

# STUDENT NOTES

## The ICC and Environmental Protection: Prosecuting Environmental War Crimes in Ukraine

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### INTRODUCTION

The beginning of the twenty-first century has seen an unprecedented cultural and social emphasis on minimizing human impact on the natural environment. Companies are using statistics that demonstrate their progress in adopting environmentally friendly policies and practices as advertising tools, targeting everyday citizens who express a growing commitment to sustainability each year.<sup>1</sup> In the United States, corporate researchers have responded to consumer interest, publishing data that tracks the environmental impacts of everything from the amount of greenhouse gas emitted during the production of food products like cheese and beef,<sup>2</sup> to the energy and water required to run a single load of laundry.<sup>3</sup> The corporate climate is responding to the international community's increasing consensus that issues like climate change, environmental degradation, and biodiversity loss are some of the world's most pressing existential threats.<sup>4</sup>

While corporate actors and even state actors in various arenas are working to minimize their environmental impact in light of the public's growing interest in environmental protection, one area where the international community at large has seen minimal progress is in the world of warfare. Nuclear weapons with the potential to devastate entire continents continue to be developed and maintained by world powers, unexploded ordnances and artillery from decades-old conflicts poison groundwater and soil, and the military industrial complex continues to emit more carbon emissions than nearly any other industry on Earth.<sup>5</sup> Our

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1. In a survey of 11,700 customers from 19 countries, 66% ranked sustainability as one of the top factors they consider in a purchase decision, up from 50% in 2021. Press Release, Simon Kucher, Sustainability Study 2022 (Oct. 24, 2022), <https://perma.cc/J388-9S26>.

2. Hannah Ritchie, Pablo Rosado, & Max Roser, *Environmental Impacts of Food Production*, OUR WORLD IN DATA (2022), <https://perma.cc/9CUW-LT6L>.

3. Christine Ro, *The Hidden Impact of Your Daily Water Use*, BBC (Mar. 27, 2020), <https://perma.cc/2ZYQ-2HJD>.

4. See UNESCO, THE WORLD IN 2030: PUBLIC SURVEY REPORT 14 (Tarja Turtia, Tim Francis, & Ellen Ledger, eds., 2021).

5. See Neta C. Crawford, PENTAGON FUEL USE, CLIMATE CHANGE, AND THE COSTS OF WAR, BROWN UNIV., WATSON INST. OF INT'L & PUB. AFF. (Nov. 13, 2019), <https://perma.cc/ENH6-A3GY>.

international legal mechanisms, while recognizing unnecessary environmental damage as a prosecutable war crime through provisions like Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court (Rome Statute),<sup>6</sup> have failed to enforce these standards, instead tending to prioritize criminal conduct with a more direct and tangible human impact.

The international community must prioritize efforts to avoid unnecessary wartime environmental damage and encourage the development of military strategies and weapons that have minimal long-term environmental consequences. These efforts are particularly important in the twenty-first century, where technological advancements have given militaries the capability to decimate land and natural resources in an unprecedented manner. With appropriate incentivization, these same technological advancements could also allow military leaders and weapons developers to create innovative designs that achieve military objectives while avoiding unnecessary environmental impact.

This paper looks to the war in Ukraine as a key place where the International Criminal Court (ICC) could demonstrate its commitment to setting new international norms for environmental protection by asserting both a willingness and a capacity to prosecute excessive environmental damage as a war crime. Part I examines the history of war's impact on the natural environment, the international community's past efforts to seek accountability, and the environmental damage that has been documented thus far during the conflict in Ukraine. Part II addresses the ICC's jurisdiction to bring cases against perpetrators of atrocity crimes in Ukraine and jurisdictional challenges that could be raised by defense attorneys representing Russian defendants. Part III examines the elements of, and potential challenges to, bringing charges under Article 8(2)(b)(iv) of the Rome Statute. Part IV concludes by reiterating the significance of the ICC's role in protecting the viability of our planet and emphasizing the importance of seeking accountability for environmental war crimes occurring during the conflict in Ukraine.

## I. ENVIRONMENTAL DEGRADATION IN INTERNATIONAL ARMED CONFLICTS AND THE SITUATION IN UKRAINE

### A. *War's Impact on the Natural Environment and Past Accountability Efforts*

The environment is a forgotten victim of every modern armed conflict. Before conflicts even begin, the building and manufacturing of weapons and supplies to support a military consumes massive amounts of natural resources, requires a great deal of energy (usually produced by fossil fuels), and results in significant greenhouse gas emissions.<sup>7</sup> In 2022, the Conflict and Environment Observatory

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6. See Rome Statute of the International Criminal Court, Art. 8(2)(b)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

7. Stuart Parkinson & Linsey Cottrell, *Estimating the Military's Global Greenhouse Gas Emissions*, SCIENTISTS FOR GLOBAL RESP. & CONFLICT AND ENV'T OBSERVATORY (Nov. 2022), <https://perma.cc/SDD4-RAYJ>.

estimated that emissions from military vehicles, bases, and industrial supply chains related to military operations were responsible for 5.5% of global greenhouse gas emissions.<sup>8</sup> Constantly evolving weapons development creates ongoing disposal challenges for obsolete weapons, namely the historical open burning of equipment<sup>9</sup> and dumping of munitions into the sea<sup>10</sup> has had massive environmental implications.

During a conflict, environmental damage is caused by nearly every modern method of warfare. Severe pollution incidents can be caused by attacks on industrial facilities that result in the inadvertent or deliberate release of toxic industrial materials and compounds.<sup>11</sup> Hellfire missiles and GBU-12 and GBU-38 bombs contain explosive fills of toxic chemicals that can spread through the soil into groundwater supply.<sup>12</sup> The increased consumption of fossil fuels required to sustain a military during times of war has extensive implications for climate change,<sup>13</sup> and large-scale vehicle and troop movements can cause widespread physical damage to landscapes and biodiversity.<sup>14</sup>

During the Vietnam War, the United States sprayed more than fifteen million gallons of Agent Orange, an herbicide, over portions of Vietnam, Cambodia, and Laos to defoliate trees and shrubs and kill crops that were providing cover and food to opposition forces.<sup>15</sup> Agent Orange devastated millions of acres of forests and farmland, degrading some tracts of land so substantially that they remain unproductive sixty years later.<sup>16</sup> Following the Vietnam War, the international community responded with the United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), prohibiting any large-scale environmental modification techniques which have the ability to turn the environment into a weapon,<sup>17</sup> and Additional Protocol I of the Geneva Conventions, prohibiting means or methods intended or

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8. Ellie Kinney, *New Estimate: Global Military is Responsible for More Emissions than Russia*, CONFLICT AND ENV'T OBSERVATORY (Nov. 10, 2022), <https://perma.cc/5NM2-Z47K>.

9. See Abraham Lustgarten, *Open Burns, Ill Winds*, PROPUBLICA (Jul. 20, 2017), <https://perma.cc/5GZ5-PL4M>.

10. See G.A. Res. 68/208 (Jan. 21, 2014).

11. See Doug Weir, *Collateral Damage Estimates and the Acceptability of Attacks on Industrial Sites*, CONFLICT AND ENV'T OBSERVATORY (Jul. 3, 2015), <https://perma.cc/7QUS-V4QE>.

12. See Elizabeth Minor & Doug Weir, *The Environmental Consequences of the Use of Armed Drones*, CONFLICT AND ENV'T OBSERVATORY (Oct. 19, 2017), <https://perma.cc/7PTZ-Y3VA>; Ursign Hoffman & Pascal Rapillard, *Do No Harm in Mine Action: Why the Environment Matters*, J. OF ERW AND MINE ACTION 1, 5 (2015).

13. See Crawford, *supra* note 5.

14. See Michael J. Lawrence, Holly L.J. Stemberger, Aaron J. Zolderdo, Daniel P. Struthers, & Steven J. Cooke, *The Effects of Modern War and Military Activities on Biodiversity and the Environment*, 23 ENVIRON. REV. 443, 450 (2015); see also Doug Weir, *How Does War Damage the Environment?*, CONFLICT AND ENV'T OBSERVATORY (Jun. 4, 2020), <https://perma.cc/2AZC-AWG9>.

15. See NAT. INST. MED., VETERANS AND AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM, COMMITTEE TO REVIEW THE HEALTH EFFECTS IN VIETNAM VETERANS OF EXPOSURE TO HERBICIDES (1994), <https://perma.cc/U72B-YKEJ>.

16. *What is Agent Orange?*, ASPEN INSTITUTE, <https://perma.cc/7M32-5USZ>.

