

**PROTECTION OF THE NATURAL ENVIRONMENT UNDER IHL AND ICL:
THE CASE OF THE JEP IN COLOMBIA**

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I. Introduction

The Special Jurisdiction of Peace (*JEP* in Spanish) is one of the components of the Integral System of Truth, Justice, Reparations, and Non-Repetition (*SIVJRNR* in Spanish) created by the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (Final Agreement). The *SIVJRNR* has the function of contributing to victims' rights by the establishment of truth, prosecution and sanction of the maximum responsible for the most severe crimes and the generation of conditions for non-repetition. The *SIVJRNR* has both judicial and extrajudicial mechanisms. On the extrajudicial side, there is the Truth Commission (*CEV* in Spanish) and the Special Search Unit for Persons reported as Missing (*UBPD* in Spanish). On the judicial side, there is the *JEP*.

The *JEP* is the Justice component of the *SIVJRNR*. It has the function of investigating, prosecuting and sanctioning wrongful conduct committed or occurred during the Colombian Armed Conflict (CAC), including the task of imposing sanctions from a transitional standpoint, to fulfill the international obligations to truth, justice, reparation, and non-repetition. It must be noted

that under International Humanitarian Law (IHL), the CAC was a Non-International Armed Conflict (NIAC). This has significant effects on *JEP*'s approach to those serious crimes.¹

With regard to its structure, the *JEP* is formed in two instances. First, it has the Justice Chambers. Those are the Chamber for Amnesty or Pardon, the Chamber of Definition of Judicial Situations, and the Chamber for Acknowledgment of Truth, Responsibility, and Determination of Facts and Conducts (*SRV/R* in Spanish). Generally, those chambers have the task of defining the contexts, situations, facts, persons, and conducts that will be prosecuted. Second, it has the Peace Tribunal. Four sections compose it: The Trial Section with Recognition of Truth and Responsibility of Facts and Conducts, the Trial Section Without Recognition of Truth and Responsibility of Facts and Conducts, the Revision Section, and the Appeals Section. Globally, those sections have the obligation of punish and establish the sanctions of those persons under the jurisdiction.

One of the challenges that the *JEP* faces is the determination and prosecution of those crimes that, due to their complexity, were not considered by the ordinary justice system. Indeed, the CAC had such a complexity that a lot of crimes did not pass under the scope of the authorities. Some of the crimes that have not been investigated were those that had harmful effects in the natural environment. Although those conducts have been recurrent in the more than fifty years NIAC and are punishable under criminal law as violations of IHL at least since the year 2000, they have not been the object of investigation, prosecution, nor sanction.

The goal of this piece is to argue that the *JEP* creates the perfect stage for the prosecution and truth building in relation to those conducts. Certainly, harm to the natural environment was committed by the parties to the conflict in violation of International Law (IL). That is why this

¹ Rodrigo Uprimny Yepes & Nelson Camilo Sánchez León, *Transitional Justice in Conflict: Reflections on the Colombian Experience*, in *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* 258 (Roger Duthie & Paul Seils, ICTJ, eds. 2017).

article attempts to establish the different sources -especially under IHL and International Criminal Law (ICL)- that the *JEP* could use to prosecute this type of crime.

The first part of the argument concerns a hypothesis regarding the different approaches that there could exist between domestic law and IL, establishing that using IL is a better approach for the prosecution of the conducts. The second part addresses some sources of ICL and IHL related to the protection of the natural environment in NIACs. The third part pretends to show how the *JEP* could -and even must- use those IL sources. The fourth part takes some *JEP* relevant decisions related to the protection of the natural environment. Fifth, we will posit some possible conducts that could be prosecuted. Finally, we explain why we must take on the *JEP* the sources of IL.

II. Hypothesis, domestic and international approach to the protection of the Environment under IHL and ICL

Colombian domestic law in itself is insufficient to protect the natural environment in the occurrence of the CAC nor another armed conflict. The prohibitions included in the Colombian Criminal Code do not have a broad and comprehensive view of affections to the natural environment that could happen in the case of a military confrontation. That is why lawyers – especially the *JEP*– must use IL when addressing harm to the natural environment in the CAC context. This section will demonstrate why a domestic law approach is insufficient. In the next section the protection of the natural environment under IL will be addressed.

a) Environmental harm in the Colombian context: the Colombian NIAC

In Colombia occurred an armed confrontation amongst almost 50 years between the State, represented by its armed forces, and different organized armed groups (OAG)². Translating that

² In this regard, Article 1 of APII states that for a situation of NIAC to arise, it is necessary that "there are in the territory of a High Contracting Party armed forces and dissident armed forces or organized armed groups which, under the direction of a responsible command, exercise control over a part of that territory in such a way as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Also, the international

to the Additional Protocol II to the Geneva Conventions (APII) and Customary International Law (CIL) terminology, it means that the CAC is a NIAC. In this context, some conducts affected the civilian population in violation of IL, mainly concerning the affection of individual rights. Nonetheless, other structural damages have occurred in violation of IL but have not yet been approached by the Colombian authorities such as those that harm the natural environment. In response to that situation, some social organizations and government institutions have started to identify the impact that the CAC has had on the environment³.

The different parties to the conflict affected in two forms of the environment. First, there are direct effects caused by the conduction of hostilities. That is, for example, the case of the bombing of pipelines managed by both public and private companies. Second, there is an indirect or mixed affection on the environment which respond to the need for funding of the conflict. This category is not confined to the activities that parties had when financing themselves. It also includes the

jurisprudence of the international criminal tribunals has pointed to the existence of two essential elements, on the one hand, the degree of organization and the level of intensity. See: Camilo Ramírez Gutiérrez *Evolución de los actores armados ante el derecho internacional humanitario en el siglo XXI*. [The evolution of armed actors vis-à-vis IHL in the 21st century] (2019); See also: Rogier Bartels & Katharine Fortin, Bartels Law, Justice and a Potential Security Gap: The ‘Organization’ Requirement in International Humanitarian Law and International Criminal Law., 21 – 1. *Journal of Conflict and Security Law*. 29 (2016).

³ See: Contraloría General de la República [Comptroller General's Office] *Minería en Colombia: Control público, memoria y justicia socio-ecológica, movimientos sociales y posconflicto* [Mining in Colombia: Public control, memory and socio-ecological justice, social movements and post-conflict] (2014); Rodrigo E. Negrete, *Derechos minería y conflicto. Aspectos normativos* Rights, mining and conflict] *in* [Volume I] *Minería en Colombia fundamentos para superar el modelo extractivista* [Mining in Colombia: foundations for the superation of the extractive model]. 23, 50 (Comptroller General's Office comp., 2014); In this vein, the Ombudsman's Office has shown the environmental harm of aerial spraying against illicit crops. See: Defensoría del Pueblo [Ombudsman's Office] *La ejecución de la estrategia de erradicación aérea de los cultivos ilícitos, con químicos, desde una perspectiva constitucional* [The execution of the strategy of aerial eradication of illicit crops, with chemicals, from a constitutional perspective]. (2018).

reaction that the counterpart had to those activities. In this category can be included activities such as the cultivation of coca crops by OAG and the subsequent State response by air spraying those crops⁴. Another example can be the affection of water fountains caused by illegal mining.

This last variant is of the utmost importance for IHL when looking at the socio-political variants that integrate the armed conflict, mainly when talking about the protection of the natural environment in armed conflicts. As Collier puts it, one of the primary triggers of modern irregular wars is the existence of natural resources or raw materials in the territories in which the confrontations are occurring. Collier believes that there is an inverse cause-consequence relation between the existence of socio-economic conditions in which illegal economies tend to flourish and the existence of armed groups. For example, the exploitation of mining resources and the existence of irregular armed actors. When the former takes place, not only the armed group tends to be affected by it as it finances them, but it also affects the civilian population at being in enclave economies, which create contexts of the high vulnerability of the civilian population. This context facilitates recruitment by armed groups as they become the only way of living in those areas⁵.

