Comment on OTP Environmental Crimes Policy

"Taking an environmentally-protective approach"

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Overview

Detailed doctrinal guidance relevant to this call for submissions is set out in the recent book: Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (Cambridge University Press, 2022). The present submission provides updates on pertinent legal developments since the writing of that book, as well as exploring issues that are closely linked with these developments or otherwise relevant to the International Criminal Court (ICC) Office of the Prosecutor's (OTP) Environmental Crimes Policy. Its contents are divided into 4 sections:

- (i) An environmentally-protective approach to the ICC legal framework;
- (ii) New jurisprudence from the Colombian Special Jurisdiction for Peace;
- (iii) Defining the natural environment;
- (iv) Investigating environmental harm.

(i) An environmentally-protective approach to the ICC legal framework

It is important that an environmentally-protective approach is taken to the reading of the Rome Statute and other components of the ICC's governing legal framework. This should not be substitutive of the Court's anthropocentric orientation, but instead complementary to it.

Adopting an environmentally-protective approach entails two facets. First, from the legal perspective, established principles of international environmental law should be applied, where appropriate, in accordance with Article 21(1)(b) of the Rome Statute. Relevant principles include the precautionary principle, the preventive principle, the polluter pays principle, and the principle of intergenerational equity.[2]

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.

As a further example, the range of organisational victims under Rule 85(b) should be interpreted to encompass *inter alia* organisations safeguarding environmentally significant locations. Such organisations can qualify as "organizations or institutions that have sustained

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[2] See generally, Gillett (2022), pp. 170-174.

direct harm to any of their property which is dedicated to religion, *education*, art or *science or charitable purposes*, and to their historic monuments, hospitals and other places and objects for humanitarian purposes" (emphasis added). When demonstrating that the environmental facet was the "property" of the organisation, the predicate concept of "ownership" should be given a broad reading, encompassing *de jure* and *de facto* forms of control, as well as concepts of ownership according to customary laws of the affected communities.[3] On this environmentally-protective approach, a trust or similar charitable, educational or scientific organisation, which is responsible for safeguarding an area in which environmental facets are damaged, should be eligible to receive victim status under Rule 85(b).

An environmentally-protective approach would also encompass environmentally protective principles, which have been recognised in the context of related bodies of law such as international humanitarian law. For example, in relation to the crime of pillaging, the "property" set out under the Elements of Crimes for this crime, should include "property constituting part of the natural environment".[4] Such an approach mitigates the risk of invisibilizing environmental harm committed during armed conflicts.

Second, from an operational perspective, training on environmental law and environmental protection should be made available to OTP personnel. This should not be restricted to those in trial and appeal teams, but also extend to investigators, analysts, and all those involved in collecting, assessing, or presenting (in court) evidence relating to potential crimes within the Court's jurisdiction. The training should include legal notions, environmental concepts, and relevant operational considerations, such as evidence gathering and investigation of environmental crimes, as discussed below in section (iv).

(ii) New jurisprudence from the Colombian Special Jurisdiction for Peace (JEP)

In recent years, the JEP has produced jurisprudence directly relevant to the prosecution of environmental harm under international criminal law. The JEP applies the Colombian Penal Code along with the norms of International Human Rights Law, International Humanitarian Law, and International Criminal Law.[5] The Colombian Constitutional Court has held that, when exercising its distinctive competence to prosecute the crimes under its jurisdiction, the JEP must harmonize these multiple legal regimes.[6]

In Macro Case No. 5, the JEP addressed environmental harm. The specific types of environmental harm in this case are: attacks impacting moors and high mountain ecosystems;

[3] ICC: *Prosecutor v. Dominic Ongwen*, ICC-02/04–01/15–1762-Red, Trial Judgment, 4 February 2021, para. 2766 (in the context of pillage "[t]he concept of private property and the right to property must be understood as encompassing not only the property of individuals, but also the communal property of the communities. It must also take into consideration the customary law of the community (i.e. practices on possession, titles and registration)". See, by analogy, Otto Triffterer and Kai Ambos (eds.), The Rome Statute of the International Criminal Court. A Commentary (3rd ed.) (C.H. Beck, Hart, Nomos, 2016), pp. 190-191 (taking a broad interpretation of "ownership" for the purposes of the crime of enslavement). By further analogy, the concept of being "lawfully present" for the purposes of deportation and forcible transfer is not strictly bound by national legal requirements, such as residency rights; ICTY: *Prosecutor v. Popovic´ et al.*, IT-05-88-T, 10 June 2010, para. 900; ICTY; *Prosecutor v. Đorđević*, No. IT-05-87/1-T, Judgment, Trial Chamber, 23 February 2011, paras. 1613, 1616.

