armed conflicts, A/RES/77/104, 19 December 2022.
12 IRRC, 'Protecting the Environment in Armed Conflict', vol 105 no 924, December 2023.

2024 the issue of how and to what extent conventional and customary IHL protect the natural environment in armed conflict is firmly on the agenda: both in Ukraine and at The Hague.[13]

5. Climate Counsel takes the position that IHL's robust environmental protection regime rests on three key propositions:

   a. *The Natural Environment Should Be Understood Broadly*: The OTP should approach the natural environment expansively, in the 'widest sense possible', to include 'everything that exists or occurs naturally'.[14]

   b. *Broadly Understood, the Natural Environment is Protected in Three Distinct Ways*: The OTP should acknowledge the three *general* ways in which established IHL prohibitions afford various types of protection to the natural environment:

      (i) The First Category of Protection: The natural environment is *directly* protected as a general *civilian object*—unless and until it becomes a legitimate military objective—by the IHL rules on targeting and attack as set out in API. As a civilian object, the natural environment shall not be the object of attack unless and until it becomes a military target (principle of distinction). As a military target, the natural environment enjoys two levels of protection from excessive incidental damage: (1) the general legal framework applicable to other civilian objects (principles of proportionality and precaution) as well as (2) a heightened level of protection as a specially-protected civilian object, pursuant to which, the natural environment may never be subjected to widespread, long-term, and severe damage. Here all the relevant IHL is found in API and related custom.[15]

      (ii) The Second Category of Protection: The natural environment is *directly* protected by the IHL rules on *enemy property* as set out in GCIV and HRIV. As enemy property, the natural environment may not be destroyed, appropriated, and/or seized when the adversary controls or occupies territory. Here all the relevant IHL is found in the Geneva Conventions, Hague Regulations, and related custom.[16]

      (iii) The Third Category of Protection: The natural environment is *directly* and *indirectly* protected by the various IHL rules on prohibited weapons. Here all the relevant IHL is found in various conventions and related custom.[17]

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[13] *See*, e.g., Richard J Rogers, Kate Mackintosh, and Maksym Popov, 'No Longer the Silent Victim: How Ukrainian Prosecutors Are Revitalizing Environmental War Crime Law', Just Security, 23 January 2024.

[14] ICRC Guidelines on IHL and the Environment, para 16. Such an understanding is both 'in line with the meaning states have given it in the context of IHL' and 'accords with the fact that the notion of the "natural environment" may evolve over time'. ICRC Guidelines on IHL and the Environment, para 17. *Nb*. There has been some disagreement among states between the so-called 'anthropocentric' and 'intrinsic-value' approaches to environmental harm. *See ibid*, para 19. However, in Climate Counsel's view, this presents something of a false dichotomy given the fundamental importance of the natural environment to humans. In any case, the latter approach is preferable. *See ibid* ('This approach recognizes the intrinsic dependence of all humans on the natural environment, as well as the still relatively limited knowledge of the effects of armed conflict on the environment and the implications of this for civilians.')

[15] *See* CC Guide, paras 16–35.

[16] *See* CC Guide, paras 36–43.

[17] *See* CC Guide, paras 44–46.

c. *These Categorical Prohibitions Amount to War Crimes*: Finally, the OTP should appreciate that the important IHL prohibitions underlying these three categories have been criminalized as either grave breaches or other serious violations of IHL.[18]

Accepting these propositions and acknowledging the dynamism of both IHL and ICL, the OTP can and should operationalize environmental war crimes ('EWCs') as a matter of policy.

6. Custom has played an essential role in IHL's progression from concept to crime. The framework outlined in the previous paragraph is based in large part on three customary IHL propositions contained in the ICRC's CIHL Study: Rules 43 to 45.[19] For present purposes, the validity of those propositions is taken for granted.[20] (While national and international jurisprudence provide only limited clarification and guidance, state practice is better reflected in military manuals.[21]) As demonstrated below, based on its own explicit terms, Article 8 can undoubtedly accommodate this customary evolution. Ultimately, the OTP should critically assess the strength of the customary rules and determine for itself whether in 2024 the propositions are truly supported by sufficient state practice and *opinio juris*. In any case, even assuming ambiguity on this score, ICC jurisprudence permits a progressive approach under the established framework of IHL.[22]

B. Article 8 of the Rome Statute Can Fully Accommodate Existing IHL

1. On Its Face, Article 8 Aligns with the Full Range of Possible EWCs

7. Since 1998, serious violations of IHL have been generally restated in one place: Article 8 of the Rome Statute, which provides a useful catalogue of established war crimes (the specific elements of which are stated separately in the ICC Elements of Crimes). As noted by the ICC Appeals Chamber, '[i]n principle […] the crimes under the [Rome] Statute were intended to be generally representative of the state of customary international law when the [Rome] Statute was drafted'.[23]

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18 *See* CC Guide, paras 26–28, 36–39, 44.