Bearing that in mind, it becomes inevitable that the parties tend to use methods that affect specific natural resources and the natural environment. That is the case in the CAC. Thus, it is essential that the *JEP* investigates to what extent this type of conduct occurred contrary to IHL either by the State armed forces or by the FARC-EP.

⁴ See: John Walsh et al, Washington Office on Latin America [WOLA], *La Aspersión Aérea de Cultivos en Colombia. Una Estrategia Fallida* [Aerial Spraying of Crops in Colombia, a failed strategy] (2009).

⁵ Paul Collier, *Guerra en el club de la miseria. La democracia en lugares peligrosos*. [War in the misery club]. (Víctor Úbeda trans., 2007). In the same vein, when discussing the second report of Rapporteur Lehto, Eduardo Valencia Ospina addressed the subject of exploitation of natural resources to finance war and the cycles of violence that it generates. See: Int'l Law Comm'n., 71st Sess., 3466 mtg. at 9, U.N. Doc. A/CN.4/SR.3466 (May 17, 2019).

b) Protection under domestic law

In 2000 the Colombian Congress adopted the current Colombian Criminal Code. Some of the more notable changes are the crimes included in Book II, Title II, Sole Chapter titled "Crimes against IHL." Its 37 crimes in articles 135 to 164 are related to the conduction of hostilities under the jurisdiction of the Colombian State. Notably, every single of those articles starts with the *chapeau* "The person who, in the course of armed conflict (...)"⁶. That means that those crimes are applied in either International Armed Conflict (IAC) or NIAC indistinctly. Concerning the specific protection of the natural environment in armed conflicts, three different crimes are identified:

Article 154 establishes the crime of Destruction and Appropriation of Protected Objects.

The person who, in the course and conduction of armed conflict and outside the primarily criminal cases which provide a more substantial penalty, destroys or appropriates protected objects under [IHL] by illegal or excessive means to the actual military advantage expected, shall be liable to a term of imprisonment (...)

Paragraph: to the effects of this and the other articles of this title, the following shall be understood as protected objects under [IHL]

1. Civilian objects which are not military objectives
2. Cultural objects and places destined for purposes of worship
3. Objects indispensable to the survival of the civil population
4. The elements which integrate the natural environment
5. Works and Installations are containing dangerous forces⁷:

Article 154 can be considered as an 'umbrella clause' of protection of civilian objects and property. Nevertheless, even if there is an inclusion of the environment in numeral 4 of the sole paragraph,

⁶ See Código Penal (Criminal Code) [C. Pen.]. Articles 135 to 164

⁷ *Id.* Article 154

there is a specific article that proscribes the destruction of the environment. As the last part of article 154 shows, when there is a special provision, the applicability of article 154 is excluded.

Articles 157 and 164 can be considered as those that exclude the application of article 154.

Article 157 establishes the crime of attack towards works and installations containing dangerous forces:

The person who, in the course and conduction of armed conflict and without justification based on imperative military needs, attacks dams, dikes, power plants, nuclear power plants, or other works or installations containing dangerous forces, shall be liable to a term of imprisonment (...)

If the attack derives in the release of forces with loss or damage to property or objects necessary for the livelihood of the civilian population, the penalty shall be (...)⁸

This article punishes the well-known prohibition of attacks directed towards works and installations containing dangerous forces. By reading the article, it is evident that it does not consider the natural environment as a directly protected object. However, the protection could emerge by interpreting that the natural environment is essential for the livelihood of the civilian population, protecting it indirectly. Consequently, this article protects the environment in the event of an attack towards a work or installation which contains dangerous forces, those forces are released and then the natural environment is affected. Nevertheless, it requires an effective attack directed towards those works and installations, which is not always the case.

Finally, Article 164 establishes the crime of Destruction of the environment: “The person who, in the course and conduction of an armed conflict, uses methods or means of warfare conceived to

⁸ *Id.* Article 157

cause widespread, long-term and severe damage to the natural environment, shall be liable to a term of imprisonment (...)"⁹

This crime protects the natural environment against specific attacks towards it. In order to apply this article, the conduct must have the following two requisites: 1) the method or mean used must be conceived to cause harm to the natural environment; 2) the nature of the hypothetical harm must be widespread, long-term and severe. Then, the effective harm to the natural environment is unnecessary. It suffices with the use of methods or means that are destined to cause harmful effects to the natural environment. Yet, it does not protect from those crimes in which the natural environment is targeted by using means or methods that are not destined to cause this type of harm, nor protects from harm occurred as "incidental damages".

Because of the above, one can conclude that the sole domestic law is not enough to protect the natural environment. Undeniably, article 154 cannot be applied because of the protection provided by articles 157 and 164, but the protection provided by those two articles has flaws. On the contrary, IL -mostly IHL and ICL- do have provisions that have a broader and better range of protection.

III. Protection under international law

a) Damage to the natural environment under IHL

In IHL, some norms seek the protection of the natural environment directly or indirectly, although that idea does not follow the specific object of IHL (the regulation of the conduction of hostilities). IHL regulates the conduction of hostilities in its different approaches, such as the means or methods used in warfare or the conduct related to the protection of persons and objects. It also

⁹ *Id.* Article 164. A similar structure is followed by article 1 of The Environmental Modification Convention. However, Colombia is not a State Party to that treaty. Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques [ENMOD] art. 1, Oct. 5 1978, 1108 U.N.T.S. 151.

has provisions that protect the natural environment, which, in itself, have a double connotation: as a violation of IHL and as an International Crime punishable according to ICL.

Two approaches can be identified related to those affections towards the environment. First, there is the protection of civilian objects and the prohibition of attacks against them. In this category the main goal is to protect humans from the affections that warfare might have on some objects which are necessary for their existence. In it are included the protection of works and installations containing dangerous forces that affect the subsistence of persons such as oil pipeline bombing that has effects in the water sources used by the civilian population.

Second, there are attacks directed directly towards the natural environment, which causes widespread, long-term, and severe damage. This protection is established when there is no military need nor proportionality between the damage caused and the military advantage received. An example of this is the State's aerial spraying of OAG's illegal crops that affects their surroundings.

Those two categories are similar to the two views posited by Erdem. He states that there are two possible approaches to the protection of the environment under IHL. The first is the protection of the environment as an object needed for the survival of the civil population. The second is the protection of the environment directly¹⁰That translates into the anthropocentric and an eco-centric approach respectively. Those two approaches do not exclude the other completely. They are intertwined and complement themselves. In fact, having both might be important when addressing situations where one must simultaneously recognize the effects on the environment as a subject, and on the people, who have a relation with the affected natural environment. An example of this is the situation approached by the *JEP* about the Awá People detailed below.

Now, those norms have a dual character. First, there is the prohibition in itself at the armed conflict. Then, there is the ultimate sanction that arises from the conduct contrary to IHL.

¹⁰, Mete Erdem, *Enforcing Conventional Humanitarian Law for Environmental Damage during Internal Armed Conflict*, 29 *Geo. Int'l Envtl. L. Rev.* 435 (2017).

Particularly in the case of protection of the environment, the primary sources come from Customary International Humanitarian Law (CIHL)¹¹. In the same vein, the International Criminal Tribunal for the former Yugoslavia (ICTY) established in the Tadic Case¹² that infractions towards CIHL could be considered War Crimes (WC). Henceforth, the violations to CIHL that tend to the protection of the natural environment could be considered as WC.

