



# Towards a Holistic Consideration of Crimes Against Nature Committed in Times of Armed Conflict: A Critical Approach to the Case of Iraq

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## Abstract

During the armed conflict in Iraq between 2014 and 2017, Daesh committed crimes with clear environmental effects and consequences; however, these events have not been adequately clarified. The investigation of these crimes by official bodies, such as the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh, is required and is still possible. Even if UNITAD's investigative action would be mainly symbolic, it would be important because it could help to raise awareness of environmental crimes and thus also advance the emerging international agenda in the field of environment, peace and security and clarify the connection between environment and human rights. Additionally, it could have the more practical and strategic functions of laying a firm foundation for expanding the jurisdiction to pave the way for environmental peace building and helping to strengthen certain components of transitional justice in the country, in particular, by providing some reparation to victims.

**Keywords:** Environmental crimes; Iraq; armed conflict; transitional justice; UNITAD.

## Introduction

Human beings are an integral part of nature, and there is a clear link between people and the environment, including in time of armed conflict, as attacking the environment also generally harms the civilian population (Kreike 2021). However, the natural environment has often been left on the periphery of pressing issues to be addressed during armed conflicts (Stahn et al. 2017: 3). This is slowly changing, at least at the conceptual level, and commentators regularly explore new forms of nexuses between the environment and other key elements. First, as reflected in several recent legal developments, such as the Draft Principles on the Protection of the Environment in Times of Armed Conflict (PERAC) by the United Nations (UN) International Law Commission (ILC) (2022),<sup>1</sup> endorsed by the United Nations General Assembly (UNGA) (2022a), linkages between environmental protection and peace and security are increasingly being acknowledged. Additionally, the horizons of green criminology and transitional justice are expanding, showing that there is an expectation that issues related to territory and the environment should be covered (Goyes 2015; Killean and Dempster 2022; Rueda et al. 2022). Further, progress is being made towards reaching an accepted definition of 'ecocide' (Independent Expert Panel for the Legal Definition of Ecocide 2021), which is gaining increasing support due to the view that its adoption and enforcement does not necessarily have to be at the universal level but could be generated outside the Rome Statute system (e.g., at the regional level) (Council of Europe 2023b; European Parliament 2022: par. 49). This is despite the fact that the proposed definition of ecocide is 'realistic', guided by 'precedent' and built 'with deference and respect' to the existing crimes in the Rome Statute (Voigt 2021). Second, the interrelations between environmental and human rights have become especially clear since the recognition of the right to a healthy environment (R2HE) at the international level (Human Rights Council 2021; UNGA 2022b). Third, deep links between



the environment and the rule of law have been identified (United Nations Environment Programme [UNEP] 2019). All these recent developments make it clear that protecting the environment involves caring for people (UNEP et al. 2020) and that restoring the integrity of the environment is indispensable in breaking cycles of violence (Bruch 2017; Payne 2017). Thus, environmental protection at all times, including before, during and after armed conflicts, should be raised in terms of political importance to the same level as that of human rights, as its safeguarding is in fact a *conditio sine qua non* (an indispensable condition) for the protection of the latter and for peace itself (UNEP / Jensen 2019).

As the ILC's PERAC provides a comprehensive consideration of various crucial aspects regarding the specific protection of the environment in relation to armed conflicts, it can be considered a pillar of a new international environment, peace and security agenda. This could help promote the customary character of much of its content and thus solve some gaps and imperfections presented by existing international law on the matter, especially in relation to the protection of nature during non-international armed conflicts, as the environment as such is not even mentioned in the conventional norms that refer to these kinds of conflicts (Bothe et al. 2010: 321; International Committee of the Red Cross [ICRC] 2011; UNEP 2009). Ecocide is yet to be adopted as a crime at the international level; however, it is important to note that customary international humanitarian law (IHL) and certain treaty laws already prohibit disproportionate attacks in respect of cases that cause widespread, long-term and severe damage to the environment, including in the context of non-international armed conflicts (ICRC 2005; Gillet 2017).

In relation to Iraq, in addition to the overlapping scars caused by previous armed conflicts, there are those caused specifically by Daesh in the 2014–2017 war. Beyond the severe human consequences, such as genocide against the Yazidis and possibly other religious minorities (German Federal Court of Justice 2023; Independent International Commission of Inquiry on the Syrian Arab Republic [IICISAR] 2016; United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh [UNITAD] 2021), as well as the general negative environmental effects, Daesh used scorched-earth tactics. This article seeks to ascertain whether the implications and consequences of the serious and wanton attacks of Daesh against the environment have been properly considered by relevant stakeholders, given that disregarding any such obligations, expectations or opportunities could have additional adverse effects on the post-conflict reconstruction, reparation and (un)sustainability of today's fragile peace. A holistic approach is needed to achieve these objectives; that is, a whole, non-fragmented, perspective is required to consider all the aspects that matter, starting with a proper investigation of the perpetrated crimes. This is the only way to comprehensively stay abreast of the recent developments and current trends about increasing interdependences between environment, security and peace.

This article seeks to disentangle a number of aspects. First, it examines the main parameters defining the last Iraqi conflict, including the country's complex and fragile context both from the socio-political and legal points of view, as well as from an environmental perspective. Second, it considers the actors which could be in charge of investigating the environmental effects of the Iraqi conflict (2014–17), as well as the environmental crimes deliberately committed by Daesh, and how this investigation has been or is being conducted and its scope. Third, it examines the main obstacles and the current jurisdictional avenues to get justice in relation with environmental crimes, paying attention to the links between transitional justice and nature. In this respect, it emphasises the importance of the investigation of environmental harm and crimes. The article also makes potentially helpful connections between different sectors of public international law relevant to the analysis. In addition, it also reviews the work carried out by the UNITAD, the body created by the United Nations Security Council (UNSC), to investigate the atrocity crimes committed by Daesh in Iraq. Further, it examines whether the UNITAD could create new opportunities to raise awareness of and further investigate crimes against the environment.