19 See ICRC CIHL Study, 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; and Rule 45. Causing Serious Damage to the Natural Environment

20 *Nb*. The authors understand that not all commentators agree. *See*, *e.g.*, W. Casey Biggerstaff and Michael N. Schmitt, 'Protecting the environment in armed conflict: Evaluating the US perspective', *International Review of the Red Cross*, Volume 105, Number 924, December 2023.

21 *See* ICRC CIHL Study, Practice Relating to Rules 43–45.

22 *See* fn 43, *infra*.

23 Adb-Al-Rahman Judgment, para 89 (citing various and notably conflicting scholars, omitted).

This applies to the war crimes listed in Article 8,[24] each of which is an established serious violation of IHL[25] including those hereby characterized as EWCs.[26]

a. As a Civilian Object, the Natural Environment is Covered by the Article 8 Crimes on Targeting/Attack

8. Comparative Chart:

War Crime	IHL Source	Rome Statute Analogue
Attacking Civilian Objects	This is a serious violation of IHL pursuant to API, Art 52(1). The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 7, 43–45, 156.	Article 8(2)(b)(ii): References to 'civilian objects' here and in the ICC Elements include the natural environment.
Indiscriminate / Disproportionate Attack	This is a serious violation of IHL pursuant to API, Arts 35(3), 55(1), 57(2)(a)(iii); and 85(3)(b). The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 14, 43–45, 156.	Article 8(2)(b)(iv): References to 'civilian objects' here and in the ICC Elements include the natural environment in the general sense, while specific references to 'the natural environment' indicate special protection (as clarified below)

9. Clarifications: The protection afforded by these two EWCs can be summarized as follows: (a) as a general civilian object, the natural environment can *never* be intentionally targeted directly or made the object of reprisals (an absolute prohibition); (b) if and when the natural environment becomes a legitimate military objective or adjacent to such, it cannot be incidentally damaged *excessively* in relation to the concrete and direct overall military advantage anticipated (a qualified prohibition); (c) the natural environment itself can *never* be incidentally subjected to widespread, long-term, and severe damage (an absolute prohibition); such damage is by definition 'clearly excessive'.[27] Any protections offered to the natural environment by the rules on other specially-

[24] Otto Triffterer and Kai Ambos (eds), 'Rome Statute of the International Criminal Court: A Commentary', 3d Ed, 2016 ('Triffterer & Ambos'), para 26, page 311 ('Since the drafters of Article 8 as well as the war crimes elements generally intended to reflect established humanitarian law, their product generally can be perceived, despite the fact that the elements do not legally bind the ICC judges, as indicating the *opinio juris* of a high number of states as to the current state of the customary international law relating to war crimes.')

[25] Triffterer & Ambos, para 2, page 305 ('Only those violations of IHL that have been specifically "criminalized", that is, for the perpetration of which customary or treaty international law establishes individual criminal responsibility, may qualify as war crimes.'); *ibid*, para 19, page 309 ('Delegations informally came to broadly agree on two cumulative criteria to select and define the war crimes to be included under the Draft Statute: First, the conduct concerned must amount to a violation of customary international humanitarian law. Secondly, the violation of humanitarian law concerned must be criminalized under customary international law.') *But see* fn 43, *infra*.

[26] *Nb*. In Climate Counsel's view, the proper focus here is on the violations themselves, rather than each constituent part or every conceivable instance of such. It is beyond doubt that the individual offenses catalogued in Article 8 attract individual criminal responsibility. Given jurisprudential developments at the ICC, it need not be further established that each and every aspect of API inherent in those crimes has been further criminalized. *See* fn 43, *infra*. The established framework of IHL will provide the necessary clarification. *Ibid*; *see also* Triffterer & Ambos, para 45, page 317 ('The short definitions of the 53 war crimes under article 8 are far from being self-explanatory and the non-binding Elements of (War) Crimes provide only occasionally and in most cases only limited clarification. Therefore, one would still be at loss to adequately understand the elements of the individual war crime *without referring to international humanitarian law*.') (emphasis added).

[27] While 'Attacking Civilian Objects' is straightforward, the analysis required for 'Indiscriminate/Disproportionate Attack' is more complex. Any incidental environmental damage will need to be understood in light of the natural environment's specially-protected status (under both conventional and customary IHL). Therefore: (a) regular incidental environmental damage (harm that does not meet the widespread, long-term, and severe threshold) is subject to the normal proportionality assessment.

protected objects—those containing dangerous forces (dams, dykes, nuclear-electrical generating stations),[28] those necessary for the survival of the civilian population (natural food or water sources),[29] or those properly understood as cultural objects[30]—are contained in these two EWCs (and others discussed below).