[4] See ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, Geneva, 2020, Rule 14.

[5] See Interim Article 5 of the Colombian Constitution, as amended by Constitutional Act 01 of 2017 (granting the JEP jurisdiction over crimes committed before 1 December 2016 in the context of the conflict with the FARC-EP).

[6] Ruling C-674/17 (Constitutional Court of Colombia), decision (sentencia) of 14 November 2017.

illegal mining; the use of land to cultivate illicit crops; the installation of military camps in protected zones; and the placement of anti-personnel mines in natural locations.[7]

The JEP has held that this damage to the environment qualifies as multiple crimes within its jurisdiction. The JEP first found that these harms to the natural environment could be qualified as the war crime listed under Article 8(2)(e)(xii) of the Rome Statute (which applies in non-international armed conflicts): "[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict."[8] In doing so, it analysed how the environment constitutes "property" of an "adversary". Classifying elements of the environment as "property" has historic bases, for example in Article 55 of the Hague Regulations of 1907, which list forestries as property.[9] When classifying an environmental feature as "property" for the purpose of establishing a crime under international criminal law, this is not equivalent to a determination regarding the existence or extent of property rights and should not prejudice any rights of *bona fides* third parties who may have a legal interest in the property.

Importantly, the JEP also classified this environmental harm as meeting the elements under Article 164 of the Colombian Penal Code.[10] This provision is titled: "Destruction of the Environment". It prohibits "on the occasion and in the course of an armed conflict, [using] methods or means designed to cause widespread, long-term and severe damage to the natural environment."[11] Article 164 requires that (1) the method or means employed must be conceived to cause harm to the natural environment; and (2) the nature of that expected damage must be widespread, long-term and severe.[12] In assessing Article 164, the JEP noted that overlap with Article 8(2)(b)(iv) of the Rome Statute, but held that Article 164 can be autonomously applied in situations of non-international armed conflict.

The JEP's jurisprudence in Macro Case No. 5 also stands as an important precedent for environmental harm constituting a component of crimes against humanity. It considered the use of anti-personnel mines and other impacts on the environment were one of the patterns of conduct used to secure the perpetrators' control of territory and inhabitants and thereby were part of the attack on a civilian population.[13] It also held that the environmental harm was part of the conduct that violated fundamental rights, and therefore constituted the crime against humanity of persecution.[14]

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[7] JEP: República De Colombia, Jurisdicción Especial Para La Paz, Salas de Justicia Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de Los Hechos y Conductas, Caso 5, Auto, Srvr, No. 001 de 2023, 1 February 2023 ("JEP: Macro Case No. 5 Decision of 1 February 2023"), para. 500. On anti-personnel mines, the JEP noted that these particularly impacted sites that are sacred to indigenous and other special communities, including lagoons, moors, and riverbanks.

[8] JEP: Macro Case No. 5 Decision of 1 February 2023, paras. 1029-1030.

[9] Laws and Customs of War on Land (Hague IV); October 18, 1907, Article 55 ("[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.").

[10] JEP: Macro Case No. 5 Decision of 1 February 2023, para. 1057.

[11] Ramírez Gutiérrez, Camilo and Eslava, A. Sebastian Saavedra, "Protection of the Natural Environment Under International Humanitarian Law and International Criminal Law: The Case of the Special Jurisdiction for Peace in Colombia", *UCLA Journal of International Law and Foreign Affairs*, (2020) 25(1) (Ramírez and Eslava), citing Jurisdicción Especial para la Paz [JEP] [Special Jurisdiction of Peace], Sección de Apelación abril 3, 2019, Sentencia Interpretativa TP-SA-SENIT 1, para.19 (Colom.).

[12] Ramírez and Eslava (2020), p.138.

[13] JEP: Macro Case No. 5 Decision of 1 February 2023, para. 671(iv).

[14] JEP: Macro Case No. 5 Decision of 1 February 2023, para. 1005.

These findings underscore that environmental harm can be prosecuted as multiple crimes, and that several of these fall within the jurisdiction of the ICC, in addition to Article 8(2)(b)(iv) of the Rome Statute.

