

Truth Hounds Submission to the ICC Office of the Prosecutor on the Policy Initiative to Advance Accountability for Environmental Crimes

TRUTH HOUNDS

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Introduction

We commend the Office of the Prosecutor ('OTP') of the International Criminal Court ('ICC' or 'Court') for launching this important policy initiative to advance accountability for environmental crimes under the Rome Statute. This effort reflects a growing recognition of the catastrophic impact of environmental harm on both human populations and ecosystems and aligns with the OTP's commitment to addressing emerging global challenges.

This submission draws, *inter alia*, on the research and findings we undertook with our colleagues from Project Expedite Justice related to the destruction of the Kakhovka Dam and its legal implications, particularly regarding Article 8(2)(b)(iv) of the Rome Statute.¹ Through this submission, we aim to highlight the crucial points of the OTP's Draft Policy on Environmental Crimes under the Rome Statute ('OTP Policy Paper')² and provide constructive recommendations that strengthen the OTP's policy framework and ensure a robust, consistent approach to investigating and prosecuting environmental crimes.

¹ Truth Hounds and Project Expedite Justice, *Study of the Destruction of the Kakhovka Dam and Its Impacts on Ecosystems, Agrarians, Other Civilians, and International Justice*, 6 June 2024.

² Office of the Prosecutor, *Draft Policy on Environmental Crimes under the Rome Statute*, December 2024 ('OTP Policy Paper').

Key Definitions and Legal Framework

Clarifying the Definition of the “Natural Environment”

Relevant OTP Policy Statement

“21. “Natural environment” refers to the earth’s biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, including outer space. This definition draws upon scientific recognition of the interactions that make up the environment.

22. In general, the term “natural environment” should be “understood in the widest possible sense, in line with the meaning States have given it in the context of IHL,” because the concept of the environment “may evolve over time as knowledge about it increases” and because “the environment itself is constantly changing.”

Reasoning

The current definition in the OTP Policy Paper provides a scientifically grounded description of the natural environment that could be developed a bit further to ensure clarity, inclusivity, and comprehensiveness.

First, the systemic nature of the environment should be explicitly recognized. The natural environment is not merely a collection of separate elements, but an interconnected system in which disruptions to one component can have cascading effects on others.³ This perspective considers environmental harm not only in terms of isolated damage to specific elements but also in terms of its broader impact on ecosystems.

Secondly, human-modified natural elements should be included in the definition, as they play a crucial role in environmental crime assessments. The International Committee of the Red Cross’ (‘ICRC’) interpretation of the natural environment under Additional Protocol I includes agricultural areas, food resources, and water supplies, recognizing that these elements are integral to ecosystems and essential to human survival.⁴ Since environmental crimes frequently involve the destruction or contamination of these resources,⁵ explicitly acknowledging them in the OTP Policy Paper would provide a stronger legal foundation for assessing violations under ICL.

By incorporating these refinements, the OTP Policy Paper would provide a more precise and legally aligned definition of the natural environment, ensuring that it fully

³ Jean Pictet et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of Red Cross (‘ICRC’), Geneva, 1987, p. 415, para. 1451.

⁴ ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, 2020, pp. 15-16, para. 16.

⁵ See, for instance, Truth Hounds and Project Expedite Justice, 2024, Section IV, see *supra* note 1.

captures both scientific understanding and humanitarian law principles relevant to environmental protection in armed conflict.

Proposed Amendment

"21. "Natural environment" refers to the Earth's biosphere, cryosphere, lithosphere, hydrosphere, and atmosphere, including outer space. This definition draws upon scientific recognition of the interactions that make up the environment. It also acknowledges the dynamic interrelations between these components, emphasizing that the environment is not merely a collection of separate elements but an interconnected system.⁶ The natural environment, moreover, includes human-modified natural elements, such as agricultural areas, food resources, and water supplies, which are essential to sustaining ecosystems and human life."⁷

22. In general, the term "natural environment" should be "understood in the widest possible sense, in line with the meaning States have given it in the context of IHL," because the concept of the environment "may evolve over time as knowledge about it increases" and because "the environment itself is constantly changing."

⁶ ICRC, 2020, p. 15, para. 16, see *supra* note 4.

⁷ *Ibid.*, pp. 15-16, para. 16, referring to Pictet *et al.* (eds), 1987, p. 662, para. 2126, see *supra* note 3, and to M.N. Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict", in *Yale Journal of International Law*, 1997, vol. 22, p. 5.

Rome Statute Crimes Committed by Means of Indirect Environmental Damage

Relevant OTP Policy Statement

"24. "Environmental crimes" are [...] b. Rome Statute crimes committed by means of environmental damage, making the damage a material fact relevant to establishing an element of the crime and/or the actus reus of a mode of liability."

Reasoning

In paragraph 24 of the OTP Policy Paper, the classification "Rome Statute crimes committed by means of environmental damage" requires "the damage [to be] a material fact relevant to establishing an element of the crime and/or the *actus reus* of a mode of liability". However, one could conceptualize that a bombing campaign resulting in mass destruction of civilian infrastructure (such as in Gaza) severely contaminated the air and soil due to the release of noxious smoke, toxic dust, and fumes,⁸ and thereby "inflicted great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k) of the Rome Statute ('first example'). A similar case could be made for damage caused by a bombing campaign to sanitation and hygiene facilities, sewage networks, and wastewater treatment plants which may result in the discharge of untreated sewage discharge and other hazardous substances such as pesticides, herbicides, solvents, *et cetera* ('second example').⁹ In both these examples, while the environmental damage arose as a consequence and is an incidental effect to the initial bombing campaign, it may be a material fact in establishing the crime itself. Such types of 'indirect' harm may incur individual criminal responsibility under the Rome Statute depending on an understanding of "intent and knowledge" and whether the consequence "will occur in the ordinary course of events" under Article 30 of the Rome Statute.

At the outset, it is important to remember that the crime noted above would essentially materialize as a consequence of a consequence (environmental harm) of a conduct (a bombing campaign, for instance). The "leading view in the early practice

⁸ Sunil S. Amrith, "War Has Become a Force of Planetary Destruction", in *The New York Times*, 18 February 2025.

⁹ Arava Institute for Environmental Studies, *The Environmental-Humanitarian Impacts of the Israel-Hamas War in Gaza*, June 2024.

of the ICC¹⁰ is that the cumulative standard under Article 30(2)(b) requires that “the occurrence of such crimes was a *virtually certain* consequence”.¹¹

In the first example mentioned above, the question then is whether the eventual inflicting of great suffering or serious injury, as a consequence of air contamination, rather than from the actual bombardment, is a virtually certain consequence of the latter. The question is necessarily of a subjective nature, but advances in environmental science and concurrent ecological analyses of war, both generally and of specific contexts and operations,¹² have arguably instilled the certainty of both environmental damage and the subsequent harm to physical and mental health resulting from massive bombing campaigns (as an example) in the collective legal and military consciousness. This is all the truer for military operations such as carpet bombings, and if one is to understand an ‘attack’ as also envisaging a cumulation of military operations which may differ temporally.¹³ Factors such as the proximity of the attack to civilian objects and to areas of heavy population density would also comprise objective factors which would nonetheless influence the subjective knowledge possessed by the perpetrator.

In the second example mentioned above, a similar assessment could follow, but with an addition of assessing whether there was awareness of the fact that specially harmful or hazardous substances, such as untreated sewage water (more harmful than mere smoke and dust contaminants), existed. This would follow from the requirement that “awareness that a circumstance exists” must be established under Article 30(3) of the Rome Statute; an awareness which is “actual” and not “constructive”.¹⁴

We assert that the OTP should also consider these cases within its understanding of “Rome Statute crimes committed by means of environmental damage”. Based on this understanding, we suggest that point (b) in paragraph 24 of the OTP Policy Paper be amended to read as follows, with a clarifying note explaining how individual criminal responsibility may be assessed for such indirect environmental damage.

¹⁰ Mohamed Elewa Badar, “Article 30”, in Mark Klamberg, Jonas Nilsson, and Antonio Angotti (eds.), *Commentary on the Law of the International Criminal Court: The Statute*, vol. 1, 2nd ed., Torkel Opsahl Academic EPublisher, 2023, p. 873.