The lack of action from *official* organs to clarify so far of the environmental crimes committed by Daesh in Iraq, on the one hand, and the search for what a *holistic* approach should really imply for the same purpose, on the other hand, are two of the main leitmotifs of this research. One of the major conclusions of this article is that the UNITAD should play a crucial role in the investigation into the crimes committed in Iraq not only to avoid impunity but also to promote awareness and ensure adequate redress. The article argues that this organ needs to investigate environmental crimes. The final section expands on the necessity of adopting a holistic approach in relation to crimes against nature through the Iraqi case and presents additional implications from an international law perspective.

### **Armed Conflict, Sectarianism, Corruption, Political Instability and Climate Change in Iraq**

The illegal military intervention of 2003 resulted in a deep destabilisation, the effects of which 'continue to reverberate throughout the Middle East and wider world in multiple, if still underacknowledged, ways' (Fawcett 2023: 585). Among its harmful consequences was the birth of Daesh in 2004. The country suffers from high levels of corruption and political instability, which are largely attributable to its political leaders, who are passive in assuming their responsibilities, which in turn contributes further to the instability and violence. This is particularly true if we consider the set of disturbing elements that

have currently come together (e.g., the neglect of the basic needs of the population, corruption, weak governance, violence perpetrated by non-State armed groups without the reaction of the authorities or impunity of certain perpetrators of human rights violations) as some of the distinctive features of the State apparatus (United Nations Assistance Mission for Iraq [UNAMI] May 2022; October 2022).

Sectarianism and confrontations among human groups with different religious identities (e.g., Shiite or Sunni Muslims, Christians and Yazidis) have been a constant in the country's recent history, have been particularly intense during the armed conflicts and when they have come to an end and have also had an effect on nature. In addition to recent events, past incidents, such as Saddam Hussein's drainage of the Southern marshes of Iraq in the early nineties in retaliation against the Shias, who were considered rebels, which destroyed a unique ecosystem and can be considered a paradigmatic case of ecocide, need to be kept in mind (Conflict and Environment Observatory [CEOBS] 2021). When the war against Daesh finished at the end of 2017, a strong distrust in the Iraqi system's ability to deliver justice existed and a certain return to self-help and numerous acts of revenge also occurred (Redlich Revkin 2018) within a framework of inter-ethnic disputes and factionalism. This dissension remains one of the great scourges faced by the country (UNAMI May 2022; October 2022).

According to recent estimates, there are about 1.2 million persons internally displaced and at least 4.1 million people in need of humanitarian assistance (World Food Program 2022: 1). In addition, several years after the end of the conflict, Iraq remains one of the most polluted countries in the world due to the explosive remnants of war (United Nations Mine Action Service [UNMAS] 2020; UNMAS 2021). In 2022, the territory of Iraq still had about 2,850 square kilometres of contaminated areas marked as very dangerous; thus, large areas of land cannot be used for agriculture, the reconstruction of infrastructure is hindered and interconnectivity within the country is blocked (UNMAS 2022). There is an urgent need to continue to remove the remnants of war, which requires more funding, coordination and partnerships (CIVIC 2022: 4).

The soil composition of previously fertile land has changed dramatically: 97% of the existing surface is arid, and of that, 50% is desert (UNEP 2016: 2). The added effects of environmental degradation resulting from successive military conflicts, the effects of climate change and desertification and the compounded effects of the two have created a complex and highly vulnerable situation (ICRC 2020 and 2021). Indeed, in terms of climate change, Iraq is the fifth most affected country in the world (International Organization for Migration [IOM] 2022: 5; UNEP 2016). A significant part of the current displacements is a result of the above-mentioned armed conflict; however, climate change-related migration is also becoming a reality due to desertification and water shortages (IOM 2022: 5). It is also expected that as environmental changes intensify, displacements will increase exponentially.<sup>2</sup> Other related serious problems include salinisation, which could have harmful consequences for agriculture and food security (International Atomic Energy Agency [IAEA 2020]), and soil degradation, dust and sandstorms, which are increasingly affecting cities and causing hospitalisations (Muhyedeen 2022; UNAMI 2022).

Climate change is a 'threat multiplier' (Center for Naval Analyses [CNA] 2007: 3; G-7 2015: 5; High Representative/European Commission 2008: 2), and its effect is becoming increasingly evident in the Iraqi context (CIVIC 2022: 14). Blaming climate change for every evil would be excessive,<sup>3</sup> as conflicts are rarely motivated by a single cause (International Union for Conservation of Nature [IUCN] 2021: 19). Nevertheless, climate change threatens Iraq's stability and could contribute to the outbreak of further conflict in the country (CIVIC 2022). The current situation implies a multifaceted challenge, as it is related to a decrease in livelihood from agriculture and a corresponding increase in the local support of terrorist groups; an insufficient governance capacity to respond to the challenges of climate change and environmental degradation; an increase in dependence on neighbouring countries for water resources, which has negative potential implications for regional stability; mass displacement and forced migration; and an increase in communal tensions concerning access to food and water (Expert Working Group on Climate-related Security Risks 2018).

Both material and immaterial reasons can be found for the progress of Jihadist terrorism in Iraq that feed off one another. The primary reasons include marginalisation, misery, and a lack of opportunities (Verwimp 2016). The secondary reasons include those based on identity and its intertwined realities (Fukuyama 2018), such as religion or ethnicity. An analysis of the extent of tribal feelings in Iraq reveals the prevalence of this aspect over other ideological issues and how this, having not been adequately managed, has had disastrous consequences for the country (Chua 2018). Climate change and environmental degradation have in turn fuelled other threats, thus significantly advancing radicalism and the recruitment capacity of terrorist groups (Hendrix 2022). Not everyone who joined the Islamic State can be categorised the same, either in terms of their involvement in the crimes committed or in terms of their degree of ideological alignment with Daesh, as 'absent the authority of the State [Daesh was] simply chosen for a safety net, an identity and an income to provide their families' (UNAMI May 2022).