10. Conclusion: The OTP can give full effect to *all* of API's key prohibitions with respect to the natural environment by way of Articles 8(2)(b)(ii) and 8(2)(b)(iv) as EWCs.

b. The Natural Environment is Covered by the Article 8 Crimes on Enemy Property

11. Comparative Chart:

War Crime	IHL Source	Rome Statute Analogue
Destruction and Appropriation of Property	This is a serious violation of IHL pursuant to GCI, Art 50; GCII, Art 51; GCIV, Art 147.	Article 8(2)(a)(iv): References to 'property' here and in the ICC Elements includes the natural environment.
Destroying or Seizing Enemy Property	This is a serious violation of IHL pursuant to HRIV, Art 23(g). The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 50, 51, 156.	Article 8(2)(b)(xiii): References to 'property' here and in the ICC Elements includes the natural environment.
Pillaging	This is a serious violation of IHL pursuant to HRIV, Art 28. The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 52, 156.	Article 8(2)(b)(xvi): References to 'property' here and in the ICC Elements includes the natural environment.

12. Clarifications: Given the comprehensive protections afforded to the natural environment in cases of targeting/attack (under the previous category), the three specific EWCs in this category will typically apply in cases where parts of the natural environment (especially natural resources) have been taken by a hostile party without military justification.

This applies to any attack which is not directed at the environment, but causes incidental harm to the environment (and possibly other civilian objects); (b) when incidental environmental damage reaches the widespread, long-term, and severe threshold, that damage should be considered *ipso facto* disproportionate (and should be deemed so as a matter of law) to the military advantage anticipated. *See* ICRC Customary IHL Study, Rule 45.

[28] Works or installations containing dangerous forces will almost always be considered civilian objects, in which case they are covered by 'Attacking Civilian Objects' (and/or 'Destroying or Seizing Enemy Property', discussed below). However, 'Indiscriminate/Disproportionate Attack' applies where (i) such works or installations are military objectives, for example, where an attack upon them would give a concrete and direct military advantage as in the case of 'dam-busting' or (ii) in cases of attacks against military objectives located at or in the vicinity of such works result in excessive incidental civilian casualties or damage. As noted, the special protection provided by API Article 56 only applies when a dam (or other such work/installation) is a military target; otherwise, it is treated as a normal civilian object under API Article 52. *See* ICRC Guidelines on IHL and the Environment, paras 113, 164; *see also* ICRC, CIHL Study, Rule 156, Commentary.

[29] In cases where the destruction of natural food and/or water sources (as parts of the natural environment) are accompanied by the intention of the perpetrator to starve the civilian population), the natural environment may benefit from indirect protection. The elements of the war crime of 'Starvation as a Method of Warfare' are defined by Rome Statute, Article 8(2)(b)(xxv) ('1. The perpetrator deprived civilians of objects indispensable to their survival. 2. The perpetrator intended to starve civilians as a method of warfare. […].') But note that this is not strictly an EWC.

[30] Moreover, the specific war crime covering defined cultural property (Article 8(2)(b)(ix)) will not likely apply to the natural environment, which is not clearly a 'historic monument'. *See also* ICRC Guidelines on IHL and the Environment, Rule 12 – Prohibitions Regarding Cultural Property. Again, this cannot be considered an EWC in any practical sense.

13. Conclusion: The OTP can give full effect to *all* of the GCs and HRs key prohibitions with respect to the natural environment by way of Articles 8(2)(a)(iv), 8(2)(b)(iii), and 8(2)(b)(xvi) as EWCs.

c. The Natural Environment is Covered by the Article 8 Crimes on Prohibited Weapons

14. Comparative Chart:

War Crime	IHL Source	Rome Statute Analogue
Willfully Causing Great Suffering	This is a serious violation of IHL pursuant to GCI, Art 50; GCII, Art 51; GCIII, Art 130; GCIV, Art 147.	Article 8(2)(a)(iii): Any damage to the natural environment (a secondary consideration) would need to be linked to great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
Employing Poison or Poisoned Weapons	This is a serious violation of IHL pursuant to HRIV, Art 23(a). The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 72, 156.	8(2)(b)(xvii): Any damage to the natural environment (a secondary consideration) would need to be linked to death or serious damage to health.
Employing Prohibited Gases, Liquids, Materials, or Devices	This is a serious violation of IHL pursuant to 1925 Geneva Protocol. The customary nature of the violation is clarified by the ICRC CIHL Study, Rules 73–76, 156.	Article 8(2)(b)(xviii): Any damage to the natural environment (a secondary consideration) would need to be linked to death or serious damage to health.

15. Clarifications: This category does not strictly define EWCs. Rather, it may provide direct or indirect environmental protection by prohibiting and further criminalizing the use of certain weapons, which may—by their very nature—damage the natural environment if employed. However, as these offenses are firmly rooted in the prohibition against harming civilians, no actual environmental damage is required to prove them.

16. Conclusion: The OTP can give full effect to *all* of IHL's key prohibitions with respect to the natural environment by way of Articles 8(2)(a)(iii), 8(2)(b)(xvii), and 8(2)(b)(xviii) as EWCs.

2. The Rules of Statutory Interpretation at the ICC Support This Alignment

a. Generally

17. When it comes to interpreting international treaties like the Rome Statute, the starting point is the Vienna Convention on the Law of Treaties.[31] Its key provisions are Article 31 (General Rule of

[31] Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980), UN Treaty Series, vol 1155, p 331 (the 'Vienna Convention'), Section 3. Interpretation of Treaties.

