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NPWJ Submission to the ICC OTP public consultation on a new policy initiative to advance accountability for environmental crimes under the Rome Statute

Introduction

1. No Peace Without Justice (NPWJ) welcomes the public consultation undertaken by the Office of the Prosecutor (OTP) on its new policy initiative to advance accountability for environmental crimes under the Rome Statute, especially at this very early stage of the policy's development, and thanks the OTP for the opportunity to provide written comments. We have participated in numerous consultations relating to different OTP policies and believe they are important not just in terms of the content of submissions the OTP may receive, but also in terms of a concrete expression of the OTP's commitment to transparency and cooperation, including with civil society. We are honoured to offer our preliminary thoughts on elements that could be considered in a policy on accountability for environmental crimes under the Rome Statute.
2. NPWJ is an international non-profit organisation that works for the protection and promotion of human rights, democracy, the rule of law and international justice. NPWJ's International Criminal Justice work focuses both on international and national efforts to restore the rule of law and provide accountability and redress for the victims of crimes under international law, be they through the International Criminal Court, or through ad hoc Courts or Tribunals, national prosecutions or other judicial and non-judicial accountability processes. Our overall objective is to ensure that whatever accountability solution is adopted, it is shaped and implemented so that it can contribute to the restoration of the rule of law, it is responsive to the needs of stakeholders and it adheres to the strictest human rights standards.
3. NPWJ has been working on the ICC since its inception; NPWJ participated in the Preparatory Commission leading to the Rome Conference, in the Rome Conference itself and in all subsequent Preparatory Committees and Assembly of States Parties sessions. NPWJ works



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with stakeholders around the world, including with the ICC itself, to promote the principles of universality, effectiveness, efficiency and impact of the ICC. Since 2019, NPWJ has also been working on accountability for deforestation and other environmental devastation together with partners in the Amazon region, including through research and policy development of the crime of ecocide.

4. This submission sets out some general considerations in relation to the investigation and prosecution of environmental crimes within the Rome Statute before examining the specific issues on which thoughts have been solicited, namely what specific crimes within the Court's jurisdiction should be included in the policy paper; how to understand and apply the applicable modes of participation in those crimes; best practices for investigating and prosecuting crimes that can be committed by means of or that result in environmental damage; and how to consider environmental crimes when putting into practice the principle of complementarity and engaging in international cooperation.

General Considerations

5. NPWJ adopts an eco-centric approach to the crime of ecocide, believing that the environment (and the non-human elements comprising the natural world) requires the protection of the law in its own right, independent of direct harm to human beings. We submit that while such a direct approach is not necessarily applicable *per se* to Rome Statute crimes, which are centred on harm to human beings, the drafting and implementation of a policy relating to "environmental crimes" as such take a broad approach in considering different types of environmental damage and their potential short-, medium- and long-term impacts, both on humans and on the natural world.
6. NPWJ further submits that broad consultations with a range of stakeholders will be crucial for the development, implementation and dissemination of the proposed policy, to reflect the reality of lived experiences and maximise its effectiveness, especially insofar as it will have an impact on domestic jurisdictions. In particular, we recommend that specific consultations be held with indigenous groups and with children and young people, to help ensure the policy addresses issues of specific concern to those stakeholders and captures some possible approaches that would maximise the utility of the policy both for the ICC and in other jurisdictions.



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7. The issue of specific crimes that could be highlighted in the policy are discussed in the next section; it is, however, worth bearing in mind that many of the crimes within the jurisdiction of the Rome Statute that may not specifically relate to environmental damage do have an impact on the environment at different levels and within different timeframes. In this respect, it would be important to keep abreast of scientific research on environmental damage, to keep pace with continuous developments in our understanding of the environmental impact of human actions and human-made items. Current knowledge on these issues will be important for considerations of which crimes non-specific to the environment might also be prioritised, all else being equal. An example may be the military use of defoliant or incendiary agents or pesticides, or biological or chemical agents, where the balance of proportionality should take into account not only direct human harm, but also the latest evidence on environmental damage.
8. As has been demonstrated at the Special Court for Sierra Leone, for example in relation to the crime of forced marriage,¹ existing law should be applied dynamically, so that charging strategies that can reflect more precisely the experiences of victims. The ICC has the opportunity to build on the SCSL legacy by adopting a similar approach in respect of the crimes that, while not specifically directed against the environment, have either a direct environmental impact, or where such impact exacerbates the gravity of the crime. The real life experience of massively displaced populations, for example, is that governmental approval of mine tailing facilities (which contain the waste and residue after mining operations) near ancestral and conservation areas may constitute the crime against humanity of extermination, due to the resulting human deaths and environmental devastation that threatens water and food supply.² It is also real life experience that high rates of malnutrition and chronic illness within indigenous groups, and the erosion of their traditional food systems, directly caused by actions such as mercury poisoning of rivers for gold digging and violence that is the consequence of illegal activities, as well as government food programs and policies, may constitute crimes