17. See Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 1108 U.N.T.S. 151.

expected to cause “widespread, long-term and severe damage to the natural environment.”<sup>18</sup> The United States faced no legal liability for the use of Agent Orange, although an estimated three million Vietnamese have been affected by the herbicide, including at least 150,000 children born after the war with serious birth defects.<sup>19</sup> In addition to the Cambodian, Vietnamese, and Laotian people who were affected by Agent Orange, the U.S. Department of Veterans Affairs has acknowledged that an estimated 2.6 million American military personnel who served in Vietnam were potentially exposed.<sup>20</sup>

In light of the lack of international accountability, victims of the United States’ use of Agent Orange brought suit in U.S. federal courts. There have been a variety of successful settlements in civil cases brought against the chemical companies who supplied the federal government with Agent Orange.<sup>21</sup> However, Judge Jack B. Weinstein, a former World War II submarine officer, made clear in a famous dismissal that “[n]o treaty or agreement, express or implied, of the United States operated to make use of herbicides in Vietnam a violation of the laws of war or any other form of international law until at the earliest April of 1975.”<sup>22</sup>

Although the creation of ENMOD and Additional Protocol I has placed new international law restrictions on the use of herbicides since the Vietnam War, wartime environmental destruction has continued. The 1991 Gulf War was an unprecedented environmental disaster. In addition to the environmental implications associated with unexploded ordnance covering 3,500 square kilometers in the region and millions of displaced refugees, Kuwait and its neighbors suffered “from the unique impact of the calculated use of oil as a weapon of war.”<sup>23</sup> More than 700 oil wells were set aflame as Iraqi forces retreated from Kuwait at the end of the conflict, with the retreating forces burning an estimated six million barrels of oil per day for ten months.<sup>24</sup>

The United Nations Security Council affirmed that Iraq was liable under international law “for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign [g]overnments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.”<sup>25</sup> Two months after the end of the conflict, the United Nations

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18. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), art. 55, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

19. Ashish Kumar Sen, *Addressing the Harmful Legacy of Agent Orange in Vietnam*, U.S. INST. OF PEACE (Jan. 27, 2022), <https://perma.cc/3ZGL-8XE7>; see also George Black, *The Victims of Agent Orange the U.S. Has Never Acknowledged*, N.Y. TIMES (Mar. 16, 2021), <https://perma.cc/Q854-F8LY>.

20. Press Release, Dep’t of Veterans Affs., VA Extends “Agent Orange” Benefits to More Veterans, (Oct. 13, 2009) <https://perma.cc/PE86-S3CT>.

21. See e.g., *In Re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984).

22. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 139 (E.D.N.Y. 2005).

23. Laurence Menhinick, *What the Environmental Legacy of the Gulf War Should Teach Us*, CONFLICT & ENV’T OBSERVATORY (Mar. 18, 2016), <https://perma.cc/D45A-FDE9>.

24. *Follow-up Programme for Environmental Awards*, U.N. COMP. COMM’N, <https://perma.cc/97QY-SVJY>.

25. S.C. Res. 687, ¶ 16 (Apr. 8, 1991).

Compensation Commission (UNCC) was established by the UN Security Council and mandated to “process claims and pay compensation for losses and damage suffered as a direct result of Iraq’s unlawful invasion and occupation of Kuwait.”<sup>26</sup>

Placing a monetary value on the variety of types of environmental damage and harm that occurred during the conflict proved to be an incredibly complex task. The UNCC awarded damages for only 6.2% of the claims brought before it, resulting in approximately \$5.261 million awarded to ten claimant states.<sup>27</sup> Evidentiary debates and disagreements as to the appropriate framework for quantifying damage and establishing liability resulted in 94% of the claims being dismissed,<sup>28</sup> and much of the UNCC’s decision-making process was not public, leaving little guiding precedent for future remediation processes.<sup>29</sup>

While this international remediation mechanism was a step in the right direction for addressing environmental harm in armed conflicts, much of the long-term damage caused by the Persian Gulf War was left without redress. In addition, this method of accountability provides only retroactive harm mitigation, rather than proactive deterrence for individual military actors. While the potential for reparations surely could be part of a state’s calculation regarding a given military action, state liability through reparations is likely to provide no real deterrent effect for an individual military actor, as that individual will not be personally responsible for any payments. Looking to the leadership level, if the only international accountability mechanism for environmental harm is monetary reparations, state leadership is given the opportunity to make a cost-benefit analysis comparing the potential value of reparations to the value of the given military action – and that cost-benefit analysis may not always weigh in favor of environmental protection. When comparing the potential deterrent value of individual criminal liability for a military commander versus state monetary liability via reparations, it seems clear that individual criminal liability has a higher likelihood of success.

### *B. The Situation in Ukraine*

On February 24, 2022, the Russian Federation invaded and occupied parts of Ukraine, catalyzing an escalation in a conflict that has been building in tension over the past two decades. Since the invasion, there has been an extensive and catastrophic environmental impact on Ukraine’s territory. The Ministry of Environmental Protection and Natural Resources of Ukraine estimates that, as of March 2023, the existing damage to the environment has exceeded \$54 billion.<sup>30</sup>

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26. Menhinick, *supra* note 23; see S.C. Res. 687 (Apr. 8, 1991).

27. Menhinick, *supra* note 23.

28. *Id.*

29. Allenisheo Lalanath Mark De Silva, *International Conflict Related Environmental Claims – A Critical Analysis of the UN Compensation Commission* (Aug. 31, 2012) (Ph.D. dissertation, University of Sydney) (on file with institution).

30. Anna Akage, *The Dam Attack Adds To Ukraine’s Huge Environmental Toll, Already Estimated At \$54 Billion*, *WORLD CRUNCH* (June 6, 2023), <https://perma.cc/K7FD-ZL6Q>.

As of February 2023, the Office of the Prosecutor General of Ukraine was actively processing eleven criminal proceedings under Article 441 of the Ukrainian Criminal Code, a progressive provision that criminalizes the crime of “ecocide” or the “mass destruction of flora or fauna, poisoning of the atmosphere or water resources, as well as the commission of other actions that can cause an ecological disaster.”<sup>31</sup> To collect evidence to build these ecocide cases, government and civil society actors alike are working to build Ukraine’s evidentiary collection capacity and find innovative ways to empirically document the impact of Russia’s invasion on the environment.

Early in the conflict, the Ukrainian Ministry of Environmental Protection and Natural Resources set up a hotline for citizens to report instances of environmental damage for further investigation,<sup>32</sup> and more recently that effort has evolved into the government’s launch of EkoZagroza, a mobile application that allows Ukrainian citizens to report evidence of environmental crimes and track data regarding air quality and radiation pollution in their areas.<sup>33</sup> However, the Ukrainian government is not alone in these efforts. Throughout the first year of the conflict, senior U.S. officials from twenty-one federal agencies reportedly met weekly as part of an “Interagency Working Group on Environmental Damage in Ukraine” to assist the Ukrainian government in addressing the environmental challenges of Russia’s invasion.<sup>34</sup> Looking towards long-term monitoring efforts, the Swedish government and the United Nations Development Programme announced in March 2023 an initial investment of \$6.7 million to develop a “Coordination Centre for Environmental Damage Assessment,” which will work to monitor and record the character, magnitude, and significance of conflict-related environmental impacts.<sup>35</sup>

Alongside the Ukrainian government and its international partners, civil society organizations and conservation groups are also taking action. The Conflict and Environment Observatory is a United Kingdom-based organization that is analyzing data from the United Nations Environment Programme (UNEP), the Ukrainian government, and open source channels, and drafting short-form reports explaining the war’s impact on the environment.<sup>36</sup> The Observatory has published

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31. CODE CRIMINAL, art. 441 (Ukr.); Jonathan Watts, *The ‘Silent Victim’: Ukraine Counts War’s Cost for Nature*, THE GUARDIAN (Feb. 20, 2023, 10:39 AM), <https://perma.cc/V CJ2-EJUG>.

32. Watts, *supra* note 31; see *Dashboard with Data on Environmental Threats*, ECOZAGROZA, <https://perma.cc/BL98-CFX4>.

33. Press Release, Ukrainian Ministry of the Environment, *Mindovkilllya zapustylo zastosunok EkoZahroza* [The Ministry of the Environment has launched the EkoZagroza application], <https://perma.cc/G2WH-7UUS>.

34. Andrew Freedman, *Exclusive: 21 Federal Agencies Monitoring Ukraine War’s Environmental Toll*, AXIOS (May 13, 2022).

35. Press Release, UNDP, *New Coordination Center to Assess Environmental Impacts of the War on Ukraine* (Mar. 10, 2023), <https://perma.cc/P5ZG-V53G>.

