

# Addressing environmental damages in contexts of armed conflict through transitional justice in Colombia

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## Abstract

*It is unquestionable that Colombian armed conflicts have had adverse impacts on the natural environment in the country. Current transitional justice mechanisms offer an opportunity to recognize harm and responsibility, establish restorative sanctions and reparations and adopt public policies for the recovery of ecosystems and prevention of further damage. This article focuses on how transitional justice mechanisms, especially the Special Jurisdiction for Peace, have addressed the effects of armed conflicts on the natural environment. Specifically, it analyzes the criminal characterization of environmental degradation, the question of whether amnesties and pardons could be granted for such conducts, precautionary measures and the implementation of restorative sanctions related to the environment. It presents some challenges regarding the preservation of the natural environment due to the persistence of armed conflicts after the 2016 Peace Accord between the government and the FARC-EP guerrillas, and the sustainability of reparations for victims and prevention of further damage. It also sustains that the developments of current transitional justice mechanisms may have significant influence on ongoing and future peace negotiations with other armed groups and the processes for establishing responsibility for environmental damages.*

**Keywords:** armed conflict, transitional justice, environment, environmental damage, reparations, restorative sanctions, precautionary measures.

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## Introduction: Colombia's armed conflicts and their impacts on the natural environment

Colombia is one of the most ecologically diverse countries in the world.<sup>1</sup> It has the second-greatest variety of birds, the largest moorland and river on Earth, the Amazon rainforest and thousands of species of fauna and flora.<sup>2</sup> It is also the most biodiverse country per square kilometre, with 311 types of continental and marine ecosystems and 53% of the territory covered by diverse types of forests.<sup>3</sup>

- 1 World Wide Fund for Nature (WWF), "A Look at the Natural World of Colombia", 2017, available at: [www.worldwildlife.org/magazine/issues/winter-2017/articles/a-look-at-the-natural-world-of-colombia](http://www.worldwildlife.org/magazine/issues/winter-2017/articles/a-look-at-the-natural-world-of-colombia) (all internet references were accessed in November 2023). See also Aisling Irwin, "Colombia's Ecological Treasure Trove", *Nature*, 19 July 2023, available at: [www.nature.com/immersive/d41586-023-02300-6/index.html](http://www.nature.com/immersive/d41586-023-02300-6/index.html).
- 2 Ministerio de Ambiente y Desarrollo Sostenible, "Colombia, el segundo país más biodiverso del mundo, celebra el Día Mundial de la Biodiversidad", 21 May 2019, available at: [www.minambiente.gov.co/colombia-el-segundo-pais-mas-biodiverso-del-mundo-celebra-el-dia-mundial-de-la-biodiversidad/](http://www.minambiente.gov.co/colombia-el-segundo-pais-mas-biodiverso-del-mundo-celebra-el-dia-mundial-de-la-biodiversidad/); "Colombia es el tercer país en variedad de especies, gracias a su ubicación", *Periódico el Tiempo*, 21 September 2021, available at: [www.eltiempo.com/vida/medio-ambiente/colombia-es-el-tercer-pais-con-mayor-biodiversidad-617791](http://www.eltiempo.com/vida/medio-ambiente/colombia-es-el-tercer-pais-con-mayor-biodiversidad-617791); WWF, "¿Por qué Colombia es el país de las aves?", 23 May 2022, available at: <https://tinyurl.com/33h6uekb>.
- 3 Ministerio de Relaciones Exteriores, "Biodiversidad", available at: <https://www.cancilleria.gov.co/internacional/politica/ambiental/biodiversidad>; Global Biodiversity Information Facility, *Biodiversity Action Plan 2016–2030*, 2017, available at: [www.cbd.int/doc/world/co/co-nbsap-v3-en.pdf](http://www.cbd.int/doc/world/co/co-nbsap-v3-en.pdf); United Nations Development Programme, "Acuerdos multilaterales de Colombia: Biodiversidad y cambio climático", 9 December 2022, available at: [www.undp.org/es/colombia/discursos/acuerdos-multilaterales-colombia-biodiversidad-cambio-climatico](http://www.undp.org/es/colombia/discursos/acuerdos-multilaterales-colombia-biodiversidad-cambio-climatico).

According to the Ministry of Environment, Colombia has 31 million hectares of environmentally protected land, which amounts to 15% of its entire territory.<sup>4</sup> Amid this ecological richness, the Constitutional Court has held that Colombia has an “ecological constitution” which demands the defence of a healthy environment. The Court holds that this has three dimensions: (1) it is a guiding principle of the legal order because it is the State’s obligation to protect the nation’s natural resources; (2) it is a constitutional right of all persons, enforceable through judicial means; and (3) it imposes specific obligations on public authorities and private individuals or institutions.<sup>5</sup> Similarly, national legislation protects the environment as a collective right,<sup>6</sup> criminalizes illegal mining, ecocide and contamination of rivers, and aggravates sentences when such conducts affect endangered species.<sup>7</sup> In contexts of armed conflict, criminal law forbids the destruction and appropriation of protected objects, attacks against installations containing dangerous forces, attacks against objects indispensable to the survival of the population, devastation, and destruction of natural environment.<sup>8</sup> Moreover, higher and lower courts have recognized that the natural environment is a subject entitled to rights.<sup>9</sup>

However, these provisions have not been effective in preventing environmental damage as a result of armed conflicts. Over the last sixty years, armed hostilities in rural areas have led to the destruction of forests, farmlands and other natural habitats. At the same time, in some areas of high biodiversity and ecological importance, the presence of armed groups has contributed to environmental preservation by preventing the settlement of populations and development projects.<sup>10</sup> Despite this, the expansion of coca cultivation, aerial fumigation of coca crops with glyphosate,<sup>11</sup> legal and illegal mining and other

4 Ministerio de Ambiente y Desarrollo Sostenible, above note 2.

5 Corte Constitucional de Colombia, Judgment T-760/07, para. 3.1; Corte Constitucional de Colombia, Judgment C-032/19, para. 9.

6 Law 492 of 1998 regulates collective and class actions; the law also incorporates, as part of the collective interests and rights of the population, the rights to a healthy environment, ecological equilibrium, rational use of natural resources to ensure sustainable development, the protection of areas of special ecological importance, the preservation of animals and vegetable species and the preservation and restoration of environment. This legislation further provides for the assessment of collective damage against indigenous communities during armed conflict and the creation of collective plans for reparation.

7 Congreso de la República de Colombia, Law 599 of 2000 (Colombian Criminal Code), Title XI, “Crimes against Natural Resources and the Natural Environment”, Arts 332, 333, 334, 334A, 338B.

8 *Ibid.*, Title II, “Crimes against Persons and Objects Protected by International Humanitarian Law”, Arts 154, 157, 160, 164.

9 Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP), *El ambiente como víctima silenciosa: Un diagnóstico de las afectaciones en el posacuerdo de paz (2017–2022)*, July 2022, pp. 12–19, available at: [www.jep.gov.co/JEP/documentos1/El%20ambiente%20como%20v%C3%ADctima%20silenciosa.pdf](http://www.jep.gov.co/JEP/documentos1/El%20ambiente%20como%20v%C3%ADctima%20silenciosa.pdf). Within this report there is a list of judicial decisions where different courts have recognized rivers, lakes, moorlands and the Amazon region as subjects entitled to rights.

10 César Rodríguez, Diana Rodríguez and Helena Durán, *La paz ambiental: Retos y propuestas para el posacuerdo*, Dejusticia, Bogotá, 2017, pp. 35–39; Corte Constitucional de Colombia, Judgment C-644/17, para. 16.2.

11 Colombia has been eradicating illicit crops for the past fifty years. Various strategies have been employed for that purpose, including aerial or manual spraying with the broad-spectrum systemic herbicide and crop desiccant glyphosate. For a more detailed scientific discussion on the characteristics and effects of glyphosate, as well as its history, see e.g. Keith R. Solomon, E. J. P. Marshall and Gabriel Carrasquilla, “Human Health and Environmental Risks from the Use of Glyphosate Formulations to Control the Production of Coca in Colombia: Overview and Conclusions”, *Journal of Toxicology and*

activities have deteriorated the natural environment. These acts have caused loss of biodiversity, felling of trees, forest fires, contamination of water resources and deforestation.<sup>12</sup> Armed groups have extracted minerals, causing significant pollution to water, flora and fauna. These adverse impacts have also been caused by private actors or companies who have been extorted or taxed by armed groups.<sup>13</sup> The use of landmines and explosive devices has also had adverse effects on the environment, as such devices often remain in the ground long after the end of hostilities, threatening humans and wildlife.<sup>14</sup> Also, armed groups have displaced populations and, directly or in collusion with economic actors, have transformed traditional use of land by cultivation of teak and African oil palm and extensive cattle industry.<sup>15</sup> These activities have caused deforestation and overuse and contamination of water sources.<sup>16</sup>

In addition, activities by banana, rice and sugar producers accused of financing paramilitary groups<sup>17</sup> have deteriorated the soil.<sup>18</sup> This has led to the extension of agricultural frontiers and the incorporation of territories into economic market dynamics, where alliances and transactions have been led by illegal actors, companies and political actors.<sup>19</sup> The Colombian Constitutional Court has remarked that natural resources could be one of the causes of armed conflict and its perpetuation, due to tensions arising from their scarcity, unequal distribution, and exploitation for the financing of armed groups.<sup>20</sup> The Court has also indicated that over the last three decades, out of 5 million deforested hectares, 3 million are located around towns most affected by armed conflicts.<sup>21</sup>

*Environmental Health*, Vol. 72, No. 15–16, 2009. Aerial spraying of glyphosate could have adverse effects on the health of populations and wildlife in cases of direct exposure. See International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, 3 January 1966, Art. 12, available at: [www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights](http://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights); Corte Constitucional de Colombia, Judgment T-080/17, para. 4.13; International Agency for Research on Cancer, *Monographs on the Evaluation of Carcinogenic Risks to Humans*, Vol. 112, 2017, pp. 321–399, available at: <https://publications.iarc.fr/549>.

12 Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición, *Hay futuro si hay verdad: Sufrir la guerra y rehacer la vida: Impactos, afrontamientos y resistencias*, Final Report, Bogotá, August 2022 (Truth Commission Final Report), pp. 201–202, 208.