One must have in mind that the different sources of IL let the interpreter reach different conclusions by studying jointly various sources. This situation rises from the hermeneutic tools that IL has for interpretation such as article 21 of the RE, article 30 of the Statute of the International Court of Justice (ICJ) or the norms of interpretation of the 1969 Vienna Convention on the Law of Treaties. In that sense, one must study and interpret those different sources, irrespective if they are hard or soft law sources.

Regarding hard law sources, the analysis starts on the I-IV Geneva Conventions (I-IV GC) and the Additional Protocols I and II, ICHL, the Rome Statute (RS), and the ICC Rules of Procedure and Evidence. Also, the judgments emanated from international criminal tribunals¹³. On a subject-approached list, these sources tend to consider the following: (i) the severe breach of IHL when

¹¹See. [Volume 1: Rules] Jean- Marie Henckaerts and Luise Doswald-Beck. ICRC Customary International Humanitarian Law, (2005); Gary D. Solis. The Law of Armed Conflict (2ed., 2016) [hereinafter *ICRC CIHL*]; Andrew Clapham *et al*, The 1949 Geneva Conventions. Commentary. (2018). On the importance of CIL and its identification, see Int'l Law Comm'n. Preliminary report on the protection of the environment to armed conflicts submitted by Marie G. Jacobsson, Special Rapporteur, UN. Doc. A/CN.4/674, at ¶ 89 and 116 [hereinafter *Jacobsson first report*]

¹² Prosecutor v. Tadic. Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹³ Nonetheless, as Jacobsson noted, in this subject, the jurisprudence is scarce. Int'l Law Comm'n. Second Report on the protection of the environment concerning armed conflicts submitted by Marie G. Jacobsson, Special Rapporteur, UN. Doc. A/CN.4/685, ¶ 89 and 92 [hereinafter *Jacobsson second report*]

attacking civilian objects; (ii) the serious breach when attacking installations containing dangerous forces; (iii) the serious breach when causing widespread, long-term and permanent damage to the natural environment; and (iv) the typical conduct of Article 8(2)(b)(iv), regarding GC of incidentally causing death, injury or excessive damage.

Regarding soft law, the most crucial source nowadays are the efforts done by the International Law Commission (ILC); especially the reports elaborated by special rapporteurs Marie G Jacobsson and Marja Lehto on Protection of the Environment to Armed Conflicts¹⁴. In this research, the second report by Lehto addressing the specifics of protection of the natural environment in NIACs is of the utmost importance.

b) Damage to the natural environment as a severe breach of customary international humanitarian law

At first sight, one can conclude that attacks that affect the environment categorically were not included as grave breaches under conventional law. That is demonstrated in the silence on those issues while some other types of breaches to IHL, such as illegal killings or raping, are established as grave breaches. This is verified by looking at article 51 of IIGC, article 130 of IIIGC, and article 147 of IVGC. However, this consideration loses its basis when CIHL is revised.

The developments toward CIHL aiming at the protection of the environment during armed conflicts began in the 1970s:

¹⁴ See *Jacobsson first report*, *Supra* note 11; *Jacobsson second report*, *Supra* note 13; Int'l Law Comm'n. Third Report on the protection of the environment about armed conflicts submitted by Marie G. Jacobsson, Special Rapporteur, UN. Doc. A/CN.4/700 [*Jacobsson third report*]; Int'l Law Comm'n. The first report on the protection of the environment concerning armed conflicts by Marja Lehto, Special Rapporteur, UN. Doc. A/CN.4/720; and Int'l Law Comm'n. Second report on the protection of the environment about armed conflicts by Marja Lehto, Special Rapporteur, UN. Doc. A/CN.4/728 [hereinafter *Lehto second report*].

In the early 1970s, two developments occurred: the international community began addressing environmental protection generally, and it also made a serious attempt to remedy the deficiencies of legal protection for victims of armed conflict. Both developments were prompted by a scandalization of public opinion triggered by several key events. In the international environmental realm, these were environmental disasters such as major oil spills, as well as a broad citizens' movement. As to the law of armed conflict, the developments were the Vietnam War, the protection of human rights in occupied territories (...), and the armed conflicts that occurred during decolonization.¹⁵

In the following years, it is hard to find concrete development until the 1990s. As it was recalled by the ICRC, until 1993, the subject is discussed once again thanks to the report submitted to the UN General Assembly¹⁶. Then, in 2007 the matter was developed in the ICRC study on CIHL. Particularly Rules 43¹⁷, 44¹⁸ and 45¹⁹ of that study establish the prohibition of attacks directed against the natural environment. Although it states the existence of doubts with the application of Rule 45 in NIAC, Rule 43 and 44 maintain the protection of the environment via application of the precautionary principle. The study suggests that in both NIAC and IAC, the parties to the conflict should apply this principle when directing an attack, even if they lack a scientific concept of certainty. In the same vein, principles of proportionality, distinction, necessity, and precaution

¹⁵ Michael Bothe *et al.*, *International law protecting the environment during armed conflict: gaps and opportunities*, 92. IRRC 569, 571-572 (2010).

¹⁶ *CIRC CIHL*, *Supra* note 11, at 144.

¹⁷ *Id.*, at 143-416

¹⁸ *Id.*, at 147-151

¹⁹ *Id.*, at 151-158

brought by common Article 3 to the GC are immersed within this prohibition of an attack on the natural environment.

It is clear then that in CIHL exists a customary norm concerning the protection of the environment in NIAC. In addition, in other spheres of IL there are some developments on this issue even if they are less clear or binding to States. That means that international society has some degree of awareness about this topic.

c) The political dimension of the prohibition about instrumentalization to the environment in uses and methods of warfare

Both the Gulf War and the conflict in Kosovo produced an international debate about the extensive damage to the natural environment caused by the use of warfare methods and the future implications for humanity. After those events, it began a 'slow-paced race' for the international protection of the natural environment in both IAC and NIAC²⁰.

The protection has tended to consider the environment as a particular object and not just an object related to the civil population. For example, "The ICJ has recalled, in para. 32 of the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (...) that: the destruction of the environment not justified by military necessity and carried out free of charge is manifestly contrary to IL in force²¹.

Another example is Principle 24 of the Rio Declaration. It states that "war is, by definition, the enemy of sustainable development. States shall, therefore, respect the provisions of [IL] protecting the environment in times of armed conflict, and cooperate in its further development, as

²⁰ See: Michel B. Likosky, *Law, Infrastructure, and Human Rights*, (2006).

²¹ *Id.*, at. 328.

necessary"²². This could be translated to protection in terms of common article 3 of the GC (application of the core principles) while constituting protection to the environment as of itself.

Likewise, the ENMOD has as its characteristics that (i) it focuses on damage caused to some other State Party, and therefore does not foresee situations such as damage caused in the national territory itself or in areas located outside the jurisdiction of States (such as the high seas), and, (ii) the conduct must be intentional or deliberate (and therefore does not include collateral damage). Because of these considerations, its scope is narrower. Despite this, and because of its effects, this scope can be complemented by Articles 54 and 55 of AP I (for the case of IAC)²³.

It must be highlighted that these developments are typical of IACs in which States limit their means and methods of warfare against other political entities of equal status. This is not the same in NIACs. Here, these types of obligations of self-restraint are more diffuse. In fact, as it is known, of the GC and their AP, only the APII brings obligations for States in NIAC situations. This problem increases with the OAG since they do not subscribe to international instruments, and the enforceability of such duties becomes more complicated by any tribunal.

Resuming to ENMOD, it enforces IHL as protection of different natural processes and elements that compose the natural environment (earth, biotics, lithosphere, hydrosphere, atmosphere, and outer space)²⁴. Yet, the treaty allows attacks towards the environment when given the

²² G.A. A/CONF.151/26(Vol. I) Annex I. Rio Declaration on Environment and Development. (Aug. 12, 1992).