36. *About*, CONFLICT AND ENV’T OBSERVATORY, <https://perma.cc/ZTS4-7UAA> (last updated 2023).

on topics including the consequences of Russian attacks on Ukrainian fossil fuel infrastructure<sup>37</sup> and other industrial sites as well.<sup>38</sup> Ecoaction, Ukraine's largest conservation group, partnered with Greenpeace International to collate reports of environmental damage and plot them on an interactive map.<sup>39</sup> This presentation of data in a way that is easily consumable and digestible for the general public and policymakers alike has raised a great deal of awareness for the environmental costs of this war, and demonstrates how government, international, and civil society actors are working together to document the damage and encourage public support for Ukraine.

EcoZagroza publishes a weekly status update covering the week's most recent attacks and some of the ongoing environmental threats caused by the war.<sup>40</sup> As of May 2023, key concerns included Russian occupation and mismanagement of the Zaporizhia nuclear power plant, pollution and contamination caused by unexploded ordnances damaging agricultural production capacity, large-scale ecosystem and biodiversity destruction, and the Russian destruction of water supply infrastructure.<sup>41</sup>

### C. Russia's Attack on the Kalynivka Oil Depot

Although there is a collection of potentially prosecutable and highly dangerous actions being taken by the Russian Federation, for the purposes of assessing the plausibility of an ICC prosecution for environmental war crimes, the remainder of this paper will focus on the Russian Federation's March 24, 2022 attack on an oil depot in Kalynivka, Ukraine. This attack was chosen for analysis in this paper for three primary reasons: (1) the site of the Kalynivka attack is one of the few locations where post-attack soil and water contamination sampling has been conducted and publicly reported; (2) this is one of many attacks on oil depots throughout Ukraine, and this analysis could be applied to several other factual circumstances; and (3) oil depots, as entities that are both extraordinarily dangerous to civilians and harmful to the environment when attacked, but also clearly valuable military targets, pose a particularly complex analysis of military necessity and proportionality.

On the evening of March 24, 2022, a Russian sea-launched Kalibr cruise missile struck the KLO oil depot in Kalynivka, thirty kilometers southwest of Kyiv.<sup>42</sup> The attack detonated fuel tanks and ignited a massive fire that burned an

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37. *Ukraine Conflict Environmental Briefing: Fossil Fuel Infrastructure*, CONFLICT AND ENV'T OBSERVATORY (Nov. 2022), <https://perma.cc/XNZ2-WWS9> [hereinafter *Fossil Fuel Infrastructure*].

38. *Ukraine Conflict Environmental Briefing: Industry*, CONFLICT AND ENV'T OBSERVATORY (Oct. 2022), <https://perma.cc/N5YD-7A4D>.

39. *Environmental Damage in Ukraine During the Full Scale War, 2022*, GREENPEACE INT'L, <https://perma.cc/QH6Q-HTZB>.

40. See, e.g., *Briefing on the Environmental Damage Caused by Russia's War of Aggression Against Ukraine (May 4-10, 2023)*, ECOZAGROZA (Apr. 5, 2023), <https://perma.cc/45R7-B4DH>.

41. *Id.*

42. *Russian Military Delivers Kalibr Cruise Missile Strike on Key Fuel Base Outside Kyiv*, TASS (Mar. 25, 2022, 6:34 AM).

estimated 10,000 tons of fuel products, releasing a plume of smoke that was reportedly visible up to thirty-five kilometers downwind.<sup>43</sup> Russian authorities contend that the Kalynivka depot was the largest remaining military fuel storage facility in Ukraine and that it supplied a substantial amount of fuel to troops in central Ukraine.<sup>44</sup> The Ukrainians assert the depot provided oil to civilians and, more specifically, farmers and agricultural operations.<sup>45</sup>

No direct measurements were taken to determine the composition of the plume of smoke that plagued residential areas of Ukraine following the attack, but past incidents suggest that this type of explosion likely contaminated the air with dangerous concentrations of particulate matter, carbon monoxide, sulfur dioxide, and dioxins.<sup>46</sup> In addition to air pollution and the release of harmful contaminants into the atmosphere, the water and soil in the region were also contaminated.

The Riznytisa pond sits sixty meters from the attack site and served as a fish nursery and cultural site for the nearby Kozhuhivka village.<sup>47</sup> A site visit conducted by experts at the National University of Kyiv-Mohyla Academy in September 2022 found clear evidence of oil pollution in the pond, including a perceptible smell of petroleum products and a noticeable amount of decomposing fish.<sup>48</sup> Water samples indicate that the level of oil products in the pond are more than forty times Ukrainian state standards, 12.3 mg/dm<sup>3</sup> compared to the state standard of 0.1-0.3 mg/dm<sup>3</sup>.<sup>49</sup> Soil samples show concentrations of oil products that are more than sixty times higher than background levels, and sixteen times higher than Ukrainian state standards.<sup>50</sup> These levels of contamination reflect severe damage to the productivity of the soil and water ecosystems that will have long-term effects in the region.<sup>51</sup>

## II. GATEWAY CONSIDERATIONS: THE ICC'S JURISDICTION

For the ICC's Office of the Prosecutor (OTP) to bring a case before the ICC, the Court must have (1) subject matter jurisdiction, (2) temporal jurisdiction, and (3) *either* territorial or personal jurisdiction over the alleged crime.<sup>52</sup> In addition,

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43. *Fossil Fuel Infrastructure*, *supra* note 37.

44. *Russia Hits Ukraine Fuel Storage Site Outside Kyiv*, NDTV (Mar. 25, 2022, 8:50 PM), <https://perma.cc/2SNB-9ZLY>.

45. Який вигляд має нафтобаза у Калинівці після обстрілу російськими військами [*What Does the Oil Depot in Kalynivka Look Like After Being Shelled by Russian Troops*], TCH (Mar. 27, 2022, 2:26 PM).

46. *Fossil Fuel Infrastructure*, *supra* note 37.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Constantin Streche, Diana M. Cocarta, Irina-Aura Istrate, & Adrian Alexandru Badea, *Decontamination of Petroleum-Contaminated Soils Using the Electrochemical Technique: Remediation Degree and Energy Consumption*, SCI. REPS. 1 (2018).

52. See Rome Statute, *supra* note 6, arts. 11-12; Situation in the Democratic Republic of the Congo, ICC-01/04-101, Decision on Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS6, ¶ 85 (Jan. 17, 2006).



as the ICC was designed to be complementary to national judicial systems rather than a replacement or substitute for national prosecution efforts, all cases must comply with the principle of complementarity as codified in Article 17 of the Rome Statute.<sup>53</sup> Finally, the OTP may open an investigation into a situation only with either a finding from the Pre-Trial Chamber authorizing the investigation or a referral from a State Party to the Rome Statute.<sup>54</sup> In regards to the situation in Ukraine, a record number of forty-three State Parties filed formal referrals, giving the OTP the ability to open an investigation without a finding from the Pre-Trial Chamber.<sup>55</sup>

As is evidenced by the ICC's issuance of an arrest warrant for Vladimir Putin and Maria Lvova-Belova related to the unlawful deportation of children from Ukraine during the conflict, the ICC has thus far seemed to be satisfied that the jurisdictional prerequisites are met, allowing them to hear cases of international crimes committed during the conflict in Ukraine.<sup>56</sup> However, if the case against Putin and Lvova-Belova or any other Ukraine-related case continues to the confirmation of charges stage, defense lawyers will likely bring a litany of arguments challenging the Court's jurisdiction. This Part examines the various jurisdictional preconditions of the ICC and the potential arguments that could be raised by lawyers on both sides of the dispute.

#### A. Subject Matter Jurisdiction

For the ICC to have proper subject matter jurisdiction, the alleged crime must constitute a war crime, crime against humanity, crime of aggression, or genocide, as defined in Article 5 of the Rome Statute.<sup>57</sup> The ICC was established to deal only with "the most serious crimes of concern to the international community as a whole," and State Parties and non-State Parties alike have opposed proposals to expand the Court's subject matter jurisdiction to include other offenses.<sup>58</sup> While the prosecution of conduct like the attack in Kalynivka will be new, precedent-setting territory for the Court, there are compelling arguments that the harm caused by the Kalynivka attack is squarely within the ICC's subject matter jurisdiction via Article 8(2)(b)(iv), the only provision of the Rome Statute that explicitly mentions environmental damage.

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53. See Rome Statute, *supra* note 6, art. 17.

54. Rome Statute, *supra* note 6, art. 13.

55. *Situation in Ukraine*, INT'L CRIM. CT., Investigation, ICC-01/22, <https://perma.cc/3V4S-2MAZ> [hereinafter *ICC Ukraine Investigation*].

56. The ICC has not yet publicly released the actual text of the arrest warrants for Vladimir Putin or Maria Lvova-Belova, however, ICC arrest warrants typically include a section addressing the Court's jurisdiction over the alleged crimes. While minimally persuasive at this point, it is noted because of its likely future impact on this analysis. See Press Release, Int'l Crim. Ct., *Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, (Mar. 17, 2023), <https://perma.cc/J5VN-BEXY> [hereinafter *ICC Issues Arrest Warrants*].