¹ *The Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-2004-16-A, decision of the Appeals Chamber, 22 February 2008, paras 175-203. See also, for example, Oosterveld, V, “SCSL Symposium: The Special Court for Sierra Leone—Instigating International Criminal Law’s Consideration of Forced Marriage”, 19 March 2021, available from <https://opiniojuris.org/2021/03/19/scsl-symposium-the-special-court-for-sierra-leone-instigating-international-criminal-laws-consideration-of-forced-marriage/>.

² See for example <https://www.uq.edu.au/news/article/2023/11/sensitive-ecosystems-risk-mine-waste>.



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against humanity or genocide, where the chapeau elements are met.³ There are therefore possibilities for the identification of new headings of crime that fit general Rome Statute provisions, but better reflect the experiences of victims and the totality of criminal conduct involved.

9. One difference between the ICC and the SCSL, however, is the ICC's statutory requirement that the definition of crimes be strictly construed, not extended by analogy and be interpreted in favour of the person being investigated or prosecuted in the case of ambiguity.⁴ This arguably makes *de lege ferenda* interpretation of the law more difficult at the ICC than it has been at other *ad hoc* international courts and tribunals. Careful and strategic consideration should therefore be given to potential consequences of seeking to extend jurisdiction beyond the letter of the Rome Statute and Elements of Crimes, both in terms of public perception and in risking "setting the cause backwards".

Specific crimes to be included

10. The most evidently relevant crime relating to environmental damage contained in the Rome Statute is in article 8(2)(b)(iv), which explicitly 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". Despite the drawbacks in this definition – in particular the characterisation of the damage as being not only widespread but also "long-term" and also "severe", as well as the inexplicable fact it only applies during international armed conflict – it is nonetheless the only provision in the Rome Statute that does not necessarily require human damage or harm as an element of the crime. As such, it would fall at the centre of the specific crimes that could be charged at the ICC to ensure accountability for environmental crimes.
11. There is a group of crimes where the commission of those crimes can inevitably cause harm to the environment, namely the prohibition on the use of poisons, gases, poisonous weapons

³ NPWJ, *The Food & Nutrition Crisis Facing Brazilian Indigenous Populations: A Brief On The Failure Of Food Distribution Policies In Brazil*, March 2023, available from http://www.npwj.org/sites/default/files/ressources/FoodDistributionBriefing_March23_compressed.pdf

⁴ Rome Statute, article 22(2).



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and so on, both in international and non-international armed conflicts.⁵ Many of these agents cause not only human suffering, but severe and potentially irreversible negative consequences for the environment. White phosphorous, for example, as Napalm in previous decades, not only causes severe and potentially lifelong damage for humans, it has also been linked with damage to agricultural land and the ignition of forest fires.⁶ These specific crimes could usefully be included within the policy given their impact on the environment and the natural world.

12. Another group of crimes involves damage to the environment as the means by which civilians are targeted and harmed. These could include genocide, through damage to the environment as a deliberately inflicting on a protected group conditions of life calculated to bring about its physical destruction in whole or in part,⁷ or as a means of causing serious bodily or mental harm to members of a protected group;⁸ or the crime against humanity of extermination, through the intentional infliction of conditions of life calculated to bring about the destruction of part of the population.⁹ There are numerous ways that changes in environmental conditions or damage to the natural environment can cause severe harm to civilians, such as bombardment, the use of incendiary agents, employment of scorched earth strategies, the poisoning of water sources and countless others. Such environmental damage has also historically been used as a means of securing the forcible transfer of a population, as life becomes impossible in their original location due to scarcity of food and water, land or air pollution, alongside illness cause by insanitary conditions and denial of access to health services or facilities.¹⁰ The war crime of starvation has been historically committed through damage to the environment that results in scarcity or destruction of food and water.¹¹ Actions directed

⁵ Rome Statute, article 2(b)(xvii), (xviii), (xx) and (e)(xiii) and (xiv).