The establishment of an adequate post-conflict response is further complicated by the fact that since the referendum in Kurdistan in September 2017, this region has lived in quasi-independence. Baghdad and Erbil signed the Sinjar Agreement in October

2020, aimed at stabilising the area through a new administration and security structure to promote reconstruction and allowing the return of the displaced population; however, some essential provisions of the agreement are not yet applicable and thus the agreement's survival is at risk (International Crisis Group 2022; UNAMI May 2022). Ongoing changes related to the Ukraine war, including an at least partial dealignment from the West, and effects from the region's responses to the Coronavirus 2019 pandemic could also escalate existing risks (Fawcett 2023: 585). Additionally, the precarious situation in the area seems to have worsened both as a result of Iraq's internal problems and the rivalry between Turkey and Iran (UNAMI October 2022). In sum, it is becoming increasingly evident that the country needs to rethink its social contract (United Nations Development Programme [UNDP] 2022).

### **Sailing Between the Attention and Neglect of Environmental Damage and Crimes Committed by Daesh During the Armed Conflict (2014–2017)**

A report drafted by the UNEP after several years of hostilities in Iraq wisely stated that 'ISIL's scorched-earth tactics provide a dramatic illustration of how pollution from conflicts, deliberate sabotage, and looting of industrial facilities and civil infrastructure can affect people's health and livelihoods for decades and impede reconstruction and peacebuilding efforts' (2017: 4). The IOM established the term 'urbanicide', which the Yazidis themselves used to refer to the deliberate and widespread destruction of the city of Sinjar, evoking its previous use during the nineties, in connection with the Bosnian war (IOM 2020: 9).

At the non-governmental level, several reports stand out because they accurately analyse attacks and environmental damage in Iraq. A 2015 ICRC report on Middle East conflicts reported severe damages to water and its regrettable humanitarian and health consequences in the long term. Another 2020 ICRC report, entitled 'I saw my city die: Voices from the front lines of urban conflict in Iraq, Syria and Yemen', emphasised the cumulative and long-term effects of conflicts in some Middle Eastern cities characterised by urbanisation. This form of hostilities, which affected cities like Fallujah, implies a form of urban warfare based on a siege that has extremely damaging consequences that go beyond simple effects on the functioning of essential service networks (such as water), which residents need to survive, and contribute to a contamination increase from the use of explosive and even chemical weapons, which further increases the dramatic consequences for civilians (ICRC 2017). Another 2020 ICRC report, entitled 'When rain turns to dust', focuses on the combined effects of armed conflict and the environmental climate crisis on people's lives in specific areas, including southern Iraq. Notably, this report set out the adverse effects of repeated and long-lasting conflicts throughout the country's recent history on water security (ICRC 2020, 29). Similarly, Amnesty International's Report, 'Dead land: Islamic State's deliberate destruction of Iraq's farmland', published in December 2018, draws attention first and foremost to the intentional destruction of the rural environment of Sinjar where wells have been sabotaged (with debris, oil or other destructive elements) by Daesh and essential survival elements (such as mechanisms for pumping water, cables, generators or transformers) have been stolen or destroyed by its members (Amnesty International 2018: 12). For its part, in a 2018 country brief on Iraq, the CEOBS reviewed the aftermath of recent conflicts in the country, which included insecurity, policies sanctions and climate change, focusing on certain key environmental issues (e.g., damage to the oil infrastructure and its consequences, including oil well fires and deliberate discharges in various oil producing areas during the last conflict) and damage to other critical infrastructure and urban areas (e.g., contamination by explosive remnants and the problems arising from the absence of an adequate environmental governance). Similarly, in its 2017 report, entitled 'Living Under a Black Sky Report', PAX thoroughly analysed the pollution caused by successive conflicts in Iraq and the health problems caused to people living in the country, focusing specifically on the legacy of environmental damage from the conflict, such as the damage resulting from oil fires and discharges and artisanal oil refineries, the damage caused to urban areas by waste and debris, the damage to critical and industrial infrastructure and the effects on agricultural areas and consequences for refugees and internally displaced persons.

The detailed attention to environmental issues discussed above can be contrasted to the lack of attention shown by the UNSC when establishing the UNITAD and the lack of investigation by the UNITAD within its own action. Resolution 2379 of the UNSC provides for the creation of this body to support national efforts to hold Daesh accountable through the collection, preservation and storage in Iraq of evidence of acts 'likely to constitute war crimes, crimes against humanity and genocide (...) to ensure their widest possible use before national courts, and to supplement investigations carried out by Iraq authorities or investigations carried out by the authorities in third countries upon request'.<sup>4</sup> While the UNSC reiterates its condemnation of all violations of international humanitarian law<sup>5</sup> and the Preamble explicitly condemns certain categories of acts that go beyond those directly directed against people, such as 'attacks on vital infrastructures, as well as the destruction of cultural heritage, including archaeological sites, and trafficking in cultural property',<sup>6</sup> no mention is made of attacks on the environment. Likewise, no references to environmental attacks can be found in the UNITAD reports, as discussed below, or in the reports of the International Mechanism for Syria,<sup>7</sup> even though some effects extended beyond Iraq's territory.<sup>8</sup>

In the reports of Special Rapporteurs on Internally Displaced Persons and Minority issues prepared with respect to Iraq at the end of the conflict, not only are there no references to possible environmental crimes (the study of which as such is outside their purview), but there is also no discussion of the effects of environmental crimes on the categories of persons within the scope of their mandates. In the report of the Special Rapporteur on Internally Displaced Persons (2017), the contamination of the land by explosive remnants of war is mentioned in an accurate manner, invoking the need for cooperation to ensure their removal, but no reference is made to environmental damage other than from the perspective of the right to property.<sup>9</sup> Similarly, the report of the Special Rapporteur on minority issues (2017) covers the effects of certain actions beyond those relating to individuals, such as the destruction of cultural heritage; however, there is no mention of attacks on the environment or nature or the remnants of war.