²³ Bin Cheng, Custom: *The Future of General State Practice in a Divided World*, in *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, 513, (Ronald St. John. Macdonald & Douglas M. Johnston, eds. 1983). See also: Niels Petersen, Customary Law without Custom-Rules, Principles, and the Role of State Practice in International Norm Creation. 23 - 2 Am. U. Int'l L. Rev., 275 (2007).

²⁴ ENMOD. *Supra* note 9, at articles 1 & 2

circumstances to consider it as a military objective. Nonetheless, this does not mean that the rule is one of the allowances of attacks towards the natural environment.²⁵

States have also taken internal measures taken to protect the natural environment in times of war. As an example, the United States has stated that protecting the environment had long been a priority for its military, not only to ensure resources to maintain military capability, but also to preserve irreplaceable resources for future generations, and reaffirmed that protecting the environment during armed conflict was a matter of policy for many military, civil, economic and health reasons, in addition to purely environmental ones²⁶.

Another example is China which issued The Regulations of the People's Liberation Army of China on Environmental Protection. They include the obligation to ensure that environmental protection requirements are met in the development and production of military equipment. They also establish that measures must be taken to eliminate or reduce pollution when testing, using, and disposing of that equipment. It appears that the measures regulate pre-conflict situations the testing of weapons. They also appear to meet (partially) the requirements of the API.²⁷

²⁵ See: Glen Plant. *Environmental Protection and the Law of War: A Fifth Geneva Convention on the Protection of the Environment in Time of Armed Conflict*. (1992).

²⁶ U.N. GAOR 6th Comm., 68th Sess., 27th mtg. at ¶ 54, A/C.6/69/SR.27 (Nov. 24, 2014).

²⁷ China (People`s Republic of) *Reglamento del Ejército Popular de Liberación de China sobre la Protección del Medio Ambiente*. [China`s Army Rules on the protection of the natural environment] *in 31st International Conference of the Red Cross and Red Crescent*. (International Federation of Red Cross and Red Crescent Societies comp. 2011. On other examples of protection of the environment in national legislations, see: Nicolas Tsagourias & Alasdair Morrison, *International Humanitarian Law. Cases, materials and commentary*, (2018).

Colombia has also stated that the different branches of IL must be integrated in post-conflict contexts when addressing the impact that armed conflict had on the natural environment, especially when national law has been ineffective²⁸.

As a result, it could be concluded that States practice reaffirms the customary nature of the protection of the natural environment in times of conflict. However, it is unclear if the protection includes the application of treaties related to IAC in cases of NIAC and confrontations with OAG. Despite that, in recent years there has been a tendency to talk about environmental protection in NIACs. This can be seen in two lines: on the one hand, we have the RS and the work of the International Criminal Court (ICC). On the other hand, we are looking at the work of the ILC. Regarding the work of the ICC, Article 8 of the RS establishes a WC related to environmental damage under the IAC. As mentioned by Rapporteur Lehto, the first and only article that protects environmental damage is Article 8(2)(b)(iv) of the RS²⁹. That article establishes the following prohibition:

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 excessive concerning the concrete and direct overall military advantage anticipated³⁰.

The Elements of the Crimes of the ICC state the following related to this provision:

1. The perpetrator launched an attack.

²⁸ U.N. GAOR 6th Comm., 73th Sess., 279h mtg. at ¶ 143, A/C.6/73/SR.29 (Dec. 10, 2018).

²⁹ *Lehto Second Report, Supra.* note 14, at ¶ 60.

³⁰ Rome Statute of the International Criminal Court art. 8(2)(b)(iv), Jul. 17, 1998. 2187 U.N.T.S. 3.

2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
4. The conduct took place in the context of and was associated with an [IAC]
5. The perpetrator was aware of factual circumstances that established the existence of armed conflict.³¹

Although the crimes posited in articles 8.2.a) and 8.2.b) of the RS do not apply to IAC, the interpretation done of this provision is useful to shed some light to the protection of the environment under IHL and ICL.

At interpreting this clause, Cottier acknowledged some flaws and critics made by some authors and the United Nations Environmental Project to the standard of widespread, long-term and severe damage³². Indeed, it seems that there exists a consensus among different authors that the

³¹ ICC Elements of Crimes, ASPOR. 1st Sess., 8(2)(b)(iv), U.N. publication, Sales No. E.03.V.2 and corr.) (Sept 3-10, 2012).

³² Michael Cottier, *Paragraph 2(b)(iv): Intentionally launching an attack in the knowledge of its consequences to civilians or the natural environment*, in *The Rome Statute of the International Criminal Court: A Commentary*. 239, ¶ 241–242; (Otto Triffterer and Kai Ambos eds., 1rd ed. 1999).

RS standard is much higher than the one in ENMOD or in ICRC Customary Rules 43 to 45 in order to be considered an attack as a WC³³.

On the other hand, Rapporteur Lehto highlights that even if article 8.2.b)iv) is the only article in the RS who mentions the protection of the environment, some crimes established in articles 8.2.c) and d) can be related to the protection of the environment in NIAC³⁴. She also points out that Crimes Against Humanity (CAH) or the crime of genocide, both committed in the context of a NIAC, could affect the natural environment, and the clauses of the RS who prescribe them can be used in order to sanction harms to the natural environment. In fact, at studying the practice of the Office of the Prosecutor of the ICC (OTP), there is an interest in the protection of the environment.

The most important decision related to the protection of the natural environment under the ICC's jurisdiction is the application made by the OTP under Article 58 of the RS in the situation of Sudan. In this document, the OTP found that there were enough grounds to investigate Omar Al-Bashir for genocide and CAH. Among others, the OTP finds that attacks towards water sources are acts that fall under the category of genocide³⁵.

³³ See: Roberta Arnold & Stefan Wehrenberg, *Paragraph 2(b)(iv): Intentionally launching an attack in the knowledge of its consequences to civilians or to the natural environment*, in *The Rome Statute of the International Criminal Court: A Commentary*. 378-379 ¶ 253; (Otto Triffeter and Kai Ambos eds., 3rd ed. 2016); Jerome De Hemptinne. *Ensuring Compliance with the Conventions. Prohibitions of reprisals*, in *The 1949 Geneva Conventions. A commentary*, 581 (Andrew Clapham *et al.* eds. 2015); Michel Bothe. Geneva Convention IV, *Administration of Occupied Territory*, in *The 1949 Geneva Conventions. A commentary*, 1463, 1476, 1504, 1548 (Andrew Clapham *et al.* eds. 2015).

³⁴ *Lehto second report*, *Supra*, note 14, at ¶ 60.

³⁵ ICC. OTP. The situation in Darfur, Sudan. Case No. ICC-02/05-157, Public redacted version of prosecution's application under article 58 filed on 14 July 2008, Annex A. ¶ 200 (12 September 12, 2008).

In the same vein, in September 2016, the OTP issued a Policy Paper on case selection and prioritization. The approximation that the OTP had in it on the impact of the environment has two perspectives. First, it establishes that the OTP will contribute and collaborate with the countries that have investigations of conducts that constitute severe crimes under domestic law³⁶. Second, it establishes that case selection and prioritization shall have into account the environmental impact of the conducts that are under investigation by the OTP, specifically at assessing the gravity of the crime³⁷.

In conclusion, the interest of the ICC -specifically the OTP in prosecuting grave crimes which have effects on the natural environment can be identified. That is done within the specific reach of the jurisdiction of the ICC, which translates into the inapplicability of crimes designed specifically for the protection of the environment in NIAC.

Going back to the ILC's work, Rapporteur Lehto postulates the need for protection of the natural environment not only via the application of IHL, but also International Human Rights Law (IHRL) and International Environmental Law. For example, she recalls the effects that forced displacement has on the environment³⁸, as well as forms used by armed groups to finance themselves, such as poaching and the exploitation of the natural environment³⁹. Those remarks concluded in the proposition of two principles by the rapporteur. Principle 13 *ter* and Principle 14*bis*⁴⁰.