Interpretation)[32] and Article 32 (Supplementary Means of Interpretation).[33] ICC Chambers have consistently adopted the methodology set out in those provisions.[34]

18. The 'General Rule' (Article 31) calls for a 'holistic approach' to the consideration of three key 'ingredients': the ordinary meaning of the text, its context, and its object and purpose.[35] Under the General Rule, '[w]here the founding texts do not specifically resolve a particular issue, the [ICC] must refer to treaty or customary humanitarian law and the general principles of law'.[36] Notably, 'the text of the [Rome] Statute itself refers at times to external sources', as in the case 'for war crimes under Articles 8(2)(a) and 8(2)(b) of the Statute, which refer verbatim to the Geneva Conventions and "the established framework of international law".'[37] The latter includes custom.[38] Finally, the General Rule indicates that 'special meaning shall be given to a term if it is established that the parties so intended'.[39]

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[32] Vienna Convention, Article 31 ('1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.')

[33] Vienna Convention, Article 32 ('Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.')

[34] *See Prosecutor v Katanga*, Case No ICC 01/04-01/07, Trial Chamber II, Judgment Pursuant to Article 74 of the Statute, 7 March 2014 (the 'Katanga Trial Judgment'), paras 43–49 (on the 'Method adopted by the Chamber for the interpretation of the founding texts of the Court') (citing various ICC Appeals Chamber, Trial Chamber, and Pre-Trial Chamber judgments and decisions).

[35] Katanga Trial Judgment, para 45 ('[…] This method of interpretation [under Article 31(1)] prescribes that the various ingredients—the ordinary meaning, the context, and the object and purpose—be considered together in good faith. The General Rule, which therefore refers to a holistic approach, does not establish any hierarchical or chronological order in which those various ingredients are to be examined and then applied. On the contrary, it enumerates various elements which must be simultaneously taken into account in a single process of interpretation. In other words, the ordinary meaning, the context, and the object and purpose must be considered together, not individually. Accordingly, a bench cannot decline to draw on a particular element of the General Rule because, as noted above, its ingredients form a whole.') (internal citations omitted). *Nb*. This approach must be undertaken in 'good faith' pursuant to the 'principle of effectiveness'. Katanga Trial Judgment, para 46 ('The principle of effectiveness of a provision also forms an integral part of the General Rule as that Rule mandates good faith in interpretation. Thus, in interpreting a provision of the founding texts, the bench must dismiss any solution that could result in the violation or nullity of any of its other provisions.') (internal citations omitted).

[36] Katanga Trial Judgment, para 47 ('Article 31 of the Vienna Convention also provides that in addition to the context consideration shall be given to "any relevant rules of international law applicable in the relations between the parties". The General Rule provides that, to interpret or impart meaning to a provision of a treaty, the bench may rely on rules extraneous to the text concerned (in this case, the founding texts) where it is established that they are applicable to the relations between the States Parties. Where the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty or customary humanitarian law and the general principles of law. […] Nonetheless, the ultimate meaning which the Chamber will apply must always be underpinned by the above-mentioned method of interpretation, which means that it must construe, in good faith, the terms used in accordance with their ordinary meaning, considered in their context and in the light of the purpose and object of the Statute.') (internal citations omitted).

[37] Katanga Trial Judgment, para 48 ('The Chamber notes that, as regards the interpretation and application of the statutory provisions, the text of the Statute itself refers at times to external sources. This is the case, for example, for war crimes under articles 8(2)(a) and 8(2)(b) of the Statute, which refer verbatim to the Geneva Conventions and "the established framework of international law".') (referring to Rome Statute, Article 21(3)).

[38] *Nb*. The Rome Statute explicitly mentions custom only twice: when defining two categories of 'war crimes' in the chapeaux of Article 8(2)(b) and 8(2)(e). *See* Rome Statute, Article 8(2)(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: […].') and Article 8(2)(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: […].') (emphasis added).

[39] Vienna Convention, Article 31(4) ('A special meaning shall be given to a term if it is established that the parties so intended.')

19. If however—after careful application of the General Rule—the meaning of any particular provision is still 'ambiguous or obscure' or the proposed interpretation would be 'manifestly absurd or unreasonable', then the arbiter may 'have recourse to the supplementary means of interpretation' (Article 32) 'such as the preparatory work of the treaty and the circumstances of its conclusion'.[40]

20. Pursuant to this well-established analytical framework, Climate Counsel submits that a good-faith examination of Article 8 reasonably leads to the following conclusions:

    a. '*The ordinary meaning to be given to the terms of the treaty*': On their face, the terms in question—'civilian objects' and 'property'—include the 'natural environment' per established conventional and customary IHL (as above). Accordingly, wherever these two terms appear in Article 8, they should *prima facie* include the natural environment.

