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15 March 2024

Mr Karim A.A. Khan KC
Prosecutor
International Criminal Court
By email: OTP.Policies@icc-cpi.int

Comment on OTP Environmental Crimes Policy

Dear Mr Prosecutor:

We refer to the recent press release from the International Criminal Court (**ICC**) regarding the forthcoming Environmental Crimes Policy.

The International Bar Association (**IBA**) thanks the Office of the Prosecutor (**OTP**) for the opportunity to provide comments during the stakeholder engagement process and looks forward to contributing to the second round of public consultations and participating in roundtable discussions to address key pillars of the emerging policy.

Background of the IBA

Established in 1947, the International Bar Association (**IBA**) is the world's leading international organisation of legal practitioners, bar associations and law societies. The IBA influences the development of international law and shapes the future of the legal profession throughout the world. It has a membership of over 55,000 individual lawyers and 195 bar associations and law societies spanning all continents.

The IBA has written extensively on climate justice and is involved in ongoing projects regarding international criminal law. In 2014 the IBA published a report titled [Achieving Justice and Human Rights in an Era of Climate Disruption](#).¹ In 2020, the [Model Statute for Proceedings Challenging Government Failure to Act on Climate Change](#) was released. In May 2020 the IBA published the [Climate Crisis Statement](#), stating that 'the legal profession must be prepared to play a leading role in maintaining and strengthening the rule of law and supporting responsible, enlightened governance in an era marked by a climate crisis'. This Statement included guidance for law associations globally and demonstrates a commitment to collaborate actively with others for the greatest impact in addressing the climate crisis, including clients, regulators, bar associations, other professional bodies and legal networks focused on ameliorating the climate crisis.

In 2021 the IBA was admitted by the Conference of the Parties as an observer organisation to the UN Framework Convention on Climate Change (UNFCCC) process. Since then, the IBA jointly held two events at COP27 and COP28, collectively engaged in the 2022 and 2023 Climate Law and Governance Day and held a side session at the Bonn Climate Change Conference in June 2023. These events provided valuable

¹ See page 124 regarding proposed criminalising certain acts as crimes against future generations and conferring jurisdiction on both domestic courts and the International Criminal Court to prosecute these crimes.

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networking opportunities for legal practitioners, law associations, law firms, and academic institutions to exchange information, best practices, and ideas on key issues facing the legal profession and the planet.

The IBA and the ICC

The IBA has been a longstanding supporter of the ICC and engages with the Court and with States Parties to support the development of international criminal law. The IBA International Criminal Court & International Criminal Law (ICC & ICL) Programme, based in The Hague, works to increase cooperation with and support for the ICC and other accountability efforts, with the goal of strengthening the Rome Statute system globally and achieving fair, effective, and accessible justice for victims of genocide, crimes against humanity, war crimes, and aggression. The Programme consults and engages with the Office of the Prosecutor, Presidency, and Registry of the ICC, and with State representatives, civil society organisations, academics and international lawyers.

The IBA ICC & ICL Programme is the IBA's representative to official bodies of the ICC, including the Assembly of States Parties, and is the IBA's representative to the NGO Coalition for the ICC. The Programme has participated in numerous consultations on policy matters at the ICC, including the Independent Expert Review, and makes annual recommendations to the ASP. Since its establishment in 2005, the IBA ICC & ICL Programme has contributed to the development of international criminal justice through monitoring and analysing issues related to fairness and equality of arms at the ICC, and through conducting outreach to deepen understanding of the place of the ICC within the broader landscape of international justice and in particular contexts. For programme reports and activities, please see: <https://www.ibanet.org/ICC-ICL-Programme>.

IBA Comment on OTP Environmental Crimes Policy

Please see enclosed the comments from the ICC & ICL Programme of the IBA, including:

- Dr Mark Ellis, IBA Executive Director
- Kate Orlovsky, Director, IBA ICC & ICL Programme
- Lara Douvartzidis, Project Lawyer, IBA Legal Policy and Research Unit

Should you have any questions, please do not hesitate to contact us.