13 Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición, “Minería ilegal”, available at: [www.comisiondelaverdad.co/etiquetas/mineria-ilegal](http://www.comisiondelaverdad.co/etiquetas/mineria-ilegal); JEP, Auto SRVR 01, 1 February 2023, para. 1040. See also JEP, Auto SRVR 03, 5 July 2023, paras 349, 1096.

14 Truth Commission Final Report, above note 12, p. 192.

15 Camilo Ramírez and Sebastián Saavedra, “Derecho Internacional Humanitario y la protección del medio ambiente: nuevas perspectivas para Colombia”, in Édgar Solano González, Manuela Losada Chavarro, María Camila Medina García and María Alejandra Osorio Alvis (eds), *Desafíos del derecho internacional humanitario en Colombia: Aspectos filosóficos, hermenéuticos, constitucionales y ambientales*, Vol. 2, Universidad Externado de Colombia, Bogotá, 2022, p. 588, available at: <https://bdigital.uexternado.edu.co/server/api/core/bitstreams/93aa26d9-39eb-4741-aa3e-8a62075fd671/content>.

16 *Ibid.*, p. 590.

17 Jennifer Morales Correa, “Complicidad empresarial con grupos paramilitares: Un análisis al caso colombiano”, *Razón Crítica*, No. 9, 2020, available at: <https://revistas.utadeo.edu.co/index.php/razoncritica/article/view/1626>.

18 “Los desechos generados por la industria bananera colombiana”, *Zonolística*, 14 May 2020, available at: <https://zonolistica.com/los-desechos-generados-por-la-industria-bananera-colombiana>.

19 C. Ramírez and S. Saavedra, above note 15, p. 592.

20 Corte Constitucional de Colombia, Judgment C-644/17, para. 16.2.

21 *Ibid.*

In past experiences and other locations, the negative and long-term environmental impacts of armed conflict have not been properly addressed or prevented and transitional justice has paid insufficient attention to the intersections between armed conflict and environmental degradation.<sup>22</sup> In this context, transitional justice mechanisms in Colombia gain importance as they could incentivize recognition of environmental damage and provide a scenario for restoration, prevention of recurrence and adequate provision of reparations to victims.

The purpose of this article is to analyze how transitional justice mechanisms in Colombia, especially the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, JEP), have addressed the effects of armed conflict on the natural environment. The article is divided into five sections. The first section presents the transitional mechanisms implemented after the 2016 Peace Accord and its approaches towards environmental damage, focusing on some key decisions of the JEP. The second section analyses how the JEP has characterized the behaviour of armed groups against the environment, and whether amnesties and pardons are feasible. The third section focuses on interim measures issued by the JEP, and their relationship with the environment. The fourth section shows how reparation proposals by perpetrators and victims and restorative sanctions integrate environmental concerns, and finally, the fifth section presents some challenges to effectively restoring nature and preventing further damages.

Throughout the article, the authors refer to the concepts of “environment” and “natural environment” interchangeably. According to the Colombian Constitutional Court, the environment includes water (and its natural sources such as oceans, rivers, lagoons, wetlands and swamps), forests, soil, food sources, animal species and their ecosystems, and the atmosphere.<sup>23</sup> Additionally, the term “victims” is used mainly with regard to individuals, groups or communities in their litigation roles or as beneficiaries of reparations. However, as will be discussed below, the notion of “victim” is also used when alluding to the environment as it has been recognized by transitional justice in Colombia.<sup>24</sup>

## **Transitional justice and the natural environment: Institutional background and framework**

In 2011, after the Colombian government’s recognition of the existence of an armed conflict,<sup>25</sup> the Congress approved the Victims and Land Restitution Law that

22 Rachel Killean and Lauren Dempster, “Mass Violence, Environmental Harm, and the Limits of Transitional Justice”, *Genocide Studies Prevention: An International Journal*, Vol. 16, No. 1, 2022–23, available at: <https://digitalcommons.usf.edu/gsp/vol16/iss1/5/>.

23 Corte Constitucional de Colombia, Judgment 7-622/16, para. 5.1.

24 See JEP, Auto SRVR 226, 11 July 2023. In this decision, the Cauca river was recognized as a victim for its use as a mass grave by armed groups and the spill of toxic chemicals from illegal mining and planting of illicit crops by armed groups.

25 International Center for Transitional Justice (ICTJ), “The Recognition of Armed Conflict: A Positive Step”, 12 May 2011, available at: [www.ictj.org/es/news/el-reconocimiento-del-conflicto-armado-un-paso-positivo](http://www.ictj.org/es/news/el-reconocimiento-del-conflicto-armado-un-paso-positivo).

provided for reparations of collective rights to victims of armed conflicts.<sup>26</sup> This initiative reinforced and complemented civil, criminal and administrative mechanisms for obtaining redress. Subsequent legislation incorporated reparations for indigenous, tribal peoples and ethnic communities and defined territorial damage as damage that alters equilibrium, harmony, health and food sovereignty.<sup>27</sup>

In 2013, the National Center for Historical Memory (Centro Nacional de Memoria Histórica, CNMH)<sup>28</sup> published a report on the effects of armed conflict on the natural environment. It highlighted that armed groups had invaded land and natural reservations, shifting their use, and had caused indiscriminate felling of trees, mineral extraction, and alteration of riverbeds. The report also pointed out that armed groups had forced communities to displace and abandon their territories, and had launched attacks against oil infrastructure.<sup>29</sup> The CNMH affirmed that these actions produced soil erosion and contamination of water, putting fauna and flora at risk of extinction. Besides these damages, the report also recognized moral and socio-cultural repercussions such as the disruption or destruction of community bonds, relationships and identities closely linked with nature.<sup>30</sup>

The 2016 Peace Accord or Final Agreement<sup>31</sup> signed by the Colombian government and the leftist guerrillas of the Revolutionary Armed Forces of Colombia – People’s Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC-EP) acknowledged that transitioning to peace required respect for nature, its renewable and non-renewable resources, and biodiversity.<sup>32</sup> In the chapter on access and use of land, the Final Agreement included the settlement and resettlement of communities, demarcation and closure of agricultural frontiers, protection of areas of special environmental interest, recovery of forests, strengthening of food production, and protection of intangible cultural heritage.<sup>33</sup> It also established the need to adopt policies for the eradication and substitution of illicit crops, the environmental recovery of such areas<sup>34</sup> and the promotion, respect

26 Congreso de la República de Colombia, Law 1448 of 2011, Art. 151.

27 Congreso de la República de Colombia, Law Decree 4633 of 2011, Art. 45.

28 The CNMH was created by Law 1448 of 2011 (Victims Law) with the purpose of receiving, recovering, preserving, compiling and analyzing all documentary material, oral testimonies and those obtained by any other means, related to violations that occurred during armed conflict in Colombia. See CNMH, “Contexto”, available at: <https://centrodememoriahistorica.gov.co/contexto/>.

29 CNMH, *¡Basta ya! Colombia: Memorias de guerra y dignidad*, 2012, pp. 277, 278, available at: <https://centrodememoriahistorica.gov.co/wp-content/uploads/2021/12/1.-Basta-ya-2021-baja.pdf>.

30 *Ibid.*

31 Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, 12 November 2016 (Final Agreement), available at: [www.jep.gov.co/Marco%20Normativo/Normativa\\_v2/01%20ACUERDOS/Texto-Nuevo-Acuerdo-Final.pdf?csf=1&e=0fpYA0](http://www.jep.gov.co/Marco%20Normativo/Normativa_v2/01%20ACUERDOS/Texto-Nuevo-Acuerdo-Final.pdf?csf=1&e=0fpYA0).

32 *Ibid.*, pp. 3, 189.

33 *Ibid.*, p. 20. See United Nations Educational, Scientific and Cultural Organization (UNESCO), “What Is Intangible Cultural Heritage?”, available at: <https://ich.unesco.org/en/what-is-intangible-heritage-00003>. UNESCO indicates that the category of “intangible cultural heritage” includes “traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts”.

34 Final Agreement, above note 31, pp. 105–114.

and guarantee of environmental rights.<sup>35</sup> The Final Agreement provided for reparations for communities and territories in compliance with restorative justice. According to this paradigm, transitional justice should prioritize the restoration of damages, social inclusion, reparations for victims considering their needs and dignity, and the guaranteeing of victims' rights to justice, truth and non-recurrence of violations.<sup>36</sup>

The Final Agreement created the Comprehensive System of Truth, Justice, Reparation and Non-Repetition, which is made up of three institutions:<sup>37</sup> (1) the Commission for the Clarification of Truth, Coexistence and Non-Repetition (Truth Commission) as a truth-telling extrajudicial mechanism; (2) the Special Unit for the Search of Persons Deemed as Missing in the Context of and Due to the Armed Conflict, which has an extrajudicial and humanitarian nature; and (3) the JEP as a judicial body for the investigation, judgment and punishment of genocide, war crimes and crimes against humanity. These institutions are complemented by the government's Unit for the Attention and Reparation of Victims, created in 2011 with the purpose of coordinating public institutions in the implementation of the policy for attention, assistance and reparations to victims of armed conflicts.<sup>38</sup>

As discussed below, both the findings of the Truth Commission, published in its final report in 2022, and the decisions by the JEP have helped to integrate the environment in transitional justice debates and raise awareness on the devastating environmental impacts of past and current armed conflicts.

## **The perspective of the Truth Commission on the impacts of armed conflict on the natural environment**

One of the core mandates of the Truth Commission was to clarify and promote recognition of the human and social impacts of armed conflicts on society, including economic, social, cultural and environmental rights.<sup>39</sup> The Truth Commission recognized that the harms that Colombia's armed conflicts caused to members of ethnic peoples and indigenous groups go beyond the categories of national criminal law and international humanitarian law (IHL) frameworks.<sup>40</sup> It sustained that the damages must be understood in relation to the historical exclusion, discrimination and invisibility experienced by such groups, as well as the effects on their social, cultural and economic organization, and their relationship with the territory.<sup>41</sup>

The final report of the Truth Commission included a full chapter on the impacts of armed conflict on the natural environment and the relationship between the two. In this chapter, the Truth Commission cited the 1982 World Charter for Nature adopted by United Nations General Assembly, which

35 *Ibid.*, p. 188.