    b. '*In their context*': The terms in question are situated in Article 8, which for present purposes catalogs the various war crimes applicable at the ICC as either: (i) grave breaches of the GCs per Article 8(2)(a) or (ii) other serious violations of IHL 'within the established framework of international law' per Article 8(2)(b). The context includes reference to the ICC Elements of Crimes, as adopted by the parties pursuant to Article 9. Here it is relevant to (re)consider that Article 8 was meant to reflect custom as of 1998 however imperfectly its provisions may have been stated.[41] This begs a central question: Does the context require a static/conservative approach or does it allow for a dynamic/progressive evolution? In other words, was the Article 8(2)(b) chapeau designed to strictly preserve the Rome Statute in amber circa 1998 or potentially expand the ambit of the various offenses by means of the progressive nature of custom? Cleary it is the latter.[42] IHL's conception of the natural environment should be understood to have evolved considerably since 1998 as indicated by the various sources cited above. Accordingly, the operative contextual element—*the established framework of international law*—includes those customary developments.[43]

    c. *'In the light of its object and purpose'*: The general object and purpose of the Rome Statute is set out in its preamble and Article 1, neither of which has any particular bearing on the

[40] Katanga Trial Judgment, para 49 ('It must also be recalled that, in addition to the General Rule, Article 32 of the Vienna Convention provides for "supplementary means of interpretation" such as the preparatory work of the treaty and the circumstances of its conclusion. Having examined the texts in accordance with the General Rule, the bench may then have recourse to the supplementary means of interpretation to confirm the meaning resulting from the application of Article 31, or to determine the meaning of a provision where the interpretation according to Article 31 "leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable".') (internal citations omitted). The '*travaux préparatoires* of a treaty are only supplementary means of interpretation, to which recourse may only be had to confirm an interpretation or if the interpretation leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result'. *Prosecutor v Jean-Pierre Bemba Gombo et al*, Case No ICC-01/05-01/13, Appeals Chamber, 'Judgment on the appeals of Mr Jean-Pierre Bemba Gombo [et al] against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"', 8 March 2018, para 679 (citing Vienna Convention, Article 32).

[41] Triffterer & Ambos, para 51, page 318 (Regarding Article 8(2)(b), 'the war crimes under sub-paragraph b have been drawn from a number of sources, namely Additional Protocol I of 1977, the 1907 Hague Regulations, other particular international instruments such as treaties prohibiting certain weapons, and customary international humanitarian law.')

[42] *Nb*. The ICC has already taken a progressive approach to the interpretation of crimes under its mandate. *See* fn 43, *infra*. Like the interests of vulnerable young women and girls (in the *Ntaganda* case), there is no reason the same approach should not be taken with respect to a fundamental concern to all human beings—the preservation of the natural environment.

[43] See *Prosecutor v Ntaganda*, ICC-01/04-02/06, Appeals Chamber, 'Judgment on the appeal of Mr Ntaganda against the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9', 15 June 2017.

questions presented. However, the object and purpose of Article 8 is clear and telling: criminalization/codification of serious violations of IHL (war crimes) within the bounds of 'existing' convention and custom. The object and purpose of Article 8's individual sub-provisions is to give specific effect to the more general object and purpose of Article 8. For present purposes, this can be understood as: maximum protection of civilian objects and enemy property as well as the regulation of prohibited weapons, within the bounds of IHL by way of permissible international criminal sanction. Again, assuming dynamism over stasis, the object and purpose of Article 8 allows the OTP to proceed as indicated.

Therefore, in Climate Counsel's view, a 'holistic' analysis of these three inter-related 'ingredients' leads to the *preliminary* conclusion that Article 8 can accommodate EWCs as stated above.

21. Finally, for purposes of the General Rule, there is no indication that the parties—that is: the states who signed the Rome Statute not the individuals who participated in drafting it—intended that any 'special meaning' should be given to the terms 'civilian object', 'property', or 'natural environment'. Each term is used without any qualification in the text of Article 8, the ICC Elements of Crimes, or elsewhere of relevance. (It is notable that the Elements contain some 75 explanatory footnotes, not one of which qualifies the meaning of 'civilian object', 'property', or 'natural environment' in any way.) Therefore, these terms should be understood to mean what IHL says they mean (as above). Thus read, a kind of superficial harmony between IHL prohibitions and Article 8 crimes is evident. Accordingly, the *prima facie* interpretation set out in the previous paragraph is undisturbed. But not so fast; there is a major exception.

b. The Article 8(2)(b)(iv) Challenge

22. To a close reader of Article 8 in 2024—one reasonably au fait with the relevant law and associated academic literature—ambiguity swirls around Article 8(2)(b)(iv): does its distinct references to 'civilian objects' (second prong) and the 'natural environment' (third prong) actually allow for the interpretation posed in paragraph 9 above? Or does it reflect, as some have suggested, a kind of *lex specialis* regime whereby the latter (third prong) somehow trumps the former (second prong)? The distinction lies in the manner in which the proportionality test applies across both prongs (as noted above).