57. Rome Statute, *supra* note 6, art. 5.

58. *Id.*; WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 111 (2d ed. 2016).

However, if the OTP decides to charge a perpetrator for the attack in Kalynivka, defense attorneys would likely challenge the court's subject matter jurisdiction at the confirmation of charges stage, arguing (1) that the case should be deemed inadmissible because it does not satisfy the Rome Statute's gravity requirement, and (2) that allowing this case to proceed would impermissibly extend the Court's jurisdiction.

Defense counsel will likely argue that the Kalynivka attack, as a single incident with no reported human casualties, could not possibly satisfy Article 17(1)(d) of the Rome Statute, which requires that the case be of "sufficient gravity to justify further action by the Court."<sup>59</sup> However, while it is true that historically the Court has typically prosecuted courses or patterns of conduct, that does not mean that a single attack cannot satisfy the Court's admissibility requirement for gravity. In the *Al Hassan* case, the Appeals Chamber held that the gravity requirement is a factual determination that must be made on a case-by-case basis and is intended to "exclude from the purview of the Court those rather unusual cases when conduct that technically fulfills all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only."<sup>60</sup> The Appeals Chamber explicitly rejected the argument that the gravity requirement actively prohibits the Court from hearing cases that might not qualify as the "most serious" offense imaginable; rather, the Court found that the drafting history of the Rome Statute suggests that "the purpose of [A]rticle 17(1)(d) of the Statute is not to oblige the Court to choose only the most serious cases, but merely to oblige it not to prosecute cases of marginal gravity."<sup>61</sup> Thus, as a preliminary matter, the nature of the Kalynivka attack as a single attack with no human casualties does not immediately mean the case is insufficiently grave and therefore inadmissible.<sup>62</sup>

Article 8(2)(b)(iv)'s built-in gravity clause, which requires the conduct to be sufficiently "long-term, widespread and severe," makes this provision particularly well-suited for prosecutions of single attacks while still prioritizing the Court's mandate of prosecuting only crimes of a sufficient gravity. For a prosecution under this provision to be successful, the Court will be required to make a gravity assessment as part of the substantive elements of the offense, serving as an additional backstop that supports allowing this prosecution to proceed.

The OTP could also argue that the nature of environmental offenses requires that the Court broaden its traditional conception of "gravity." While in the past the seriousness of conduct has been measured by things such as the loss of human

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59. Rome Statute, *supra* note 6, art. 17(1)(d).

60. Prosecutor v. Al Hassan, ICC-01/12-01/18 OA, Judgment on the Appeal of Mr. Al Hassan Against the Decision of Pre-Trial Chamber I, ¶ 53 (Feb. 19, 2020).

61. *Id.* ¶ 59.

62. Those who caution against ICC prosecutions of a single attack argue that such prosecutions could discourage states from becoming parties to the Rome Statute. The Court mitigates these concerns through their enforcement of the high gravity requirement. The author notes those arguments and would like to emphasize that the framework outlined in this piece could also be used to prosecute a pattern of similar attacks — although, as outlined and per the text of the Rome Statute, one attack should be enough.

life or harm to a civilian population, environmental damage presents new dangers that, although on a more long-term or aggregate scale, have comparable potential to cause substantial loss of human life.

Defense counsel will also likely argue that allowing this prosecution to proceed would impermissibly extend the Court's jurisdiction. To rebut, the OTP can emphasize that it is not asking the Court to broaden its jurisdiction at all. Rather, the Court should allow the OTP to work within the existing jurisdictional bounds provided by the enumerated elements of Article 8(2)(b)(iv). This is not an extension of the ICC's power – it is a first use of already existing enumerated authority.

### B. Temporal Jurisdiction

Typically, the ICC has temporal jurisdiction over crimes involving State Parties that have been committed since the Rome Statute entered into force on July 1, 2002.<sup>63</sup> However, Ukraine is not a State Party to the Rome Statute. For the ICC to have proper temporal jurisdiction over a crime within the jurisdiction of a non-State Party, the non-State Party must file a declaration with the ICC Registrar accepting the Court's jurisdiction.<sup>64</sup> Within the declaration, the non-State Party will specify a temporal scope of the grant of jurisdiction, and as long as the alleged crime falls within the terms of the declaration, the Court will have proper temporal jurisdiction.

The Ukrainian government has lodged two separate declarations with the ICC Registrar that together accept the Court's jurisdiction as to all "acts committed on the territory of Ukraine since 21 November 2013."<sup>65</sup> The first declaration, filed on April 9, 2014, granted the Court jurisdiction for an "indefinite duration" over crimes that occurred between November 21, 2013 and February 22, 2014.<sup>66</sup> The second declaration, filed on September 8, 2015, grants the Court jurisdiction of an indefinite duration for crimes committed on Ukrainian territory since February 20, 2014.<sup>67</sup> The Court has accepted these declarations, noting that the second declaration extended the first specified time period "on an open-ended basis encompassing ongoing alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards."<sup>68</sup>

The Court's purported acceptance of the declarations and finding of temporal jurisdiction as to crimes committed during the conflict in Ukraine is further supported by the issuance of warrants of arrest for Vladimir Putin, President of the Russian Federation, and Maria Lvova-Belova, Commissioner for Children's

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63. Rome Statute, *supra* note 6, art. 11(1).

64. *Id.*, art. 11(2).

65. *Declaration Accepting the ICC's Jurisdiction Pursuant to Article 12(3)*, EMBASSY OF UKRAINE (Apr. 9, 2014), <https://perma.cc/7V27-XTNX> [hereinafter *First Ukraine Declaration*]; Pavlo Klimkin, Ukrainian Minister of Foreign Affairs, *Declaration Accepting the ICC's Jurisdiction Pursuant to Article 12(3)* (Sept. 8, 2015), <https://perma.cc/ACA8-REL8> [hereinafter *Second Ukraine Declaration*].

66. *See First Ukraine Declaration*, *supra* note 65.

67. *See Second Ukraine Declaration*, *supra* note 65, at 5.

68. *ICC Ukraine Investigation*, *supra* note 55.

Rights in the Office of the President of the Russian Federation in March 2023.<sup>69</sup> While the arrest warrants have not yet been filed publicly, a typical ICC arrest warrant includes boilerplate language wherein the Court satisfies itself that the subject of the arrest warrant is properly within the jurisdiction of the Court.<sup>70</sup> Thus, it seems likely that at least at this early stage of the proceedings, that the Court has accepted the validity of Ukraine's declarations and is satisfied that the Court has temporal jurisdiction over these crimes "occurring from at least 24 February 2022," the time period in which Putin and Lvova-Belova's crimes allegedly occurred.<sup>71</sup>

While the defense team will have the opportunity to challenge the Court's jurisdiction, there seem to be few persuasive arguments that the Court lacks temporal jurisdiction over any crimes committed during the conflict, particularly those that have occurred since the invasion in 2022. The Kalynivka attack occurred on March 24, 2022, falling within the period specified in Ukraine's declarations and within a month of the conduct allegedly committed by Vladimir Putin and Maria Lvova-Belova, crimes for which the Court has already issued arrest warrants.

### C. Territorial or Personal Jurisdiction

Article 12 of the Rome Statute requires that the Court either have *territorial* jurisdiction over the territory on which the crime was committed or *personal* jurisdiction over the perpetrator of the crime.<sup>72</sup> The Court has proper territorial jurisdiction over crimes committed on the territory of a State Party or crimes committed on the territory of a state that has filed a declaration accepting the Court's jurisdiction as to that particular territory.<sup>73</sup> The Court has proper personal jurisdiction over nationals of State Parties, and can prosecute such nationals regardless of where the alleged crime was committed geographically.<sup>74</sup>

As neither Ukraine nor Russia are State Parties to the Rome Statute, it will be rare that the Court has proper personal jurisdiction over any parties involved in the conflict. Therefore, the Court will rely on territorial jurisdiction, specifically the territorial jurisdiction which was given to the Court in Ukraine's declarations – jurisdiction over "acts committed in the territory of Ukraine."<sup>75</sup>

Understanding that the Court's ability to prosecute crimes occurring in the conflict in Ukraine is limited to crimes occurring on Ukrainian territory, the complex legal question becomes what constitutes "Ukrainian territory." Article 12(2) does not define "territory"; it simply notes that the Court will have jurisdiction if "[t]he State on the territory of which the conduct in question occurred" has accepted the Court's jurisdiction.<sup>76</sup> This conflict is riddled with territorial disputes, and it is

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69. ICC Issues Arrest Warrants, *supra* note 56.