36 *Ibid.*, p. 144.

37 *Ibid.*, p. 129; Congreso de la República de Colombia, Legislative Act 01 of 2017.

38 Congreso de la República de Colombia, Law 1448 of 2011, Arts 166, 168.

39 Presidencia de la República de Colombia, Law Decree 588 of 2017, Art. 11.

40 Comisión de la Verdad, *Guía para periodistas: Claves para comunicar el proceso, el Informe Final y el legado de la Comisión de la Verdad*, 2022, pp. 174, 175.

41 *Ibid.*



establishes that nature should be secured from degradation as a result of warfare or other hostile activities, and that military activities that are damaging to nature must be avoided.<sup>42</sup> It also mentioned the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, or ENMOD Convention,<sup>43</sup> arguing that the international community has reached a consensus that humanity “deserves to live in harmony with nature and that it must be protected in contexts of war and hostilities”.<sup>44</sup>

The Truth Commission affirmed that, on many occasions, nature was used as an instrument to commit serious violations of IHL.<sup>45</sup> Due to its extrajudicial nature, it did not characterize the specific crimes or violations, but it recognized that armed conflicts have especially affected indigenous and ethnic communities. In addition, it held that those communities’ territory should be considered a victim, “taking into account their worldview and the special and collective bond that unites them with Mother Earth”,<sup>46</sup> and that comprehensive reparations for damages and misuse of natural resources must therefore be implemented in order to guarantee their right to exist as a community.<sup>47</sup>

Moreover, the Truth Commission claimed that all the armed groups, without exception, had used nature to advance their economic or military goals<sup>48</sup> without considering the fragility of the ecosystems involved, such as the National Natural Parks.<sup>49</sup> It named events such as the use of antipersonnel landmines, explosive devices<sup>50</sup> and other weapons buried or left in the ground; harms caused to domestic and wild animals, which were often used as weapons; contamination of water sources and food; and hostilities and bombings.<sup>51</sup> It also asserted that illegal mining, coca monocultures and aerial spraying with glyphosate to eradicate crops were some of the most contaminating and harmful practices against the environment.<sup>52</sup> While these activities all had negative impacts, they have had different considerations and legal consequences. The extraction of minerals and coca planting are deemed illegal,<sup>53</sup> and as will be explained below, transitional justice has concluded that these conducts may amount to the war crime of destruction of the environment. With

42 World Charter for Nature, 28 October 1982.

43 The ENMOD Convention had not been ratified by Colombia at the time this article was written.

44 Truth Commission Final Report, above note 12, p. 187.

45 *Ibid.*, pp. 195–201. The Truth Commission documented that nature was weaponized by the paramilitary groups, which used rattlesnakes and other poisonous snakes to kill, alligators and crocodiles in ponds, pools and lakes to get rid of human bodies, and dogs as a means of torture. Also, with regard to the guerrillas, it referred to the destruction of oil infrastructure and the use of donkeys, horses and turtles to carry explosives and bombs.

46 *Ibid.*, pp 189–190.

47 Presidencia de la República de Colombia, Law Decree 4633 of 2011, Arts. 3, 130.

48 Truth Commission Final Report, above note 12, p. 190.

49 *Ibid.*

50 *Ibid.*, p. 197. For the Truth Commission, the bombings carried out by the armed forces could have potentially affected multiple hectares of land, forests, water, animals and plants.

51 *Ibid.*, p. 191.

52 *Ibid.*, p. 209.

53 See International Committee of the Red Cross (ICRC), “Los bienes que generan ingresos para los conflictos armados y el DIH”, Bogotá, 4 June 2020, available at: [www.icrc.org/es/document/colombia-los-bienes-que-generan-ingresos-para-los-conflictos-armados-y-el-dih](http://www.icrc.org/es/document/colombia-los-bienes-que-generan-ingresos-para-los-conflictos-armados-y-el-dih).



regard to aerial fumigation of coca fields by security forces, there is not yet a criminal characterization by the transitional justice system,<sup>54</sup> notwithstanding the ongoing debate on whether such operations should be governed under a law enforcement (international human rights law) or a conduct of hostilities (IHL) paradigm.<sup>55</sup>

In addition to the long list of harmful activities against the natural environment, the Truth Commission acknowledged that attacks against the country's oil infrastructure by organized armed groups were a widespread practice. According to the final report, there were at least 3,659 armed actions against oil infrastructure; 60% of these actions included the use of explosives, which caused oil spills and contamination of water sources, land contamination and changes in the forms of interaction of the communities with their territory.<sup>56</sup>

## The JEP and its legal views on the impacts of armed conflict upon the natural environment

As a judicial mechanism, the JEP seeks to materialize victims' rights to access justice<sup>57</sup> by investigating, prosecuting and punishing war crimes, genocide or crimes against humanity.<sup>58</sup> It also seeks to guarantee legal certainty regarding sanctions, parole, amnesties and pardons to those who participated directly or indirectly in non-international armed conflicts (NIACs).<sup>59</sup> Moreover, the JEP has preferential and exclusive jurisdiction over the prosecution and judgment of conducts committed during or in connection with the armed conflict between the FARC-EP guerrillas and the Colombian government.<sup>60</sup>

54 In relation to its territorial macro cases, the JEP has stated that aerial spraying of glyphosate is one of the activities that has systematically destroyed human–nature relationships. See JEP, “Así investiga la JEP los casos territoriales”, available at: [www.jep.gov.co/Sala-de-Prensa/Paginas/Las-particularidades-de-los-macrocasos-territoriales-de-la-JEP.aspx](http://www.jep.gov.co/Sala-de-Prensa/Paginas/Las-particularidades-de-los-macrocasos-territoriales-de-la-JEP.aspx). At the moment, the JEP has not characterized whether aerial spraying of glyphosate constituted a crime. In 2018, the Inter-American Commission on Human Rights (IACHR) admitted a petition against Colombia in the case of a woman who was allegedly a victim of aerial spraying of glyphosate. IACHR, “Informe de admisibilidad: Yaneth Valderrama y familia, Colombia”, Informe No. 76/18, Petición 1453-08, OEA/Ser.L/V/II, Doc. 88, 21 June 2018, available at: [www.oas.org/es/cidh/decisiones/2018/coad1453-08es.pdf](http://www.oas.org/es/cidh/decisiones/2018/coad1453-08es.pdf). See also Corte Constitucional de Colombia, Judgment T-236/17, in which the Court ordered the government not to resume its aerial spraying of glyphosate until an independent institution had adopted regulations to assess risks to health and the environment, and to ensure adequate complaint mechanisms. And see Corte Constitucional de Colombia, Judgment T-413/21, in which the Court invalidated a government resolution that modified an environmental plan for the eradication of illicit crops. The Court ruled that the government had failed to guarantee the right of affected communities to previous consultation.

55 Hector Olasolo Alonso and Felipe Tenorio Obando, “Are the Targets of Aerial Spraying Operations in Colombia Lawful under International Humanitarian Law?”, *Yearbook of International Humanitarian Law*, Vol. 20, 2018; Natalie Andrade Cadena, “Colombian Fumigation of Herbicides and International Humanitarian Law”, *Ius Humani: Revista de Derecho*, Vol. 6, 2017; Morgane Landel, “Are Aerial Fumigations in the Context of the War in Colombia a Violation of the Rules of International Humanitarian Law?”, *Transnational Law and Contemporary Problems*, Vol. 19, No. 2, 2010.

56 Truth Commission Final Report, above note 12, p. 199.

57 Congreso de la República de Colombia, Law 1957 of 2019, Art. 9.

58 *Ibid.*, Art. 42.

59 *Ibid.*, Art. 9.

60 *Ibid.*, Art. 8.

In this regard, the JEP plays a key role in determining the legal consequences of environmental harm caused by armed conflict. This section analyzes some decisions by the JEP on these matters up until August 2023. At that point, the Tribunal for Peace<sup>61</sup> had not yet imposed its first sanctions against the FARC-EP or members of the State armed forces, and it is therefore possible that those decisions will have changed, reviewed or deepened the perspectives on characterization of crimes, as well as the sanctions and reparations for environmental harms, presented in this article.

One of the main developments in the JEP's jurisprudence is the recognition of the natural environment as a victim of armed conflicts.<sup>62</sup> The Chamber of Recognition of Truth and Responsibility and Determination of Facts and Conducts (Chamber of Recognition)<sup>63</sup> has emphasized that, for some indigenous communities, the experiences of armed conflict are not limited to the damage caused to humans but also include damages to their spirituality and the natural environment.<sup>64</sup> As of 2023, the Chamber of Recognition has declared this status for the territories of indigenous communities such as the Nasa,<sup>65</sup> Awá<sup>66</sup> and Eperera Siapidara,<sup>67</sup> two Afro-Colombian communities' territories in Tumaco,<sup>68</sup> and the Cauca river.<sup>69</sup>

In 2022, in the opening of a comprehensive case against the FARC-EP guerrillas (Macro Case<sup>70</sup> No. 10), the Chamber of Recognition<sup>71</sup> identified the

61 See Congreso de la República de Colombia, Law 1957 of 2019. According to Article 72(b), the Tribunal for Peace is an organ of the JEP. Article 91 provides that the Tribunal is divided into four sections: (1) the Section of First Instance for Cases of Recognition of Truth and Responsibility, (2) the Section of first Instance for Cases of Non-Recognition of Truth and Responsibility, (3) the Section of Appeals, and (4) the Section of Revision. According to Article 92, the Tribunal for Peace examines the resolutions of the Chamber of Recognition, and decides on the restorative sanctions to impose on the accused in cases of recognition of responsibility. According to Article 93, the Tribunal establishes ordinary sanctions (deprivation of liberty) when the accused does not recognize responsibility and is found guilty after an adversarial trial.

62 JEP, above note 9, p. 4.

63 According to Article 72(a) of Law 1957 of 2019, the Chamber of Recognition is an organ of the JEP. Article 79 provides that the Chamber of Recognition is in charge of documenting genocide, war crimes and crimes against humanity and proposing restorative sanctions to the Tribunal for Peace when the accused contributes to truth-seeking and recognizes responsibility.