23. According to Climate Counsel, if the parties to the Rome Statute clearly intended to impose the *lex specialis* regime, surely they would have made that clear. They did not. In fact, they adopted a provision with three distinct prongs that on their face lead to the confusion indicated. Moreover, the *lex specialis* principle is meant to resolve conflicting provisions by subordinating a general rule to a specific one (where the latter is typically conceived as an exception to the former). But this is not the case with Article 8(2)(b)(iv). Rather than a conflict between two irreconcilable terms, IHL imposes two complementary approaches to the protection of the environment from (excessive) incidental when a military object is targeted—indeed, one general and one specific.

However, they are by design meant to exist in tandem (per above). Simply put: there is no obvious conflict.

24. Admittedly, the application of the General Rule may not definitively settle this particular Article 8(2)(b)(iv) inquiry. On the one hand, the interpretation proposed by Climate Counsel may leave 'the meaning ambiguous or obscure', while on the other hand the *lex specialis* view may lead 'to a result which is manifestly […] unreasonable'. The answer, perhaps, lies in the legislative history of the Rome Statute. Applying the Vienna Convention's Supplementary Rule (Article 32), clarification is sought in 'the preparatory work of the treaty and the circumstances of its conclusion'. Is any light shed on the intended scope of the Rome Statute as it relates to EWCs in general and the specific ambit of 8(2)(b)(iv) in particular? In fact, while there appears to have been much debate around the manner in which the principle of proportionality would be applied under Article 8(2)(b)(iv), there does not appear to have been any detailed discussion of general versus special protection of the natural environment.[44] If the Climate Counsel position was not even considered in the lead up to 1998 (or for that matter afterwards), then the legislative record cannot be said to negate the positions advanced above. Therefore, the clarifying value of the preparatory works is highly, if not completely, limited.

25. Assuming (for purposes of argument) the *lex specialis* approach was in fact the desired outcome of the parties to the Rome Statue, two important questions remain: (a) With respect to the current and actual state of customary IHL, has state practice and *opinio juris* materially progressed beyond its status in 1998? (b) And, if so, can Article 8 accommodate such progress? For the reasons already stated above, the answer to the first question is very likely yes. And the answer to the second question is yes again—but this time emphatically so. Accordingly, the OTP *can* interpret Article 8(2)(b)(iv) in the manner Climate Counsel suggests.

[44] A review of the publicly-available 'Prep Com' materials does not provide any meaningful clarification. While greater detail may lie in the individual submissions of the various state delegations, Climate Counsel has not seen these. Upon information and belief, the preparatory discussion of Article 8(2)(b)(iv) only reveals that three different proportionality options were debated—none of which sheds any light on the matter at hand. *See* Mark Drumbl 'International Human Rights, International Humanitarian law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?', ILSA Journal of International& Comparative Law, Volume 6:305, p 312; Steven Freeland, 'Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court', *Intersentia*, Cambridge, 2015, p 206. Commentators have suggested that the mere addition of a proportionality test *in and of itself* indicated that environmental considerations were secondary to military objectives. *See* Helen Obregón Gieseken and Vanessa Murphy, 'The protection of the natural environment under international humanitarian law: The ICRC's 2020 Guidelines', *International Review of the Red Cross*, Volume 105, Number 924, December 2023, p 1195 (citing Jessica Lawrence and Kevin Jon Heller, 'The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime', *Georgetown International Environmental Law Review*, Vol 20, No 1, 2007; Freeland, *op cit*,) Yet this is not quite right. As conceded, 'the final provision requires a balancing of the damage as against military advantage'. Freeland, at 206. Of course it does—that is the essence of IHL proportionality. But it does not answer the question presented: how, precisely, should such balancing be done? Luckily, IHL provides the answer: (a) in the standard fashion with respect to the natural environment as a normal civilian object and (b) in the heightened fashion with respect to the natural environment as a specially-protected civilian object. In the former case, the devil is in the details of the balancing; while in the latter case, the devil is in the details of the meaning of the terms 'widespread, long-term and severe'. *See* para 9, *supra*.

C. As a Matter of Policy, the OTP Should Aim for Maximum Environmental Protection Within the Bounds of Established International Criminal Law

26. As all wise policy-makers know, just because something *can* be done does not mean that it *should* be done. (The history books are littered with cases of unintended outcomes motivated by the best of intentions.) While Climate Counsel wears its environmental justice goals on its sleeve, it is well aware that other competing interests are in play and is keenly interested in hearing and hopefully debating the perspectives of more conservative jurists and military commanders alike. That is presumably the intended goal of this open and inclusive OTP exercise. The purpose of this submission therefore is not to *insist* on a singular path forward, but rather to *propose* a route towards greater environmental justice through a contemporary but permissible application of IHL.

