

Geneva Water Hub's contribution to the development of the policy paper on Environmental Crimes by the Office of the Prosecutor of the International Criminal Court

Introduction

The environment encompasses the essence of human existence, including our living space, quality of life, and overall health. There is an intrinsic connection between environmental preservation and human well-being. While the Rome Statute has an anthropocentric orientation, recognising environmental harm as falling within the ambit of serious crimes, international action is necessary to prevent devastating environmental damage that threatens human security and, consequently, international peace and security.

In fact, the Statute has a specific war crime provision for international armed conflicts (IAC) which addresses environmental damage. The preamble of the Statute furthermore emphasises the imperative of ending impunity for atrocity crimes to protect present and future generations. This signals a convergence between international criminal law and international environmental law. The International Criminal Court's 2016 Policy further alluded to the convergence by paying "*particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land*" (para. 41).

This submission by the Geneva Water Hub explores how the core crimes outlined in the Statute could be leveraged to tackle environmental crimes while delving into the limitations and challenges associated with prosecuting such crimes effectively.

1. What specific crimes within the Court's jurisdiction should be included in the policy paper?

a) Genocide

The Rome Statute defines the crime of genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The enumerated acts are killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures to prevent births, and forcibly transferring children.

Damage to the environment influences the severity of many of such acts. For example, damage to the environment may cause serious harm to groups whose lifestyles, culture, and livelihoods are closely

connected to their natural surroundings, such as some indigenous groups. Environmental damage could also inflict *conditions of life calculated to bring about the physical destruction of a group* (Article 6(c)). For instance, the draining of the marshlands on which the population is materially or spiritually tied to, scorched earth tactics during warfare, or destroying all the target group's means of survival (e.g., poisoning sources of water including communal wells and aquifers, or destroying or contaminating water resources, and crops). Such acts could potentially be charged as genocide **when** they result in large-scale death or serious harm among targeted populations.

The ICC can therefore prosecute acts such as the poisoning of water sources as they constitute conditions of life calculated to bring about the physical destruction of a protected group. The indictment brought by the ICC Prosecutor against President Omar Al-Bashir of Sudan illustrates this linkage (ICC, Pre-Trial Chamber, In the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/99 (Omar Al-Bashir case), pars.91 and 93). The Prosecutor in this case argued that the destruction, pollution and poisoning of water resources in Darfur constituted an act underlying the crime of genocide. In the Pre-Trial Chamber decision issuing an arrest warrant against President Omar Al-Bashir, though the majority of the judges dismissed the charge of genocide, in her dissenting opinion attached to the arrest warrant, Judge Usacka highlighted the large amount of evidence regarding the destruction of essential means of survival (based on Article 6 (c) of the ICC Statute). Judge Usacka's opinion accepts the argument put forward by the Prosecutor, stipulating that the destruction of water sources and the resulting deprivation of the population's means of survival was an act underlying the crime of genocide (Omar Al-Bashir case, Separate and Partly Dissenting Opinion of Tudge Anita Usacka, par.98).

In the Genocide case brought by South Africa against Israel at the ICJ, South Africa requested that the State of Israel, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, desist from depriving access to food and water to the Palestinian people (Article 5 (5)). In the merit of the case, the ICJ will determine whether the deprivation of water could constitute an act aimed at imposing conditions of life on the Palestinians with the intent to bring about its physical destruction, either wholly or partially contrary to Article II of the Genocide Convention. In this context, it is noteworthy that Israel tried to convince the International Court of Justice that "it continues to supply its own water to Gaza by two pipelines, that it facilitates the delivery of bottled water in large quantities, and that it repairs and expands water infrastructure" (Art 63). The response illustrates that the State of Israel has taken seriously the argument that the deprivation of water could amount to the crime of genocide.