64 JEP, Caso 002, Auto 094, 10 June 2020, para. 94. The territory in this case is called Eperera Euja, home of the Eperera Siapidara tribal people.

65 JEP, Caso 005, Auto 002, 17 January 2020. The territory in this case is called Cxhab Wala Kiwe.

66 JEP, Caso 002, Auto SRVBIT 079, 12 November 2019. The territory in this case is called Katsa Su.

67 See above note 64.

68 JEP, Resolución SRVBIT, Caso 002, Auto 018, 24 January 2020.

69 JEP, Auto SRVR 226, 11 July 2023.

70 See ICTJ, "Macro-Criminality and the Case of Colombia: ICTJ Translates Herbert Jäger's Seminal Work into Spanish", available at: <https://tinyurl.com/5a6hner7>. The ICTJ defines a macro case as an approach used by the JEP to group together multiple crimes. The purpose is to reveal the broader patterns of macro-criminality – as opposed to focusing on individual or isolated acts – and to prosecute those most responsible for these crimes. See also the JEP cases available at: [www.jep.gov.co/Paginas/casos.aspx](http://www.jep.gov.co/Paginas/casos.aspx).

71 Two of the main functions of the Chamber of Recognition are deciding whether the facts and behaviours attributed to different individuals fall under the jurisdiction of the JEP due to them having been committed because of, in connection with or as a direct or indirect result of the armed conflict, and referring a list of persons that are not subject to amnesties or pardons to the Chamber of Definition of Legal Situation. See Law 1957 of 2019, Art. 79(a).

destruction of vehicles and oil infrastructure as one of their criminal patterns against the natural environment.<sup>72</sup> As a result, the Chamber decided that it would assess whether the environment kept its nature as a civilian object protected by IHL considering its use or purpose.<sup>73</sup> Additionally, it indicated that it would consider whether the attacks violated the principle of proportionality and if they caused severe damage to the health and survival of civilians and preservation of natural resources with no clear and definite military advantage.<sup>74</sup> Interestingly, the Chamber did not rule that illegal mining or the planting of illicit crops were a criminal pattern, despite having received reports by some organizations on the adverse environmental impacts of those activities.<sup>75</sup>

The decision of the Chamber of Recognition to assess violations of the principles of distinction and proportionality and subsequent harm or destruction of the environment goes beyond the Rome Statute of the International Criminal Court (Rome Statute), because this treaty does not list such conducts as war crimes in NIAC.<sup>76</sup> Furthermore, this decision seems to accept that during hostilities some conducts would not have to be criminalized when, for example, the environment becomes a military object – momentarily or permanently – or when incidental damages are not excessive in relation to the concrete and direct anticipated military advantage.<sup>77</sup>

In 2023, the Chamber of Recognition adopted landmark decisions that made its legal view on environmental damage more evident. In Macro Case No. 05 on crimes affecting peasants, indigenous and Afro-Colombian communities and their territories in the north of Cauca and the south of Valle del Cauca,<sup>78</sup> it determined that eight FARC-EP guerrillas were indirect co-perpetrators of the war crime of destruction of the environment.<sup>79</sup> The decision sustained that the FARC-EP occupied lands, installed landmines, set up camps, launched attacks that affected widely and permanently moorlands and other environmental protected areas,<sup>80</sup> engaged in illegal mining and cultivated coca crops, causing the felling of trees, deforestation and contamination of hydric sources.<sup>81</sup> In addition, the Chamber held that those conducts caused a decrease in species and micro-

72 JEP, Auto SRVR 102, 11 July 2022, para. 177(h).

73 *Ibid.*, para. 149.

74 *Ibid.*

75 *Ibid.*, para. 122.

76 The Rome Statute provides as war crimes in international armed conflicts (IACs): intentionally directing attacks against civilian objects, that is, objects which are not military objectives (Art. 8(2)(b)(ii)); and 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 (Art. 8(2)(b)(iv)). However, these crimes do not appear in the Rome Statute in relation to situations of NIAC. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute).

77 JEP, above note 72.

78 JEP, Auto SRVR 01, 1 February 2023, paras 504–525, 677–679.

79 *Ibid.*

80 *Ibid.*, paras 1062, 1062.1.

81 *Ibid.*, paras 1041, 1063.

organisms, the invasion of exotic weeds, loss of organic matter and soil nutrients, and the use of agrochemicals, pesticides and herbicides, resulting in the destruction of the soil's structure and water retention capacity.<sup>82</sup> The Chamber concluded that the damages were (a) widespread, because the impacted geographical areas were vast;<sup>83</sup> (b) long-term, because the recovery of moorlands ecosystems requires prolonged periods of time;<sup>84</sup> and (c) severe, because of the disturbance or considerable damage to human lives and natural resources, and the excessive exploitation of mineral resources, deforestation, and contamination of hydric sources.<sup>85</sup>

Based on voluntary recognition by defendants, reports by public institutions and NGOs, and plans for the protection of communities,<sup>86</sup> the Chamber of Recognition concluded that the FARC-EP had caused adverse impacts on the environment and the culture, identity, autonomy and traditions of the indigenous and Afro-Colombian communities. In sum, the Chamber declared that those harms were the consequence of the FARC-EP's occupation of sacred sites, military operations, permissive behaviour towards environmental damages, and failure to prevent.<sup>87</sup> In line with the Chamber of Recognition,<sup>88</sup> a concurring opinion asserted that the armed groups had acted like a *de facto* authority or Occupying Power and that they should therefore have adopted measures to protect the natural environment and prevent damages.<sup>89</sup>

The Chamber of Recognition underlined that excessive incidental damage to the natural environment as a result of a disproportionate attack is not foreseen by the Rome Statute as a war crime in NIAC.<sup>90</sup> Nevertheless, it added that the International Committee of the Red Cross (ICRC) considers that the practice of *ad hoc* international tribunals does not exclude the possibility that a State can define other serious violations of IHL as war crimes in its domestic legislation.<sup>91</sup>

82 *Ibid.*, para. 502.

83 *Ibid.*, paras 129–150, 1040.

84 *Ibid.*, para. 1040.

85 *Ibid.*, paras 1041, 1063.

86 *Ibid.*, paras 235–258.

87 *Ibid.*, paras 493, 1039–1041, 1062.2–1062.6. The Chamber of Recognition held that in the affected territories, the FARC-EP was a *de facto* environmental authority and did not have an active policy to prevent damages from illegal mining and the cultivation of illicit crops. It concluded that the guerrillas profited from the exploitation of mineral resources.

88 JEP, above note 78, para. 493.

89 See concurring opinion in JEP, Aclaración de voto del Magistrado Óscar Parra Vera, Auto SRVR No. 1 de 2023, 15 March 2023, paras 11–15.

90 JEP, above note 78, paras 1025, 1026. The Rome Statute, above note 76, does not have a war crime explicitly labelled as “destruction of the environment”. Article 8(2)(b)(iv) of the Statute establishes the war crime of excessive incidental damage in IACs. With regard to the natural environment, the commission of this crime requires the knowledge that an attack will produce environmental damage. In addition, the damage has to be widespread, long-term, severe and excessive in relation to the concrete and direct overall military advantage anticipated. Article 164 of the Colombian Criminal Code, above note 7, incorporates the crime of destruction of the natural environment without reference to the principle of proportionality: “anyone who in relation to or during an armed conflict, uses methods or means conceived to cause widespread, long-term and serious damage to the natural environment”.

91 JEP, above note 78, para. 1026.

In consequence, it declared that the FARC-EP had committed such conduct and held that (a) the war crime of destruction of the environment allows for the recognition of the environment as victim of armed conflict;<sup>92</sup> (b) the protection of the environment as a civilian object in accordance with the principles of distinction, proportionality and precaution is deeply rooted in conventional and customary IHL;<sup>93</sup> (c) there are several international and regional instruments and conventions that protect the natural environment;<sup>94</sup> (d) the Colombian Criminal Code forbids widespread, long-term and severe destruction of the environment by means and methods of warfare, and those damages had been caused by illegal mining and illicit crops;<sup>95</sup> (e) according to the *Tadić* precedent of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Colombian Criminal Code could be used as basis for prosecuting a war crime;<sup>96</sup> (f) characterization of criminal conduct does not have to be identical to the crimes found in the Rome Statute;<sup>97</sup> (g) the Colombian Criminal Code incorporates a crime with the wording of Article 55.1 of Additional Protocol I to the Geneva Conventions (AP I) on protection of the natural environment;<sup>98</sup> and (h) conduct not explicitly outlawed in Additional Protocol II to the Geneva

92 *Ibid.*

93 *Ibid.*, paras 1007–1023. The Chamber of Recognition cited Articles 35(3) and 53 of Additional Protocol I to the Geneva Conventions, Rules 43, 44 and 45 of the ICRC Customary Law Study, and paras 8 and 9 of the ICRC's 1994 *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, available at: <https://www.icrc.org/en/doc/resources/documents/article/other/57jn38.htm>. See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules>. The ICRC Guidelines were updated in 2020, and Rule 13 of the updated version establishes the prohibition of the destruction of the natural environment not justified by imperative military necessity; see ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict: Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary*, Geneva, 2020 (ICRC Guidelines), available at: <https://shop.icrc.org/guidelines-on-the-protection-of-the-natural-environment-in-armed-conflict-pdf-en.html>. The Chamber of Recognition also referred to Article 147 of Geneva Convention IV, on the extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly. See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). It further cited Rule 50 of the ICRC Customary Law Study in relation to the prohibition of destruction and seizure of property of an adversary.

94 JEP, above note 78, paras 1021, 1022.

95 *Ibid.*, paras 1035–1041. The Chamber of Recognition referred to Article 164 of the Colombian Criminal Code, above note 7, on destruction of the environment.

96 JEP, above note 78, paras 1031, 1042. The Chamber of Recognition cited ICTY, *The Prosecutor v. Duško Tadić*, Case No. ICTY-94-1-AR72, Decision on Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 38. This decision included four cumulative requirements for reinforcing characterization of crimes in domestic law as war crimes. These are: (1) the violation must constitute an infringement of a rule of international humanitarian law; (2) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (3) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (4) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

97 JEP, above note 78, para. 1043.

98 *Ibid.*, para. 1044.