¹¹ ICC, *Prosecutor v. Bemba*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, para. 369 (emphasis added); See also, ICC, *Prosecutor v. Lubanga*, Trial Chamber I, Judgment, ICC-01/04-01/06-2842, 14 March 2012, para. 1011; ICC, *Prosecutor v. Katanga*, Trial Chamber, Judgment, ICC-01/04-01/07-3464-tENG, 7 March 2014, para. 777 (though here the Court required that “it is nigh on impossible for [the accused] to envisage that the consequence will not occur”, which arguably raises the standard even further).

¹² See, for examples, United Nations Environment Programme (‘UNEP’), *Environmental Impact of the Conflict in Gaza: Preliminary Assessment of Environmental Impacts*, 2024; Conflict and Environment Observatory and Zoï Environment Network, *The Environmental Consequences of the War Against Ukraine*, 2024; High-Level Working Group on the Environmental Consequences of the War, *An Environmental Compact for Ukraine*, 9 February 2024.

¹³ See *infra* Section “Recognition that Cumulative Environmental Damage can Satisfy the WLS Threshold”.

¹⁴ Mohamed Elewa Badar, “Article 30(3)”, in Klamberg, Nilsson, and Angotti (eds.), 2023, p. 875, see *supra* note 10.

Proposed Amendment

"24. "Environmental crimes" are [...] b. Rome statute crimes committed by means of environmental damage, whether directly or indirectly, making the damage a material fact relevant to establishing an element of the crime and/or the actus reus if a mode of liability."

Jurisdictional and General Legal Considerations

Jurisdiction Ratione Loci in Cases Involving Transboundary Environmental Damage

Relevant OTP Policy Statement

"28. Any case involving environmental crimes that the Office investigates must fulfil the Statute's regular jurisdictional requirements: temporal jurisdiction; either territorial or personal jurisdiction; and subject-matter jurisdiction. In terms of territorial jurisdiction, the Court can prosecute crimes committed not only on the territory of a State Party, but also "on board a vessel or aircraft" registered to a State Party. [...]."

Reasoning

Given the transient ecological effect of environmental crimes, the question of attributability, and the possibility for the extension of territorial jurisdiction over transboundary harm caused to a state party, the OTP should supplement its reference to territorial jurisdiction under paragraph 28 with a discussion of the following two cases.

A. Cases in which Rome Statute crimes are committed by means of environmental damage

According to Article 12(2)(a) of the Rome Statute, the jurisdiction *ratione loci*, or geographical jurisdiction, of the ICC is limited to conduct occurring on the territory of a state party, or on board a state party's vessel or aircraft.¹⁵ However, the transboundary nature of certain environmental harm must be acknowledged when determining jurisdiction, especially in cases when a part of the conduct occurs in the territory of a state party. The consideration flows directly from the decisions of Pre-Trial Chamber I,¹⁶ as confirmed by Pre-Trial Chamber III,¹⁷ in the *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, recognizing that

¹⁵ Rome Statute of the International Criminal Court, 17 July 1998, Article 12(2)(a) ('Rome Statute').

¹⁶ ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 6 September 2018 ('PTCI Decision').

¹⁷ ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, 14 November 2019 ('PTCIII Decision').

the Court may assert jurisdiction “if *at least one element* of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party”.¹⁸ In doing so, the Court accepted that it could assert territorial jurisdiction under Article 12(2)(a) of the Rome Statute on four bases when concerned with transboundary crimes: (1) subjective territoriality;¹⁹ (2) objective territoriality;²⁰ (3) the principle of ubiquity;²¹ and (4) the constitutive element theory.²²

Here, a fifth basis was recorded as forming customary international law – the effects doctrine²³ – but noted to be “developed mainly in the field of antitrust and competition law”.²⁴ Assuming the applicability of the effects doctrine to criminal matters,²⁵ the effects doctrine may potentially be entirely inapplicable since at least one element or part of the crime must be committed within the territory of the state party. However, doubt may be raised as to whether the ‘consequences’ of criminal conduct form a part of its *actus reus*. One may, for instance, consider the deliberate poisoning of a river designed to affect certain upper riparian communities in the territory of a non-state party which nonetheless later similarly affected lower riparian communities in the territory of a state party under Article 7(1)(a) of the Rome Statute. While causing death in the territory of the state party only follows as a consequence of acts committed in the territory of the non-state party, the act of causing death itself is a (constituent) element of the crime.²⁶ The line between whether the jurisdictional basis being invoked is the principle of ubiquity or the effects doctrine may thus be blurry. The OTP, on its part, should clarify its understanding of these issues, though a final determination will naturally depend on the decision of the Court.

As to the first four bases, the OTP should consider and clarify its approach with respect to the specific crimes invoked and how these may apply in a transboundary context. Some possible scenarios may be imagined: (1) the causing of uncontrollable forest fires in the territory of a non-state party which traverse into the territory of a

¹⁸ PTCI Decision, para. 72, see *supra* note 16 (emphasis added).

¹⁹ PTCIII Decision, para. 56, see *supra* note 17 (“the subjective territoriality principle, according to which the State may assert territorial jurisdiction if the crime has been initiated in the State’s territory but completed abroad”).

²⁰ *Ibid.* (“the objective territoriality principle according to which the State may assert territorial jurisdiction if the crime is initiated abroad but completed in the State’s territory”).

²¹ *Ibid.* (“the principle of ubiquity, according to which the State may assert territorial jurisdiction if the crime took place in whole or in part on the territory of the State irrespective of whether the part occurring on the territory is a constitutive element of the crime”).

²² *Ibid.* (“the constitutive element theory, according to which a State may assert territorial jurisdiction if at least one constitutive element of the crime occurred on the territory of the State”).

²³ *Ibid.* (“the effects doctrine, according to which the State may assert territorial jurisdiction if the crime takes place outside the State territory but produces effects within the territory of the State”).

²⁴ PTCIII Decision, fn. 98, see *supra* note 17; See also, Andrés Payer, “The Territorial Principle as a Basis for State Criminal Jurisdiction: Particularly with Regard to Cross-Border Offences and Attempts, and to Multiple Parties to an Offence Acting in Different Countries”, in *International Criminal Law Review*, 2023, vol. 23, no. 2, p. 219 (noting the lack of a state practice to find customary status for this basis with respect to transboundary criminal matters).

²⁵ A matter that must be separately assessed and clarified.

²⁶ Elements of Crime, 2 November 2000, Article 7(1)(a)(1) (“The perpetrator killed [or caused the death of] one or more persons”).

state party; (2) dumping untreated sewage, hazardous waste or toxic pollutants into water bodies commonly shared between a non-state party and state party, and thereby causing significant detriment in water quality and marine ecology; (3) illegal appropriation of natural resources and wildlife when transported through the territory of state party; (4) excessive poaching of highly migratory species which may constitute the 'property' of both a non-state and a state party; (5) discharging toxic air-borne agents or producing atmospheric contaminants which may disperse to affect the air quality of a state party. In each of these cases, knowledge that the consequences would follow in the ordinary course of events may be established.²⁷ A finer issue may be that of dissecting such conduct into its constituent and non-constituent parts so as to situate at least one element in the territory of a state party. Naturally, it must also be considered whether the crime in question is of an inchoate nature, as in the case of Article 8(2)(b)(iv) of the Rome Statute.²⁸

The OTP should also address two further obstacles which may affect a case's reception by the Court: (1) how it plans to demonstrate attributability, or a chain of causation, between the conduct in question and the consequences arraigned, since this could prove to be a particularly challenging issue; and (2) whether there is a jurisdictional requirement to demonstrate a 'sufficient link' between transboundary consequences and the "situation of crisis that triggered the [ICC] investigation".²⁹ The test was first established by the Court to determine whether it could assert jurisdiction over events that were *primarily* temporally, but also geographically,³⁰ removed from the theatre of conflict under investigation.³¹ Its applicability, however, remains contested with scholars questioning its applicability to jurisdiction *ratione loci* (when both locations are within a state party's territory), pointing out irregularities in its future application,³² and raising doubt as to whether it denotes that the alleged offences fall outside a defined situation (requiring a separate triggering of

²⁷ Rome Statute, Article 30, see *supra* note 15.