70. *See, e.g.*, Prosecutor v. Ahmad Harun, ICC-02/05-01/07, Warrant of Arrest, ¶ 5 (Apr. 27, 2007).

71. ICC Issues Arrest Warrants, *supra* note 56.

72. Rome Statute, *supra* note 6, art. 12(2).

73. *Id.*

74. *Id.* art. 12(2)(b).

75. *Second Ukraine Declaration*, *supra* note 65.

76. Rome Statute, *supra* note 6, art. 12(2)(a).

practically guaranteed that a central tenet of defense lawyers' arguments in the early proceedings will be that Ukraine does not have the authority to accept the Court's jurisdiction as to occupied, annexed, or disputed territories, as the Court's exercise of jurisdiction over those territories would be a violation of Russian sovereignty.

In March 2014, Russian troops took control of the Ukrainian region of Crimea amidst significant strife within the Ukrainian government.<sup>77</sup> A referendum was held shortly after wherein citizens were offered two choices: vote to join Russia or return to Crimea's 1992 constitution—there was no voting option for remaining part of Ukraine.<sup>78</sup> There were no credible international observers present, and local authorities reported an 83% turnout with 96.7% voting to join Russia.<sup>79</sup> A leaked report from President Putin's Human Rights Council later reported turnout at only thirty percent, with about half voting to join Russia.<sup>80</sup>

In October 2022, the United Nations General Assembly declared the annexation of Crimea illegal, asserting that “the unlawful actions of the Russian Federation with regard to the illegal so-called referendums. . .and the subsequent attempted illegal annexation of these regions, have no validity under international law and do not form the basis for any alteration of the status of these regions of Ukraine.”<sup>81</sup> In September 2022, Russia announced the formal annexation of four additional regions, with voters in Luhansk, Donetsk, Zaporizhia, and Kherson allegedly also voting to accede to Russia.<sup>82</sup>

However, after the announcement of the additional annexations, Ukraine reclaimed a significant amount of territory in those disputed regions. For example, in June 2022, Russia controlled 93% of Kherson; as of February 2023, Ukraine's efforts had reduced Russia's control of the territory to 73%.<sup>83</sup> As of April 2023, Russia controlled 40,000 square miles of Ukrainian territory, approximately 17% of Ukraine.<sup>84</sup>

Territorial control of the various regions and cities involved in this conflict is fluctuating by the day. The question therefore becomes, if defense counsel challenges the validity of Ukraine's Article 12(3) declarations, what is the ICC's legal standard for determining what state has the authority to lodge such a declaration accepting the Court's jurisdiction as to a given piece of territory? The Court will

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77. See, e.g., Tim Sullivan & Vladimir Isachenkov, *Russian Troops Take Over Ukraine's Crimea Region*, ASSOCIATED PRESS, (Mar. 1, 2014), <https://perma.cc/B35N-MPF6>.

78. Steven Pifer, *Crimea: Six years After Illegal Annexation*, BROOKINGS INST. (Mar. 17, 2020), <https://perma.cc/M6H9-3C3G>.

79. *Id.*

80. *Id.*

81. G.A. Res. 11/4 (Oct. 12, 2022).

82. *Mapping the Occupied Ukraine Regions Russia is Formally Annexing*, AL JAZEERA (Sept. 21, 2022, 2:48 PM), <https://perma.cc/72MR-YGMJ>.

83. Pablo Gutierrez & Ashley Kirk, *A Year of War: How Russian Forces Have Been Pushed Back in Ukraine*, THE GUARDIAN (Feb. 21, 2023, 3:00 AM), <https://perma.cc/HT8D-L5W2>.

84. *Id.*; Riley Bailey, Kateryna Stepanenko, Nicole Wolkov, & Frederick W. Kagan, *Russian Offensive Campaign Assessment, April 1, 2023*, INST. FOR THE STUDY OF WAR (Apr. 1, 2023), <https://perma.cc/H9QS-6E7H>.

have to make two important decisions that will shape future court practice: (1) what test determines what state has the authority to lodge an Article 12(3) declaration, and (2) at what temporal point should that determination be made?

Looking to the first question, possible pathways for the Court include adopting (1) a test based on which state has sovereign rights to the territory, (2) a test based on which state holds effective control over the territory, or (3) a test based on “Mann’s doctrine,”<sup>85</sup> looking to whether the crime is sufficiently factually connected to the territory of the state attempting to lodge the declaration.<sup>86</sup> For a test based on sovereignty, the Court would look to which state most properly has legal rights to a piece of territory under international law.<sup>87</sup> For effective control, the Court would consider which state is actually in control of the operation and governance of the territory.<sup>88</sup> Finally, for a test that adopts Mann’s doctrine, the Court would look to whether, as a factual matter, the crime is sufficiently closely connected to the territory of a State Party or a state that has accepted the Court’s jurisdiction by lodging a declaration.<sup>89</sup>

Regardless of which test is adopted by the Court, the Court will also need to decide at what temporal point the determination should be made: should the factual determination as to who holds sovereign rights, effective control, or a sufficient factual connection to the conduct be made based on the situation at the time the crime was committed, or at the time the declaration was filed?

The defense will likely contend that the Court should adopt a test based on effective control and that the determination should be made at the time the declaration is lodged. The defense’s position will likely first be that Russia is effectively controlling the occupied Ukrainian territories and therefore should have the sole ability to consent to the Court’s jurisdiction. However, if the Court agrees that the territories are disputed, the defense’s position will likely be that the Court should require the consent of *all* potential owners of a piece of disputed territory in order to legitimately exercise jurisdiction. Although this would be a case-by-case factual determination for the Court, if this position is adopted, the Court would likely lose territorial jurisdiction over all crimes that have been committed

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85. “Mann’s doctrine” refers to the body of scholarship and theory developed primarily by Francis Mann. Mann’s doctrine contends that historical conceptions of territorial jurisdiction that allowed states to have jurisdiction only over acts that were committed actually and completely on their legal soil fail to recognize the complexities of the modern geopolitical landscape. Thus, the more appropriate way to determine whether a state should have jurisdiction is looking to whether the legally relevant facts present a sufficiently close connection to a given state such that those facts “*belong*” to its courts. See Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues* 30-31 (May 25, 2011) (Ph.D. dissertation, Universiteit Leiden) (on file with institution).

86. *Id.* at 31.

87. See generally Yusra Suedi, *Self-determination in Territorial Disputes Before the International Court of Justice: From Rhetoric to Reality?*, 36 LEIDEN J. INT’L L. 161, 165-67 (2023) (discussing the International Court of Justice’s hierarchy of authority applicable to territorial sovereignty determinations).

88. See generally Brad R. Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELBOURNE J. INT’L L. 1 (2010) (discussing the factors relevant to an effective control analysis in the context of seceded or post-coup states).

89. *Id.*

in Crimea since the annexation in 2014, and any crimes committed on disputed territory in Luhansk, Kherson, Zaporizhzhia, and Donetsk, among others, since Russia took control of those areas.

The OTP's position could be firstly that the Court should look to Mann's doctrine, as that is the position that would give the Court maximum flexibility to exercise its jurisdiction. The sovereignty and effective control tests create difficult issues for the ICC in that questions of sovereignty or disputed territory are typically left to the United Nations Security Council. Even if it is simply a factual determination for the purposes of satisfying itself that the Court has jurisdiction, the Court will likely be hesitant to make any sweeping statements about which state has sovereign rights to any given piece of territory. The Mann's doctrine approach is much more manageable for the Court and also dispenses with the temporal question; rather than asking at which point a sovereignty or effective control determination should be made, the question would be whether the conduct is sufficiently factually connected to a state's territory. This position will likely be challenged as giving the Court too much power to potentially invade the sovereignty of non-consenting states, but it should be emphasized that the doctrine would only need to be applied in rare circumstances of true and complex territorial dispute.

If the Court is unpersuaded by the Mann's doctrine approach, a secondary position for the OTP could be that the Court should look to which state held sovereign rights to the territory at the time the crime was committed, as *that* is the state that was harmed by the conduct and should be able to consent to the Court's jurisdiction to remedy that harm. Further, even if the Court adopts the sovereignty test but chooses to make the determination at the temporal point when the declaration was lodged, the OTP could contend that given all of the territory that is under Russia's control was taken pursuant to an illegal act of aggression, the Court should recognize Ukraine's continuing sovereign rights to all of the invaded and occupied territories, including Crimea. This would give Ukraine the authority to accept the Court's jurisdiction as to any crimes committed on territory within Ukraine's pre-invasion territorial lines.