The seriousness of the crimes committed directly against people in Iraq's conflict, together with the anthropocentric perspective prevailing in IHL, human rights law (HRL) and international criminal law (ICL), have contributed to these 'silences' and the lack of a comprehensive approach. However, consideration of the destroyed or degraded environment is crucial for several reasons. First, there is an essential double interdependence to address; that is, the influence of conflicts on nature and natural resources, as well as the influence of nature and natural resources in conflicts (IUCN 2021: 6), and the interrelationship between the environment and human rights. In addition to the fact that a healthy environment is a *sine qua non* requirement for the enjoyment of human rights and that human rights can serve to ask for redress in cases of damage to the environment, environment and human rights are also integrated within the conceptual framework of sustainable development. At the same time, since the adoption of the Agenda 2030 in 2015, peace has been formally conceived as the fourth pillar of sustainable development (UNEP 2019 Environmental Rule of Law Report: 1). In relation to this development, as a precursor for future advances, the adoption of R2HE, recognised by the UNGA in July 2022, without any vote against it, should serve as a beacon to illuminate new paths, including its correlative duties.

## Limits and Possibilities for Action

### *Difficulties in the Exercise of Jurisdiction, Non-Compliance with Obligations Arising from Transitional Justice and a Lack of Jurisdiction of Iraq Over International Crimes*

The anthropocentric design of norms referred to crimes against humanity and genocide hinders their application to attacks against the environment (Killean 2022); however, the inclusion of severely damaging behaviour to the environment under these categories of offences remains feasible. Even if attacks against the environment do not fit neatly within such criminal offenses, it must not be forgotten that the very initial conception of genocide, proposed by Lemkin for the Nuremberg trials, covered ecocide and even integrated animals slaughter (Frieze 2013; Gauger et al. 2012: 6). In addition, more recently, the International Criminal Court (ICC) has alleged links between attacks on the environment and genocide or other crimes against humanity. For example, the charges for genocide brought against the then President of Sudan, Al-Bashir, in 2008 refer to environmental harms.<sup>10</sup> In 2016, a policy paper by the ICC Prosecutor clarified that consideration of environmental damage is a priority area for its Office;<sup>11</sup> however, to date, this has not led to any charges of environmental crimes being brought. The communication in which activists (with the support of non-governmental organisations) contended that the 'land grabbing' of the Cambodian ruling elite should be considered a crime against humanity should also be mentioned. However, the fact that in 2015, the Prosecutor of the Court closed the door to the prosecution of crimes committed by foreign terrorist fighters in the territories of Iraq and Syria, in practice, blocked the potential action of international jurisdiction in this regard.<sup>12</sup>

Under international law, the Iraqi State has several obligations relating to transitional justice, particularly those relating to its four well-known pillars: truth, the right to justice, reparation, and guarantees of non-repetition.<sup>13</sup> However, their application is far from fulfilled. Iraqi authorities are limiting prosecutions to the serious violations of IHL and HRL committed by Daesh, without considering other possible severe violations committed by other actors involved in the armed conflict. This double standard contradicts those norms on transitional justice (Amnesty International 2017/18: 72; Human Rights Watch [HRW] 2018). Similarly, the fact that the UNITAD was conceived as an instrument aimed at gathering evidence only about Daesh is equally objectionable (Van Schaack 2018: 119).

The persecution of members of Daesh is enormously complicated. Additionally, in terms of environmental crimes, there are severe shortcomings in the Iraqi national legal system at various levels that go beyond these shortcomings and that may be summarized as follows: 1) the non-inclusion of international crimes in the legislation<sup>14</sup> and the consequent reduction of the use and abuse of anti-terrorist legislation (Abad Castelos 2019); and 2) alongside the death penalty,<sup>15</sup> a lack of fair trial standards (HRW 2017 and 2018). Moreover, Resolution 2379, which created the Investigation Team and established that it must rely on the sovereignty of Iraq for the prosecution of war crimes, crimes against humanity and genocide, is incongruous because Iraqi courts do not have jurisdiction over the mentioned crimes. Further, these trials are also taking place at 'breakneck' speed (Klausen 2019). Thus, by the time that Iraqi courts have jurisdiction over such international crimes, it will be too late, as

thousands of alleged Daesh members will have already been tried under conditions that do not meet the minimum criteria of the due process standard (UNAMI and Office of the United Nations High Commissioner for Human Rights [OHCHR] 2021). In short, it is a vicious circle.

Nevertheless, new horizons could be opened via universal jurisdiction even in the short term, at least in the intersection between atrocity crimes and environmental crimes (i.e., in the realm of crimes against nature). Authoritative voices support the application of universal jurisdiction principles to environmental crimes (Council of Europe 2023a; UNEP Legal Division [undated doc.]). However, to proceed this way, it is necessary to first conduct an in-depth investigation of these complex and usually compound crimes.

### ***The Investigation of Environmental Damage as the Basis for Possible Scenarios***

Reparation is a key issue. If thoughtfully implemented, it could foster cooperation and help diminish possible friction between communities, ideally preventing new grievances. In addition, the potential of international HRL, which is both extremely important and underused, to deal with destroyed, degraded or contaminated environmental resources, including access to land or water (Hulme 2017), suffers from intense weaknesses in the case of Iraq. In addition to the lack of any instrument that makes the R2HE compulsory at the universal level and the lack of any process that at least consolidates it through policies that articulate its application, there is also the fact that Iraq has not ratified relevant universal treaties (such as that which grants competence to the Committee on Economic, Social and Cultural Rights). Further, Iraq is located in a geographical-institutional environment, that of the Arab League, which, unlike other regional areas, is characterised by a lack of human rights hard-law instruments and specific monitoring bodies. Indeed, beyond the Human Rights Council, the Special Rapporteurs on Internally Displaced Persons and Minority issues, and an Investigation Mechanism, such as the UNITAD, there are a few tools or approaches that can be used to place additional pressure on rights enforcement in Iraq within the scope of the UN. Thus, it is important that the existing bodies do everything within their power to raise awareness of the interdependence of human rights and the environment, draw attention to the need to address environmental damage and crimes, and open the door to reparations in this regard.

