15 March 2024

To: Office of the Prosecutor, International Criminal Court

From: Professor Cymie R. Payne, Rutgers University, New Jersey, USA

Re: **Comment on OTP Environmental Crimes Policy**

Thank you for the opportunity to comment on the proposed ICC OTP Environmental Crimes Policy. I make these comments from my perspective of six years serving with the UN Compensation Commission, "F4" Environmental Claims program as a senior legal officer; and my subsequent contributions to the field, including an expert report in the International Court of Justice case, *Costa Rica v. Nicaragua*. I chair the International Union for Conservation of Nature, World Commission on Environmental Law, Ocean Law Specialist Group. These comments are offered in my personal capacity and are not intended to represent the views of any organizations with which I am affiliated.

Specific crimes to include in the policy paper

Specific crimes that should be covered by the policy paper include war crimes that explicitly mention the environment and those addressing protection of civilians and civilian objects, as relevant. These include, under the Rome Statute, Article 8 (2) (a)(iv), (b)(ii), and (b)(iv).

The policy paper should address the threshold requirement for Article 8 (2)(b)(iv) of "widespread, long-term and severe damage to the natural environment", evaluating it in light of the current fragile state of the environment, best available scientific knowledge, including recognition that critical ecosystems, such as keystone species, may not be "widespread" but whose destruction should qualify for the threshold, and consideration of the effect of cumulative impacts. Applying the threshold in light of the best available scientific evidence would not constitute an extension of the crime's definition as contemplated by Article 22 of the Statute: the threshold provision has not yet been interpreted by a court, only by commentators. It may be noted that at the time of the 1990-91 Gulf War commentators speculated that the environmental harm would not reach this threshold, yet the detailed factual review by the UNCC from 2000-2005 showed that, to the contrary, the threshold interpreted in the most restrictive sense was exceeded in many cases.[1] The policy paper's definition of environmental harm should recognize terrestrial, marine, riverine, and atmospheric aspects of the environment, specially fragile or vulnerable features, biodiversity, and public health, as well as cultural landscape values.[2]

Other serious violations that could be considered in the policy paper include Article 8 (b)(ix), which includes "buildings dedicated to … science", because of the importance that scientific records and other materials have for environmental recovery and for reparations processes that require evidence of pre-conflict environmental baseline conditions. Article 8 (b)(xvi), pillaging;

[1] C.R. Payne, Protection of the Natural Environment, in Oxford Guide to International Humanitarian Law (Ben Saul, Dapo Akande, eds., Oxford University Press, 2020).

[2] *Id.*, pp. 212-214.

(xvii) use of poison or poisoned weapons; (xviii) use of poisonous gases and analogous liquids, materials or devices are also relevant.

The policy paper can consider how customary international law applicable to environmental harm includes destruction that occurs when anticipated environmental damage is excessive in relation to the expected military advantage. Customary international law provides a basis for prosecution when a belligerent destroys or seizes the enemy's public or private property without military necessity. A number of acts, treated as either war crimes or grave breaches by the Nuremberg Tribunal, would have caused serious environmental damage integrally related to the purpose of the legal prohibition, including the following:

- Looting and destruction of agricultural products, minerals, and other natural resources, whether public or private property;
- Plunder of public and private property;
- Wanton destruction of cities, towns and villages and devastation not justified by military necessity;
- Inundations not justified by military necessity;
- The practice of "total war" including "methods of combat and of military occupation in direct conflict with the laws and customs of war, and the commission of crimes perpetrated on the field of battle during encounters with enemy armies … and in occupied territories against the civilian population of such territories."[3]

The marine environment, including life in the water column, on the seabed, and its subsoil, may be protected as a civilian object and under the San Remo Manual rule 46(d) that states that collateral damage that is excessive in relation to the anticipated concrete and direct military advantage is prohibited.

Best practices for investigating and prosecuting crimes that can be committed by means of or that result in environmental damage

While there is much to say about the specific best practices for investigating and prosecuting environmental crimes, I wish to make a single point in this comment: it is essential for prosecutors to engage as advisors scientific and technical experts in the fields necessary to evaluate the nature, severity, and persistence of the harm, which will in turn be crucial to the determination of how to prioritize investigation and prosecution.[4] Financial and human resources capacity to do this work may be found in cooperation with other judicial proceedings, non-Court actors, and with the assistance of the Scientific Advisory Board.[5]

[3] *Trial of the Major War Criminals before the International Military Tribunal*, vol 1 (International Military Tribunal 1947) 55, 239–240, 297.

[4] ICC, Regulations of the Court, Regulation 44.

[5] See Human Rights Center, School of Law, University of California, Berkeley, Beyond Reasonable Doubt: Using Scientific Evidence to Advance Prosecutions at the International Criminal Court, Workshop Report (23-24 October 2012). This report contains valuable reflections and recommendations with respect to subjects like remote sensing, satellite imaging, social media and video evidence, training non-Court actors in collecting admissible and helpful evidence, with an emphasis on the importance of cooperation and coordination between the Court and non-Court actors.