⁶ See, for example, American University of Beirut, *The Socio-Environmental Impact of White Phosphorous Ammunition in South Lebanon: Analysis and Risk Mitigation Strategies*, November 2023, available from <https://www.aub.edu.lb/natureconservation/Documents/Brief%20WP%20English.pdf>

⁷ Rome Statute, article 6(c).

⁸ Rome Statute, article 6(b).

⁹ Rome Statute, article 7(1)(b) and (2)(b).

¹⁰ Rome Statute, article 7(1)(d) and (2)(d).

¹¹ Rome Statute, article 8(2)(b)(xxv). While currently only applying during international armed conflict, it is hoped that the amendment to include it also during non-international armed conflict that was approved by the



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against the environment have been historically undertaken as a means to commit the crime against humanity of persecution, for example where such actions are directed against indigenous populations with a view to deprive them of their fundamental rights (to land, to culture, to life, to name a few).¹² These acts can also be qualified as inhumane acts intentionally causing great suffering, or serious injury to body or to mental or physical health,¹³ given the ancestral, cultural and spiritual connections between indigenous communities and the natural environment in which they live.

13. Finally, the war crime of intentionally attacking civilian objects¹⁴ or historic monuments can also constitute environmental crimes, when the protected object is part of the natural world. Examples could include places like the Great Barrier Reef, Uluru (both in Australia), Burtint (in Southern Albania), Los Glaciares National Park (in Argentina), Ancient and Primeval Beech Forests of the Carpathians and Other Regions of Europe (in Ukraine) or the Socotra Archipelago (in Yemen).

Applicable modes of participation

14. All potential modes of participation could be applicable in respect of environmental crimes. For direct perpetrators – i.e. those who planned, ordered and implemented the crimes described above – the main challenge will, as always, be linkage and knowledge, particularly in respect of the element of “widespread, long-term and severe damage” to the natural environment. As noted, this is why it will be important to keep track of developments in scientific knowledge about environmental damage as well as how widespread that knowledge is within the general population, and by those allegedly committing environmental crimes.

Assembly of States Parties in December 2019 will enter into force before too long:
<https://treaties.un.org/doc/Publication/CN/2020/CN.394.2020-Eng.pdf>.

¹² This has been our observation from our work and discussions with indigenous leaders and communities in Brazil. Also see Lily Grisafi, *Prosecuting International Environmental Crime Committed Against Indigenous Peoples In Brazil*, HRLR Online, 2020, available from <https://hrlr.law.columbia.edu/files/2020/11/Grisafi.pdf>.

¹³ Rome Statute, article 7(1)(k).

¹⁴ Rome Statute, article 8(2)(b)(ii) and (e)(iv).



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15. It would be interesting to consider the criminal responsibility of various actors in the supply chains in terms of the products that may be used to create environmental damage, such as toxic or poisonous gases. Examples include arms manufacturers in the context of the production of weapons known to be devastating to the environment and suppliers of equipment to land-grabbers or illegal miners. The most evident type of participation would be aiding, abetting or otherwise assisting in the commission of the crime,¹⁵ or contribution to the commission of the crime by a group of people acting with common purpose,¹⁶ provided the person had either the aim to further the criminal activity or purpose, or had the requisite knowledge of the intention of the group to commit the crime.
16. In terms of aiding and abetting, it would be interesting to consider convergences between crimes within the jurisdiction of the Rome Statute and the generation of funds to support the commission of those crimes. In Sierra Leone, for example, illegal exploitation of natural resources – especially diamonds – was a well-known driver of conflict and a means to support the conduct of that conflict.¹⁷ Increasing attention is being paid to the convergence between wildlife crime – such as illegal fishing, illegal trade in protected species and so on – and various types of organised crime.¹⁸ While the most obvious links relate to drug smuggling and other transnational crimes of a similar nature, it is highly likely that such practices are used to aid, abet, or otherwise assist in the commission of Rome Statute crimes.