Conventions (AP II) should not be perceived as permitted, considering that a human person remains under the protection of the principles of humanity and the dictates of the public conscience (Martens Clause).<sup>99</sup>

In addition to that reasoning, the Chamber of Recognition indicated that environmental damage could be characterized as destroying or seizing the property of an adversary unless such destruction or seizure is imperatively demanded by the necessities of the conflict.<sup>100</sup> The Chamber concluded that the State was the adversary of the FARC-EP, that natural resources could be considered as the State's property, that the State has the sovereign right to exploit those resources, and that the contamination of land by illegal mining or illicit crops was not justified by the principle of imperative military necessity.<sup>101</sup> Although the Chamber stated that the elements of the crime were met<sup>102</sup> and that this crime is also listed in the Rome Statute for NIACs,<sup>103</sup> it did not indicate in the resolution section of its decision that the FARC-EP defendants had committed such conduct.<sup>104</sup> In concurring opinions, justices considered that environmental damage could have also been characterized as destruction of cultural goods<sup>105</sup> or pillage.<sup>106</sup>

The decision endorsed by the majority in the Chamber of Recognition was partially contested in three separate dissenting opinions.<sup>107</sup> Although the dissenting judges recognized environmental damages by illegal mining and illicit crops,<sup>108</sup> they considered that the characterization of such conducts as the war crime of disproportionate attack causing excessive harm to the natural environment was incorrect. In sum, they argued that according to the Rome Statute, this is a crime in international armed conflicts (IACs) but not in NIACs.<sup>109</sup> The dissenters opined that the Chamber had erred in its characterization of a war crime with a basis in the Colombian Criminal Code,<sup>110</sup> that its references to human rights law

99 *Ibid.*, para. 1033.

100 *Ibid.*, paras 1027–1030. See also Rome Statute, above note 76, Art. 8(2)(e)(xii); and see concurring opinion in JEP, Aclaración de voto del Magistrado Óscar Parra Vera, Auto SRVR No. 001 de 2023, 15 March 2023, paras 16–23.

101 JEP, above note 78, paras 1028–1030.

102 *Ibid.*, para. 1030. See concurring opinion in JEP, Aclaración de voto de la Magistrada Belkis Izquierdo, Auto SRVR No. 001 de 2023, 10 March 2023, para. 28.

103 Rome Statute, above note 76, Art. 8(2)(e)(xii).

104 JEP, above note 78, paras 667–669.

105 Rome Statute, above note 76, Art. 8(2)(e)(iv). See concurring opinions in JEP, Aclaración de voto del Magistrado Óscar Parra Vera, Auto SRVR No. 001 de 2023, 15 March 2023, paras 31, 32; and JEP, Aclaración de voto de la Magistrada Belkis Izquierdo, Auto SRVR No. 001 de 2023, 10 March 2023, paras 70–94.

106 Rome Statute, above note 76, Art. 8(2)(e)(v). See concurring opinion in JEP, Aclaración de voto del Magistrado Óscar Parra Vera, Auto SRVR No. 1 de 2023, 15 March 2023, paras 24–30.

107 See dissenting opinions in JEP, Salvamento parcial de voto de la Magistrada Catalina Díaz, Auto SRVR No. 01 de 2023, 21 March 2023, pp. 2–10; JEP, Salvamento parcial de voto de la Magistrada Lily Andrea Rueda Guzmán, Auto No. 01 de 2023, 9 March 2023, pp. 9–11; and JEP, Salvamento parcial de voto de la Magistrada Julieta Lemaitre Ripoll, Auto No. 01 de 2023, 8 March 2023, pp. 11–16.

108 See dissenting opinions in above note 107.

109 *Ibid.*

110 Article 164 of the Colombian Criminal Code, above note 7, forbids the destruction of the natural environment. This norm is part of Title II on “Crimes against Persons and Property Protected by International Humanitarian Law”.



were unrelated to international criminal responsibility<sup>111</sup> and that the decision contravened the principles of legality,<sup>112</sup> legal certainty<sup>113</sup> and non-retroactivity.<sup>114</sup> Also, they underlined that illegal mining and cultivating illicit crops did not correspond with the definition of attack in the conduct of hostilities or of means or methods of warfare.<sup>115</sup> A judge observed that causality between the conduct of FARC-EP commanders and environmental damages was not established, that the extraction economies preceded the presence of the FARC-EP in the affected territories and persists after their withdrawal, and that environmental impacts derive from multiple causes.<sup>116</sup>

In addition, both a concurring and the three dissenting opinions contested the statement of the Chamber of Recognition on the possibility of characterizing environmental damage as a war crime of destroying or seizing the property of an adversary.<sup>117</sup> They asserted that such an interpretation was inconsistent with the juridical personality of the environment and its nature as a collective right, and that paradoxically the Chamber of Recognition had reaffirmed a colonial perspective of the environment when considering it an object or property of the adversary, which does not reflect the special meaning of and relationships between communities, nature and territory.<sup>118</sup> Additionally, a dissenting judge indicated that neither the defendants nor the victims identified the natural environment as an object that the FARC-EP attacked in order to illegitimately reduce the combat ability of the adversary.<sup>119</sup>

The dissenting opinions considered that all the elements of the *Tadić* precedent<sup>120</sup> were not met.<sup>121</sup> They underlined that despite the existence of the crime of destruction of the environment in national legislation, it was not yet incorporated as a war crime in NIAC, either in conventional or customary

111 See dissenting opinions in above note 107.

112 *Ibid.*

113 *Ibid.*

114 *Ibid.*

115 *Ibid.* See concurring opinion in JEP, Aclaración de voto del Magistrado Óscar Parra Vera, Auto SRVR No. 001 de 2023, 15 March 2023, paras 16, 17, 23. The judge considered that qualifying illegal mining and illicit crops as attacks may not correspond to the definition found in Article 49(1) of AP I. He underlined that “attacks” take place in the context of military operations and hostilities, excluding other activities performed by non-State armed groups such as exploitation of soil. In contrast, see concurring opinion in JEP, Aclaración de voto de la Magistrada Belkis Izquierdo, Auto SRVR No. 001 de 2023, 10 March 2023, paras 73, 85. This judge argued that the environmental destruction could have been characterized as the war crime of destruction of cultural goods. She also stated that since the attack does not have to take place during hostilities, illegal mining and illicit crops could be covered by this war crime.

116 See dissenting opinion in JEP, Salvamento parcial de voto de la Magistrada Catalina Diaz, Auto SRVR No. 01 de 2023, 21 March 2023, pp. 8, 9.

117 See concurring opinion in JEP, Aclaración de voto de la Magistrada Belkis Izquierdo, Auto SRVR No. 001 de 2023, 10 March 2023, paras 28–62; and the dissenting opinions cited in above note 107.

118 JEP, above note 117. In para. 59 the judge disagrees with characterizing environmental damage as destruction of the adversary’s property. In her opinion, this perspective does not correspond with the understanding of nature, territory and sacred places of indigenous and ethnic communities.

119 See dissenting opinion in JEP, Salvamento parcial de voto de la Magistrada Catalina Diaz, Auto SRVR No. 01 de 2023, 21 March 2023, p. 8.

120 ICTY, *Tadić*, above note 96.

121 See the dissenting opinions cited in above note 107.



law,<sup>122</sup> regardless of the serious impacts of such conduct.<sup>123</sup> They further emphasized that even if a conduct is prohibited by customary or conventional IHL, this does not automatically lead to criminal individual liability.<sup>124</sup> Conversely, the two concurring opinions argued that the elements of the *Tadić* test were fully met and that the crime of destruction of the natural environment in national legislation was a legitimate basis from which to criminally charge defendants for the commission of a war crime.<sup>125</sup>

Similarly, in Macro Case No. 02 covering the southwest Colombian territory of Nariño and in particular the municipalities of Tumaco, Ricaurte and Barbacoas, the Chamber of Recognition held that fifteen FARC-EP commanders were indirect co-perpetrators of the war crime of destruction of the environment.<sup>126</sup> It concluded that the FARC-EP had caused damage to the environment by attacks to oil pipeline infrastructure, illegal gold mining and installation of anti-personnel landmines.<sup>127</sup> In relation to attacks on the Transandino Oil Pipeline (Oleoducto Transandino, OTA), it affirmed that the FARC-EP had violated the principles of distinction, proportionality and precaution and that even if the OTA was to be regarded as a military target, the damage to nature and territory caused by oil spills was excessive, widespread, long-term and severe.<sup>128</sup>

In a separate opinion, a judge challenged this decision by arguing that destruction of the environment is not a war crime in NIACs, and that such qualification was unnecessary as the guerrillas' conduct already fell under other international crimes.<sup>129</sup> Indeed, the Chamber of Recognition concluded that the FARC-EP commanders also committed the crimes against humanity of extermination<sup>130</sup> and destruction of cultural objects and places dedicated to religion.<sup>131</sup>

122 Ibid. See ICRC Customary Law Study, above note 93, Rule 45, “Causing Serious Damage to the Natural Environment”, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule45>. “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. Destruction of the natural environment may not be used as a weapon.” The ICRC indicates that the applicability of both parts of this rule to NIACs is less clear than for IACs.

123 See the dissenting opinions cited in above note 107.

124 *Ibid.*

125 See concurring opinions in JEP, Aclaración de voto del Magistrado Óscar Parra Vera, Auto SRVR No. 001 de 2023, 15 March 2023, para. 22; and Aclaración de voto de la Magistrada Belkis Izquierdo, Auto SRVR No. 001 de 2023, 10 March 2023, para. 62.

126 JEP, Auto SRVR 03, 5 July 2023, para. 3932.

127 *Ibid.*, paras 1067, 1710, 1733–1763.

128 *Ibid.*, paras 1761, 1797.