While the OTP has compelling arguments, the temporal question is complex and has several concerning long-term consequences, regardless of the path that is chosen. For example, if the Court assesses the validity of a declaration without considering the current control or status of the territory, a parent state with a region that legally secedes and declares its independence could continue to hold the authority to accept the ICC's jurisdiction as to that newly independent territory. Parties should emphasize that the complexity of this determination requires that the Court allow itself flexibility to make a case-by-case factual determination that best serves the ICC's justice objectives without impermissibly invading a state's sovereignty. Pointing to the potential consequences and various factual scenarios that could arise in the future could be helpful in persuading the Court to adopt a more flexible approach that serves the object and purpose of the Rome Statute.

If the OTP were to charge a perpetrator solely with the Kalynivka attack, the above-raised questions and complicated arguments regarding disputed territory would be inapplicable – Kalynivka is located in the Vinnytsia region in western Ukraine, far from the regions where Russian and Ukrainian control over territory is fluctuating. However, these are significant questions for understanding the role of the ICC in the Ukraine conflict, and if the OTP were to choose to bring charges for a pattern of attacks on oil depots, including even one on disputed territory, or Russia succeeds in annexing more of Ukraine’s territory, much of the pre-trial arguments will likely be consumed by these questions of sovereignty, territorial control, and what the ICC’s role should be in navigating these complex disputes.

#### *D. Complementarity*

A final jurisdictional precondition for any case brought before the ICC is that the Court’s exercise of jurisdiction over the case must not violate the principle of complementarity. Article 17 of the Rome Statute was a cornerstone of the original negotiations to create the ICC, and one of its most sacred tenets is that the ICC is meant to be complementary to national criminal jurisdictions, not a replacement or supervisory body.<sup>90</sup> The principle asserts that domestic authorities have the primary competence and power to investigate and prosecute international crimes, and the ICC has secondary jurisdiction that cannot be exercised if a domestic authority is actively prosecuting, has already prosecuted, or has declined to prosecute the conduct.<sup>91</sup>

Complementarity is unlikely to be an issue to be raised in proceedings related to Ukraine, but is included in this paper given the interesting and innovative nature of the partnership between the ICC and the Office of the Prosecutor General (OPG) in Ukraine that has developed throughout the conflict. In April 2022, the OTP became a member of the Joint Investigation Team led by EuroJust, a first for the office.<sup>92</sup> EuroJust’s Joint Investigation Teams are international teams of judges, lawyers, and law enforcement personnel who come together via a written agreement with a domestic state to assist the investigation and prosecution of large-scale or widespread criminal conduct.<sup>93</sup> ICC Prosecutor Karim Khan noted that “[t]he Ukraine situation, in particular, demands collective action so as to secure relevant evidence and ultimately ensure its effective use in criminal proceedings.”<sup>94</sup> In March 2023, the Prosecutor General of Ukraine, Andriy Kostin, and ICC Registrar Peter Lewis signed a cooperation agreement to establish an ICC country office in Ukraine.<sup>95</sup>

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90. SCHABAS, *supra* note 58, at 453.

91. See Rome Statute, *supra* note 6, art. 17.

92. Press Release, Statement by ICC Prosecutor Karim A.A. Khan QC: Office of the Prosecutor Joins National Authorities in Joint Investigation Team on International Crimes Committed in Ukraine, Int’l Crim. Ct. (Apr. 25, 2022), <https://perma.cc/J442-9MAR> [hereinafter ICC Prosecutor Statement].

93. *Joint Investigation Teams*, EUR. UNION AGENCY FOR CRIM. JUST. COOP., <https://perma.cc/R9XX-JKM5>.

94. ICC Prosecutor Statement, *supra* note 92.

95. Press Release, Ukraine and International Criminal Court Sign an Agreement on the Establishment of a Country Office, Int’l Crim. Ct. (Mar. 23, 2023), <https://perma.cc/R4WD-8RBV>.



This unprecedented level of cooperation suggests a new kind of role for the ICC, where although the drafters of the Rome Statute envisioned the ICC stepping in when states were unwilling or unable to prosecute conduct, the ICC here can step in and assist when the caseload is simply too substantial for any domestic judicial system to manage on its own. While of course this partnership will not allow the ICC to hear crimes that are insufficiently grave, as of March 2023, there were more than 74,000 allegations of atrocity crimes committed in Ukraine;<sup>96</sup> there is no provision of the Rome Statute that explicitly prevents the OTP from offering its assistance to a domestic system struggling to manage the burden of collecting evidence and building cases amidst a violent war.

In sum, the ICC's jurisdictional preconditions by their very nature have always been and will continue to be extraordinarily complicated. International legal mechanisms are charged with dealing with unprecedented and unpredictable situations with conflicting legal doctrines, varying state interests, and ever-present sovereignty concerns, which creates legal disputes that tend to rely on case-by-case factual determinations much more so than a typical domestic court. As discussed above, some of these jurisdictional issues can be circumvented by strategic charging decisions that achieve the ICC's justice objectives and deter future environmental harm without asking the Court to address some of the more complex territorial jurisdiction issues. However, the Court must not shy away from seeking accountability for the current and future generations of Ukrainians who will be impacted by this environmental damage; these unprecedented times require a practical, flexible approach to international justice that will address, and effectively deter Russia and other actors from taking, similar action in the future.

### III. THE SUBSTANTIVE CHARGE: ARTICLE 8(2)(B)(IV)

While there are several articles that could perhaps be applied by analogy to provide a plausible avenue for prosecuting excessive environmental damage, Article 8(2)(b)(iv) is the only provision of the Rome Statute that explicitly references damage to the environment. This Part discusses the possibility and potential challenges of bringing charges under Article 8(2)(b)(iv) for the Russian Federation's attack on the Kalynivka oil depot.

Article 8(2)(b)(iv) of the Rome Statute defines "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 military advantage anticipated" as a war crime.<sup>97</sup> The ICC's Elements of Crimes identifies several required elements for this type of war crime, which are addressed in the following subsections.<sup>98</sup>

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96. Stephanie van den Berg & Anthony Deutsch, *Explainer: How are War Crimes in Ukraine Being Investigated*, REUTERS (Mar. 17, 2023).

97. Rome Statute, *supra* note 6, art. 8(2)(b)(iv).

98. Int'l Crim. Ct. Rome Statute Elements of Crimes, art. 8(2)(b)(iv), U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter Elements of Crimes].

*A. The Conduct took Place in the Context of an International Armed Conflict and the Perpetrator was Aware of the Factual Circumstances that Established the Existence of an International Armed Conflict*

All crimes charged under Article 8 as a war crime must have taken place as part of either an international or non-international armed conflict. Article 8(2)(b)(iv) applies specifically to conduct within an international armed conflict. As a practical matter, this element seems obviously satisfied, regardless of who is charged. “[A]n armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”<sup>99</sup> The Russia-Ukraine war is a traditional armed conflict between two states and has been one of the most widely covered news media events of the past decade. While as a matter of law the OTP will still need to provide evidence to satisfy this element, simply providing evidence of the defendant’s competence and awareness of the role of the Russian military in the conflict should be sufficient to establish that the perpetrator knew that he was engaged in an international armed conflict.

*B. The Perpetrator Launched an Attack*

For this element, there are two considerations: first, whether the Kalynivka missile strike constitutes an “attack,” and second, whether the OTP can provide evidence that the charged perpetrator launched the attack. This will likely be an uncontroversial element, weighing in the OTP’s favor.

As to the first question, Article 8(2)(b)(iv) requires that an “attack” be launched, although the Rome Statute provides no definition as to what constitutes an attack.<sup>100</sup> Article 49 of Additional Protocol I defines the concept of an “attack” as “acts of violence against the adversary.”<sup>101</sup> The ICRC Commentary defines an “attack” as “the use of armed force to carry out a military operation.”<sup>102</sup> In *Katanga*, Trial Chamber II defined an attack as “acts of violence against the adversary, whether in offence or defence.”<sup>103</sup> While airstrikes have not been tried at the ICC before, a missile strike on an oil depot is a traditional, kinetic military operation that should almost always constitute an “attack” within any interpretation of Article 8.

As to the second question, Article 8(2)(b)(iv) requires that the OTP provide evidence that the charged perpetrator launched the attack. This paper does not

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99. Prosecutor v. Tadić, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995); Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment Pursuant to Article 71 of the Statute, ¶ 533 (Mar. 14, 2012).

100. Elements of Crimes, *supra* note 98.

101. Additional Protocol I, *supra* note 18.

102. COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (ADDITIONAL PROTOCOL I), art. 49 (Int’l Comm. for the Red Cross).

103. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, ¶ 798 (Mar. 7, 2014).

discuss the nuances of individual criminal responsibility and of course, this consideration within the second element will be shaped by the mode of liability under which the OTP chooses to bring charges. However, it is significant that the Russian government has publicly claimed responsibility for the attack. The day after the attack in Kalynivka, Igor Konashenkov, official representative of the Russian Ministry of Defense, stated in a public video address on Russian state media that Russian cruise missiles had struck the oil depot in Kalynivka, taking out the largest remaining oil depot supporting Ukrainian military activities.<sup>104</sup> If Igor Konashenkov is the charged defendant, this element is easily satisfied. However, if the Prosecutor charges an alternative defendant, they will have the burden of proving that the individual was in some way individually responsible for the launch.

*C. The Attack was Such that it Would Cause Incidental Widespread, Long-Term, and Severe Damage to the Natural Environment that was Clearly Excessive in Relation to the Concrete and Direct Overall Military Advantage Anticipated*

This element requires the OTP to establish two separate factual circumstances: (1) the nature of the physical damage that the attack should have been expected to cause, and (2) the concrete military advantage that was anticipated by the attack.<sup>105</sup> Once evidence is provided to define the nature of the damage and the anticipated military advantage of the attack, the OTP must prove that the damage to the environment was “clearly excessive” in relation to the anticipated military advantage.<sup>106</sup>

First, the Rome Statute provides that for excessive environmental damage to constitute a war crime pursuant to Article 8(2)(b)(iv), the nature of the damage the attack should have been expected to cause must have been “widespread, long-term and severe.” The Rome Statute provides no guidance as to what might constitute widespread, long-term, and severe conduct, but the strong terminology and the use of the conjunctive “and” suggests that the drafters intended this to be a high bar, prosecuting only environmental damage that is of a particularly excessive character.<sup>107</sup> However, the language of Article 8(2)(b)(iv) does not seem to require that the damage actually occur; the relevant question is what damage should have reasonably been expected to occur given the nature of the attack.<sup>108</sup>

Various actors in the international justice space have proposed explanations for this standard. The United Nations Environment Programme suggests that

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104. ВС РФ “Калибрами” уничтожили топливную базу под Киевом [Russian Armed Forces “Kalibr” Destroyed the Fuel Base Near Kyiv], TASS (Mar. 25, 2022, 3:47 AM), <https://perma.cc/9J5S-8RLH>.

105. See Elements of Crimes, *supra* note 98.

106. *Id.*

107. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

108. Elements of Crimes, *supra* note 98 (“The attack was such that it *would cause* incidental. . .widespread, long-term and severe damage”) (emphasis added); MATTHEW GILLET, PROSECUTING ENVIRONMENTAL HARM BEFORE THE INTERNATIONAL CRIMINAL COURT 99-100 (2022).

“widespread” should be read as encompassing an area on the scale of several hundred square kilometers, “long-term” as a period of months or approximately a season, and “severe” as involving serious or significant disruption to human life, natural resources, and economic resources or other assets.<sup>109</sup> The U.S. Department of Defense has also adopted this definition of the widespread, long-term, and severe standard, signaling that this is a particularly stringent and exacting interpretation of the law.<sup>110</sup>

The defense attorneys in an environmental war crime prosecution will likely argue for this kind of stringent interpretation that limits the Court’s jurisdiction over such crimes to particularly egregious environmental acts, such as the US’ aerial release of Agent Orange over 20,000 square kilometers during the Vietnam War. The lack of guiding precedent defining this standard means the Court has an opportunity to determine what this standard should mean in international criminal law, and what the Court’s role should be in the prosecution of environmental harm. An overly narrow interpretation could nullify the Court’s utility in this space, and an excessively broad interpretation could expand the Court’s jurisdiction in a way that harms its credibility. The Court must find a middle ground that allows it to prosecute and deter this harmful conduct while still working within the bounds of its mandate.

Looking first to the meaning of the word “widespread,” while no case has been brought for environmental damage under Article 8(2)(b)(iv) before, international conventions like ENMOD that use the word “widespread” have been interpreted by the International Committee for the Red Cross (ICRC) as referring to the required geographical scope of the environmental damage.<sup>111</sup> The OTP could argue that setting a bright-line rule as to the required geographic scope of an attack’s environmental impact for it to be prosecutable would be inconsistent with the object and purpose of the Statute and would make the Court unable to consider significant contextual circumstances relevant to whether incidental environmental damage rises to the requisite level of seriousness. For example, a bright-line rule that requires damage to encompass hundreds of square kilometers, as has been suggested by UNEP and adopted by the United States, would mean that geographically small State Parties to the Rome Statute could be the victim of an environmental attack that affects the entirety of their state territory, but is not sufficiently “widespread” to be heard by the Court; State Parties like Lichtenstein, a country of only 160 square kilometers, could not have intended to assent to a definition of “widespread” that would exclude the destruction of their entire natural habitat from consideration by the ICC.<sup>112</sup>

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109. Ricardo Pereira, *After the ICC Office of the Prosecutor’s 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?*, 31 CRIM. L. F. 179, 199 (2020).

110. See OFF. OF GEN. COUNS., U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 6.10.2 (June 12, 2015).

111. See Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Understandings, May 18, 1977, 1108 U.N.T.S. 151 [hereinafter ENMOD Understandings].

112. GILLETT, *supra* note 108, at 100-01.

Water and soil sampling from the region surrounding the KLO oil depot in Kalynivka suggest that the contaminants from the attack have spread through the soil and groundwater to impact water sources as far as sixty meters away.<sup>113</sup> The defense will likely point to the actual measured effect of the attack and argue that soil and groundwater pollution in a sixty meter radius cannot possibly satisfy the “widespread” requirement. However, OTP could assert that the question is not the *actual damage* that occurred, but rather the damage that should have been reasonably expected to occur. In addition, it could be persuasive that this sixty meter measurement only accounts for soil and groundwater pollution, and does not reflect the widespread nature of the air pollution resulting from the attack.

The oil depot in Kalynivka was nearby several ponds and streams that feed directly into the River Irpin, a river that has been dubbed the “Hero River” by local Ukrainian ecologists who contend that the river has served as a central protector of Ukrainian territory for over a thousand years.<sup>114</sup> Water sampling from the Riznytsia pond, a pond sixty meters from the oil depot, has indicated significant contamination; the levels of oil products in the pond are more than forty times higher than state standards.<sup>115</sup> Riznytsia is directly connected to the River Irpin, and more expansive contamination has been prevented only by the fact that the link between the two bodies of water is currently dried out.<sup>116</sup> If that small tributary had not been dried out at the time of the attack and remained empty since, pollutants from the attack could have contaminated a river that stretches 162 kilometers across Ukraine and has one of the most extensive floodplains in eastern Europe.<sup>117</sup> The OTP could contend that although the word “widespread” should not be interpreted to require impact over hundreds of kilometers of land, even if the Court disagrees, this attack should have reasonably been anticipated to have a negative impact on a substantial portion of Ukrainian land that would satisfy the “widespread” requirement regardless of whether the Court interprets “widespread” to mean sixty meters or 160 kilometers.

The Rome Statute also requires that the environmental damage be “long-term.”<sup>118</sup> Given the documented contamination of the water and soil surrounding the Kalynivka oil depot, the key evidence the OTP will need to present for this element is scientific testimony as to the time it will take for the oil products to be degraded to a point where they will no longer be harmful to the environment. Scientists have developed several successful remediation techniques for removing oil products from contaminated soil, but they each require a significant amount of time, money, and resources.<sup>119</sup>

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113. *Fossil Fuel Infrastructure*, *supra* note 37.

114. Vincent Mundy, *Ukraine’s ‘Hero River’ Helped Save Kyiv. But What Now for its Newly Restored Wetlands?*, THE GUARDIAN (May 11, 2022, 1:30 AM), <https://perma.cc/6KD6-EVL3>.

115. *Fossil Fuel Infrastructure*, *supra* note 37.

116. *Id.*

117. *Id.*; Mundy, *supra* note 114.

118. Elements of Crimes, *supra* note 98.

119. See Dalel Daassi & Fatimah Qabil Almaghribi, *Petroleum-Contaminated Soil: Environmental Occurrence and Remediation Strategies*, 3 BIOTECH, May 25, 2022, at 139, 2.

Once it is determined how long the effects of the attack are expected to impact the environment in Kalynivka and its surrounding villages, the Prosecutor must argue that this period satisfies the “long-term” requirement. Long-term is not defined in the Rome Statute, but the ICRC has interpreted the similar phrase of “long-lasting” within ENMOD to mean “lasting for a period of months, or approximately a season.”<sup>120</sup> The OTP could argue that the ICC should adopt the ICRC’s interpretation, and that while long-term will continue to be a term that is guided by the factual circumstances of the case, it should be understood to mean an environmental impact that lasts at least three months. Under this interpretation, the OTP should be able to satisfy the long-term requirement simply by showing that a sampling taken some time after June 2022 demonstrates water, soil, or air contamination in the area around the plant. However, the defense will likely counter by challenging the adoption of the ICRC’s interpretation, because while long-lasting and long-term are similar, long-term connotes a longer time period than long-lasting.