Kind regards,

Dr Mark Ellis, Executive Director, IBA

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1. Introduction

- 1.1. Criminalisation of offenses related to the environment has been discussed since the preparatory stages of the Rome Statute. The issue was on the agenda of the UN International Law Commission in the 1990s when the Commission was working on the update of the Draft Code of Crimes against the Peace and Security of Mankind, and environmental damage was criminalised in the context of war crimes under Article 20 of the Draft Code, the basis of Article 8(2)(b)(iv) of the Rome Statute.
- 1.2. While the possibility to define ecocide as a separate crime was considered by the Commission, the proposal was dropped during the drafting of the Rome Statute. However, there has been continued and growing momentum towards including ecocide as a fifth crime under the jurisdiction of the Court. In 2021, an Independent Expert Panel composed of practitioners and civil society leaders developed a legal [definition](#) of ecocide with the aim of offering it for a formal amendment for eventual submission by a State Party. This momentum and the high-level recognition of the crime of ecocide, including the adoption of ecocide in the domestic law of numerous states,² illustrates the consensus building around the need to prioritise crimes against the environment and prosecute them at the highest level.
- 1.3. Taking into account the importance of offenses related to the environment, in 2016 the OTP published a Policy Paper on Case Selection and Prioritisation, stating that *'the Office will give 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.'* In the most recent Strategic Plan of the OTP, the Office reiterates that during the period of implementation, the Office will develop policies addressing environmental crime.

² Ecocide Law, Ecocide / serious environmental crimes in national jurisdictions, <https://ecocidelaw.com/existing-ecocide-laws/>

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1.4. Consistent with the recognition of the gravity of crimes against the environment in international criminal law and domestic criminal law, other international and regional bodies have similarly taken steps to recognise international obligations around the environment. In 2022 the UN General Assembly formally recognised the right to a healthy environment as a standalone right, stating:

- 1. Recognizes the right to a clean, healthy and sustainable environment as a human right;*
- 2. Notes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law;*
- 3. Affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law*
- 4. Calls upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.*

1.5. This right is intrinsic to the right to life, the most fundamental of all human rights and non-derogable even in times of war.³ Additionally, the UN General Assembly has also recognised the importance of the protection of the environment in times of armed conflict.⁴

³ UN General Assembly Resolution 76/300 and Human Rights Council Resolution 48/13 (adopted 26 July 2022); Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on Business, planetary boundaries, and the right to a clean, healthy and sustainable environment A/HRC/37/59 A/HRC/55/43 (2 January 2024) <https://documents.un.org/doc/undoc/gen/g23/266/63/pdf/g2326663.pdf?token=RDUhMqCUUO9EPsCn6c&fe=true>; Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment A/HRC/37/59 (24 January 2018).

⁴ See Principle 9 of the UNGA Resolution 77/104 Protection of the environment in relation to armed conflicts, A/RES/77/104 (adopted 7 December 2022): [ICC Legal Tools Database | UNGA Resolution 77/104 Protection of the environment in relation to armed conflicts \(legal-tools.org\)](#).

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- 1.6. The EU has also recently issued a Directive on Environmental Crime which establishes minimum rules about the definition of criminal offences and penalties to protect the environment more effectively, and measures to prevent and combat environmental crime and to effectively enforce Union environmental law. The Directive includes environmental crimes against ecosystems, which is defined in Article 2 of the Directive as “*a dynamic complex of plant, animal, fungi and microorganism communities and their non-living environment, interacting as a functional unit, and includes habitat types, habitats of species and species populations.*”⁵
- 1.7. With these shifts the IBA welcomes the OTP’s willingness via the policy paper to rethink environmental damage and its effects on humans. The IBA welcomes the opportunity to revisit how the Rome Statute can be interpreted to consider environmental damage as a tool by which to commit crimes and to violate human rights and how that violation can be a crime under the Rome Statute.
- 1.8. As a preliminary matter, the answers below do not rely on a single definition of the term ‘environmental damage’. **We recommend that, as an outcome of the consultation process, the OTP Policy adopt a clear definition that includes reference to the scope of damage.** For example, does environmental damage include damage to land, water (including marine waters), protected species and natural habitats, and sites of special interest or significance? We further recommend that the policy confirm that the environmental damage need not be ‘widespread, long-term and severe’ as is the case in Article 8(2)(b)(iv).