³⁶ ICC. OTP. Policy Paper on Case Prioritization and Selection, ¶ 7 (15 September 2016).

³⁷ *Id.*, at ¶ 40-41

³⁸ *Lehto second report*. Supra note 14, at ¶ 39- 49

³⁹ Hyeran Jo. Compliant rebels. Rebel groups and international Law in World Politics. at 56 (2015).

⁴⁰ *Lehto second report*. Supra note 14, at ¶ 50

d) Article 21: the way from RS

Authors like Nagler have proposed the harmonization of WC under the ER, which is the case of article 8(2)(b)(iv): disproportionate attacks⁴¹. His suggestion does not resource to an analogy between the IAC and NIAC applicable crimes. Instead, it uses CIHL for widening the norm without recalling the rules of interpretation included in article 21 of RS. He posits that disproportionate attacks in themselves constitute a serious violation of CIHL entailing individual responsibility in NIACs. However, the problem with this vision is that the RS does not allow the enforceability of the same crimes in both NIACs and IACs. Authors like Sassoli have similar ideas regarding the protection of the natural environment in basis of the conjoint study of the RS and CIHL in situations such as the transboundary effects on the environment or the prohibition against indiscriminate attacks⁴².

Those new approaches validate the idea that the RS is not the compilation or codification of the totality of international crimes condemned under ICL. The stipulations inside the ICRC Customary Rules related to the protection of the environment, its application in NIAC as basis for WC and the lower threshold that they require to be applied in comparison to the one required by article 8(2)(b)(iv), demonstrate the existence of rules of CIL different to those enshrined in the RS. In the same vein, approximations different to those that apply *stricto sensu* to the conduction of hostilities such as the prohibition of pillaging natural resources shows us that in order to thoroughly investigate, prosecute, and punish WC related to the destruction of the natural environment, judges and tribunals must use CIL.

⁴¹ See: Patrick S. Nagler. Harmonizing war crimes under the Rome Statute. (March 2019)

⁴² See Marco Sassoli, International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare. (2019).

Likewise, it shows that the international community tends to generate new rules aimed at the direct protection of the natural environment in armed conflicts. This practice has led to the construction of norms, prohibiting the particular type of actions when conducting military operations mainly under CIHL and indistinctly if it is an IAC or a NIAC.

By using this formula, the *JEP* has the opportunity to establish a constant and vital precedent in the protection of the environment by using conventional and customary IHL and ICL to accomplish its objective to investigate, prosecute and punish the responsible for grave crimes - specifically WC- in the CAC and the transitional justice system.

IV. Special Jurisdiction for Peace - *JEP*

Since the explanation of the whole legal basis of the *JEP* could take an investigation in itself, only some basic concepts related to the structure of the *JEP* will be mentioned. Then, the sources applicable by the *JEP* will be explained.

a) General regulations of the *JEP*

The principal norms that rule the *JEP* are the Final Agreement, the Legislative Act No. 01 of 2017 (*AL01/17*), the Statutory Law on the Administration of Justice in the Special Jurisdiction of Peace – Law 1957 of 2019 (*LEJEP* in Spanish), the Rules of Procedure for the Special Jurisdiction of Peace – Law 1922 of 2018, and the Law on Amnesty, Pardon, and Special Criminal Treatments – Law 1820 of 2016 (Amnesty Law). From those norms it can be inferred the principal function of the *JEP*: to investigate, prosecute and punish crimes non-eligible for amnesty (CNEA) that constitute serious violations of IHL or serious human rights violations⁴³ caused by, as a result of, or direct or indirect relation with the armed conflict⁴⁴. In specific, like any other tribunal, the *JEP*

⁴³ L. 1957/19, June 6, 2019, Diario Oficial [D.O.] 50.976, (Colom.) [*LEJEP* hereinafter] art. 8

⁴⁴ *Id.*

has a limit to its jurisdiction *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione loci*. Here it will be addressed the *ratione materiae* and *ratione personae* exclusively.

Before that, it must be highlighted that the *JEP* is a transitional justice tribunal inside the *SIVJRNR*. That means that its objective is to maximize as possible the variable of justice in accordance to international obligations but responding to the transitional context and the maximization of other variables –such as Truth- by the other mechanisms established in the *SIVJRNR* – such as the *CEV*-.

Having that as a starting point, the design of the *SIVJRNR* included this approach since day one. Because of that, the only persons that will be prosecuted and sanctioned under the *JEP* are those maximum responsible for the most representative cases and of the most severe or grave crimes, and consequently those that are not going to be prosecuted will receive amnesty or pardons. IHL supports this position. Indeed, the Final Agreement⁴⁵ explicitly establishes that Article 6.5 of APII⁴⁶ will be applied in order to give the broadest amnesty possible.

⁴⁵ Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera [*Final Agreement*] at Item 5.1.2 ¶ 37 (2016).

⁴⁶ “At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”. Protocol Additional II to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts, art. 6.5, Jun. 8 1977, 1125 U.N.T.S. 609. This provision is also included in other *JEP* regulations. See: L. 1820/16, December 30, 2016, D.O. 50.102, (Colom.) [*Amnesty Law* hereinafter] art. 21; *LEJEP*, *Supra.* note 43 at art. 82

This is also the position of IHRL, specifically of the Inter-American Court of Human Rights. Judge García-Sayan demonstrates this position in his concurrent vote in the case of *Masacre del Mozote y lugares aledaños vs. El Salvador*⁴⁷:

This harmonization must be carried out by weighing these rights [rights to truth and justice] in the context of transitional justice itself. Thus, particularities and specificities may admittedly arise when processing these obligations in the context of a negotiated peace. Therefore, in these circumstances, States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict. (...)

It can be understood that this State obligation is broken down into three elements. First, the actions aimed at investigating and establishing the facts. Second, the identification of individual responsibilities. Third, the application of punishments proportionates to the gravity of the violations. Even though the aim of criminal justice should be to accomplish all three tasks satisfactorily, if applying criminal sanctions is complicated, the other components should not be affected or delayed. The right of the victims and society to access the truth of what happened acquires a particular weight that must be considered by an adequate assessment in order to delineate the specifics of justice in such a way that it is not antagonistic to the transitional justice required in peace and reconciliation processes. In that context, specific guidelines can be designed for processing those responsible for the most severe violations, opening the way, for example, to giving priority to the most severe

⁴⁷This position was explicitly referred by the parties to the Final Agreement. See: *Final Agreement*, *Supra* note 45, at ítem

cases as a way to handle a problem which, in theory, could apply to many thousands of those held for trial, dealing with less severe cases by other mechanisms.⁴⁸

In this vein, the *SIVJRNR* lets the *JEP* investigate within the limitations without the prejudice of the other obligations that non-prosecuted persons have in the transitional context, such as contributing to the truth before the *CEV* or providing information to the *UBPD*.

Passing to the specifics of the jurisdiction of the *JEP*, it has some guidelines in deciding whether to investigate or not investigate some cases. Those are the prioritization and selection criteria. The former refers to a workload management method. It is a form of organizing the information in order to attend more effectively the different matters brought⁴⁹. The latter is a criterion that lets the *JEP* establish if a particular case shall be prosecuted and punished or not, always looking for the most responsible persons and the most relevant cases. That means that when selecting cases, the *JEP* decides if it will apply or not the renouncing to a criminal action.⁵⁰ For this research, it suffices to have in mind that these criteria will limit the investigation, prosecution, and judgment of cases, paying particular attention to some situations and not the whole entirety of the *CAC*.