The defense will likely argue that long-term should be interpreted to be an extensive time period, perhaps even a period of years. They will likely invoke the gravity principle, contending that the Court must interpret long-term to mean some significant period in order to protect its credibility as a body that charges only the most serious offenses. If the Court is compelled by these arguments, the OTP could attempt to admit evidence like expert testimony to demonstrate the long-term impact the Kalynivka attack will have on air quality, groundwater, soil, and ecological diversity in the coming years. The defense will likely argue that such testimony would be hypothetical evidence, and a defendant should not be convicted based on hypothetical harm. However, if the defense pushes for an interpretation of long-term that is a period of years, how else could the Court ever hold a defendant accountable under Article 8(2)(b)(iv) if it is not permitted to use projections?

Finally, the OTP must provide evidence that the attack was sufficiently “severe.”<sup>121</sup> The ICRC has interpreted the term severe within ENMOD to mean “involving serious or significant disruption or harm to human life, natural and economic resources, or other assets.”<sup>122</sup> If the ICC adopts a similar interpretation, the OTP can support this element with evidence of the impact on the civilian population caused by the contamination of the natural resources and the destruction of such a substantial amount of fuel products. In addition, while there is minimal documentation as to the chemical composition of the plume of smoke that erupted from the attack, the OTP could point to samples taken from similar attacks in the past to support that the release of toxic airborne pollutants into the atmosphere will have a long-term severe impact on the air quality of the region and the natural environment in general.

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120. See ENMOD Understandings, *supra* note 111.

121. Elements of Crimes, *supra* note 98.

122. See Report of the Conference of the Committee on Disarmament, transmitted to the United Nations General Assembly, U.N. Doc. A/31/27, at 91-92 (1976).

After presenting evidence of the “widespread, long-term and severe” nature of the attack, the OTP must establish the anticipated “concrete and direct overall military advantage” so that it can be weighed against the environmental harm. The expression “concrete and direct overall military advantage” refers to the advantage that is foreseeable by the perpetrator at the time the attack was launched.<sup>123</sup> The military advantage of attacks on oil refineries has been debated extensively, gaining particular attention in academic circles since Houthi rebels in Yemen obtained drones and launched attacks on Saudi oil facilities in September 2019, disrupting half of Saudi Arabia’s oil capacity and impacting the global oil supply.<sup>124</sup> Defense lawyers could contend that given the oil depot’s role in supplying petroleum products to the Ukrainian military, an attack that destroys that fuel to prevent it from being used in conflict is a prime example of a concrete and direct anticipated military advantage. The OTP could argue that the contested dual-use nature of the facility calls into question whether the oil depot was even a legitimate military target at all, much less whether a concrete and direct military advantage was anticipated. Data as to the primary customers of the oil produced at the Kalynivka oil depot has not been publicized, but the percentage of oil produced in the facility that was actually sent to battlefield military actors could be a significant factor in the Court’s determination of the weight of the attack’s anticipated military advantage.

Once the nature of the anticipated damage and military advantage resulting from the attack are established, the Rome Statute requires the Court to engage in a balancing analysis to determine if the perpetrator violated the international humanitarian law principle of proportionality when they undertook the attack. To constitute a war crime under Article 8(2)(b)(iv), in addition to being sufficiently widespread, long-term, and severe, the environmental damage must be “clearly excessive” in comparison to the military advantage anticipated. This issue in particular will be a battle of the evidence; what evidence can the OTP provide that supports how devastating the perpetrator should have expected the attack to be on the natural environment, and how much data can the defense team point to that suggests that Kalynivka oil depot was a key supplier of oil to the Ukrainian military? This element does not obviously weigh in favor of either side and will be a complex factual determination for the Court.

*D. The Perpetrator Knew that the Attack would Cause Incidental Long-term, Widespread, and Severe Damage to the Natural Environment and that Such Damage would be Clearly Excessive in Relation to the Concrete and Direct Overall Military Advantage Anticipated*

This element, the *mens rea* element of Article 8(2)(b)(iv), is the most likely bar to a successful environmental war crimes prosecution under the existing Rome

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123. Elements of Crimes, *supra* note 98, at 13 n.36.

124. Ilya Sobol & Margherita Stevoli, *Saudi Oil Attacks Raise Questions About Nature of Yemen Conflict and Legitimate Military Targets*, JUST SEC. (Sept. 19, 2019), <https://perma.cc/WGH9-LDWP>.

Statute. Article 8(b)(2)(iv) contains a unique triple *mens rea* test, requiring that (1) the attack was launched intentionally, (2) the perpetrator knew that the anticipated environmental harm would be widespread, long-term, and severe, and (3) this anticipated damage was clearly excessive in relation to the concrete and overall direct military advantage anticipated.<sup>125</sup> As a practical matter, this element will likely be extremely difficult for the OTP to prove.

The first part of the triple *mens rea* test is straightforward and clearly satisfied. For the attack to have been intentionally launched, the OTP must provide evidence that the oil depot was the intended target of the attack and not simply collateral damage. The Russian Defense Ministry's statement noting the use of "high-precision" cruise missiles when attacking the oil depot satisfies this sub-element.<sup>126</sup> The second and third portions are much more complicated. The second portion seems to require evidence that the perpetrator knew and understood the likely environmental impact of the attack, and undertook the action regardless. The wording seems to eliminate the possibility that a perpetrator could be held liable for negligence, willful blindness, or reckless conduct in failing to adequately assess the potential for environmental conduct before launching an attack.<sup>127</sup>

The third portion requires that the perpetrator knew and recognized that the environmental damage caused by the attack would be "clearly excessive in relation to the concrete military advantage anticipated."<sup>128</sup> Considering the second and third sub-elements together, the defense will likely argue for an exacting and literal interpretation of these requirements and contend that only *direct* evidence that the defendant knew of the environmental damage and knew it would be excessive in relation to the anticipated military advantage would be sufficient.

The OTP's most promising argument is for the Court to apply a reasonable person standard to this element and find that willful blindness is not an exonerative defense to prosecution for this kind of crime. Rather than requiring the OTP to seek evidence of direct intent that likely will not exist given the specific and extensive *mens rea* requirement of Article 8(2)(b)(iv), the Court should ask whether a reasonable, similarly situated commander ordering the Kalynivka oil depot attack should have known that the attack would result in widespread, long-term, and severe environmental harm and that the harm would be excessive in relation to the military advantage anticipated. This is the interpretation that best serves the object and purpose of the Statute – if the defense's position is adopted, Article 8(2)(b)(iv) will be effectively moot.

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125. Rome Statute, *supra* note 6; GILLETT, *supra* note 108, at 104.

126. TASS, *supra* note 104.

127. GILLETT, *supra* note 108, at 105.

128. Elements of Crimes, *supra* note 98.



#### IV. CONCLUSION

A prosecution for the kind of conduct Russia undertook at Kalynivka has never been done before. Never has the international community successfully sought criminal liability for harm to the *environment* rather than harm to *people*. These are unprecedented times, with climate change and global warming making us more cognizant of environmental dangers than any generation before, and it provides an unprecedented opportunity for the ICC to shape our future.

This kind of prosecution gives both the OTP and the Court the ability to determine the role that international justice mechanisms will play in protecting the planet. The OTP can actively deter persons from engaging in unnecessarily harmful conduct, and the Court can interpret the Rome Statute in a way that reflects the seriousness of offenses against our very fragile natural environment.

A prosecution for the Kalynivka attack would be challenging, but the legal basis is present within the Rome Statute – the arguments are there. To convict someone for this attack, the Court must be willing to see the danger of the current era, and understand why the role of the Court must adapt as threats to the international community continue to evolve. The defense will argue that to prosecute Kalynivka under Article 8(2)(b)(iv), the ICC will be forced to step outside its mandate, and exceed the authority given to it by State Parties. However, this paper demonstrates that the ICC does not need to step outside its authority – it simply needs to read the Rome Statute in a way that is consistent with its language and intent, in a way that will allow the OTP to prosecute and deter unnecessary environmental harm caused by armed conflicts. The Assembly of State Parties foresaw the need for accountability for this kind of conduct, and it is far past time the ICC began to effectively enforce these prohibitions.

With an active OTP fighting for accountability in the environmental war crime space, the international community can look towards a world in which technological advancement is used to protect the environment, rather than destroy it. Military leaders will begin to include environmental damage in their strategy calculations, and such considerations will be emphasized in military training and law of war manuals. This is an imperative piece of a global effort to better protect our planet across state and industry lines, and it is long past time for international justice mechanisms to use their statutorily enumerated authority and join the fight.

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