It may also be noted that environmental damage that has no direct harm to humans is unlikely to constitute an adequate ground for prosecuting the crime of genocide. Such prosecution, however, needs to demonstrate specific genocidal intent. Moreover, establishing causation in environmental harm cases, particularly considering other potential intervening factors such as climate change and economic dynamics, could present significant challenges. The growing body of research on the reverberating effects of armed conflict on water systems and public health is beginning to fill this gap (see Talhami M, Zeitoun M., 2021; and Nohle E, Robinson I., 2017).

b) Crimes against humanity

The Rome Statute delineates acts that constitute crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population. Crimes against humanity are designed to protect civilians and encompass actions that cause immense suffering or grave harm to their physical or mental well-being. While the Rome Statute does not explicitly list environmental crimes as crimes against humanity, there has been an acknowledgement of the interconnectedness between environmental degradation and human rights violations since the 1972 United Nations Conference on the Human Environment (UN Doc A/CONF. 48/14/Rev. 1, Principle 1). Severe environmental destruction, such as widespread pollution, deforestation, or contamination of water sources, could lead to adverse health effects, displacement, or loss of livelihoods for civilian populations. While these actions may not be carried out with the explicit intent to harm civilian populations, they can still be deemed criminal under the broader framework of protecting civilians from widespread and systematic harm, if it was foreseeable.

The underlying acts constituting crimes against humanity could indirectly address environmental crimes, especially when such harm is a foreseeable result of ongoing policies or actions. For instance, environmental destruction resulting in fatalities, like deliberate habitat burning or attacks on protected areas leading to deaths, may constitute murder under Article 7(1)(a). Relatedly, environmental damage or destruction could fall under the crime of extermination. This includes the *intentional infliction of conditions of life, such as depriving access to essential services, such as water and food* calculated to destroy part of a population, which could fall under Article 7(1)(b).

Besides, environmental damage or degradation causing displacement, like habitat destruction or forced evictions due to land grabbing, could be charged under Article 7(1)(d). Moreover, deliberate deprivation of fundamental rights due to environmental harm could amount to persecution under Article 7(1)(h).

Lastly, “*other inhumane acts*” under Article 7(1)(k) provide a crucial avenue for addressing environmental damage that inflicts significant suffering or causes serious injury to both mental and physical health.

While crimes against humanity offer a potential avenue for prosecuting environmental harm, challenges persist in establishing necessary elements and overcoming the anthropocentric focus of the legal framework. Prosecuting environmental harm as crimes against humanity requires demonstrating a *widespread or systematic attack*, showing an assault on a civilian population *as part of state or organisational policy*.

The UN Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation discussed the issue of crimes against humanity and their linkage to the contamination of aquatic ecosystems. In his report to the Human Rights Council in 2023, he recognised the magnitude of the harm that

represents the “systematic toxic contamination” of aquatic ecosystems (A/HRC/54/32, 2023, par.117) and underscored the need to ensure accountability.

c) War crimes

Contemporary armed conflicts exact a profound and often devastating toll on both human populations and the environment. When acts of environmental destruction occur in the context of armed conflict, they may amount to war crimes – serious violations of international humanitarian law (IHL) committed during armed conflicts (ICRC, [Guidelines, Rule 28](#)). Deliberate attacks on the environment, such as the destruction of forests, poisoning of water sources, or pollution of air and land, can result in widespread harm to both human health and the ecosystem.

IHL offers heightened protection for certain works and installations, including those containing dangerous forces like dams and dykes, and the natural environment, recognising their potentially catastrophic humanitarian and environmental consequences (see Geneva Water Hub, [Geneva Principles on the protection of water infrastructure](#)). In addition, IHL prohibits specific methods of warfare, such as attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, drinking water installations, and irrigation works (see ICRC, [CIHL, Rule 54](#)). These areas represent crucial domains where environmental crimes could be effectively addressed. Research has also shown the linkages between environment and war crimes. For example, intentional deprivation of water can constitute a war crime in both international and non-international armed conflicts (see Tignino, M. 2023).