Best practices for investigating and prosecuting

17. The majority of best practices already developed by the OTP (and others) are applicable when investigating and prosecuting environmental crimes. That said, it is likely that insider witnesses will be even more critical to cultivate when investigating environmental crimes. Such witnesses

¹⁵ Rome Statute, article 25(3)(c).

¹⁶ Rome Statute, article 25(3)(d).

¹⁷ See for example, *The Prosecutor v Taylor*, Case No. SCSL-03-01-A, Appeals Chamber Decision, 26 September 2013.

¹⁸ See for example the Wildlife Justice Commission, *Convergence of wildlife crime with other forms of organised crime: A 2023 Review*, 30 October 2023, available from <https://wildlifejustice.org/publications/convergence-wildlife-crime-with-organised-crime-review-2023/>



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will be able to provide invaluable information concerning the knowledge of potential perpetrators about the environmental impact of means or methods used to commit Rome Statute crimes. They are also likely to be able to provide useful information relating to the proportionality test in article 8(2)(b)(iv).

18. It would be important to consider a wide variety of sources other than witness information, especially given the scientific and technical nature of damage to the environment. Useful sources of information regarding the environment could be gathered from environmental protection agencies, disaster response agencies and similar bodies charged with gathering and analysing environmental information. Reports from UN agencies regarding the status of water, hygiene and sanitation (WASH) could provide helpful information about the impact on those services of the commission of crimes within the Rome Statute.¹⁹ Such agencies could also be useful partners in gathering WASH information where it is not already being done. Another source, potentially more difficult, could be environmental impact statements where those are required in advance of mining or logging operations, or other similar activities, should such a legislative or administrative framework exist.
19. The most important best practice to take into account for these types of investigations and prosecutions is to consider the “big picture” and how different elements of that picture are inter-related and contribute towards environmental crime. In Amazonia, for example, environmental crime is comprised of numerous elements including land-grabbing, illegal mining, illegal fishing, forced transfer of populations, persecution of indigenous people, deforestation, questionable governmental policies, corruption and more. This broader context will be important to understand the potential liabilities of individuals at all levels and along the supply chain; the enabling environment that at best fails to take environmental impact into account in decision-making; and to reflect the experiences of victims in the OTP’s investigative and prosecutorial activities.

¹⁹ See for example the WHO/UNICEF Joint Monitoring Programme for Water Supply, Sanitation and Hygiene (JMP): <https://washdata.org/reports>.



Complementarity and international cooperation

20. Environmental crimes are gaining attention throughout the world, as youth groups, indigenous communities and others are increasingly engaging in climate litigation. Governments are under pressure to show their citizens that they are doing something to alleviate, if not reverse, what many consider to be impending environmental disaster. Many States are actively engaging on the definition of the crime of ecocide, with several already having incorporated it into their criminal law or being close to doing so. This provides an interesting avenue for opening discussions with States Parties to encourage them to adopt proactive approaches to the investigation and prosecution of environmental crimes at the national level.
21. At the same time, while ecocide is not yet part of the Rome Statute, complementarity could also prove a useful vehicle to promote incorporating ecocide into the criminal law of those States who have not yet done so, which would also contribute to State practice and opinion juris, thereby making an amendment of the Rome Statute potentially easier at a later date.

Conclusion

22. As noted, NPWJ very much welcomes the opportunity to provide these initial thoughts regarding some of the pressing issues that may usefully be considered in an OTP policy on advancing accountability for environmental crimes through the Rome Statute and would encourage the OTP to seek ways to engage directly with indigenous communities and others who historically have been most affected by environmental crimes. We stand ready to engage further on this issue, including through consultations and comments on the draft policy itself once it is produced.
23. We would find it very useful to receive feedback on this submission, so we can tailor our contribution to future consultations to be as beneficial as possible, and would gladly provide any further information or clarifications that may be helpful.²⁰

²⁰ Please contact Alison Smith, NPWJ's International Criminal Justice Director, on asmith@npwj.org.