27. Still and all, having demonstrated (as a matter of law) that Article 8 of the Rome Statute could fully accommodate the EWCs indicated above, Climate Counsel urges the OTP (as a matter of policy) to take a fresh look at the legislative history in line with the positions advocated herein, review in detail the current state of affairs with respect to domestic practice/*opinio juris*, and let the chips fall where they may. What really did the parties agree to? Does that agreement countenance progress? If so, what is the best way forward in terms of maximum environmental protection in line with the Court's existing jurisprudence?

28. While the ICC may be more constrained in its approach than individual states, it is still able to deal with IHL as a dynamic body of law. When the GCs and API were drafted, few people were thinking hard about the ways in which IHL might protect the natural environment. Fast forward to 2024 and such matters are at the cutting edge of ICL. Climate Counsel invites the OTP to sensibly synthesize these two fields, pursuant to the cold hard logic of convention, custom, and case law.

III. ENVIRONMENTAL CRIMES AGAINST HUMANITY UNDER ARTICLE 7

29. Unlike war crimes—which have a distinct conventional and customary history with regard to the protection of the natural environment—crimes against humanity lack a similar legal pedigree. While the various references in Article 8 (to civilian objects, enemy property, and the natural environment itself) clearly encompass some form of environmental protection, there is no such clarity in Article 7.[45] Nevertheless, environmental destruction is very often the driver, context, or consequence of mass crimes committed against civilian populations – crimes that in some cases amount to crimes against humanity. For example, rural land users and defenders trying to protect their homes and livelihoods may be victims of murder, illegal imprisonment, torture, persecution,

[45] *See* ICC-OTP Statement, 'The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute', 16 February 2024 ('The Prosecutor of the International Criminal Court […] is pleased to announce a new policy initiative to advance accountability for environmental crimes under the Rome Statute. The Office of the Prosecutor is commencing today a process that will culminate in a comprehensive policy paper on Environmental Crimes, aiming to ensure that it takes a systematic approach to dealing with crimes within the Court's jurisdiction committed by means of, or that result in, environmental damage.')

forced displacement, and other inhumane acts committed in the context of destruction of the natural environment or illegal exploitation of natural resources. Land grabbing and the associated abuses represent some of the greatest threats to human rights this century. Addressing the mass crimes committed in the context of environmental destruction would be a great service to humanity going forward.

30. The OTP's previous policy statement in 2016 announced that, in selecting and prioritizing its own cases, the '*manner of commission of the crimes* may be assessed in light of, *inter alia*, […] [those] committed by means of, or resulting in, the destruction of the environment […]'.[46] Moreover, with regard to the '*impact of the crimes*' under consideration, the OTP indicated that such 'may be assessed in light of, *inter alia*, […] the social, economic, and *environmental damage inflicted on the affected communities*';[47] and, in conducting such impact analysis, the OTP would 'give particular consideration to prosecuting […] crimes that are committed by means of, or that result in, *inter alia*, *the destruction of the environment, the illegal exploitation of natural resources, or the illegal dispossession of land*'.[48]

31. Climate Counsel has always appreciated and supported the theoretical strength of the 2016 policy with respect to crimes against humanity. Unfortunately, the OTP has never put it into action, despite the impending environmental crisis. This represents a missed opportunity for the former ICC Prosecutor, and a great opportunity for the current.

32. In this regard, Climate Counsel and its institutional cousin, Global Diligence LLP, have submitted two Article 15 communications and one Open Letter to the OTP, each urging the implementation of the 2016 policy and/or its underlying rationale in different ways:

    a. ***Cambodia*:** In October 2014, on behalf of Cambodian victims, Richard J Rogers (partner Global Diligence LLP), filed an Article 15 Communication to the ICC Prosecutor entitled *The Commission of Crimes Against Humanity in Cambodia, July 2002-Present.*[49] The Communication outlines the mass human rights violations perpetrated against the Cambodian civilian population by senior members of the Royal Government of Cambodia, senior members of State security forces, and government-connected business leaders (the 'Ruling Elite'), from July 2002. In furtherance of its twin-objectives of self-enrichment and maintaining power at all costs, the Ruling Elite have committed serious crimes as part of a widespread and systematic attack against the Cambodian civilian population, pursuant to a State policy. The crimes fulfil all the legal elements of crimes against humanity. At the time

[46] ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, 15 September 2016 (the 'OTP Policy Paper'), para 40 (emphasis added).
[47] OTP Policy Paper, para 41 (emphasis added).
[48] OTP Policy Paper, para 41 (emphasis added). *Nb*. Contrary to some wishful thinking on the part of activists, this did not give rise to any new legal rights. OTP Policy Paper, para 2 ('This is an internal document of the Office and as such, it does not give rise to legal rights, and is subject to revision based on experience and in light of evolving jurisprudence and/or any relevant amendments to the legal texts of the Court.').
[49] Global Diligence, The Commission of Crimes Against Humanity in Cambodia, July 2002-Present, October 2014, available at https://www.globaldiligence.com/s/executive_summary-ICC.pdf.

of the initial filing, an estimated 770,000 people had been affected by land grabbing (145,00 in the capital alone), a figure that has since increased considerably. Of these, hundreds of thousands had been forcibly evicted (and listed underlying crime in Article 7).