While the war crimes provisions of the Rome Statute primarily aim to protect individuals and their property during armed conflict, they could also indirectly safeguard against actions that result in significant environmental damage or exploitation. This has also been reaffirmed by the International Law Commission’s Principles on Protection of the Environment in relation to Armed Conflicts which assert that the obligation to prosecute war crimes “extends to war crimes that concern the environment, for instance, the pillaging of natural resources, and the extensive destruction and appropriation of property that is not justified by military necessity and is carried out wantonly and unlawfully” ([A/77/10](#), p.104).

Within the framework of the Rome Statute, Article 8 (and its amendments) provide the list of such crimes. Under this article, Article 8(2)(b)(iv) specifically criminalises environmental damages. It stipulates that intentionally launching an attack, knowing it will cause widespread, long-term, and severe damage to the natural environment which is disproportionate to the military advantage anticipated is a war crime. This provision acknowledges the significant impact that environmental destruction can have on civilian populations and the broader environment during armed conflict. The provision, however, only applies to IAC.

Other war crimes could also provide indirect protection for the environment in both IAC and non-international armed conflict (NIAC).

These crimes encompass (in IAC):

- Extensive destruction and appropriation of property (part of the environment) not justified by military necessity and carried out unlawfully and wantonly -Article 8(2)(a)(iv);
- Deliberate attacks on civilian objects, such as water treatment facilities, agricultural land, or wildlife reserves, could be considered war crimes - Article 8(2)(b)(ii);
- Attacking undefended towns or villages (part of the environment) - Article 8(2)(b)(v);
- Destroying enemy property not imperatively demanded by the necessities of war - Article 8(2)(b)(xiii);
- Pillaging of natural resources - Article 8(2)(b)(xvi);
- Using poison or poisoned weapons causing environmental harm- Article 8(2)(b)(xvii);
- Employing chemical weapons (Article 8(2)(b)(xviii)); and
- Using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, such as water and food - Article 8(2)(b)(xxv).

In NIAC:

- Pillaging of natural resources - Article 8(2)(e)(v).
- Destroying enemy property not imperatively demanded by the necessities of war Article 8(2)(e)(xii).
- Using poison or poisoned weapons causing environmental harm- Article 8(2)(e)(xiii).
- Prohibits employing chemical weapons- Article 8(2)(e)(xiv).
- Using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, such as water and food – Article 8 (2)(e)(xix).

Similar to the preceding two core crimes, using war crimes provisions of the Rome Statute for prosecuting environmental crimes presents its own challenges. These include difficulties in interpreting provisions not originally designed for environmental crimes, navigating exceptions for military necessity, establishing intent for environmental destruction, and complexity related to establishing the causality link of environmental damage and the conduct.

d) The crime of aggression

There are also suggestions for utilising the crime of aggression to prosecute environmental crimes. Examples such as invasions leading to the burning of oil wells, poisoning water supplies, aerial spraying of forests, or potential nuclear attacks causing severe environmental harm, vividly illustrate how environmental destruction can intertwine with acts of aggression. While the crime of aggression primarily addresses state conduct, individual criminal responsibility remains its focal point.

Environmental damage could be interpreted as an act of aggression under specific circumstances. For example, harm to a state’s environmental features might be perceived as an attack on its territory or sovereignty, given the importance of safeguarding the ecological balance as an “essential interest” of a state.

Actions that may not inherently constitute aggression, such as pollution crossing waterways, air, or land from one state to another, do not fall under this provision. Nonetheless, the crime of aggression may offer a framework to prosecute environmental harm when it amounts to an attack on the sovereignty or essential interests of a state.