²⁸ See *infra* Section "Explicit Recognition of the Inchoate Nature of the Crime".

²⁹ ICC, *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber I, Decision Requesting Clarification of the Prosecutor's Application under Article 58, ICC-01/04-575, 6 September 2010, para. 12; ICC, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest Against Callixte Mbarushimana, ICC-01/04-01/10-1, 28 September 2010, pp. 5–6.

³⁰ The Mbarushimana defence had argued that events in the Kivu provinces of the Democratic Republic of the Congo, which were alleged against the accused, were not 'sufficiently linked' with events in the province of Ituri, the theatre of the ongoing situation of crisis. The Pre-Trial Chamber rejected the argument by referencing how the OTP formulated its scope of investigation and other public records detailing the conflict, including in Security Council resolutions, to hold that the situation of crisis extended to the Kivu provinces. See ICC, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the 'Defence Challenge to the Jurisdiction of the Court', ICC-01/04-01/10-451, 26 October 2011, paras. 16, 39.

³¹ See also, ICC, *Prosecutor v. Al-Werfalli*, Pre-Trial Chamber I, Warrant of Arrest, ICC-01/11-01/17-2, 15 August 2017, para. 23.

³² Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, 2014, pp. 201.

jurisdiction and compliance with complementarity) or wholly outside the Court's jurisdiction.³³ Notably, the test has not yet been applied in a transboundary context.³⁴

B. Cases in which Rome Statute crimes only result in environmental damage

When dealing with Rome Statute crimes resulting in environmental damage, the OTP should also consider their adverse transboundary environmental effects in assessing the crime's gravity or impact. This would be situations in which the environmental effects are not material elements of the crimes, and thus not bound by considerations of whether the perpetrator intended or had knowledge that such adverse effects would be caused in the ordinary course of events. In such circumstances, the OTP should clarify its methodology in determining which effects it would consider relevant for its purposes. It should also clarify that significant and traceable detrimental effects to global commons, such as the global climate, high seas, or outer space, will be considered, and delineate its approach to assess traceability.

A test of reasonableness is customarily employed when state jurisdiction is being exercised over transboundary harm under the effects doctrine. The test essentially follows from the principle of non-intervention and the doctrine of abuse of rights, and may demand either that the effects are "substantial and intended", "direct, substantial and reasonably foreseeable effects", or "immediate, substantial and foreseeable".³⁵ These qualifications, though irrelevant in establishing the Court's jurisdiction,³⁶ may inform the OTP's approach in assessing gravity. If the OTP intends to adopt such filtration criteria, the contours of the same should be clearly formulated.

³³ Rod Rastan, "The Jurisdictional Scope of Situations Before the International Criminal Court", in *Criminal Law Forum*, 2012, vol. 23, p. 3. See also, Kevin Jon Heller, "The Scope of the (Aborted) Afghanistan Investigation", in *Opinio Juris*, 27 April 2019 (discussing the test in the relation to the investigative scope of the OTP, to which the test is co-applicable with issues concerning the jurisdictional scope of the Court. Here, a discrepancy in the Court's approach between the application of a 'sufficient link' or a 'close link' test is discussed).

³⁴ Note that the Mbarushimana defence argued that his contributions were committed on French territory and hence outside the jurisdiction of the Court which was limited to conduct occurring in the territory of the Democratic Republic of the Congo. See ICC, *Prosecutor v. Callixte Mbarushimana*, Defence request for leave to reply to the Prosecution's response to the Defence challenge to the jurisdiction of the Court and Defence request to adduce oral testimony, ICC-01/04-01/10-323, 1 August 2011, para. 6. The Court rejected this request for leave to reply without specifically addressing this argument. See ICC, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the "Defence Challenge to the Jurisdiction of the Court", ICC-01/04-01/10-451, 26 October 2011, pp. 23–24.

³⁵ Vagias, 2014, pp. 192–195, see *supra* note 32.

³⁶ As noted above, due to the requirement of at least one element of the conduct in question occurring in the territory of a state party and the doubtful applicability of the effects doctrine in a criminal context.

Acknowledging the Rome Statute's Explicit Recognition of Environmental Crimes

Relevant OTP Policy Statement

"5. The Court's jurisdiction is limited. The Rome Statute primarily focuses on safeguarding the integrity of human life and property, and it makes only limited express reference to the natural environment."

Reasoning

While the Rome Statute primarily centers on human life and property, it is notable for being the first criminal tribunal statute to explicitly mention the environment in its list of crimes and explicitly recognize environmental destruction as a war crime.³⁷ This reference is historically significant in the development of international criminal law ('ICL') and international humanitarian law ('IHL') regarding environmental harm in armed conflict. Strengthening this statement in the OTP Policy Paper would reinforce the ICC's leading role in the progressive development of environmental accountability in ICL.

Proposed Amendment

"5. The Court's jurisdiction is limited. The Rome Statute primarily focuses on safeguarding the integrity of human life and property, and it makes only limited express reference to the natural environment.³⁸ Nevertheless, the Rome Statute is notable for being the first and yet only criminal tribunal statute to explicitly reference the natural environment as part of its list of crimes."

³⁷ Truth Hounds and Project Expedite Justice, 2024, p. 228, see *supra* note 1; Kevin Heller and Jessica Lawrence, "The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute", in *Georgetown International Environmental Law Review*, 2007, vol. 20, p. 73.

³⁸ Rome Statute, Article 8(2)(b)(iv), see *supra* note 15.

Clarifying the Scope of Article 21 of the Rome Statute

Relevant OTP Policy Statement

"27. Article 21(3) of the Statute governs all aspects of the Office's work. It mandates that both the application and interpretation of the Statute must be consistent with internationally recognised human rights law. Rights particularly relevant to the investigation and prosecution of environmental crimes include [...]."

Reasoning

While Article 21(3) explicitly requires the application and interpretation of the Rome Statute to align with internationally recognized human rights, it is essential to clarify that it is Article 21 as a whole that governs the legal framework applicable to the OTP's work. Notably, Article 21(1)(b) refers to *"applicable treaties and the principles and rules of international law,"* which should be understood to encompass international environmental law, including relevant principles such as the precautionary principle, the preventive principle, the polluter pays principle, and the principle of intergenerational equity.

The ICC may, in fact, refer to any international treaty³⁹ to find the *'rules of international law'* as referenced in paragraph 1(b). Moreover, it would not be novel for the ICC to cite other instruments or precedents when facing substantive questions not addressed in the Rome Statute.⁴⁰ Given that certain key concepts related to environmental crimes are not fully elaborated within the Statute, the Elements of Crime and/or Rules of Procedure and Evidence,⁴¹ recognizing international environmental law as part of the applicable legal framework would provide the OTP with additional interpretative tools.⁴²

³⁹ Margaret M. deGuzman, "Article 21", in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd ed., Nomos Verlagsgesellschaft, Baden-Baden, 2016, p. 939.

⁴⁰ *Ibid.*, p. 942, referring to the Lubanga Confirmation of Charges decision, where Pre-Trial Chamber I adopted a number of holdings from the jurisprudence of the International Criminal Tribunal for former Yugoslavia (ICTY), including the 'overall control' test for determining when a conflict is international in nature. See ICC, *Prosecutor v. Lubanga Dyilo*, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 541.

⁴¹ Consider, for instance, the notions of 'widespread, long-term and severe' damage to the natural environment mentioned in Article 8(2)(b)(iv) of the Rome Statute.