129 JEP, Aclaración de voto de la Magistrada Julieta Lemaitre Ripoll, Auto No. 03 de 2023, 10 August 2023, pp. 9, 10.

130 JEP, above note 126, para. 1341. The Chamber of Recognition held that the FARC-EP had committed the crime against humanity of extermination according to Articles 7(1)(b) and 7(2)(b) of the Rome Statute, which provide that “extermination” includes the intentional infliction of conditions of life calculated to bring about the destruction of part of a population, such as the deprivation of access to food and medicine.

131 JEP, above note 126, paras 1770, 1801, 3932. The Chamber of Recognition held that the FARC-EP had committed the war crime provided for in Article 8(2)(e)(iv) of the Rome Statute which condemns “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”.

In relation to the crime of extermination, the Chamber of Recognition concluded that the indigenous and Afro-Colombian communities were not only victims of murder and massacres but also of conditions that led to their physical and cultural extermination,<sup>132</sup> such as the destruction of nature and their territory.<sup>133</sup> In this regard, it noted that oil spills and illegal gold mining caused contamination of the air, soil, subsoil, forests, mangroves, waterfalls, rivers, lakes and sea.<sup>134</sup>

In addition, the Chamber of Recognition held that the war crime of attacks against buildings dedicated to religion may take place during hostilities or outside of hostilities when cultural property is in the hands of the armed group.<sup>135</sup> In this sense, it interpreted the term “building” broadly to include sacred sites that, according to the cosmogony of ethnic groups, could encompass places like rivers with special significance for spiritual and medicine practices.<sup>136</sup> Besides attacks on oil infrastructure and the installation of anti-personnel landmines, the Chamber expressed that the notion of attack also covers illegal mining and affirmed that the places where extraction activities took place were not military targets.<sup>137</sup>

These cases show the complexities of characterizing conduct that impacts the environment and how they give rise to considerable debate in transitional justice. Although in general the justices accepted that the environment was negatively impacted by armed conflicts, this did not mean convergence with regard to concluding that illegal mining and cultivation of illicit crops fit into the war crime of disproportionate attack causing excessive incidental harm to the natural environment. Furthermore, these discussions are connected to the distinction between a violation of IHL and a “serious violation of IHL” or an act classified as a war crime.<sup>138</sup> The ICRC outlines various rules and prohibitions within IHL regarding protection of the environment, but only mentions a few potential war crimes in NIACs: pillaging, destroying or seizing the property of an adversary, employing poison or poisoned weapons, and employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.<sup>139</sup> However, even if a conduct that harms the environment does not qualify as a war

132 JEP, above note 126, para. 1342.

133 *Ibid.*, para. 1377.

134 *Ibid.*, para. 1384.

135 *Ibid.*, paras 1769–1772.

136 *Ibid.*, paras 1782, 1785.

137 *Ibid.*, paras 1796–1802. The assertion that illegal mining amounts to an attack and that it should be assessed and regulated from the perspective of the paradigm of conduct of hostilities (IHL) is not without controversy. See, for instance, above note 55 on the debate on the legal frameworks applicable to eradication of coca crops. On the discussion on criteria for determining the nexus of an act with armed conflict, see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 2019, p. 53, available at: <https://shop.icrc.org/international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts-recommitting-to-protection-in-armed-conflict-on-the-70th-anniversary-of-the-geneva-conventions-pdf-en.html>. See also ICTY, *The Prosecutor v. Kunarac, Kovač and Vuković*, Case No. IT-96-23, 12 June 2002, para. 58, available at: [www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf](http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf).

138 ICRC, “What Are ‘Serious Violations of International Humanitarian Law’?”, Explanatory Note, available at: [www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf](http://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf).

139 ICRC Guidelines, above note 93, p. 110.

crime or “serious violation of IHL”, this does not imply that the action is acceptable from an IHL standpoint or that it should not be prevented or punishable.

## **Amnesties or pardons for conducts that cause direct or indirect environmental impacts in armed conflict**

The Colombian Constitution and criminal statutes have traditionally provided for amnesties and pardons for rebellion.<sup>140</sup> In this context, the 1991 Constitution allows amnesties and pardons for political crimes, such as rebellion or sedition, by virtue of Congress approval.<sup>141</sup> In accordance with this, in 2016 the Amnesties and Pardons Law (Law 1820 of 2016) covered the crimes of rebellion, sedition, violent riot, conspiracy, seduction, and usurpation or retention of command responsibility, as well as acts that could be in connection with them.<sup>142</sup> Also, this legislation explicitly prohibited amnesties for war crimes, crimes against humanity and genocide,<sup>143</sup> and established criteria for determining when a crime could be considered “connected to a political crime”. To that end, the law provides that the conduct must affect the State or its constitutional order, or that it must aim at facilitating, supporting, financing or hiding the rebellious acts.<sup>144</sup> In consequence, the Law does not apply to conducts that were neither committed in the context of or in relation to an armed conflict, or if their motive was based on personal or a third party’s profit.<sup>145</sup>

As shown in the previous section, in Case No. 05, the Chamber of Recognition determined that illegal mining and illicit crops fit into the war crime of destruction of the environment, ruling out the possibility of granting amnesties and pardons to the FARC-EP defendants. To support its position, the Chamber cited jurisprudence of the Inter-American Court of Human Rights (IACHR) on collective property rights, and international instruments on the protection of the environment and the right to a healthy environment.<sup>146</sup>

140 For instance, Article 127 of the 1980 Colombian Criminal Code stipulated that “[r]ebels or seditious persons will not be subject to criminal charges for punishable acts committed in combat, provided they do not constitute acts of ferocity, barbarity, or terrorism”. To this extent, under the regulation of political crimes, acts linked to hostilities were always incorporated into the crime of rebellion and therefore were not penalized, while “atrocious” crimes or acts of “ferocity and barbarity”—what we understand today as IHL violations, such as using indiscriminate weapons or directing attacks against civilians—were excluded from pardons and thus penalized. See Alejandro Aponte-Cardona, “Persecución penal nacional del homicidio en persona protegida: Alcance y límites del derecho penal en contextos de justicia transicional”, *Revista Colombiana de Derecho Internacional*, Vol. 17, 2010. This tradition of granting amnesties for political crimes was modified by a Constitutional Court decision in 1997 that declared unconstitutional Article 127 of the 1980 Criminal Code, and by the entry into force of a new statute in 2000 that eliminated the aforementioned article and included a chapter to criminalize violations of IHL. See Corte Constitucional de Colombia, Judgment C-456/97.

141 Colombian Political Constitution of 1991, Art. 150(17).

142 Congreso de la República de Colombia, Law 1820 of 2016, Arts 15, 16.

143 *Ibid.*, Art. 23, para. 2(a).

144 *Ibid.*, Art. 23, para. 1(b)–(c).

145 *Ibid.*, Art. 23, para. 2(b).

146 JEP, above note 78, paras 1021–2014, 1051–1054.

In a concurring opinion,<sup>147</sup> a judge supported the view of the Chamber of Recognition that due to the severity of environmental damages and impacts on the civilian population, illegal mining and the cultivation of illicit crops should not be awarded impunity.<sup>148</sup> In his opinion, he argued that the principle of the broadest possible amnesty (Article 6.5 of AP II) should be interpreted according to the purpose of best protection of victims, the principle of humanity and the dictates of public conscience.<sup>149</sup> The judge underscored that the application of this principle should not apply automatically and that the Chamber of Amnesties and Pardons of the JEP should make a case-by-case analysis considering harms and impacts caused to indigenous and non-ethnic communities.<sup>150</sup> He also argued that destruction of the environment is not just an act of engagement or participation in hostilities but a war crime, and that amnesties and pardons would compromise investigations, accountability and the rights of victims to reparations.<sup>151</sup>

Three separate dissenting opinions disagreed with the Chamber of Recognition because they considered that illegal mining and cultivation of illicit crops were not war crimes but criminal activities for the purposes of financing the armed group.<sup>152</sup> They asserted that the decision of the Chamber could cause legal uncertainty and affect the principle of the broadest possible amnesty.<sup>153</sup> One of the dissenting opinions also argued that the decision of the Chamber contradicted the jurisprudence on amnesties of the Chamber of Amnesties and Pardons and the Appeals Section of the Tribunal for Peace<sup>154</sup> and promoted the idea that amnesties and pardons already granted to FARC-EP guerrillas should be reviewed or reversed.<sup>155</sup>

Undeniably, the prohibition of amnesties and pardons for cultivation of coca crops raises questions regarding the treatment of conducts like fabricating, trafficking, smuggling and exporting drugs. The Chamber of Recognition did not mention whether amnesties and pardons previously granted for drug trafficking should be reversed or remain in force, and neither did it explain whether those conducts would be deemed as destruction of the environment if they had

147 See concurring opinion in JEP, *Aclaración de voto del Magistrado Óscar Parra Vera*, Auto SRVR No. 001 de 2023, 15 March 2023, paras 25, 33–45.

148 JEP, above note 78, para. 497.

149 JEP, above note 147.

150 *Ibid.*, para. 45. According to Article 72 of Law 1957 of 2019, the Chamber of Amnesties and Pardons is an organ of the JEP. Article 81 provides that this organ grants amnesties and pardons to persons accused or convicted of rebellion or related political crimes and that they may be granted conditional release. Conversely, when this Chamber denies an amnesty or pardon, the case is referred to the Chamber of Recognition or the Chamber of Definition of Legal Situation (see Article 84 on the functions of this organ).

151 JEP, above note 147, paras 37, 38. See concurring opinion in JEP, *Aclaración de voto del Magistrado Óscar Parra Vera*, Auto SRVR No. 003 de 2023, 10 August 2023, para. 43.