In respect of the competence *ratione materiae*, article 62 of *LEJEP* establishes that its competence will be over crimes caused by, as a result of or in direct or indirect relation with the *CAC*. Factors such as the ability to commit the crime thanks to the *CAC* or the resources that the *CAC* gave to the perpetrator are relevant factors to decide if the conduct is or is not related to the conflict.⁵¹

⁴⁸ *Masacres del Mozote y Lugares Aledaños vs. El Salvador*. Merits, Reparations, and Costs. Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 27 a 29 (Oct. 25, 2012). (Separate vote by Diego García Sayán).

⁴⁹ *JEP. Criterios y metodología de priorización de casos y situaciones en la Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas* [Criteria of prioritization before the *SRVR*] at ¶. 16 (2018).

⁵⁰ *Id.* ¶17

⁵¹ *LEJEP*, *Supra.* note 43 at art. 62

In addition, article 23, sole paragraph, literal a) of the Amnesty Law prohibits the granting of amnesty, pardon, or other special criminal treatments when the conduct is qualifiable as some specific crimes. As a result of that, the duty of investigation is imposed in the *JEP*. It is worth noting that some of those conducts are international crimes:

"Under no circumstances, the crimes that correspond to the following conducts will be the object of amnesty or pardon:

A) [CAH], genocide, [WC], taking of hostages or another serious deprivation of liberty, torture, extrajudicial executions, forced disappearing, violent carnal access and other forms of sexual violence, child abduction, forced displacement, also child recruitment in conformity with the provisions of the [RS]. If any criminal judgment used the wording "ferocity," "barbarism," or another equivalent, amnesty or pardon could not be granted exclusively for [CNEA].⁵²

This formula was denominated by the Colombian Constitutional Court (CCC) as the "Rule of exclusion of amnesty, pardons and renounce to a criminal action"⁵³. This is also seen in article 19 of *LEJEP*, which establishes that CNEA cannot be an object of the renounce of the criminal

⁵² L. 1922/18, 18 de julio, 2019, D.O. 50.658 (Colom.) art. 23. The underlined part was declared constitutional under the condition that child recruitment is a CNEA when the victim is under 15 years old before June 25th, 2005; and under 18 years old after June 25th, 2005. This is because of the entry into force in relation to Colombia of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. See: Corte Constitucional Colombiana [C.C.C.] [Colombian Constitutional Court], Agosto 15, 2018. C-080/18. (Colom.) [C-080 Hereinafter]

⁵³ C-080. *Supra* note 52.

action: "In no case, the exercising of the criminal action can be renounced in respect of CNEA according to (...) article 23 of [the Amnesty Law]"⁵⁴.

It is easy to conclude that although the *JEP* has jurisdiction to investigate all the conducts that happened in the CAC, it will have jurisdiction to prosecute and punish exclusively the most serious and representative crimes perpetrated in the context of the CAC.

For its part, *ratione personae* jurisdiction has two lines: one compulsory and one facultative. The former refers to those individuals that must present themselves obligatorily before the *JEP*. Article 63 of *LEJEP* regulates this group. It states that the *JEP* will have compulsory jurisdiction over i) members of the former guerrilla FARC-EP that either were included in the lists that the FARC-EP gave to the national Government; or persons that were convicted for their membership or collaboration to that group even if they themselves do not recognize their membership or collaboration; and ii) members of the armed forces, that is, persons that were part of the police or military forces when perpetrating the crimes under investigation⁵⁶.

On the other side, the voluntary jurisdiction of the *JEP* extends over those persons known as "third parties." A third party is any person different from members of the armed forces or the FARC-EP that contributed to the CAC, such as politicians, civil servants, or the civil population. When studying AL01/17 constitutionality, the CCC considered that third parties could not be judged compulsorily by the *JEP* because this tribunal is a result of the negotiation between two parties and only they consent to the *JEP* jurisdiction. If they imposed that onto other actors, it would tantamount to a violation of the guarantees of independence and impartiality, as well as to

⁵⁴ *LEJEP*, *Supra.* note 43 at art. 19

⁵⁵ The underlined part was declared constitutional under the condition that if the conduct under study was the crime of Genocide, CAH or WC, they must be systematic. *C-080*, *Supra.* note 52.

⁵⁶ *LEJEP*, *Supra.* note 43 at art. 63

the guarantee of the Natural Judge.⁵⁷ Nonetheless, if the third parties wish to present voluntarily before the *JEP*, it will be competent to investigate them in the case of those crimes related to the CAC. This last part was established in article 16 of AL01/17⁵⁸ after the CCC's judgment.

It is clear that the *JEP* will investigate combatants and non-combatants for the crimes that occurred in the CAC but will prosecute and punish only those most responsible for CNEA. In that list, there are crimes of international nature such as WC or CAH. Henceforth, the international nature of those crimes must take the *JEP* towards IHL and ICL.

b) Use of International Law by the *JEP*.

Two formulas are identified concerning the application of IL in the *JEP*. First, there is the Constitutional Block that has its roots in articles 93 and 215 of the constitution. It is a legal figure used to implement directly in the national sphere norms emanating from IL. Second, some norms command the *JEP* to apply IL explicitly. Both visions will be discussed below.

i) The Constitutional Block

The Constitutional Block, as Uprimny states⁵⁹, is an attempt to systematize IL. It consists of the inclusion of norms at the same level as the constitution in the application of articles 93 and 214 of the national constitution. In its literal meaning, Article 93 establishes that the IHRL treaty law that cannot be suspended under any circumstance, and will prevail in the national legal system. Nonetheless, the CCC has extended it to what is understood as the Block, including different norms and categories. Besides, article 214 says that Human rights and fundamental freedoms may not be suspended and that the rules of IHL shall be respected in any case.

⁵⁷ C.C.C., November 14, 2017. C-674/17, (Colom.).

⁵⁸ A.L. 01/17, abril 4, 2017, D.O. 50196 (Colom.) [*AL01/17* hereinafter] art. 16.

⁵⁹ Rodrigo Uprimny, El Bloque de Constitucionalidad en Colombia, Un Analisis jurisprudencial y un ensayo de sistematización doctrinal [The constitutional block in Colombia], https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_46.pdf

The CCC has made a distinction between the Block in *Strictu Sensu* and *Lato Sensu*. The former is composed of norms that follow the literality of article 93 and tantamount to the constitution in the Colombian legal system. The latter is composed of norms that are not part of the constitution but nurture its interpretation and scope. Uprimny and other authors⁶⁰ have understood that the Block makes the constitution a living instrument that can include new rights progressively. Nevertheless, when reviewing the Case Law of the Court, it does not limit the Block to rights. As an example, it has stated that the crimes included in the RS -but not is entirety- are a part of the Block *Stricto Sensu*⁶¹.

As mentioned before, articles 93 and 214 refers mainly to IHRL norms. That translates in the application of them as a parameter of application of the constitution directed towards public authorities. It is a general clause and not an express mandate related to the competence of an authority. Consequently, the *JEP* shall use the Block in cases in which it considers it appropriate, but it is not a call to apply IL in every situation. As an example, in the decision of the Awá people addressed below, it applied the Block when talking about the rights of indigenous people and its participation⁶².

In other words, the Constitutional Block can be seen as the use of IL as a general guideline-directed to all Colombian institutions. Bearing in mind that the *JEP* is a Tribunal that works under the Colombian constitution and is a part of the Colombian State, it has to follow it.

ii) The specific regulation of the *JEP*: international law as a *lex specialis*.

Although the *JEP* has guidelines emanated from IL applicable via the Constitutional Block, the normative framework that regulates it expressly commands the use of IHL an ICL as a *lex specialis*.

⁶⁰ See. Edgar Fuentes, *Materialidad de la Constitución [Constitutional materiarity]* (2010); Uprimny, *Supra* note 59.