In the same way that the report ‘Making Peace with Nature’ (UNEP 2021) is based on the need to establish a scientific plan to address the serious and triple ecological crisis that the world suffers in relation to the climate, biodiversity and pollution, nature should also be considered key to the promotion of peace, as nature is key to peace. Thus, more focus should be placed on the environmental situation of countries in conflict or post-conflict situations, such as Iraq, for which case-by-case formulas need to be developed. Accordingly, environmental peace building seems to be one of the adequate tools for making nature a key for peace,<sup>16</sup> even though it may have certain problems (Ide 2019). There is a great deal of room for action in Iraq where more specific instruments need to be established to reduce the potential for conflict and increase the basis for ensuring peaceful relations. Certainly, improving the governance and management of natural resources is key to the utilisation and distribution of oil resources, which in Iraq amount to between 60% and 90% of its gross domestic product (GDP) (Norwegian Institute of International Affairs [NUPI] & Stockholm International Peace Research Institute [SIPRI] 2022: 2; World Health Organization [WHO] & UN Framework Convention on Climate Change [UNFCCC] 2021: 3). Similar considerations apply to agriculture, which represents the main livelihood for about one-fifth of the population, despite generating only about 5% of the GDP (ICRC 2020). Indeed, despite previous investment and assistance by the UNEP and UNDP, the governance of natural resources is precarious, as its beneficial effects were unfortunately largely reversed by the last armed conflict and may be decisive for the reintegration of ex-combatants, the return of refugees and displaced persons, the assurance of livelihoods and food security, and ultimately, cooperation and reconciliation (Bruch 2017: 30).

Ensuring environmental justice in the post-conflict phase involves recognising the interrelationship of all relevant problems be they political, social, ethnic, economic or ecological (Cusato 2021; Kuehn 2000), while helping to reduce the risk of ethnic tensions that could degenerate into new episodes of violence (Killean 2022). It is necessary to bring environmental and ecological issues to the transitional justice field and overcome the ‘curious silence’ on nature in this area (Viaene et al. 2023). Only in this way will it be possible to ensure the rights of the present generation and the rights of those to come, thus fulfilling the principle of intergenerational equity at the heart of sustainable development.

### ***Points of Convergence***

A holistic approach that takes the environment into account is needed (Robinson N A 2022); however, there is still a long way to overcome the negative implications that come from different fronts in Iraq, in particular, those related to the lack of adequate foundations for fulfilling obligations arising from the regulatory framework of transitional justice, including the UNITAD’s official registration of deliberate serious environmental attacks and the *chronification* of sectarianism and the political crisis in the country. As a result, far from eliminating the causes that led to the last armed conflict in which Daesh was a common enemy to beat, seeds of violence are still being cultivated and will continue to be even more intense so as climate change and

desertification continue their inexorable progress. With the failure of transitional justice, the fulfilment of the goals of reconciliation and peace brought by transitional justice is increasingly further away. Thus, other aspects of reparation and mechanisms that can perform equivalent functions, whether in the field of transitional justice, the *ius post bellum* or the area of environmental peace building, need to be explored. It does not matter what source indicates the proper or a desirable behaviour. Additionally, climate change must be viewed as a challenge that also presents opportunities for mobilisation, social cohesion, gender equality and alliances between international partners, the Central Government, Kurdistan Government and civil society (Smith et al. 2021; CIVIC 2022; NUPI & SIPRI 2022: 1).

A Venn diagram can be drawn with three circles representing the laws of armed conflict, HRL and international environmental law (Dienelt 2022: 257). Moreover, additional circles could be added to capture other pertinent interactions between the diverse aspects targeted here. These extra circles would represent ICL, transitional justice, *ius post bellum* and even environmental peace building. All of the circles would share a common and valuable intersection zone. Such a convergence area, which simultaneously links these seven fields, would be unavoidably tiny, especially because IHL, on the one hand, and *ius post bellum* and transitional justice, on the other hand, must project themselves into different situations and time frames. However, the intersection area will become significantly broader when one or two regimes are left out. Indeed, there could be at least five or six junction boxes and many meaningful points of intersection.

One of the consequences of the coexistence of legal regimes that interact is that it is necessary to look at what they demand and what they can offer. There is a need to seek systemic integration for the analysis and interpretation of legal norms (ILC 2006: 420; Kammerhofer 2008). There is still no coherent legal framework for the protection of the environment in and in relation to armed conflicts; however, over the years, evolution has shown the necessity of ‘overcoming the disconnect’ and ‘confirmed that there is considerable potential for a more coherent reading of the applicable rules’ (Lehto 2021). States have clear duties in this regard; however, logically, international official investigative bodies will have specific responsibilities too. If the intersectionality and its implications are not considered, the outcome will be fragmented and thus not comprehensive. Only once the whole picture is considered, comprising or involving all the parts or aspects (i.e., all the relevant circles or regimes), will it be possible to envisage and implement real holistic measures. It is worth reflecting on existing practical problems with open minds, avoiding unnecessary restrictive strings. Thus, several questions may arise, as the following ones. Do human rights bodies not have competence over environmental damage at least to the extent that it is human-related? Does the ICL not enable legal practitioners to address crimes that simultaneously affect the environment and people? Does the normative framework of transitional justice not make it possible to envisage reparations that go beyond human beings? Does the *jus-post-bellum* framework not have great potential to take nature into account within peace processes? Is it not obvious that scorched-earth tactics concern all these circles or regimes without exception? It seems that society and the law have advanced enough to encourage the use of all available tools to look for positive answers to the previous questions. In sum, a nature perspective, which follows the lead of previous shifts in approach (mainly those related to human rights, such as the gender perspective, which brought a new transversal viewpoint and force for change) is necessary and critical in order to achieve adequate results. Setting aside other non-legal disciplines, the coexistence of so many regimes and subsectors of international law attests to the great complexity of this area and to the loopholes that could hopefully be leveraged. Thus, this multifaceted and multi-layered topic could help to reveal the options that could be explored with a view towards ‘clarifying function’ and a ‘normative intensification based on complementation’ (Dienelt 2022: 281). Consequently, an expansion of soft law seems possible in the foreseeable future.