⁴² As made clear by Mikaela Heikkilä:

Even though the aim of the ICC's internal legal sources is to comprehensively establish the legal framework according to which the Court shall function, situations can emerge where a legal question cannot be answered with reference to these instruments. As such, it is important that there are other sources of applicable law to which the Court may rely on in situations where the Court's internal legal sources are quiet or unclear. In this

Proposed Amendment

"27. Article 21 of the Statute governs all aspects of the Office's work. Article 21(1)(b) references 'applicable treaties and the principles and rules of international law,' which should be understood to encompass, inter alia, international environmental law, providing a further basis for the Office's engagement with environmental crimes. Additionally, Article 21(3) mandates that both the application and interpretation of the Statute must be consistent with internationally recognized human rights law. Rights particularly relevant to the investigation and prosecution of environmental crimes include [...]."

regard, Article 21(1)(b) establishes that the Court shall apply, in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.

Mikaela Heikkilä, "Article 21(1)(b)", in Klamberg, Nilsson, and Angotti (eds.), 2023, p. 692, see *supra* note 10.

Environmental Crimes within the Rome Statute Framework

Comments on Article 8(2)(b)(iv) of the Rome Statute

Article 8(2)(b)(iv) of the Rome Statute is the first provision in ICL to explicitly criminalize environmental destruction in the context of armed conflict. This historical significance, combined with the absence of any judicial practice interpreting this provision, underscores the need for a more detailed elaboration within the OTP Policy Paper.

A more robust interpretation would provide essential guidance for future investigations and prosecutions, ensuring that this provision effectively fulfills its preventive and accountability-driven functions.

To strengthen the OTP's approach to Article 8(2)(b)(iv), several key aspects may merit further consideration for inclusion in the Policy Paper:

- A.** Explicit Recognition of the Inchoate Nature of the Crime;
- B.** Clarification of the "Widespread, Long-term, and Severe" ('WLS') Standard;
- C.** Recognition that Cumulative Environmental Damage Can Satisfy the WLS Threshold;
- D.** Applicability of IHL Proportionality Standards; and
- E.** Clarification of the Requisite *Mens Rea* as under the ICC's Element of Crime.

Each of these points is addressed in the subsections below.

A. Explicit Recognition of the Inchoate Nature of the Crime

Relevant OTP Policy Statement

"42. The only crime in the Statute that explicitly protects the environment from the effects of armed conflict is Article 8(2)(b)(iv), which criminalises "intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." The Office will charge violations of article 8(2)(b)(iv) when appropriate, taking into account the fragile state of the environment and relying on the best available scientific knowledge when determining whether environmental damage caused by an attack qualifies as "widespread," "long-term," and "severe."

Reasoning

Currently, the OTP Policy Paper acknowledges the inchoate nature of Article 8(2)(b)(iv) in footnote 21.⁴³ The criminality of such acts derives not from the harm inflicted but from the fact that the kind of attack launched would typically pose a risk of environmental damage as qualified under Article 8(2)(b)(iv).⁴⁴ However, given the legal and practical significance of this point, it would be more accurate and appropriate to reflect this clarification in the main text when addressing Article 8(2)(b)(iv) rather than confining it to a footnote.

The inchoate character of such crimes aligns with the wider objective of the Rome Statute not only to punish international crimes *ex post facto*, but also to contribute to their prevention.⁴⁵ It also follows the established proportionality jurisprudence of other international tribunals. For example, the Trial Chamber of the International Criminal Tribunal for former Yugoslavia ('ICTY'), in *Prosecutor v. Galić*, emphasized

⁴³ Footnote 21 of the OTP Policy Paper reads in the relevant part: "Some Rome Statute crimes, such as those under article 8(2)(b)(iv), are conduct crimes and do not require proof of a consequence. In such cases, intent only relates to the conduct, and not to the consequence".

⁴⁴ Truth Hounds and Project Expedite Justice, 2024, p. 236, see *supra* note 1. See also Kai Ambos, *Treatise on International Criminal Law*, vol. 1, Oxford University Press, 2013, p. 242, referring to "conduct crimes, that is, crimes which punish mere (dangerous) conduct or activity, especially the so-called crimes of endangerment (delitos de peligro, Gefährdungsdelikte)".

⁴⁵ Rome Statute, Preamble, para. 5, see *supra* note 15. Punishment of the inchoate offenses falling short of actual harm is considered as a component of preventive justice, see Andrew Ashworth and Lucia Zedner, *Preventive Justice*, Oxford University Press, 2014, p. 95.

that the proportionality principle requires assessing an attack at the time of its launch rather than judging it based on its actual consequences.⁴⁶

Other Rome Statute crimes requiring a specific consequence explicitly include the need for an actual result in their provisions.⁴⁷ In contrast, Article 8(2)(b)(iv) refers only to the perpetrator's knowledge of environmental damage, not its actual occurrence.

Proposed Amendment

"42. The only crime in the Statute that explicitly protects the environment from the effects of armed conflict is Article 8(2)(b)(iv), which criminalises 'intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term, and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.' The offense is inchoate in nature, meaning that no actual environmental damage needs to occur for the crime to be complete. The Office will charge violations of Article 8(2)(b)(iv) when appropriate, taking into account the fragile state of the environment and relying on the best available scientific knowledge when determining whether an attack was capable of causing 'widespread,' 'long-term,' and 'severe' environmental damage."

⁴⁶ ICTY, *Prosecutor v. Stanilav Galic*, Trial Judgement and Opinion, IT-98-29-T, 5 December 2003, para. 58, fn. 109.

⁴⁷ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003, p. 131; See also Article 8(2)(b)(vii) of the Rome Statute: "making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, *resulting in death or serious personal injury*" (emphasis added).

B. Clarification of the WLS Standard

Relevant OTP Policy Statement

"The Office will charge violations of article 8(2)(b)(iv) when appropriate, taking into account the fragile state of the environment and relying on the best available scientific knowledge when determining whether environmental damage caused by an attack qualifies as 'widespread,' 'long-term,' and 'severe.'"

Reasoning

The WLS standard lacks clear definitional parameters in the Rome Statute, the Elements of Crimes, and ICC jurisprudence, as well as in the case law of other international criminal tribunals.⁴⁸ The lack of a quantifiable threshold has raised concerns about WLS's alignment with the principle of legality.⁴⁹ Critics argue that the absence of precise metrics—such as defined geographical scope, timeframes, or intensity levels—creates ambiguity in determining when environmental destruction under Article 8(2)(b)(iv) of the Rome Statute qualifies as a crime.

However, such flexibility is common in ICL, where many provisions rely on evaluative standards rather than fixed numerical thresholds.⁵⁰ This approach aligns with the principle of legality, allowing courts to refine criminal liability through case-by-case interpretation while ensuring adaptability to evolving circumstances.⁵¹

Moreover, the ICC itself has previously applied evaluative criteria to undefined legal terms. In the context of crimes against humanity, the Court ruled that: *"The assessment of whether the attack is widespread is neither exclusively quantitative nor geographical, but must be carried out on the basis of all the relevant facts of the case."*⁵²

Similarly, national courts have adopted contextual assessments of environmental harm. The Supreme Court of Slovenia ruled that environmental danger should be

⁴⁸ Truth Hounds and Project Expedite Justice, 2024, p. 246, see *supra* note 1.

⁴⁹ See Heller and Lawrence, 2007, p. 23, see *supra* note 37; also see criticism in Schmitt, 1997, p. 71, see *supra* note 7.

⁵⁰ For instance, "widespread" nature of systematic attacks against civilian population in Article 7(1) of the Rome Statute; "severe" pain or suffering in Article 7(2)(e) of the Rome Statute; and "severe" deprivation of fundamental rights in Article 7(2)(g) of the Rome Statute.

⁵¹ European Court of Human Rights, *S.W. v. The United Kingdom*, Application No. 20166/92, 22 November 1995, para. 36.

⁵² ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to article 74 of the Statute, ICC-01/05-01/0, 21 March 2016, para. 163; ICC, *Prosecutor v. Bosco Ntaganda*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/06, 8 July 2019, para. 691.

evaluated on a case-by-case basis, considering the nature of the attack and surrounding circumstances.⁵³ While such an approach ensures flexibility, it still must remain rooted in the IHL framework on environmental protection to prevent arbitrary application.

At present, the OTP Policy Paper does not define widespread, long-term, and severe damage, though it has an opportunity to offer guidance on how it should be interpreted. Even without setting rigid definitions or thresholds, the Policy Paper can outline key interpretative parameters to ensure consistency and predictability.