⁶¹ C.C.C., april 18, 2012. C-290/12, (Colom.).

⁶² In *JEP*, SRVR, November 12, 2019. Decision 079, at ¶ 49-52 (Colom.).

First, article 5 of AL01/17 establishes that the conduct under investigation must be qualified jointly between domestic and IL:

The *JEP*, when adopting resolutions or judgment, shall make a legal qualification (...) based in the Colombian Criminal Code and/or the norms of [IL] in the field of Human Rights (IHRL), International Humanitarian Law (IHL) or International Criminal Law (ICL), always in application of the most-favorable law principle⁶³.

Article 22 of AL01/17 follows the same formula. Then, even if AL01/17 overrides the *LEJEP* hierarchically, article 23 of *LEJEP* establishes the specifics of the applicable law, and mandates the use of IHRL and IHL:

Article 23. Applicable Law (...). [T]he legal frameworks of reference include primarily International Human Rights Law (IHRL) and International Humanitarian Law (IHL). The sections of the Tribunal for Peace, the Chambers and the Investigation and Prosecution Unit, when adopting their resolutions or sentences, shall make a legal qualification of the System concerning the conduct that is the object of the same, a qualification that shall be based on the norms of the general and special part of the Colombian Criminal Code and/or the norms of International Human Rights Law (IHRL), International Humanitarian Law (IHL) or International Criminal Law (ICL), always with the obligatory application of the principle of favorability

The resulting qualification may be different from the one previously made by the judicial, disciplinary or administrative authorities for the qualification of these

⁶³ AL01/17 *Supra* note 58 at art. 5

conducts, since [IL] is understood to be applicable as the juridical framework of reference⁶⁴.

Other articles relevant to the prosecution are article 29 of AL01/17 (use of IHRL standards when investigating), article 40 of AL01/17 (widest amnesty possible in use of IHL), and article 42 of AL01/17 (the reiteration of CNEA).

In its function, the Appeals Section issued in May 2019 its first interpretative judgment. The Chamber recalled its function as the closing hermeneutical organ of the jurisdiction, and reiterated that it includes the applicable law under the *JEP* procedures:

"This mandate demands the constant normative harmonization of the Jurisdiction, both to fill gaps and determine which are the sources and legal instruments that integrate the transitional order. (...) In fact, according to articles 5 and 22 of Legislative Act 1 of 2017, the law in the *JEP*, for these purposes, includes (i) the Colombian Criminal Code; (ii) [IHRL]; (iii) [IHL], and (iv) [ICL]. Despite sharing some purposes and values, these regulatory bodies display differences and even contradictions. Their simultaneous implementation, without a hermeneutic articulation that provides this universe with a certainly reasonable coherence would generate traumas and equally diverse and discordant solutions within the Jurisdiction. It is not in vain that the [CCC] pointed out that the *JEP* "[...] must assume a task of interpretation and application of the law that requires harmony between the internal and international order"⁶⁵

The regulations mentioned and the Appeals Section's interpretations mean that all of the chambers and organs that compose the *JEP* must apply directly to IHL and ICL. It also establishes that this

⁶⁴ LEJEP, *Supra* note 43 at art. 23.

⁶⁵ *JEP*. Appeals Section. Abril 3, 2017. Sentencia Interpretativa Senit 1, at ¶ 19 (Colom.).

interpretation must be harmonically between domestic and IL, but that the Jurisdiction can have a different approach at sentencing if this change is based on IL.

On the other hand, neither *AL01/17* nor *LEJEP* does not differentiate between IL sources. Indeed, they do not specify that the *JEP* can only apply conventional law -such as the RS or the APII-, nor CIL -such as the ICRC Customary Rules-. This means that the *JEP* must apply all of IHL and ICL.

This is an opportunity to establish or crystalize new rules at the moment of speaking of the protection of the natural environment under IHL and ICL. As it was demonstrated, the protection of the environment under IHL and ICL does not subsume under the RS. It is still a disaggregated body of norms coming from different sources. Despite that, it is clear that there is a prohibition of attacking the environment under NIAC when the attack does not respect the proportionality nor the distinction principles, as they also exist the obligation of investigating, prosecuting, and punishing those conducts that classify as grave crimes such as WC. The specifics of those conducts, the scope of responsibility, and the threshold needed in order to conceive environmental harm as a WC are those grey areas in which the *JEP* can shed light.

Finally, it must be stressed the importance of this formula in order to protect the natural environment and prosecute those who harmed it in the *JEP*'s framework. Even though the Final Agreement does mention the environment and its protection, specific *JEP* regulations are almost silent on the matter.

The most important mention is one of the options given by article 141 of *LEJEP* regarding appropriate sanctions⁶⁶. In this norm, it is established that when the judge has decided the

⁶⁶. The *JEP*, three different types of sanctions: Special sanctions, alternative sanctions, and ordinary sanctions. Special sanctions are restorative sanctions with no prison time, which tend to the reparation of victims. Those apply to those responsible for grave crimes who, since the beginning of the process before the jurisdiction fully acknowledge their responsibility and contribute to truth. These are of 5 to 8 years for directly responsible and 2 to 5 years to indirect

sanctions in the framework of transitional justice, he must consider the effects on the natural environment. Logically, the *JEP* should consider those same affections when investigating, prosecuting and sanctioning the most serious crimes that occurred during the CAC.

Certainly, this new jurisdiction in Colombia will seek to enforce IL and values over the armed confrontation. However, it can be better if it builds a complex framework using the widest sources possible. Hence, the challenge for the judges is to widen the scope of investigation by having a complex understanding of the CAC, while looking forward to closing the violent context effectively that Colombia has lived.

c) The *JEP* experience: Cases 002 and 005

As it was explained, the *JEP* has the function of selecting and prioritizing the cases that fall under its jurisdiction. In that labor, the *JEP* has opened the so-called "Cases," which are macro-cases that encompasses different crimes either by the zone of occurrence of the type of crime. As of January 2020, the *JEP* has opened 7 cases related to different types of victimization and crimes committed nationwide or regionally.

Of those seven cases, there are three decisions that show the possibility of developments in ICL and IHL in relation to the protection of the natural environment. The first two are *SRI/R*'s Decisions 074 of 2018 and 032 of 2019 that opened Case 005. This case is related to the different

participants on the crimes. The Alternative Sanctions are directed to those who acknowledge their responsibility at later stages of the process. Those are prison sanctions of 5 to 8 years and 2 to 5 years in the case of indirect participants. Finally, Ordinary Sanctions are aimed at persons found guilty at the end of the trial before the Absence of Acknowledgment section. Those are of 15 to 20 years of imprisonment. *LEJEP*. *Supra* note 43 at arts. 125, 126, 127, 128, 129 and 130.

severe violations of human rights and IHL occurred in the north of the Department of Cauca and South of the Department of Valle del Cauca (southwest Colombia)⁶⁷.

In both decisions, the Chamber referred to the environmental impact that the CAC had in the Cauca inhabitants. Among others, it referred to those affections that the destruction of the environment had in groups under special protection such as indigenous people, Afro-Colombian and Romani communities, and peasant peoples. It also highlighted that some of the hazardous effects on the natural environment came from activities such as deforestation, illegal mining, illegal crops (particularly coca crops), and attacks on oil pipelines, which were used for the financing of combatants in the region⁶⁸.