152 See the dissenting opinions cited in above note 107.

153 *Ibid.*

154 JEP, above note 116, pp. 2, 10.

155 *Ibid.* See Congreso de la República de Colombia, Legislative Act 1 of 2019, which reformed Article 150(17) of the Colombian Political Constitution in the sense that fabricating, trafficking and transporting of narcotics would no longer be considered related to political crimes. In this sense, since the entry into force of Legislative Act 1, amnesties or pardons cannot be granted to such conducts.

widespread, long-term and severe impacts. At the moment, however, the majority of the Chamber of Recognition (four out of seven judges) seems more inclined to an absolute exclusion of amnesties and pardons for conducts that could have caused environmental damages.<sup>156</sup>

According to the ICRC, the broadest possible amnesty can be an important incentive to respect IHL.<sup>157</sup> However, according to Rule 159 of the ICRC Customary Law Study,<sup>158</sup> amnesties must not be granted to persons suspected of, accused of or sentenced for war crimes. In this sense, it is relevant that the judicial debate in Colombia was significantly centred on defining whether illegal mining and illicit crops constituted a war crime or not, or if they were another type of criminal conduct or any other breach of IHL deserving a different treatment. Despite the argument against impunity and the guarantee of the rights of the victims, the statute of the JEP provides that even in the case of amnesties and pardons, the defendants are still obliged to contribute, individually or collectively, to the clarification of the truth, and that the right of victims to receive reparations is not extinguished.<sup>159</sup> In this regard, as transitional justice is also based on the principle of restorative and prospective justice,<sup>160</sup> it is necessary that besides the criminal implications for defendants, prevention and restoration of environmental damage are given considerable public attention and support.

## Precautionary measures and the relationship between transitional justice and environment-related projects

In its final report, the Truth Commission identified as a widespread practice that armed groups killed and disappeared people and threw bodies into rivers throughout the country.<sup>161</sup> The Truth Commission mentioned that the CNMH had documented over 1,000 bodies recovered from almost 200 rivers, demonstrating the recurrence of this practice.<sup>162</sup> In this framework, transitional justice mechanisms have identified that the protection of the environment is also key to protecting their adjudication function, truth-seeking and the rights of victims to know the whereabouts of their loved ones and to receive adequate reparations.

156 JEP, above note 78, paras 1046–1056.

157 ICRC Advisory Service on International Humanitarian Law, “Amnesties and International Humanitarian Law: Purpose and Scope”, available at: [www.icrc.org/en/download/file/54350/final\\_version\\_amnesties\\_factsheet\\_14\\_july\\_2017.pdf](http://www.icrc.org/en/download/file/54350/final_version_amnesties_factsheet_14_july_2017.pdf).

158 ICRC Customary Law Study, above note 93, Rule 159: “At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes.”

159 Congreso de la República de Colombia, Law 1957 of 2019, Art. 40, para. 2.

160 *Ibid.*, Arts 4, 13.

161 Truth Commission Final Report, above note 12, p. 197.

162 *Ibid.*

The procedural law of the JEP provides that it may issue precautionary measures with the purpose of avoiding irreparable damage to individuals and groups and guaranteeing the effectiveness of its decisions, the protection of victims and the restoration of their rights.<sup>163</sup> This mechanism has been used by the JEP in relation to infrastructure and maintenance projects with environmental impacts, although the protection of nature had not necessarily been its main purpose.

In 2021, the Tribunal for Peace's Section of First Instance for Cases of Non-Recognition of Truth and Responsibility (Sección de Primera Instancia para Casos de Ausencia de Reconocimiento de Verdad y Responsabilidad, SAR) issued precautionary measures and temporarily prohibited the operations of a dredging project in a canal leading to the Estuary of San Antonio in Buenaventura.<sup>164</sup> The purpose of these measures was to prevent these projects from affecting the search for human remains of persons deemed missing. Similarly, in 2022, the SAR issued precautionary measures in relation to a project for the restoration of harmed ecosystems in the Dique Canal after a flooding emergency.<sup>165</sup> The petitioners of these measures were organizations representing black and Afro-Colombian communities. They argued that in the area of intervention of the project, there could be human remains of persons who were victims of enforced disappearances, and who were killed, dismembered and thrown into the canal by organized armed groups.<sup>166</sup> The petitioners requested to suspend any activity or operations by the project, protect evidence, create an exhumation protocol and ensure dialogue, psychosocial support and a healing process.<sup>167</sup> In support of its order of precautionary measures, the SAR affirmed that in the period between 1991 and 2015, the bodies of 9,638 disappeared persons could have been thrown into the canal.<sup>168</sup>

When the precautionary measures were issued, the concessionary company had not been selected yet and the dredging project had not started its operations.<sup>169</sup> In this early stage, the SAR ordered the Ministry of Transport and the National Agency for Infrastructure to design an archaeological forensic protocol with an ethnic and gender perspective for the search for disappeared persons.<sup>170</sup> It also indicated that the protocol had to be created in coordination with the Special

163 Congreso de la República de Colombia, Law 1922 of 2019, Art. 22.

164 JEP, "La JEP inicia estudio de medidas cautelares sobre el estero de San Antonio en Buenaventura", Comunicado 044 de 2021, available at: [www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-inicia-estudio-de-medidas-cautelares-sobre-el-estero-de-San-Antonio-en-Buenaventura.aspx](http://www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-inicia-estudio-de-medidas-cautelares-sobre-el-estero-de-San-Antonio-en-Buenaventura.aspx); JEP, "La JEP realiza audiencia por solicitud de medidas cautelares, sobre el Estero de San Antonio de Buenaventura", Comunicado 135 de 2021, available at: [www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-realiza-audiencia-por-solicitud-de-medidas-cautelares-sobre-el-Estero-de-San-Antonio-de-Buenaventura.aspx](http://www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-realiza-audiencia-por-solicitud-de-medidas-cautelares-sobre-el-Estero-de-San-Antonio-de-Buenaventura.aspx); SAR, Auto AI 070 de 2022, 21 October de 2022, para. 49, available at: [https://relatoria.jep.gov.co/documentos/providencias/5/1/Auto\\_SARV-AI-070\\_21-octubre-2022.pdf](https://relatoria.jep.gov.co/documentos/providencias/5/1/Auto_SARV-AI-070_21-octubre-2022.pdf).

165 SAR, above note 164, para. 51.

166 *Ibid.*, para. 56.

167 *Ibid.*, para. 2.

168 *Ibid.*, para. 55.

169 *Ibid.*

170 *Ibid.*, para. 43.

Unit for the Search of Persons Deemed as Missing and the Ombudsman's Office.<sup>171</sup> In addition, the SAR ordered the Ministry of Transport to establish an inter-agency mechanism to draft guidelines and protocols to safeguard and protect non-identified bodies of suspected victims of armed conflicts and ensure their search, identification and dignified delivery to families. Those guidelines had to include a mechanism for assessing the environmental and social impacts of projects, with victim and community participation.<sup>172</sup>

Although the SAR recognized that the dredging projects had strategic importance for sustainable economic and social development, it also underlined that they had to be compatible with the State's non-renounceable obligations to search for and identify the remains of persons deemed as missing, and to deliver them to their families.<sup>173</sup> These landmark precautionary measures show how transitional justice can address connections between armed conflicts and the environment and issue orders to guarantee the rights of victims during the planning and execution of development or environmental restoration projects.<sup>174</sup>

## The natural environment and its integration into restorative sanctions and reparations

In transitional justice, restorative sanctions may contribute to reparations for victims, the reintegration of perpetrators into society, and reconciliation or re-establishment of social links.<sup>175</sup> The statute of the JEP includes a non-exhaustive list of restorative sanctions, and some are related to the environment.<sup>176</sup> The statute mandates that parole and restorative sanctions are contingent upon the perpetrators' recognition of responsibility, participation in truth-seeking and lack of recidivism.<sup>177</sup> These sanctions allow defendants' participation in or implementation of programmes for the protection of environmental areas, waste elimination and recovery of areas affected by illicit mining and crops.<sup>178</sup> In addition, the statute requires that the implementation of environmental projects align with public policies as well as the cultural and ethnic customs and traditions of the local communities.<sup>179</sup> According to the JEP's procedures, defendants may propose restorative sanctions to the Chamber of Recognition, followed by the observations of victims, their representatives, and the Ombudsman's Office.<sup>180</sup> After this process, the Chamber must prepare a conclusions report for the

171 *Ibid.*, para. 62.

172 *Ibid.*, para. 44.

173 *Ibid.*, para. 53.

174 *Ibid.*, paras 27–37.

175 JEP, "¿Qué es la Justicia Restaurativa?", available at: <https://www.jep.gov.co/Sala-de-Prensa/Paginas/justicia-restaurativa-jurisdicion-especial-paz-jep.aspx>.

176 Congreso de la República de Colombia, Law 1957 of 2019, Art. 141.

177 *Ibid.*, Art. 20.

178 *Ibid.*, Art. 141.

179 *Ibid.*

180 Congreso de la República de Colombia, Law 1922 of 2018, Art. 27.



Tribunal for Peace, which will make the final decision on the restorative sanctions to be imposed.<sup>181</sup>

In Macro Case No. 1, related to kidnappings and hostage-taking by the FARC-EP, defendants submitted a project for the environmental recovery of areas located in the National Natural Park of Sumapaz, also known to contain the largest moorland in the world.<sup>182</sup> The FARC-EP acknowledged that the environment was a victim<sup>183</sup> and that its criminal patterns during the conflict contributed to ecological imbalance. Specifically, it committed to developing activities of reforestation, education and ecotourism. As a symbolic reparation, the group proposed activities for informing tourists on the impacts of the armed conflict and of its former criminal behaviour.<sup>184</sup> Individual victims, NGOs, litigants and the Ombudsman's Office highlighted that although some abductees were taken through Sumapaz, the project had no correlation with the damages, and that defendants should not receive profits from the ecotourism company. They also made observations regarding the projects' financial sustainability and possible opposition of local communities to their implementation.<sup>185</sup> Despite this, the Chamber of Recognition valued the proposal as a restorative sanction considering that the FARC-EP had set up captivity camps in Sumapaz which caused stigmatization of the territory and its inhabitants.<sup>186</sup>

Within Macro Case No. 3, a sub-case related to the murder and enforced disappearances of members of the Wiwa and Kankuamo indigenous communities, committed by the military in the Caribbean Coast, a colonel proposed, as part of his restorative sanction, to create and lead a team for reforestation, recovery of hydric basins, and environmental sanitation activities.<sup>187</sup> He also committed to identifying existing State institutions and NGO programmes and budgets for these activities. After this, he proposed that victims should coordinate, manage and execute the budget and resources, and that the military defendants should be in charge of the material implementation.<sup>188</sup>

In this case, the Chamber of Recognition had sustained that the armed forces had caused the loss of the ecological and spiritual balance between communities and ancestral territories<sup>189</sup> and damaged the territory by profanation and destruction of sacred places.<sup>190</sup> However, the military defendants were not accused of environmental crimes, neither causing deforestation nor damage to water sources. Nevertheless, the Chamber considered that the initiative

181 *Ibid.*

182 We Are Water Foundation, "Sumapaz, the Return of the Guardians of Water", 30 March 2022, available at: [www.wearewater.org/en/sumapaz-the-return-of-the-guardians-of-water\\_349491](http://www.wearewater.org/en/sumapaz-the-return-of-the-guardians-of-water_349491).