There are solid reasons for increasing possible alternative mechanisms to find solutions in the complex realm of post-conflict scenarios. Hard law often cannot provide solutions to essential problems (Drumbl 2019) and courts cannot resolve many others; thus an innovative *jus post bellum* becomes necessary (Robinson M 2017: viii) to add new channels and contents that allow us to work on ensuring the better governance of all the questions involved, including the role that nature and natural resources should or could play. Transitional justice should not focus only on state-level responses, and scholars should analyse the implications of this field’s expansion (Hansen 2012: 231). Compassionate justice (i.e., the search for balance between justice and compassion) (Marshall 2012), has been tested in other areas,<sup>17</sup> such as in the processes in Colombia or Peru, in which *non-human* victims have been recognised (Killean 2022). However, there are certain systemic problems in Iraq that will likely hamper the ability to implement creative formulas with the hope of success.<sup>18</sup> Moreover, the rapid agreement that was reached in September 2017 within the UNSC to adopt the resolution on the establishment of the UNITAD, as well as the immediate commencement of trials against many alleged Daesh members, obstructed potential prospects for a comprehensive approach to restorative justice. Furthermore, the subsequent volume and characteristics of trials conducted by Iraqi courts (i.e., the high number of both prosecutions and violations of due process), finally eradicated any expectation that a just justice can be attained.

Given that crimes against humanity, war crimes and genocide are imprescriptible and not subject to amnesty measures, not all attacks and consequent damage to the environment fit into the profile of crimes consisting of mass atrocities, and thus the door can be opened to the testing of many innovative measures in the Iraqi context.<sup>19</sup> In any event, it cannot be denied that the starting point for everything must be the clarification of the facts. In short, the starting point is the truth and the right to know it.

The right to the truth about gross human rights violations is one of the four components of transitional justice that has the weakest support according to customary international law (together with the guarantees of non-repetition) (García Casas 2022); however, it is key to sustaining the framework of the structure of transitional justice itself and each of its components. Truth is essential whether looking backwards or forwards. Truth and the right to know it are key to the following diverse goals that are inextricably intertwined: to pursue accountability, to get reparation for victims and to ensure that peace can be sustainable. Its reach goes beyond victims directly suffering from atrocity crimes and abuses to cover all of society and is linked to collective memory. States must preserve and classify relevant material and guarantee that the right to know can be enforced. In short, the documentation of the truth is a prerequisite for every transitional period.

### ***The Lack of Official Investigation of Environmental Crimes and their Possible Remedy by the UNITAD***

Scorched-earth tactics have existed since ancient times (Fleck 2017: 206); however, the progress of the values of humanity and protection of nature, together with the evolution of law, should serve to stop serious violations, bearing in mind that hope must be placed in pre-and post-armed conflict phases, implementing preventive and remedial measures (CEOBS 2018). An added problem is that the line between peace and armed conflict is often particularly blurred in the Global South, where the human and ecological tolls of warfare are transferred to the most vulnerable people and places (Cusato 2021: 3). This is especially true in the Iraqi context, where virtually chronic “slow violence” (i.e., the assault or threats caused by climate change, toxic remnants, oil spills, deforestation and the environmental aftermath of war), which take place gradually and often invisibly (Nixon 2013), prevails. At this juncture, armed groups continue to perpetrate violent actions of different kinds and intensity with impunity. The current post-conflict phase in Iraq, which is complex and fragile in essence, should be approached as a preventive phase as well, not in vain ‘after the war is before the war’ (Dienelt 2017: 420), and it is crucial to do everything possible to avoid that the present stage becomes a new between-wars period. Consequently, there must be serious engagement to try to prevent further violence. In this vein, potential reparation measures linked with nature-based solutions could be critical helping to prevent both a new armed conflict and the spread of terrorism and structural violence in the country and beyond.

Truth is the starting point for transitional justice and is key to its other components, but it is also of vital importance from the perspective of other legal regimes. Thus, it is necessary to investigate and gather evidence about crucial environmental attacks. The UNITAD, an official body, was primarily created to support national efforts to hold Daesh accountable through the collection, preservation and storage of evidence in Iraq. Consequently, it should investigate all acts that may constitute war crimes, crimes against humanity and genocide, even those targeted at the environment and those that have an indirect objective to develop a truly holistic mission and to contribute to the visibility of this type of crime. This was the approach adopted in relation to gender-based violence, which passed from being hidden to be investigated, described and specified in different contexts, with the corresponding consequences for the adoption of both preventive and remedial measures. It would not matter so much if specific evidence related to environmental damage in the hands of the UNITAD did not end up being used by the Iraqi courts (which is likely given the limited and partial drift that has taken place, as mentioned above), as there is nothing to prevent it from being used at other times or elsewhere, including in third countries, applying the principle of nationality or universal jurisdiction. Such evidence collection work not only has symbolic value but would also be useful and could even be strategic.

Despite there still being no legally agreed definition of ecocide, the obligations derived from the coexistence of applicable legal regimes, together with the recent developments and effervescence connected with environment-peace-security issues, call for attention to be paid to environmental crimes. Indeed, a greater awareness of the relevance and (potential) implications of the commission of environmental crimes could fulfil the important mission of opening the way and contributing to maturing and expanding the customary content of the ILC PERAC Principles related to the post-armed conflict phase. The ILC PERAC Principles do not mention crimes, but instead focus on state responsibility, beyond which a non-prejudice clause is introduced with respect to individual and non-state actors’ responsibility.<sup>20</sup> However, the ILC PERAC principles include other crucial rules regarding any post-conflict scenario, which are key as well to take environmental harm adequately into account<sup>21</sup>, in particular, the following ones: the need to address restoration and protection of the environment damaged as part of peace processes; the sharing of (and granting access to) information to facilitate remediate measures; the necessity of ensuring post-conflict environmental assessment and protection of the damaged environment; the provision of specific relief and assistance when the source of environmental damage is unidentified or reparation is unavailable; and the action to remove or render harmless toxic or other hazardous remnants of wars. All these actions need cooperation among all relevant actors. Despite such



principles may enjoy a different level of normativity (the verb tense that is used regarding them oscillates between “shall” and “should”), their reach could be reinforced in all cases if the clarification of the environmental crimes perpetrated begins to become a reality.