The third decision also issued by the *SRVR* is Decision 079 of 2019. This Decision relates to the recognition of victims inside case 002⁶⁹, particularly of an Indigenous Association which encompasses 32 indigenous groups belonging to the Awá Indigenous People. In this decision, the Chamber speaks of the *Katsa Su*. This concept relates to the conception that the Awa People has of the world as a whole, including the territory, the people, and even the supra-natural species. In the words of the Chamber:

According to the Awá people, they belong to the 'Katsa Su', which is alive, is mother earth, are the fountain of good living and the house of the Awá people and the beings that inhabit it. In the Katsa Su the Awá people carry out every experience of spirituality (...). Effectively, for the indigenous peoples as the Great Awá Family,

⁶⁷ On Decision 078, the *SRVR* opened the case related to different crimes that occurred in eight municipalities located in the mentioned region. In Decision 032, the Chamber added nine municipalities. See *JEP*, *SRVR*, November 08, 2018. Decision 078. (Colom.); and March 12, 2019. Decision 032 (Colom.)

⁶⁸ Decision 078. *Supra* note 67 at ¶ 15.9; Decision 032, *Supra* note 67 at ¶. 6.2.1.3.9.

⁶⁹ Relates to serious Human Rights, and IHL violations occurred in the Nariño Pacific Coast (Southwest Pacific Colombian coast). See: *JEP*, *SRVR*, Julio 10, 2018. Decision 004. (Colom.).

"The world is not dual, everything is one, interrelated and interdependent; there is no separation between the material, the cultural and the spiritual. Also, everything is alive and sacred, not just human beings, but also hills, caves, water, houses, plants, and animals have social agency. (...) Then, the *Katsa Su* is woven from relationships endowed of sacred significance and integrated by diverse communal, social, and natural relations underlying the existence and identity of the Awá People. In words of a member of the Awá People: "without territory, we do not exist"⁷⁰.

Then, the Chamber recognized that the *Katsa Su* was a victim in itself, which derives in its right to participate as a direct victim in the proceedings before the *JEP* via the Awá indigenous groups and its representatives.⁷¹

The importance of those three decisions is the recognition not only of the environmental effects and damages that occurred during the CAC, which could tantamount to international crimes, but also the recognition of the natural environment as a victim itself. Henceforth, one can conclude that the *JEP* does have an interest in the prosecution of crimes that had harmful effects on the natural environment not only from a hegemonic and western point of view but also taking into consideration non-hegemonic and non-western world views. Concerning that point, the relationship between indigenous peoples, their territory and the effect of armed conflict in the environment was included by Rapporteur Jacobsson.⁷²

Nevertheless, those cases are not the only situations the *JEP* can analyze this type of crimes. As it was explained, prioritization is a workload management tool. That means that some conducts are

⁷⁰ Decision 079, *Supra* note 62 at ¶ 81

⁷¹ *Id.* First resolutive point.

⁷² *Jacobsson third report Supra* note 14, at ¶ 121-129

not yet under the Chambers work, but could be when, in the next months or years, the *JEP* opens the new situations or cases.

V. Proposal

As has been demonstrated, the *JEP* has the jurisdiction to investigate, prosecute and punish crimes related to damage of the environment in the context of the CAC. That being said, there are some situations occurred during the conflict that could be investigated by the *JEP*.

a) Aerial Herbicide Spraying

As Olasolo and Tenorio-Obando showed, OAG used drug trafficking as a form of financing themselves. In response to that, the State implemented a program aerial spraying over the illegal crops from which narcotics are produced. They concluded that the herbicidal spray on illegal crops -specifically coca crops- could amount to an attack under IHL. Nonetheless, they also state that under IHL those attacks are unlawful as the crops and the farmers which grow them cannot be considered lawful targets under IHL as they do not participate or contribute directly to hostilities.⁷³ In addition to those conclusions, one could argue that those attacks are also illegal under IHL because of their disproportionality and lack of distinction, which results in harmful effects on the environment. In fact, as Cárdenas and Casallas said, the agreement reached between the Governments of Ecuador and Colombia that resulted in the discontinuance of the proceedings before the ICJ brought by Ecuador for the transboundary effects of the herbicide spraying, could tantamount to a Colombian recognition of international responsibility⁷⁴.

⁷³ Hector Olásolo & Felipe Tenorio-Obando. *Are the Targets of Aerial Spraying Operations in Colombia Lawful Under International Humanitarian Law?*, in 20 YIHL. 229, 252. (Terry D. Gill Tim McCormack, Robin Geiß & Heike Krieger. ed. 2017).

⁷⁴ Fabian Augusto Cárdenas Castañeda & Oscar Orlando Casallas Meneses. *La Negociación como Estrategia de Defensa del Estado y el Caso Ecuador c. Colombia por las Fumigaciones con Glifosato* [Negotiation as an Strategy for State Defense and the Ecuador

It would be useful that the *JEP* takes into consideration that recognition of responsibility. If there is this recognition under IL before an international tribunal, the effects of those wrongful acts must also be assessed under IHL and ICL. It is worth noting that the zones of Case 002 are the same as those in which the aerial spraying of the ICJ case was based on.

b) The Bombing of pipelines

In Colombia, different OAG have used the bombing of pipelines as a form to respond militarily toward the State while making a political claim. Indeed, the FARC-EP had a left-wing political standpoint, so they saw the oil industry as an enemy. Because of that, they made direct attacks towards this civil objective causing several damages to the natural environment. As part of the armed conflict, the *JEP* has jurisdiction to investigate those conducts.

From a legal standpoint, one could argue that this conduct is contrary to IHL prohibitions. Specifically, it violates principles such as proportionality, distinction, and precaution. Besides, are violated the norms 43, 44, and 45 of CIHL. Given the multiplicity of IHL violated –and even domestic law-, it is easy to conclude that this conduct can be considered a WC. Thus, the *JEP* has not only the ability but the obligation to investigate, prosecute, and punish those responsibly.

c) Other proposals

As has been shown, the present article relates mainly to WC and its effects on the natural environment. Nonetheless, some of those affections do not relate exclusively to WC. One clear example is the case of forced displacement.

This phenomenon has been one of the most severe effects that the CAC had on the civilian population⁷⁵. Even if this is studied under the scope of IHRL and as a CAH, there must also be

v. Colombia Case for the Aerial Herbicide Spraying with Glyphosate], in *The Law of International Litigation. Legal Tools and Strategy for International Disputes Resolution in the 21st Century*, 179, 218 (Rafael Arturo Prieto Sanjuán ed., 2015).

⁷⁵ See: C.C.C., January 22, 2004, T-025/04 (Colom.).

acknowledged the impacts that it has had on the environment. The study done by the IL and Policy Institute⁷⁶ shows the effect that this humanitarian crisis had on the environment.

The sole gravity and side effects of this violation suffice for the opening of a countrywide case. Nonetheless, the harmful effects that forced displacement had on the environment could –and must- be taken into account when addressing this issue.

VI. Conclusions

Domestic law has been ineffective in the judgment of environmental harm related crimes occurred in the CAC context, which translates in the obligation on the *JEP* to address them. This has a difficulty: the complexity of the transitional framework. However, this complexity can be a tool for a new and innovative approach, while integrating the different views that IL –specifically IHL and ICL- brings to the table.

IHL and ICL are still unclear on the specifics of the standards, thresholds and reach of the protection of the natural environment, but is clear on the prohibition on attacks against it. Nonetheless, the *JEP* has the capacity to use IL in its widest form -conventional and customary-, when addressing those issues. Hence, the *JEP* could be an innovative tribunal that approaches harms to the natural environment in an unprecedented manner that encompasses the whole rules of IHL and ICL applicable in NIACs. By doing that, *JEP* can shed some light on the scope and reach of IHL and ICL on the protection of the natural environment -that could even apply to IACs-, while fulfilling its objectives and showing the consequences of crimes committed by both State and OAG forces.

⁷⁶ International Law and Policy Institute. Protection of the Natural Environment in Armed conflict, Report 12/2014, 5 & 46 (2014). See also *Lehto second report*, *Supra* note 14, at ¶ 40