2. How to understand and apply the applicable modes of participation in those crimes?

The Rome Statute identifies various modes of participation, including commission of a crime as an individual, jointly, or through another person, as well as ordering, soliciting, inducing, aiding, abetting, and contributing to a group crime (Article 25) and superior responsibility (Article 28). There are contending views about the nature of modes of participation under the Rome Statute – The nature of these modes of participation under the Rome Statute has sparked debate between proponents of the “unitary perpetrator model” and the “differentiation model” of criminal responsibility. In our view, the modes of participation under the Statute imply a differentiation model, wherein each mode indicates varying degrees of criminal responsibility.

When applying these modes of participation to environmental crimes, the ICC’s commitment to prosecuting those bearing the greatest responsibility extends to environmental offences. This often entails targeting individuals in positions of authority who directly contribute to or oversee environmental harm. Given that environmental damage frequently stems from collective conduct and involves complex causal chains with multiple actors, determining the scope of liability necessitates consideration of various factors, including the nature and extent of harm, the level of involvement of each participant, and the foreseeability of consequences. Thus, discerning the specific role and degree of culpability of each participant can pose challenges, particularly in cases of indirect contribution to environmental harm.

Hence, identifying the most suitable mode of responsibility for prosecuting environmental crimes under the Rome Statute requires careful examination of the specificities of each case and available evidence. The focus could better be directed towards those individuals in positions of authority or influence and *order* or *plan* the commission of environmental crimes. For example, a high-ranking official or a person with authority issuing an instruction to unlawfully exploit natural resources or directing subordinates to engage in activities leading to environmental damage. Additionally, liability for *contributing to a crime by a group* may apply when multiple individuals collaborate in environmental offences, such as illegal logging. Furthermore, *command responsibility*, as recognised under the Statute, holds individuals in positions of authority accountable for crimes committed by subordinates. This

aspect could prove relevant in cases involving environmental crimes committed by military or government officials who fail to prevent or punish activities resulting in environmental damage.

3. Best practices for investigating and prosecuting crimes that can be committed by means of, or resulting in, environmental damage.

The often cited trial of Alfred Jödl, a military commander, by the International Military Commission is one example where the widespread destruction caused by the German army's scorched earth tactics in Norway, resulting in the burning of 30,000 houses during WWII (there was no specific reference to harming the environment *per se*).

In a separate case in the Democratic Republic of Congo (DRC), a former army captain, Chance Mihonya, was found guilty of environmental crimes, among others. The Kahuzi-Biega National Park (KBNP), a UNESCO World Heritage Site, became a target for various militias operating in the South Kivu region, including Mihonya's militia, which encroached upon the protected natural area. Mihonya and his militia engaged in illegal activities such as deforestation for wood and charcoal, and mining for minerals, using the proceeds to fund their operations and acquire weapons. For his environmental crimes, Mihonya was sentenced to three years for violating the nature reserve and 12 months for constructing unauthorised structures within the park boundaries.

Additionally, the International Court of Justice held the Ugandan State responsible for the looting of natural resources by Ugandan soldiers in the DRC. While not specifically addressing individual criminal responsibility, such findings have the potential to pave the way for establishing individual criminal liability for similar acts in the future.

4. How to consider environmental crimes when putting into practice the principle of complementarity and engaging in international cooperation.

The principle of complementarity underscores the role of the ICC as a court of last resort, emphasising that states should primarily ensure accountability for international crimes committed within their jurisdictions or by their nationals. However, this reliance on national legal systems can lead to inconsistencies and uncertainties in prosecuting and adjudicating environmental crimes. To address these challenges within the framework of complementarity and international cooperation, several key steps are crucial. The ICC can assist states in strengthening their national legal frameworks by promoting the enactment of robust environmental laws and enhancing the capacity of law enforcement agencies, environmental authorities, and judicial systems. Collaborating with international organisations is essential in this endeavour, facilitating the exchange of information and coordination of efforts to combat environmental crimes. Moreover, providing mutual legal assistance to facilitate cross-border cooperation in investigating and prosecuting environmental offences is vital. Such measures could enable states to investigate and prosecute environmental crimes, thereby upholding accountability and promoting environmental justice.

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