In December 2014, forty civil society organizations sent a letter of support, urging the ICC Prosecutor to open the case. A Supplementary Communication was filed in July 2015 providing evidence of an additional 60,000 people having been affected by land conflicts. It also attached petitions of support from over 7500 Cambodians. Additional evidential briefs were filed on 1.12.2015, 8.12.2015, 14.12.2016, and 15.11.2016.

Yet, despite the vast amounts of strong and probative evidence, the considerable Cambodia and international support for this case, and the neat fit with the OTP's own case selection policy, the OTP has to date taken no action. Crucially, the mass crimes associated with land grabbing in Cambodia continue unabated to this day. The case is far from cold, but is arguably more relevant today than ever.

b. ***Brazil*:** In November 2022, Climate Counsel, in conjunction with Greenpeace Brasil and Observatório do Clima, filed an Article 15 Communication to the ICC Prosecutor entitled *Crimes Against Humanity in Brazil: 2011 to the Present, Persecution of Rural Land Users and Defenders and Associated Environmental Destruction*.[50] The Communication provides evidence that an organized network of politicians, civil servants, law enforcement officers, businessmen, and other criminals carried out a widespread or systematic attack against rural land users and defenders in the Amazon region. The underlying crimes - which include murder, persecution, and inhuman acts – were executed in furtherance of an organizational policy to facilitate the dispossession of land, the exploitation of natural resources, and the destruction of the environment, irrespective of the law. The evidence shows that, from 2011 to 2021, the conflicts have resulted in 430 murders, 554 attempted murders, 2290 death threats, 87 cases of torture, and over 100,000 expulsions or evictions. The victims are from a variety of Indigenous Peoples, traditional communities, and other vulnerable groups whose land has been ruthlessly exploited for profit through a widespread or systematic attack against their lives and livelihoods.

c. ***Sudan and elsewhere*:** In October 2023, Climate Counsel, Gisa Group, and Sudan Human Rights Hub submitted an open letter to the ICC Prosecutor entitled *Analysing Climate Security and Prosecuting Environmental Atrocity Crimes: Opportunities for the Prosecutor of the International Criminal Court*.[51] The letter urges action on two key issues of our time: climate change as a driver of conflict (climate security) and environmental atrocity crimes as

[50] Climate Counsel, Greenpeace Brasil and Observatório do Clima, Crimes Against Humanity in Brazil: 2011 to the Present, Persecution of Rural Land Users and Defenders and Associated Environmental Destruction, November 2022, available at https://brazil-crimes.org/downloads.html.

[51] Climate Counsel, Gisa Group, and Sudan Human Rights Hub, Analysing Climate Security and Prosecuting Environmental Atrocity Crimes: Opportunities for the Prosecutor of the International Criminal Court, October 2023, available at https://www.climatecounsel.org/climate-security-letter.

a consequence of conflict. Both issues are directly relevant to the work of the OTP in general, and the situation in Sudan in particular. The letter argues that with its mandate, resources, and expertise, the OTP is uniquely placed to (i) promote a better understanding of how climate change impacts mass crimes, by collating pertinent data, and (ii) help prevent environmental atrocity crimes, by prosecuting those most responsible. The authors did not receive a response from the OTP.

33. For present purposes, Climate Counsel urges the OTP to: (i) fully operationalize the 2016 policy with respect to crimes against humanity; (ii) reconsider the pending Article 15 communications mentioned above; and (iii) adopt their approach to legal framing—in particular as it relates to the key elements of state/organizational policy and gravity.

IV. CONCLUSION

34. Climate Counsel requests the OTP to carefully consider the various positions put forward above. With respect to war crimes, while the positions expressed herein are considered ones, they are also somewhat preliminary in nature given the timetable and program set by the OTP.[52] With respect to crimes against humanity, Climate Counsel urges the OTP, under its new leadership, to reconsider the pending Article 15 communications on Cambodia and Brazil. Indeed, it is difficult to imagine a meaningful and worthwhile OTP policy that excludes such cases.

35. Ultimately, Climate Counsel looks forward to reviewing and debating the many anticipated submissions by other interested parties and engaging further with the OTP on these important and potentially far-reaching issues. Acknowledging that the OTP's official policy will not be finalized for some time to come, Climate Counsel additionally urges the OTP to preliminary consider these submissions as they may directly apply to the Prosecutor's ongoing efforts in Ukraine.

Done, The Hague, 12 March 2024

Richard J Rogers

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[52] *See* ICC-OTP Statement, 'The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute', 16 February 2024 ('Following the development of a draft policy paper on the basis of this initial input, there will be a second round of public consultations on the draft itself. As part of that second major consultation phase, the Office will also host a number of roundtable discussions to address key pillars of the emerging policy with relevant counterparts from civil society, national authorities, affected communities and the private sector. The Prosecutor is of the view that external consultations on its policies and working methods are essential for producing the most comprehensive and effective policies.')

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

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