1. Widespread: Refers to the scope or area affected.⁵⁴ While legal scholarship suggests that several hundred square kilometers may serve as a reference point, this criterion is not strictly limited to geographical extent. Environmental harm may also be widespread due to:
 - a. Global effects of localized destruction (for example, transboundary pollution).⁵⁵
 - b. Dispersed but cumulative environmental damage (for example, multiple smaller instances of harm adding up to significant destruction).⁵⁶
2. Long-term: Relates to the duration or temporal effect of environmental harm.⁵⁷ The preparatory work for Additional Protocol I suggests that damage lasting 20–30 years would generally qualify.⁵⁸ However, defining an exact threshold is impractical, as environmental recovery depends on ecosystem resilience and the nature of the damage.
3. Severe: Concerns the intensity of harm.⁵⁹ This may include:
 - a. Threats to the viability of species, particularly human populations;⁶⁰

⁵³ Supreme Court of the Republic of Slovenia, *Judgment*, 4 July 2019, no.VS00025581, IPS 65803/2012. See also the landmark 'Mendoza' case of the Supreme Court of Argentina (Corte Suprema de Justicia de la Nación) concerning the contamination of the Matanza-Riachuelo River, where the Court mandated a comprehensive and individualized evaluation of environmental damage, leading to a historic ruling that required the implementation of an extensive environmental restoration plan.

⁵⁴ Report in Howard S. Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions*, vol. 3, Oceana Publications, 1980, p. 276, para. 27. Also described as the "size of the geographical area affected by the damage" in the Draft Code of Crimes Against the Peace and Security of Mankind, commentary to Article 26, in the International Law Commission, *Yearbook of the International Law Commission*, 1991, vol. 2, no. 2, p. 107, para. 5.

⁵⁵ Michael Bothe, "The Protection of the Environment in Times of Armed Conflict: Legal Rules, Uncertainty, Deficiencies and Possible Developments", in *German Yearbook of International Law*, 1991, vol. 34, p. 7.

⁵⁶ Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, p. 93.

⁵⁷ Howard S. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, Vol. III, Oceana Publications, 1980, p. 276, para. 27 and p. 279 (Belgian and Dutch Proposal).

⁵⁸ *Ibid.*

⁵⁹ International Law Commission, "Draft Code of Crimes Against the Peace and Security of Mankind, Commentary to Article 26", in *Yearbook of the International Law Commission*, Vol. II(2), United Nations, 1991, p. 107, para. 5.

⁶⁰ Karen Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Vol. 2, Brill, 2004, p. 96.

- b. Disruption of critical resources (for example, destruction of farmland or contamination of water supplies);⁶¹ and
- c. Irreversible environmental damage or environmental damage that significantly impairs the ability of ecosystems to recover within a meaningful timescale, either in relation to human needs or the ecological balance itself.⁶²

Rather than setting fixed numerical values, the illegality of an attack under Article 8(2)(b)(iv) of the Rome Statute must be determined holistically, considering all relevant factors in line with IHL principles on environmental protection. By incorporating these interpretative guidelines, the OTP Policy Paper can enhance the practical application of Article 8(2)(b)(iv) and contribute to the development of international jurisprudence on environmental destruction.

Proposed Amendment

"The Office will charge violations of Article 8(2)(b)(iv) when appropriate, taking into account the fragile state of the environment and relying on the best available scientific knowledge when determining whether an attack was capable of causing 'widespread,' 'long-term,' and 'severe' environmental damage. These terms should be assessed based on international humanitarian law standards, including relevant interpretations of Additional Protocol I.

To ensure consistency and legal clarity, 'widespread' should be understood as referring to the scope or area affected, which may include global effects of localized destruction and dispersed but cumulative environmental harm. 'Long-term' refers to the duration or temporal effects of environmental harm. 'Severe' should encompass irreversible harm, threats to species viability, and disruptions to essential natural resources. Given the absence of prior judicial interpretation, a case-by-case assessment should guide the application of these criteria, ensuring alignment with the IHL framework for environmental protection. While concerns about the principle of legality have been raised regarding the absence of precise thresholds, such concerns should be viewed in light of the established practice in international criminal law, which commonly relies on evaluative standards and contextual assessment to ensure legal certainty and adaptability."

⁶¹ UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law*, 2009, p. 5; ICRC, 2020, p. 38, para. 72, see *supra* note 4.

⁶² "Statement of Special Rapporteur Thiam during the discussion of the Draft Code of Crimes Against the Peace and Security of Mankind, Summary Records of the 2241st Meeting (12 July 1991)", in *Yearbook of the International Law Commission*, Vol. I, United Nations, 1991, p. 236, para. 82.

C. Recognition that Cumulative Environmental Damage Can Satisfy the WLS Threshold

Reasoning

The current OTP Policy does not specify whether different types of environmental damage can be assessed cumulatively when determining whether an attack meets the WLS threshold. However, there could be instances when multiple distinct harms—such as deforestation, water contamination, and soil degradation—can collectively amount to WLS damage. Hence, there is a need to assess not only the cumulative impact of multiple actions,⁶³ but also of multiple damages.

A cumulative approach would align with the mentioned ICC jurisprudence on crimes against humanity, where the Court has held that an attack's "widespread" nature need not be exclusively geographical but must be assessed holistically.⁶⁴

Proposed Amendment

"The determination of 'widespread, long-term, and severe' environmental damage should consider the cumulative effect of multiple harms resulting from an attack. Even if individual instances of damage do not independently satisfy the threshold, their combined impact may qualify as WLS damage when viewed holistically."

⁶³ For the cumulative effect of multiple actions emanating from different actors, please see Darryl Robinson, "Ecocide — Puzzles and Possibilities", in *Journal of International Criminal Justice*, 2022, vol. 20, no. 2, p. 317.

⁶⁴ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to article 74 of the Statute, ICC-01/05-01/0, 21 March 2016, para. 163; ICC, *Prosecutor v. Bosco Ntaganda*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/06, 8 July 2019, para. 691.

D. Applicability of IHL Proportionality Standards

Reasoning

The proportionality principle in IHL requires assessing whether the expected harm to civilians is excessive in relation to the anticipated military advantage. The same logic applies to Article 8(2)(b)(iv): The environmental damage must be “clearly excessive’ relative to the anticipated military advantage.⁶⁵

It is widely accepted that, to meet the proportionality requirement, an attack must provide a very substantial military advantage.⁶⁶ The ICTY’s Report on NATO Bombings confirmed that military operations causing massive environmental destruction with limited military justification are likely unlawful.⁶⁷ Strengthening this point in the OTP Policy would ensure that the balancing test required under IHL is clearly articulated, reinforcing that environmental harm must be justified by a compelling military necessity rather than marginal or tactical advantages.

Proposed Amendment

“In assessing whether environmental damage is ‘clearly excessive’ in relation to military advantage, the Office will apply established IHL standards on proportionality. Military operations resulting in extensive environmental destruction should be considered unlawful unless they provide a substantial, concrete, and direct military advantage.”

⁶⁵ Compared to the conventional API description of the excessiveness of damage, Art. 8(2)(b)(iv) RS adds the term “clearly.” This inclusion does not seem to establish a higher threshold for the proportionality principle as such. However, it may additionally clarify that only those cases are worth being pursued where the significant imbalance between the environmental damage and the anticipated military advantage was obvious. See Truth Hounds and Project Expedite Justice, 2024, p. 246, see *supra* note 1, referring to Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 1st ed., Cambridge University Press, 2007, p. 300; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, 2002, p. 166.

⁶⁶ Yves Sandoz *et al.*, *Commentary on the Additional Protocol I to the Geneva Conventions of 12 August 1949*, ICRC, 1986, para. 2209.

⁶⁷ ICTY, Final Report of the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 21 June 2006, para. 22.