The example of how the UN Compensation Commission used experts in its review of environmental damage claims resulting from the 1990-1991 Gulf War is helpful. The final report of the environmental panel stated:

> In view of the complexity of the issues raised by the claims and the need to consider scientific, engineering and cost issues, the Panel sought the assistance of a multi-disciplinary team of independent experts retained by the Commission (the "Panel's expert consultants"). The Panel's expert consultants were retained, inter alia, in the fields of desert ecology and botany, biology, agriculture, forestry, plant pathology, soil fauna, landscape ecology, terrestrial and marine remediation techniques, marine biology, coastal ecology and geomorphology, geology, hydrogeology, water quality, chemistry, water treatment engineering, coastal and civil engineering, veterinary toxicology, natural resource and economic damage assessment, cultural heritage, ecological and health risk assessment, economics, statistics, remote sensing, modelling of the transport of airborne pollutants, epidemiology, toxicology, demography, internal medicine, cardiovascular and pulmonary medicine, endocrinology, vascular medicine and haematology, reproductive health, mental health, orthopaedic surgery, psychiatry, prosthetic devices, infant and child health, oncology and health care economics.[6]

This list of the fields of expertise that were necessary to understand the environmental consequences of war illustrates both the complexity of the task and the advisors that can help prosecutors, defense counsel, and judiciary do their jobs. The respondent in the UNCC cases also availed itself of an advisory team "comprised of a large number of scientists, engineers, and technical experts from a range of disciplines",[7] as did the claimants.

As environmental war crimes are a new territory, it is all the more important to adopt appropriate practices for investigation and prosecution.

How to consider environmental crimes when putting into practice the principle of complementarity and engaging in international cooperation: Parallel proceedings

Although complementarity has been most often discussed in the ICC context as the respective roles of national courts taking responsibility for criminal prosecution and the ICC acting when national courts do not, parallel civil and criminal proceedings are a related and important matter that also can be discussed in the policy paper as needing a complementary—or perhaps cooperative and coordinated—approach.

The ICC has previously committed to "combining the activities of the Court and national jurisdictions within a complementary system of criminal justice"; promising to "encourage genuine national proceedings by relevant States with jurisdiction", "to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources … land grabbing or the destruction of the environment," and "endorses the role that can be played by truth seeking

[6] UNCC, Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "F4" Claims, S/AC.26/2005/10, para. 88. UNCC official documents are available from the UN Dag Hammerskjöld Library.

[7] Larraine Wilde, Scientific and Technical Advice, in GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: ENVIRONMENTAL LIABILITY (C.R. Payne & P.H. Sand, eds, Oxford University Press, 2011).

mechanisms, reparations programs …".[8] These principles of complementarity, support, and cooperation should be addressed in the policy paper, taking into account criminal, civil, national, and international proceedings.

The policy paper should address evidentiary and procedural approaches to litigating parallel criminal and civil, international, and national cases addressing the same set of facts. Cooperation between criminal and civil investigators within a national government is recognized to be important to achieve the maximum accountability and remedies available under different applicable laws. The circumstances of international judicial bodies and various national courts are significantly more complex, but no less important. The approach of one court to matters such as preservation of evidence, collection of evidence, managing sources of evidence including taking testimony, public sharing of information, and characterization of elements of a case may affect the outcome of one or more other court's activity; appropriate coordination to the fullest extent appropriate to the case and permissible under relevant law will enhance the outcome for the international rule of law and for the international community.

Practitioners in these four types of proceedings have well-learned approaches shaped by the legal system they work within; for optimal outcomes, they need to respect the other systems that are also designed to provide the rule of law in the most horrific circumstances humanity faces.

Reparations

The policy paper should identify reparations. Environmental harm is qualitatively different from harm to civilian objects such as buildings, though it may include commercialized components of the environment such as crops and soil or cultural landscape, because ecosystem components are generally not interchangeable. Reparations are needed to support the recovery of essential earth systems such as freshwater, clean and productive soil, healthy marine waters, and biodiversity that the post-conflict population will rely on. Declaratory remedies stating that the defendant committed the crime are important for impunity, for developing a historic record, and for building social norms recognizing the value of the environment, but they are not sufficient. Similarly, financial transfers do not, in and of themselves, recognize the common interest of other States in the restoration of the environment and the serious harm to those interests inflicted by war crimes. Financial compensation can be a tool for restoring the environment when the judicial process directs that it be used to restore the environment that was harmed or to provide equivalent ecosystem services and environmental qualities.[9] The reparations available through the ICC and the Trust Fund for Victims may complement other sources of funds for reparations.[10] In kind contributions to restoration could also be considered, and in some circumstances joint reconstruction might contribute to peacebuilding.

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[8] ICC-Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, (15 September 2016), para. 7.

[9] See C.R. Payne, UNCC Follow-up Programme in GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: ENVIRONMENTAL LIABILITY (C.R. Payne & P.H. Sand, eds, Oxford University Press, 2011).

[10] Second report of the Special Rapporteur (71st session of the ILC (2019)), A/CN.4/728 (27 March 2019) para. 64.