

Towards a new policy initiative to advance accountability for environmental crimes under the Rome Statute (RS)

Ideally, a fifth crime should be introduced in the RS to grant the ICC jurisdiction over a crime of ecocide, based on the IEP's proposed definition in 2021. However, given that this does not seem a realistic option, at least in the short to medium term, and, above all, that the ICC-OTP is asking for contributions within the current RS' framework, the following remarks will move within such current limits. Yet, the key point of departure is that the ICC can and must enhance its accuracy, fairness and effectiveness in investigating and prosecuting crimes that cause environmental harm, to contribute to the protection of nature in a holistic way.

Certainly, beyond human beings (it is often forgotten that we are integral part of nature), also non-human species, living and non-living resources that conform the environment and ultimately the planet as well as future generations of all species should be protected through Criminal law by the ICC and domestic courts, pursuing global and inter-generational justice. After the 2016 OTP-ICC policy paper (examined, among other scholars, by N. Bernaz, in *Journal of International Criminal Justice*, Vol. 15-3, 2017 and R. Pereira, in *Criminal Law Forum*, 2020-31, 179–224), the new OTP-ICC policy paper should go beyond and aim to strengthen the ICC's capacity to address environmental crimes as part of its broader mandate to promote justice, accountability, and the protection of human rights given that environmental crimes are “*of concern to the international community*” as well as “*threaten the peace, security and well-being of the world*” (RS Preamble).

I have the honor to make the following remarks in reply to some of the specific questions posed by the OTP-ICC within its recent announcement about a new policy initiative to advance accountability for environmental crimes.

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

In this regard, it seems crucial:

- On the one hand, to define environmental crimes providing a comprehensive description within the limits of the RS as a kind of “*the most serious crimes of international concern*” (art.1 RS). This could allow to fill gaps of the RS and overcome inertias. Thus, a crime of ecocide of *anthropocentric base* could be disentangled, clarified/ascertained, and strengthened (as a previous indispensable stage to better guarantee further investigations and prosecutions by the ICC regarding behaviors frequently intertwined with it). Therefore, a comprehensive description should:
 - o Be interconnected with three of the four crimes within the current jurisdictional reach of the Court, i.e.: war crimes, crimes against humanity or/and genocide.
 - o Set up clarifications regarding thresholds in terms of severity, scale, and impact on ecosystems (additional but -only- complementary to those which are already explicitly included in the definition of

- genocide, crimes against humanity and war crimes) which can be sufficient to amount to ecocide.
 - Highlight the significant harm to human health, livelihoods, and sustainable development, including its potential to undermine peace and security as well as their negative impact on both present and future generations.
- On the other hand, to prioritize the following specific types of environmental crimes which may amount to ecocide (non-exhaustive list):
 - Large-scale destruction of habitats or threatening vulnerable populations such as indigenous peoples or other communities at risk.
 - Illegal wildlife trafficking or trade such as smuggling, trading, or exploiting endangered species or their parts.
 - Deforestation (large-scale logging or clearing of forests without proper authorization, leading to ecological imbalances and loss of biodiversity).
 - Pillage of natural resources.
 - Illegal mining (unauthorized extraction of minerals and resources that can lead to habitat destruction, soil and water contamination and harm for local communities).
 - Land degradation (practices such as illegal mining, soil erosion, or unsustainable agriculture leading to the degradation of land and loss of fertility).
 - Ocean and sea pollution (discharge of pollutants, such as oil spills or dumping of toxic waste).
 - Watercourses pollution (*idem*).
 - Destruction of wells, dams, or large water reserves.
 - Illegal fishing (overfishing, using destructive fishing methods, or fishing in protected areas, leading to depletion of living resources and harming ecosystems).
 - Chemical pollution (release of harmful chemicals into the environment, causing pollution of air, water, or soil and endangering human health and ecosystems).
 - Dumping of hazardous waste (illegal disposal of toxic substances, such as industrial chemicals that pose serious health and environmental risks).
 - Land-grabbing involving displacement of communities, etc.

Additionally, it could be explored the convenience of using certain cross-categories (e.g. “*urbicide*”; “*environcide*” -Kreike-, etc.). or even groups of grave crimes (e.g. *crimes against biodiversity*; “*pollution crimes*”; “*crimes against animality*”, etc.).

Moreover, the *Principles on the Protection of the environment in relation to armed conflicts* should be considered since they have been already adopted by the ILC (PERAC, 2022) and the UNGA has taken note of them and brought them “*to the attention of States, international organizations and all who may be called upon to deal with the subject*” (Res 77/104, 7 Dec. 2022). Despite PERAC does not include specific provisions on crimes’ content, it does contain several relevant principles and elements on diverse strategic issues that the ICC must consider and integrate.

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

Some of these following practices should or could be considered:

- Concerning **definition, classification of crimes, and jurisdictional criteria**, a mixed approach should be used, i.e. combining general and specific perspectives (as recommended above), to embrace and systematize the most relevant environmental crimes (through a non-exhaustive list of specific crimes that result in environmental damage within the ICC's legal framework) in a consistent manner, including the key criteria that determine the severity and scale required.
- Regarding **truth and investigation**, it seems crucial to better work on scrutinizing all the facts linked with all the elements of the environmental crimes in line with the art. 54.1.a of the RS. To this end, it is worth undertaking/improving:
 - o Cooperation and information sharing: Foster strategic collaboration with significant entities and individuals to share important info and gather evidence. Therefore, it seems crucial ensure/strengthen collaboration with
 - Relevant *international bodies*, being UNEP the main one in the intergovernmental sphere.
 - *Hybrid or singular entities*, in particular the IUCN and the ICRC.
 - *NGOs* such as Amnesty International, CEOBS, HRW, ICEL, PAX, Stop Ecocide, among others.
 - *States* (those *affected* or otherwise concerned).
 - *Experts*.
 - o Development of environmental specialized units within the ICC (devoted to the investigation and prosecution of environmental crimes), equipped with expertise in environmental law, forensic science, ecological impacts, transitional justice, etc.
 - o Leverage of remote sensing technologies, satellite imagery, and geographic information systems to monitor environmental damage and gather evidence (through own and third entities' means via memoranda of understanding or agreements).
 - o Expert testimony: Engage qualified environmental experts as witnesses to provide testimony on the ecological impact of the crimes concerned...
- With regards to **victims**:
 - o Facilitate meaningful participation of affected communities and individuals in the investigative and judicial processes, ensuring their voices are heard...
 - o Consider restorative justice approaches that, in addition to punitive judgements, can somehow promote ecosystems reparation and compensation of affected communities.
- In general, it seems decisive to invest in **capacity building for ICC staff, national authorities, and legal professionals** in member States, providing training on investigating and prosecuting cases involving environmental damage.
- It is important to **strengthen the establishment of legal precedents** and jurisprudence on environmental crimes, clarifying the responsibilities of individuals, corporations, and states for actions that lead to significant environmental damage.

- And finally, it seems vital to **raise awareness** about the link between environmental damage and international crimes, both within legal circles and among the public, to get more support for enforcement efforts; **maintain/improve transparency** in ICC processes related to environmental crimes, including **public access to information and accountability mechanisms**; and **report on outcomes and lessons learned**.

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