E. Clarification of the Requisite Mens Rea as under the ICC's Element of Crime

Reasoning

Article 8(2)(b)(iv) is the only article of the Rome Statute that explicitly mentions environmental damage. The OTP Policy Paper mentions the possibility of applying the article, focusing predominantly on objective elements.⁶⁸ At the same time, it seems that one of the most problematic aspects of the application of this article is the subjective element, that is, the *mens rea*. In contrast to the general rule that the mental element of international crimes does not require a specific value judgment, according to the ICC' Elements of Crimes, Article 8(2)(b)(iv) of the Rome Statute explicitly mandates it. Particularly, footnote 37 of the ICC' Elements of Crime states that:

*"As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time."*⁶⁹

Thus, such an exclusive formulation of the *mens rea* element raises the question of how the evaluation of 'value judgment' should be made. Notably, the OTP Policy Paper, in paragraph 5, offers only a brief reference to this issue, stating that in order to be considered a crime, a "*sufficient causal link [must] exist between a perpetrator's intentional actions and an objective element of a Rome Statute offence*". This formulation raises the derivative question of what can be considered an 'intentional action' in the context of 'value judgement' requirement.

It seems that the authors of the OTP Policy Paper likely intended to assign the Court an 'icebreaking' role in determining how to assess the perpetrator's value judgment, given the ambiguity and lack of clarity surrounding the appropriate approach.⁷⁰ The main question is whether a more objective approach should be applied, giving the Court a greater role in assessing the perpetrator's actions and whether his or her value judgement was reasonable, or a more subjective approach, in which liability depends on whether the perpetrator decided that the anticipated harm would be

⁶⁸ OTP Policy Paper, para. 5, fn. 21 and para. 42, see *supra* note 2.

⁶⁹ Elements of Crime, fn. 37, see *supra* note 26.

⁷⁰ Dörmann, 2003, p. 164, see *supra* note 65; Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2014, p. 302.

clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁷¹

It seems that there is a certain consensus that the interpretation of Article 8(2)(b)(iv) should not favour the exoneration of a reckless perpetrator.⁷² The most prominent example:

- where the perpetrator had all the necessary information (for example, about the expected military advantage and expected harm) to make a 'value judgement' but chose not to do so.⁷³

However, it is important to acknowledge cases where perpetrators argue that they lacked sufficient information about the environmental damage, preventing them from making a valuable judgment, despite that the attacking side should "*do everything feasible to obtain information that will allow for a meaningful assessment of the foreseeable incidental effects on civilians and civilian objects.*"⁷⁴ In such instances, the following examples of reckless perpetrators are particularly relevant:

- The military commander had the opportunity to obtain such information but neglected to do so. For example, this may include cases in which, in anticipation of a threatened attack on a particular facility, the destruction of which could lead to significant environmental damage, countries, international organisations, and non-governmental organizations have actively communicated with a party to the conflict to prevent such an attack. In this case, the attacker possesses the necessary information to make a 'value judgment,' and the attack itself can be seen as an expression of that judgment. However, the reasonableness of this judgement remains a separate issue.
- The information about the potential harm is so commonly known and expected that the perpetrator could not have been unaware of it. First and foremost, this concerns the use of weapons that are well known to cause significant environmental damage, such as nuclear weapons.⁷⁵ Another aspect may

⁷¹ *Ibid.*

⁷² Cryer *et al.*, 2014, p. 302, see *supra* note 70; for another important point which deserves re-iteration here, see Matthew Gillett, "Comment on OTP Environmental Crimes Policy: "Taking an Environmentally-Protective Approach"", April 2024, p. 1:

For example, in interpreting footnote 37 of the Elements of Crimes, whereby "[a]n evaluation of [the perpetrator's] value judgement must be based on the requisite information available to the perpetrator at the time", the Court's evaluation should incorporate the precautionary principle. In this way, a perpetrator whose actions risk causing serious or irreversible damage to the environment could not rely on a lack of full scientific certainty regarding the likelihood, nature, and extent of the impact on the environment produced by their actions as an excuse to have avoided taking preventive measures.

⁷³ *Ibid.*

⁷⁴ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, October 2015, p. 52.

⁷⁵ Heller and Lawrence, 2007, p. 23, see *supra* note 37.

be the case when, due to the nature of the targeted object, it becomes apparent that environmental damage may be widespread, long-term and severe. An example would be an attack on a nuclear power plant or any other dangerous infrastructure object. As for the latter, the destruction of the Kakhovka Dam, which falls under the jurisdiction of the ICC, is a prime example. The Truth Hounds and Project Expedite Justice carried out a detailed analysis of the *mens rea* of the potential perpetrators and proportionality, including why they could not have been unaware of the foreseeable harm.⁷⁶

In this case, it can be argued that the perpetrator has made a valuable judgement by failing to make the necessary assessment.⁷⁷ Of course, it can be a challenge to prove that the potential perpetrator did not make an assessment, in most cases they will claim that they considered the anticipated military advantage to be justified. In this case, the assessment of the perpetrator's actions may be considered in terms of manifestly unreasonable value judgement. It is argued that a manifestly unreasonable judgement will not be accepted by the Court as credible, which will lead to more objective assessment by the court "*based on the requisite information available to the perpetrator at the time*".⁷⁸

Proposed Amendment

In our view, the approach that assigns the Court a central role in determining how the mental element should be applied is well-founded. At the same time, it is crucial to recognize that the OTP identifies tangible possibilities for enforcing what many consider a 'dead rule'. The acknowledgment that a reckless perpetrator should be held liable signals that Article 8(2)(b)(iv), despite its complexity, does not equate to impunity.

Therefore, it is essential to clarify that a 'reckless perpetrator' cannot evade responsibility by hiding behind a purely subjective interpretation of 'valuable judgment'. Thus, a manifestly unreasonable value judgement or refusal to make such a judgement should be considered as a basis for *mens rea* to be proved.

⁷⁶ Truth Hounds and Project Expedite Justice, 2024, ch. 5.6, see *supra* note 1.

⁷⁷ Dörmann, 2003, p. 165, see *supra* note 65.

⁷⁸ Dörmann, 2003, p. 165, see *supra* note 65; Heller and Lawrence, 2007, p. 23, see *supra* note 37.

Pillage, Resource Exploitation, and Property Destruction

Relevant OTP Policy Statements

"29. [...] Nature: whether the environmental crimes were committed against or affected particularly vulnerable or marginalised victims, including but not limited to women, children, the elderly, and Indigenous Peoples.

[...]

45. Similarly, article 8(2)(b)(xiii) of the Statute criminalises in international armed conflict "[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war," while article 8(2)(e)(xii) of the Statute criminalises in non-international armed conflict "[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict." These war crimes will have even greater applicability in the environmental context than article 8(2)(a)(iv) because they prohibit any destruction or seizure of enemy or adversary property that is not justified by military necessity; extensive destruction or appropriation is not required. Prohibited destruction would include a State's armed forces deliberately destroying another State's dam or nuclear power station being used for civilian purposes intending to cause significant damage to the surrounding environment or knowing that such damage would occur in the ordinary course of events. Prohibited seizure would include an armed force appropriating for non-military purposes land, water, food, or any other natural resource that belonged to an Indigenous group whose allegiance was to its adversary.

[...]

48. Articles 8(2)(b)(xvi) and 8(2)(e)(v) criminalise, in international and non-international armed conflict respectively, "[p]illaging a town or place, even when taken by assault." Because pillaging protects both private and public property, appropriating land or natural resources owned, for example, by a government, a local community, or a private individual may qualify as pillaging as long as the appropriation was "for private or personal use." Public officials, corporate actors, or private individuals may thus commit the war crime of pillaging by engaging in the illegal exploitation of natural resources or the illegal dispossession of land."

Reasoning

Paragraphs 45 and 48 are welcome inclusions in the OTP Policy Paper because the environmental impact of these particular types of crimes are not always immediately evident. Recognizing the links between pillage, resource exploitation, and property destruction and broader damage to the environment is key to exposing the full range of harm occasioned by the commission of such crimes.

The war crime of pillage can often be accompanied by the commission of other crimes or violent behaviour that represents a risk to the natural environment, to biodiversity, and to sustainability of natural resources. In Ukraine, for example, the pillage of grain – conducted systematically in occupied territories from the moment of invasion – has been accompanied by the destruction of farmland and livestock, making the land unusable and dangerous, for example, through the laying of anti-personnel mines in fields. What is notable about the situation in Ukraine is the targeting of farmers both for economic gain and because of their identity, given the importance of bread and the agricultural sector in Ukrainian culture. While not asserting that the pillage committed against farmers constitutes persecution, it is a relevant factor that is important in understanding the extent and nature of the crimes, and their impact on both direct and indirect victims.