(iii) Defining the natural environment

There are many definitions of the "natural environment" in various branches of international law. For present purposes, it is emphasized that the Policy should adopt a sufficiently broad definition, encompassing all facets of the environment, including geographically extending it to outer space and temporally to cover the environment in which future generations will live.

On the geographic scope, it is widely accepted that international humanitarian law would apply to armed conflicts that occur in outer space (or extend to space).[15] In light of these authoritative sources, the ICRC has stated that '[international humanitarian law] applies to any military operations conducted as part of an armed conflict, including those occurring in outer space.'[16] Consistent with the approach in IHL, international criminal law is also potentially applicable in outer space. The Rome Statute does not indicate that it is terrestrially bound, and so the Court would have jurisdiction over crimes committed on space vessels registered to a State Party or by a national of a State Party. If a situation were referred by the United Nations Security Council, it would have jurisdiction irrespective of those conditions.

On the temporal scope, the Preamble of the Rome Statute encourages an inter-generational perspective. It states that the crimes under the International Criminal Court's jurisdiction "threaten the peace, security and well-being of the world" and that the Court has been established "for the sake of present and future generations". Moreover, principles of international environmental law, which are applicable when appropriate via Article 21(1)(b) of the Statute, as set out above, include inter-generational equity. This is best served by conceptualizing the environment to include its future state. Where there are crimes that risk impacting the environment in which future generations will live, this should be considering when assessing the gravity of those crimes for the purposes of admissibility. By analogy, in its 1986 *Nuclear Weapons Advisory Opinion*, the International Court of Justice approved a similarly broad temporal approach, noting that international humanitarian law applies to 'all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.'[17]

(iv) Investigating environmental harm

Environmental harm presents unique challenges for investigations. While many types of evidence and techniques of evidence-gathering that are used for anthropocentric crimes will also be relevant to environmental harm, the multi-factorial nature of environmental harm will

[15] See, e.g. Cassandra Steer and Dale Stephens, 'International Humanitarian Law and Its Application in Outer Space' (2020), in Cassandra Steer, and Matthew Hersch (eds), *War and Peace in Outer Space: Law, Policy, and Ethics* (Oxford Academic Press, 2020).

[16] ICRC (2021), *The Potential Human Cost of the Use of Weapons in Outer Space and the Protection Afforded by International Humanitarian Law: Position paper submitted by the International Committee of the Red Cross to the Secretary-General of the United Nations on the issues outlined in General Assembly Resolution 75/36* (available at https://www.icrc.org/en/document/potential-human-cost-outer-space-weaponization-ihl-protection), ('The applicability of IHL in outer space is confirmed by Article III of the Outer Space Treaty, which requires States to 'carry on activities in the exploration and use of outer space … in accordance with international law'. International law includes IHL').

[17] ICJ: *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, para. 86.

likely require emphasis on considerable scientific evidence. Such environmental harm is almost inevitably multi-causal,[18] requiring an intricate disentangling of the relative effects of various human and non-human causes.

Because of this, the involvement of environmental experts during investigations should be prioritized. Investigative measures should typically encompass a wide variety of evidence, such as physical samples, expert reports on environmental phenomena, longitudinal studies (where available and feasible), epidemiological studies, big data analysis, satellite imagery (and other remote sensing data), official documents and business records (including board and shareholder meetings, email exchanges, and financial records), along with witness testimony from victims and insiders, videos, photos, orders, military reports, and firing logs, among others.

Moreover, the environment is inherently dynamic. Weather patterns and the environment's own regenerative and substitutive nature may quickly remove or comingle evidence of environmental crimes with other natural patterns and cycles. To mitigate this, Article 56 measures to secure evidence that may be available for trial should be prioritized, such as *in situ* soil, water and air sampling, animal population sampling, searches and seizures of polluting companies and organisations, and the taking of evidence from populations living in natural sites who may lose that connection and potentially the opportunity to demonstrate it, as a result of ongoing crimes against the environment.

Additionally, some forms of serious environmental harm will arise from activities that regulated under domestic legal frameworks. The lack of proper approvals or certifications will be important evidence to address counterclaims and defences of lawfulness. Further, even where lawfulness under domestic law may be established, the domestic laws may conflict with international protections of the environment. Consequently, obtaining the domestic regulatory framework (applicable at the time of the perpetrator's conduct) will be important to analyse and address any such claims.

Bio:

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[18] See, e.g. Ricardo Pereira, "After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritisation: Towards an International Crime of Ecocide?" (2020) 31 *Criminal Law Forum*, pp. 202-203.