183 JEP, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Resolución No. 02 de 2022, 24 November 2022, para. 534.

184 *Ibid.*, paras 186–188.

185 *Ibid.*, para. 559.

186 *Ibid.*, para. 583.

187 JEP, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Resolución No. 03 de 2022, 7 December 2022, paras 32, 767.

188 *Ibid.*

189 *Ibid.*, para. 803

190 *Ibid.*, para. 572

was in conformity with the law and had a restorative and reparation effect responding to the needs and priorities of victims<sup>191</sup> – namely, the restoration of forests and the recovery of their traditional crops.<sup>192</sup> It also stressed that the proposal complied with the view of territory as a victim and a subject entitled to rights.<sup>193</sup>

In sum, these two cases show that defendants may propose and eventually engage in the implementation of environmental restorative sanctions even if there was no declaration of a crime related to the environment. Although some victims may find that a proposal for an environmental restorative sanction is unrelated to their damages, the Chamber of Recognition may validate it if it benefits the general community and addresses other impacts of armed conflict such as stigmatization.

Finally, as in Macro Cases No. 2 and No. 5 the Chamber of Recognition determined the existence of crimes that caused harms to the environment, the eventual proposals by defendants, victims and their representing organizations for restorative sanctions will be an important piece of analysis, especially with regard to how they aim at restoring and preserving the environment and preventing future damages.<sup>194</sup>

## Concluding remarks

Despite the declaration of protection of the natural environment in the Final Agreement and the progressive attention of the JEP to environmental damage, the environment continues to be affected by other ongoing armed conflicts. In 2023, the ICRC documented seven NIACs in Colombia: three between armed groups and State armed forces and four between armed groups and other armed groups.<sup>195</sup>

According to a report issued by the JEP's Investigation and Accusation Unit (Unidad de Investigación y Acusación, UIA), from 2016 to 2022, there have been 283 serious damages to the environment caused by attacks on oil infrastructure, deforestation, contamination of rivers and water resources, erosion, damage to fauna and flora, massive and indiscriminate felling of trees, fires, and damage to topsoil after production of coca paste.<sup>196</sup> The report established that the Gaitanist Self-Defense Forces of Colombia (Autodefensas Gaitanistas de Colombia, AGC), also known as the Clan del Golfo, led the illegal

191 *Ibid.*, para. 804

192 *Ibid.*, para. 170

193 *Ibid.*, para. 805. See also JEP, Salas de Justicia, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Auto 128 de 2021, 7 July 2021, para. 575.

194 At the time of writing, the concluding reports of the Chamber of Recognition, with proposals for restorative sanctions to be imposed by the Tribunal for Peace in Macro Cases No. 2 and No. 5, have not yet been issued.

195 Three of the NIACs are between the Armed Forces of Colombia and the ELN, AGC and former FARC-EP currently not covered by the Peace Accord respectively. The other four are between the ELN and former FARC-EP; the ELN and AGC; the former FARC-EP and the Segunda Marquetalia; and the former FARC-EP and the Comandos de la Frontera EB. ICRC, *Retos Humanitarios 2023*, 2023, available at: [www.icrc.org/es/document/colombia-retos-humanitarios-2023](http://www.icrc.org/es/document/colombia-retos-humanitarios-2023).

196 JEP, above note 9, pp. 1, 22, 52.

mining activities, the National Liberation Army (Ejército de Liberación Nacional, ELN) launched attacks on oil infrastructure, and FARC-EP dissidents were responsible for felling of trees and coca cultivation.<sup>197</sup> In relation to illegal mining, the UIA has documented that armed groups have engaged in extortion, theft or purchase of extracted minerals, and money laundering. It has also affirmed that due to their direct extraction of minerals, they have contaminated rivers with mercury and cyanide and caused the deviation of rivers.<sup>198</sup>

Although this article has focused on impacts on the environment, transitional justice mechanisms and the government should respond to other pressing challenges. For instance, victims and communities struggle to enjoy a healthy environment and freely circulate in or return to territories that are under the control of armed groups or are suffering from weapon contamination. Also, environmental defenders and community leaders face risks and threats against their lives, physical integrity and security.<sup>199</sup>

The JEP's decisions could also be helpful in the discussions regarding the treatment of environmental damages in peace processes such as the negotiations between the ELN and the Colombian government. In their commonly agreed agenda in Mexico 2023, the delegations of the ELN and the government declared that to overcome conflict, it is necessary to adopt political, social, economic, environmental and cultural transformations, public policies to prevent environmental degradation, reparations to individuals and communities, and recognition of the environment as a victim.<sup>200</sup> Similarly, the 2022 State policy for peace defines "human security" as protection of humans, nature and animals, and provides for the adoption of environmental policies and the integration of an environmental perspective during peace negotiations.<sup>201</sup>

Certainly, the attention that the environment has gained in the JEP's case law should be maintained, avoiding regression or invisibility in other transitional endeavours. This attention also converges with the concerns of the international community, the recognition of the right to a sustainable, clean, healthy environment as a human right, the urgent call for special protection measures for the most vulnerable persons in the context of climate change and environmental degradation, and the obligations that armed groups controlling territory may have under human rights law.<sup>202</sup>

197 *Ibid.*, pp. 34, 52.

198 *Ibid.*

199 Defensoría del Pueblo, "El 2022 marcó un lamentable récord de homicidios a líderes sociales y personas defensoras de derechos humanos", 23 January 2023, available at: <https://tinyurl.com/mmkedt74>. According to this source, at least 1,113 social leaders were killed between 2016 and 2022.

200 Presidencia de la República de Colombia, "Gobierno y ELN acuerdan nueva agenda de diálogos de paz", 10 March 2023, available at: <https://petro.presidencia.gov.co/prensa/Paginas/Gobierno-y-ELN-acuerdan-Nueva-Agenda-de-Dialogos-de-Paz-230310.aspx>.

201 Congreso de la República de Colombia, Law 2272 of 2022 (Law on Total Peace), Arts 2(a), 8(c).

202 HRC Res. 48/13, 8 October 2021; Intergovernmental Panel on Climate Change, *Sixth Assessment Report: Summary for Policymakers*, 2022, p. 7, available at: [www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC\\_AR6\\_WGII\\_SummaryForPolicymakers.pdf](http://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf); Office of the UN High Commissioner Human Rights (UN Human Rights) and United Nations Environment Programme, *What Is the Right to a Healthy Environment?*, information note, 2022, p. 17, available at: <https://wedocs.unep.org/handle/20.500.11822/>

As shown in this article, judicial and extrajudicial mechanisms in the Colombian transitional system have progressively focused their attention on the effects of armed conflicts on the environment. This has led to the adoption of precautionary measures, the characterization of environmental damages as war crimes and the denial of amnesties or pardons. These decisions may make it difficult for other transitional justice processes to ignore, overlook or take environmental matters for granted. However, in order to adequately respond to victims, it is necessary to implement reparations and adopt mechanisms to prevent serious harm against the natural environment. These measures were incorporated by the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, also known as the Escazú Agreement.<sup>203</sup>

Finally, in terms of implementing realistic and sustainable environmental restorative sanctions, transitional justice demands technical and financial resources. Firstly, the determination of harm, its nature, level and extent, and the calculation of environmental impacts on ecosystems, communities and individuals may require input by physicians, biologists, anthropologists, environmental engineers and forensic experts. However, the affected communities should also be consulted, and there should be an open dialogue aimed at understanding from a multicultural perspective the impacts of armed conflict on their lives and culture, which are inseparable from their notion of nature and territory, and the best measures for redress and reparation. Secondly, the repairing of widespread, long-term and severe damage to the environment requires financial support beyond the capacity, means or goodwill of defendants. Therefore, as the Chamber of Recognition has held, it is necessary that defendants' projects complement State public environmental policies and existing programmes of environmental protection and collective reparation plans.<sup>204</sup> At this level, it is essential that restorative sanctions and reparation programmes follow principles of intergenerational equity, precaution, non-recurrence, respect for the burden capacity of ecosystems, fair distribution and sustainable use of natural resources.<sup>205</sup>

41599; UN Human Rights, "Joint Statement by Independent United Nations Human Rights Experts on Human Rights Responsibilities of Armed Non-State Actors", 25 February 2021, available at: [www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights](http://www.ohchr.org/en/press-releases/2021/02/joint-statement-independent-united-nations-human-rights-experts-human-rights).

203 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 2018, Arts 8(3)(d), 8(3)(g), available at: <https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf>; Ministerio de Relaciones Exteriores, "Presidente Gustavo Petro sanciona la ley que aprueba el Acuerdo de Escazú", 5 November 2022, available at: [www.cancilleria.gov.co/newsroom/news/presidente-gustavo-petro-sanciona-ley-aprueba-acuerdo-escazu](http://www.cancilleria.gov.co/newsroom/news/presidente-gustavo-petro-sanciona-ley-aprueba-acuerdo-escazu). In November 2022, the Colombian Congress passed Law 2273, which approves the Escazú Agreement. After positive review by the Colombian Constitutional Court, this instrument could be ratified. See Congreso de la República de Colombia, Law 2273 of 2022, available at: [www.secretariasenado.gov.co/senado/basedoc/ley\\_2273\\_2022.html](http://www.secretariasenado.gov.co/senado/basedoc/ley_2273_2022.html).

204 JEP, above note 187, paras 806, 809.

205 Carlos H. Lozano Acosta, "El daño ambiental en los programas de reparación colectiva para comunidades indígenas y afrodescendientes afectadas por el conflicto armado en Colombia", *Revista Colombiana de Derecho Internacional*, Vol. 8, No. 17, 2010, pp. 316–317.