The destruction of property can result either in direct environmental harm, for example, the destruction of a dam or nuclear power plant, or indirect environmental harm, for example, damage to industrial facilities resulting in water pollution that endangers access to fresh water for both humans and non-humans, and contaminates agricultural lands.

Ensuring the intersectionality of these issues is examined during the planning, investigative, and prosecutorial stages of the OTP's work would present a more comprehensive picture of the full extent of damage inflicted on humans, non-humans, and the natural environment through the commission of these crimes.

Proposed Amendments

"29. [...] Nature: whether the environmental crimes were committed against or affected particularly vulnerable or marginalised victims, including but not limited to women, children, the elderly, ~~and~~ Indigenous Peoples, and those targeted for their profession, such as agricultural communities.

[...]

45. Similarly, article 8(2)(b)(xiii) of the Statute criminalises in international armed conflict "[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war," while article

8(2)(e)(xii) of the Statute criminalises in non-international armed conflict “[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.” These war crimes will have even greater applicability in the environmental context than article 8(2)(a)(iv) because they prohibit any destruction or seizure of enemy or adversary property that is not justified by military necessity; extensive destruction or appropriation is not required. Prohibited destruction would include a State’s armed forces deliberately destroying another State’s dam or nuclear power station being used for civilian purposes intending to cause significant damage to the surrounding environment or knowing that such damage would occur in the ordinary course of events. It could likewise include indirect damage to the environment, such as the destruction of industrial facilities leading to water pollution that damages the natural environment and food production capacities. Prohibited seizure would include an armed force appropriating for non-military purposes land, water, food, or any other natural resource that belonged to an Indigenous group whose allegiance was to its adversary.

[...]

48. Articles 8(2)(b)(xvi) and 8(2)(e)(v) criminalise, in international and non-international armed conflict respectively, “[p]illaging a town or place, even when taken by assault.” Because pillaging protects both private and public property, appropriating land or natural resources owned, for example, by a government, a local community, or a private individual may qualify as pillaging as long as the appropriation was “for private or personal use.” Public officials, corporate actors, or private individuals may thus commit the war crime of pillaging by engaging in the illegal exploitation of natural resources or the illegal dispossession of land. Attention will be paid to the intersection between pillage and the commission of other crimes or violent behaviour that cause environmental damage, such as damage and destruction of farmland that is a consequence of the pillage of grain.”

Investigation and Prosecution Strategies

Integration of the Latest Environmental Research Methods in Investigative Practices

Reasoning

The OTP's recognition of the importance of scientific evidence in environmental crime investigations is commendable. Robust data collection and management practices are essential to ensure the credibility and reliability of evidence. Integrating satellite imagery, satellite data analytics, hydrological data, soil analysis, atmospheric readings, biodiversity assessments, water sample testing, and AI-driven environmental modelling should become standard practice for documenting environmental damage. These methods were pivotal in assessing the destruction of the Kakhovka Dam and to agrarian communities, serving as a model for future cases.

The OTP Policy Paper should explicitly promote interdisciplinary collaboration to strengthen the investigation process further. Engaging experts from environmental, scientific, and technical fields, such as hydrologists, ecologists, soil scientists, and climate researchers, will enhance the Office's capacity to document environmental harm comprehensively. Establishing frameworks for such collaboration would ensure consistent and effective evidence-gathering.

Prosecution of Individual Corporate Officers

Relevant OTP Policy Statements

"28. [...] In terms of personal jurisdiction, although the Office cannot bring environmental-crime charges against a corporation on the basis of its legal personhood because the Statute limits the Court's jurisdiction to natural persons, it can prosecute individual corporate officers who satisfy the requirements of territorial or nationality jurisdiction and are personally responsible for the commission of an environmental crime pursuant to articles 25 or 28 of the Statute."

Reasoning

While some environmental war crimes do not provide any economic benefit to the actors involved in their planning, organization, commission, aiding or abetting (for example, the destruction of Kakhovka Dam according to our research conclusions),⁷⁹ others are inspired or instigated by corporate entities or the latter directly benefit from them. In most cases, the involvement of the agents of the corporate entities in the commission of war crimes will take the form of aiding or abetting. In situations where corporate entities' role in the commission or benefiting from the war crime is not direct, it will be problematic to establish whether the involvement of such an entity will qualify as complacency in a war crime.

The Rome Statute, like the statutes of the international criminal tribunals before it, does not stipulate an *actus reus* threshold that would allow delineation of aiding and abetting from the forms of involvement with the crime that do not result in criminal complicity. This contrasts with the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind where the drafters foresaw that aiders and abettors participation in the crime should be direct and substantial.⁸⁰

Despite the Rome Statute's silence on the *actus reus* of aiding and abetting, it will be unreasonable to suggest that any act that somehow contributes to the commission of the crime or benefits from it should be seen as an international crime. Rich practice of the ICTY and International Criminal Tribunal for Rwanda ('ICTR') on the matter clearly directs towards adding an *actus reus* requirement. Thus, in *Prosecu-*

⁷⁹ Truth Hounds and Project Expedite Justice, 2024, see *supra* note 1.

⁸⁰ Caspar Plomp, "Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court", in *Utrecht Journal of International and European Law*, 2014, vol. 30, no. 79, p. 8.

tor v. Furundžija, the ICTY set a standard that was later widely accepted in the subsequent cases, holding that the *actus reus* of aiding and abetting requires “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”.⁸¹ In other words, the Tribunal confirmed that only those acts that substantially contribute to the crime may be qualified as aiding or abetting. Moreover, in the same judgement, the ICTY stressed that the approach of the International Law Commission regarding an additional requirement of direct link between the act and the perpetration of the crime was too restrictive and did not find enough support in the law.⁸²

Most recently, the ICC provided its take on the issue of the *actus reus* threshold. In *Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, the Pre-Trial Chamber engaged in lengthy discussion on the standard of *actus reus* for aiding and abetting. In essence, the ICC concluded that while there are nuances in academic literature and case law on how to approach the *actus reus*, it is well established that there is a “need for a causal effect between the contribution and the crime”⁸³ for charging aider or abettor for the international crime. Preferring the term “causal effect”, the Court did not completely abandon other standards of *actus reus*, like “substantial” or “significant” contribution.⁸⁴ As the ICC explained, citing the *Al-Hassan* Pre-Trial Chamber decision, it is required to establish a causal effect between the act of the alleged aider or abettor and each crime, but not each criminal act that constitutes the crime.⁸⁵ To put it differently, if an individual finances or supplies equipment to the group or a state engaged in the commission of environmental war crimes, invoking of aider or abettor responsibility will become possible if the prosecutors demonstrate that his/her funds or equipment were used to commit certain crimes.

The practice of the international courts also provides insights into the issue of geographical and temporal connection between the act of the accomplice and the crime. With regards to the former, there is general acceptance by the ICTY and ICTR of the rule that the aider or abettor may be geographically unconnected to the crime.⁸⁶ At the same time, the presence of the accomplice on the scene may *per se* be treated as a ground for criminal responsibility even if the individual does not participate in the direct commission of the crime.⁸⁷ More disputed is the issue of temporal connection. It is well accepted that the accomplice’s acts may take place

⁸¹ ICTY, *Prosecutor v. Anto Furundzija*, Judgement, IT-95-17/1-T, 10 December 1998, para. 235.

⁸² *Ibid.*, para. 232.

⁸³ ICC, *Prosecutor v. Mokom*, Defence, Public Redacted Version of “Defence response to “Prosecution’s Additional Submissions following the Confirmation of Charges Hearing””, ICC-01/14-01/22-274-Red, 29 January 2024, para. 17

⁸⁴ *Ibid.*, para. 16.

⁸⁵ *Ibid.*, para. 20.

⁸⁶ Plomp, 2014, p. 10, see *supra* note 80.