The establishment of the UNITAD reflects the assumption that Iraq alone cannot assume the challenge of organising the categories of acts to be prosecuted and gathering evidence with guarantees; however, neither can the third states that may potentially be involved in the exercise of extraterritorial jurisdiction. Thus, this responsibility lies with the UNITAD, even though it has not yet assumed it. At the end of the conflict, some voices referred to the role that the UNITAD should play in investigating crimes against the environment (Amnesty International 2018, 2020; Cusato 2017); however, to date, this has not been taken into account in the development of the UNITAD’s investigation strategy as revealed by the 10 reports that the UNITAD has submitted as of May 2023.

To date, the UNITAD has not been involved in collecting evidence on specific effects on the environment; however, it could still do so. In fact, it should be noted that in the development of its action, the body has already broadened the objective and scope of its inquiries at certain points. Thus, while it began by prioritising research on three fronts,<sup>22</sup> new field investigation units have subsequently joined and other investigative lines have also been added to address crimes committed against all communities in Iraq (UNITAD 2020: 5), the destruction of cultural and religious heritage and the development and use of chemical and biological weapons (UNITAD 2023b). In relation to the latter, after having verified the use of prohibited chemical weapons by Daesh against the Iraqi population and agricultural areas in Taza Khurmatu in Kirkuk, the investigative team deployed specific efforts to find technical experts to provide specialised insights into the remnants and materials recovered in certain areas. In line with this, the UNITAD is assessing evidence of the use of certain agents (e.g., aluminium phosphide, cyanide and thallium sulphate) and is engaging with medical experts to obtain knowledge of the long-term effects of exposure to these chemical warfare elements, in particular, in relation to the ongoing health complications, including chronic diseases, cancers and reproductive complications, of residents in certain areas (UNITAD 2022: 7). In addition, the UNITAD plans to prioritise, among other areas, the completion of its initial findings in support of new lines of inquiry within existing investigations with respect to the role of the ISIS [Islamic State of Iraq and Syria] Department for Precious Resources (Diwan al-Rikaz) (UNITAD 2022: 26). Beyond that, the UNITAD website contains a timid reference to ‘decontamination operations’, but only in relation to ‘where the ISIL [Islamic State of Iraq and the Levant] chemical projectiles hit, inside and in the vicinity of civilian homes’ (UNITAD 2023a). There is no sign of further engagement with a notion of environmental harm in a wider sense. Ultimately, if the UNITAD’s investigation does not cover environmental crimes after the Daesh’s scorched-earth tactics, its work cannot be considered holistic.

Following the trend behind certain developments (in particular, the advancement of the principle of sustainable development; the greening of human rights, including the adoption of the R2HE at the universal level; the progress of the environmental democracy principles, in particular the right to resort to justice to request the application of environmental norms and compensation for damages; the emergence of the environmental rule of law; the expansion of the normative pillars of the transitional justice, including the right to the truth; the ICC Office of the Prosecutor’s 2016 Policy Paper that addresses environmental harm issues; the UNEP Law Division’s claim that refers to the application of universal jurisdiction to environmental protection; and the adoption of PERAC principles), the official bodies that deal with serious damage to nature should, or at least could, resort to legal arguments and seek solutions in accordance with the evolution experienced by society and its law. Indeed, these are not the same now as they were 10 or even five years ago. It is especially important that actions of a criminal nature be considered.

Due diligence is a largely indeterminate and evolving legal concept (Viñuales 2020) that is not only projected on states. It might be easier to know what to do in cases like the one examined in this article if the (projected but now abandoned) Global Pact for the Environment had been adopted. Among its list of applicable principles, this Draft Pact contains a duty to take care of the environment that states that ‘every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels to the conservation, protection and restoration of the integrity of the Earth’s ecosystem’<sup>23</sup> (Draft Global Pact for the Environment 2017). In any case, in the epoch of the Anthropocene, nature requires justice at the same time as it demands planetary judges who view the earth as a global public good that has to be passed on to future generations (Benjamin 2022: 566).

As long as states are uninclined to adopt conventional norms that list environmental legal principles, the judiciary, government officials and other relevant legal operators (e.g., official experts in the field of human rights or members of investigation teams of crimes against humanity, war crimes or genocide, such as UNITAD) have a responsibility to fulfil and must not remain oblivious to the deliberate commission of crimes against nature. Moreover, making peace with nature is everyone’s task (UNEP 2021).

It is time to ‘capitalize on the momentum created by the ILC PERAC Principles to drive forward greater environmental protection in armed conflict’ (Hulme 2022: 1190). The UNITAD should leverage its official position and initiate a new line of inquiry that is environment-related. This UN investigative team is uniquely situated in its official capacity to undertake such an initiative given that it is exercising a powerful mandate commissioned by the UNSC. Thus, this endeavour could serve as a catalyst for progress by, for example, addressing prospecting challenges on a nationality or universal bases within a criminal competence framework. The UNITAD is supporting a growing number of national jurisdictions. Indeed, to date, 17 UN Member States have requested its assistance with respect to ongoing investigations and prosecutions (UNITAD 2023b: para 96). Moreover, it could provide an appropriate blueprint for other international and national bodies.