⁸⁷ *Ibid.*, p. 10.

before or after the perpetration of the crime.⁸⁸ The question remains as to whether the acts that follow the commission of the crime may also be regarded as aiding and abetting. In principle, both academia and international criminal tribunals accept the idea that in certain cases aiding and abetting *ex post facto* is possible.⁸⁹ But it is not fully clarified whether the *ex post facto* aiding and abetting may occur without the previous knowledge of the principal perpetrator and/or accomplice about the role of each other.⁹⁰

Probably the biggest discrepancy between the ICTY/ICTR practice and the Rome Statute standard in relation to the aider and abettor responsibility lies in the domain of *mens rea*. It is well known that Article 30 of the Rome Statute requires higher level of *mens rea* than customary international law expressed in the case law of the *ad hoc* tribunals for the Former Yugoslavia and Rwanda. Thus, Article 30 stipulates that a person shall be criminally responsible when “the material elements are committed with intent and knowledge”. This contrasts with the approach taken by, for example, the ICTY, in *Prosecutor v. Tadić*, where recklessness was found sufficient for criminal responsibility.⁹¹ For aiders and abettors, this means that reckless indifference could have been already enough for the establishment of their guilt.

At the same time, arguments may be built that Article 30 of the Rome Statute does not fully eliminate the possibility of bringing to account for the consequences of the act committed that, while not directly desired by the aider or abettor, were foreseen by them. This conclusion follows from the wording of Article 30(2)(b) that speaks to the meaning of intent in relation to a consequence and specifies that the person has an intent wherever he/she “is aware that it [consequence] will occur in the ordinary course of events”. This formula requires certain knowledge about the probability of the consequences but does not demand that an accomplice wants the consequences to occur.⁹²

There is no unified answer to another *mens rea* question that emerges in the cases of accomplices’ involvement in crimes, namely, what degree of knowledge of the crimes on the part of the aider and abettor would be sufficient to incur criminal responsibility. The practice of the ICTY gives two distinct answers to this question: a more allowing one, that the aider or abettor should simply know that “one of a number of crimes will probably be committed, and one of those crimes is in fact committed”⁹³, and a more restrictive, that the aider or abettor must know the specific crime

⁸⁸ *Ibid.*, p. 11.

⁸⁹ *Ibid.*

⁹⁰ Ines Peterson, “Open Questions Regarding Aiding and Abetting Liability in International Criminal Law: A Case Study of ICTY and ICTR Jurisprudence”, in *International Criminal Law Review*, 2016, vol. 16, no. 2, p. 24.

⁹¹ ICTY, *Prosecutor v. Tadić*, Trial Chamber, Opinion and Judgment, IT-94-1-T, 7 May 1997, para. 687.

⁹² Plomp, 2014, p. 14, see *supra* note 80.

⁹³ ICTY, *Prosecutor v. Limaj et al.*, Trial Chamber, Judgment, IT-03-66-T, 30 November 2005, para. 36.

that is committed and be aware of the essential elements of that crime.⁹⁴ It goes without saying that the first answer allows a wider array of tactics to prove the accomplice's knowledge. These may include the use of the reports of international institutions like United Nations inquiry commissions, media coverage of the previous crimes, or social media reports. At the same time, if the second answer is accepted, general knowledge about the crimes that may be gained from the sources mentioned above might not suffice for the proof of guilt.

To sum up, the OTP Policy Paper may reflect on some of the specific issues of the responsibility of corporate officers by emphasizing the *actus reus* and *mens rea* standards applicable in the investigations of aiding or abetting environmental war crimes.

Proposed Amendments

"28. [...] In terms of personal jurisdiction, although the Office cannot bring environmental-crime charges against a corporation on the basis of its legal personhood because the Statute limits the Court's jurisdiction to natural persons, it can prosecute individual corporate officers who satisfy the requirements of territorial or nationality jurisdiction and are personally responsible for the commission of an environmental crime pursuant to articles 25 or 28 of the Statute, primarily in cases where there is evidence of prior knowledge of the corporate officers about the commission of the crimes from publicly accessible and widely disseminated sources, and where the causal effect between the act of the alleged aider or abettor and each crime (though not each criminal act that constitutes the crime) may be established."

⁹⁴ Andrea Reggio, "Aiding and Abetting In International Criminal Law: The Responsibility of Corporate Agents And Businessmen For "Trading With The Enemy" of Mankind", in *International Criminal Law Review*, 2005, vol. 5, p. 640.

Conclusion

The OTP's initiative to advance accountability for environmental crimes under the Rome Statute is a significant and necessary step in strengthening the legal framework for the protection of the natural environment. Environmental destruction has long-lasting and often irreversible consequences, affecting not only ecosystems but also human populations and future generations. By refining key aspects of the OTP Policy Paper, the ICC can ensure a more robust and legally sound approach to investigating and prosecuting these crimes.

This submission has outlined several areas where the OTP Policy Paper could be strengthened:

- ➔ **Jurisdiction *ratione loci* in cases involving transboundary environmental damage** – Clarifying the Court's jurisdiction over environmental crimes with transboundary effects, ensuring that crimes that impact a State Party's territory can be prosecuted even if originating in a non-State Party.
- ➔ **Acknowledging the Rome Statute's explicit recognition of environmental crimes** – Reinforcing that the Rome Statute is the first international criminal tribunal statute to explicitly reference the natural environment.
- ➔ **Clarifying the definition of the "natural environment"** – Ensuring that the OTP Policy Paper reflects the systemic nature of ecosystems and includes human-modified natural elements, such as agricultural areas, food resources, and water supplies.
- ➔ **Clarifying the scope of Article 21 of the Rome Statute** – Recognizing international environmental law as part of the applicable legal framework under Article 21(1)(b), strengthening the OTP's interpretative tools in addressing environmental crimes.
- ➔ **Rome Statute crimes committed by means of indirect environmental damage** – Expanding the OTP's approach to include indirect environmental harm, such as long-term environmental contamination caused by the mass destruction of civilian infrastructure.
- ➔ **Explicit recognition of the inchoate nature of Article 8(2)(b)(iv)** – Strengthening the OTP Policy Paper's acknowledgment that no actual environmental damage is required for liability, ensuring that the provision fulfills its preventive function.
- ➔ **Clarification of the WLS standard** – Providing guidance on how 'wide-spread', 'long-term', and 'severe' should be assessed, based on existing legal standards and expert analysis.

- **Recognition that cumulative environmental damage can satisfy the WLS threshold** – Clarifying that multiple distinct harms (for example, deforestation, water contamination, and soil degradation) can collectively amount to WLS damage.
- **Applicability of IHL proportionality standards** – Reinforcing that military operations causing massive environmental destruction must have a substantial military justification to be considered lawful under Article 8(2)(b)(iv) of the Rome Statute.
- **Clarification of the requisite *mens rea* under the ICC’s Elements of Crimes for a violation of Article 8(2)(b)(iv)** – Addressing how ‘value judgment’ should be evaluated when determining whether the perpetrator knew that the environmental damage would be clearly excessive.
- **Pillage, resource exploitation, and property destruction** – Highlighting the interconnection between environmental crimes and the destruction of property, including the pillage of natural resources and farmland, which exacerbates environmental harm.
- **Integration of the latest environmental research methods in investigative practices** – Promoting scientific and technological advancements in environmental crime investigations, including satellite imagery, hydrological data, and AI-driven environmental modeling.
- **Prosecution of individual corporate officers** – Strengthening the OTP’s approach to prosecuting corporate actors responsible for environmental crimes, ensuring that those aiding or abetting environmental destruction are held accountable under the Rome Statute.

The ICC has a historic opportunity to set a precedent for prosecuting environmental crimes, reinforcing international humanitarian and criminal law protections for the environment. By incorporating these recommendations, the OTP can enhance legal clarity, promote accountability, and contribute to the broader development of international law on environmental destruction. As environmental harm continues to be a tool of war and conflict, ensuring effective legal responses is both a legal and moral imperative.

Contributors

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With the involvement of other legal experts who provided valuable insights and analysis to strengthen the submission.