In addition, the UNITAD could take advantage of the advances that have been made in the field of evidence, both under objective and subjective terms, to project its crucial importance in this field (Abad Castelos 2021). Indeed, the UNITAD could benefit from the fact that science now allows for the effect of wars to be measured thanks to both ‘improved access to earth observation data and new monitoring methodologies’ (CEOBS 2022; Zwijnenburg 2020) and that other entities (e.g., the UNEP, ICRC, CEOBS, PAX, AI and HRW) have already analysed environmental damage, carried out fieldwork and collected evidence that the UNITAD could receive formally, as it has already done previously, for other evidentiary materials first found and guarded by third parties.<sup>24</sup>

## Conclusions

This article adopted a critical approach in relation to the lack of official clarification of the environmental crimes committed by Daesh in Iraq. It also showed that it is essential to make these crimes visible and that there is still an opportunity to do so. The consideration of such crimes might advance the customary reach of certain principles applicable during and after armed conflicts. Some of these principles are embodied in the ILC PERAC Principles 2022 and seek to strengthen certain components of transitional justice to increase awareness while promoting possible forms of reparation in an enormously complicated scenario that jeopardizes Iraq’s future. Even if the law is inadequate and there are no magic formulas, certain potential useful paths could help prevent the perpetuation of violence and should be promoted. In particular, the following two complex and interdependent pathways should be considered.

First, the practical consequences of people being an integral part of nature and their dependence on the environment must be assumed, since, certainly, this assumption has specific implications, including in relation to the behaviours considered crimes against humanity and genocide and in building more profound knowledge concerning the nexus between the environmental degradation (including climate change), security and peace. Thus, it is necessary to dive deeper into the interrelationship between the destruction/scarcity of natural resources and both terrorism and armed conflict, in order to prevent further violence as much as possible. Second, the environmental crimes committed must be identified and clarified, even within the limits currently in place, so that jurisdiction can be exercised over such kind offences at the Iraqi national level, the third-party state level and the international jurisdiction level. It must be clear that there is a possibility for official bodies to open a door in the future. The UNITAD should thus work to identify and categorise the crimes of this kind committed by Daesh. Other experts, such as, for example, the UN Rapporteurs on internally displaced persons and minority issues, could also go further by analysing the damage that these crimes have had on nature and thus addressing the implications in such a way that enables them to make recommendations that reflect a genuinely holistic approach. Above all, the UNITAD should respond rapidly, taking the lead in the investigation of such crimes, as doing so is necessary, key and still possible. The UNITAD has both symbolic and strategic roles; it could help to raise awareness of environmental crimes and lay foundations to help expand the jurisdiction and start a chain reaction.

By clarifying the facts and laying the groundwork for legally assessing the environmental crimes committed, the catalyst power of law could be stimulated to facilitate appropriate holistic responses in Iraq. This could encourage, if not solid foundations for immediate transitional justice—sadly it is too late for this, at least for some of the components—, then at least other important elements, such as the development of the *ius post bellum*; the use of environmental peace-building tools in the country; a feasible forging of alliances among international, national and civil society entities; a deepening of these and other formulas with the potential to alleviate inter-ethnic mistrust; and the facilitation of reparation to victims.

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<sup>1</sup> ILC Doc. A/CN.4/L.968 (ILC 2022b).

<sup>2</sup> For example, in 2018, more than 100,000 people were hospitalised in the Basra region due to the poor water quality (HRW 2019).

<sup>3</sup> See the criticisms of Barnett and Adger (2007: 639 et seq) and Liverman (2009: 7 et seq).

<sup>4</sup> Operative para 3.

<sup>5</sup> Operative para 1.

<sup>6</sup> Fourth consideration.

<sup>7</sup> International mechanism for Syria.

<sup>8</sup> See International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM), Doc. A/76/690 (2022).

<sup>9</sup> Section VIII(B).

<sup>10</sup> Due to the submission of certain ethnic groups to conditions of existence that could entail their physical destruction per art. 6(c) of its Statute and due to the destruction of resources necessary for their survival, including those related to water; ICC (2008) *Situation in Darfur* (para. 1 et seq).

<sup>11</sup> ICC (2016) *Policy Paper on Case Selection and Prioritization* (par. 41).

<sup>12</sup> See ICC (2015) Statement of the ICC Prosecutor on the alleged crimes committed by ISIS.

<sup>13</sup> Each of these components has different foundations and regulatory scope (Teitel 2016: 115 et seq); however, it is generally acknowledged that the *Resolution on Basic Principles and Guidelines on the Right of Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law to Appeal and Obtain Reparations* (2005), adopted by the UNGA by consensus, includes and consolidates principles set out years ago, focusing primarily on the victims' perspective.

<sup>14</sup> The adoption of which had begun to be prepared following the adoption of resolution 2379. See UNAMI and OHCHR (2021: 2).

<sup>15</sup> Special Rapporteur on out-of-Court Enforcements (2018).

<sup>16</sup> See the definition in Ide et al. (2021: 2–3).

<sup>17</sup> For more on environmental restorative justice, see Forsyth et al. (2021).

<sup>18</sup> According to Transparency International's latest *Corruption Perceptions Index* for 2021, Iraq only scored 23 points on a scale of 0 to 100 (Transparency International 2022: 3), which can be seen as an indicator of its significant vulnerability and lack of capacity to adequately protect civil and political freedoms and economic and social rights and to test novel constructions based on the above.

<sup>19</sup> Consider, for example, the possibility of promoting ecotourism in Iraq's marshes, including virtually (CEOBS 2021).

<sup>20</sup> See principle 9.

<sup>21</sup> See part five of ILC PERAC Principles.

<sup>22</sup> 1) Attacks directed against the Yazidi community in Sinjar; 2) Crimes committed in Mosul, including crimes of a sexual character and gender-based violence and crimes against children; and 3) The killing of unarmed cadets of the Tikrit Air Academy (UNITAD 2019: 6).

<sup>23</sup> Article 2.

<sup>24</sup> The UNITAD entered into a Memorandum of Understanding with the Commission for International Justice and Accountability (CIJA) that granted it 'immediate remote access to the evidence management system'. This was due to the fact that while the UNITAD had not been able to be operational in the field until almost two years after its establishment, the CIJA was an organisation that had been working in the field from much earlier (UNITAD 2019b: para. 29).

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