⁵ [TA \(squarespace.com\)](https://www.squarespace.com).

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

2.1. Referring to Article 5 of the Rome Statute, we recommend the following crimes be included because they *could* be crimes committed by means of, or crimes that result in, environmental damage:

2.1.1. **Genocide:** This could be committed *by means of* environmental damage or as a crime *resulting in* environmental damage. For example, access to food and water sources on land that is purposefully destroyed or set fire to or bombed can be partially or wholly destroyed due to said environmental damage, which, without aid, would cause death (Article 6(a)) and/or serious bodily or mental harm to members of the group (Article 6(b)). Environmental degradation and damage can be key 'conditions of life' that brings about the physical destruction in whole or in part of a national, ethnical, racial or religious group (Article 6(c)).

2.1.2. **Crimes against humanity:** Acts that cause environmental damage and degradation can be considered crimes against humanity by reference to Article 7(1)(b), Article 7(1)(d) and Article 7(1)(k), being extermination, deportation or forcible transfer of population, and other inhumane acts of a similar character. The existence of environmental damage has the potential to cause extermination due to the causality between the environmental damage and the deprivation of access to food and water. For example, the systemic burning, bombing or seizure of crops, farmland, or arable land means that populations are either left to starve and forced to relocate for food and water.⁶ Regarding the latter, where there are other inhumane acts of a similar character intentionally causing great suffering (ie due to causing environmental damage), or serious injury to body or to mental or physical health, this has the potential to have far reaching effects. There may also

⁶ Sergio Peçanha and Jeremy White, Satellite Images Show More Than 200 Rohingya Villages Burned in Myanmar, N.Y. TIMES (Sept. 18, 2017), https://www.nytimes.com/interactive/2017/09/18/world/asia/rohingya-villages.html?_r=0 [<http://perma.cc/6F45-68YJ>].



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be cases where environmental damage is the cause of serious injury to mental health of a person (or persons – for example indigenous populations who have special connection to ancestral lands).

2.1.3. **War crimes:** Crimes that are committed by means of, or that result in, environmental damage have the potential to cause pollution and contamination, which can have long lasting and significant effects on a population's health. The Policy Paper should consider including:

- Article 8(2)(a)(iii), being acts that *wilfully* cause great suffering, or serious injury to body **or** health.

While there is a specific crime that provides redress for intentionally launching an attack that will cause widespread, long-term and severe damage to the environment (Article 8(2)(b)(iv), the scope of the crime is quite small as there seems to be a high threshold of harm to the environment. As such, this provision is inadequate to address the problem.⁷

The following acts may also be committed by means of, or result in, environmental damage during international armed conflict and are crimes recommended for the Policy Paper under Article 8(2)(e) for other serious violations of the laws and customs applicable in armed conflicts not of an international character:

- Article 8(2)(b)(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- Article 8(2)(b)(iv) regarding severe damage to the natural environment

⁷ Steven Freeland, *Crimes against the environment and international criminal law*, IBA War Crimes Committee, accessed 4 March 2024: <https://www.ibanet.org/article/6D983066-BCDB-481A-8C79-BD47362BDB49>.



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- Article 8(2)(b)(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war⁸
- Article 8(2)(b)(xvi) Pillaging a town or place, even when taken by assault
- Article 8(2)(b)(xvii) Employing poison or poisoned weapons
- Article 8(2)(b)(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices
- Article 8(2)(b)(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.

2.1.4. **Crimes of aggression:** Under Article 8(2) an act of aggression such as the blockage of ports or an attack by armed forces on the land, sea or air forces or marine and air fleets of another State could constitute crimes that result in environmental damage. Under Article 8(1) such acts of aggression that result in environmental damage may constitute a crime of aggression depending on the factual circumstances of the execution of said crime by a person in a position effectively to exercise control over or to direct the political or military action of a State.

⁸ See [The Prosecutor v Dominic Ongwen](#) (Sentence) ICC-02/04-01/15 (6 May 2021) at paragraph 242: "Turning to the war crime of destruction of property (Count 35), the Chamber observes that it is, like pillaging, a crime against the right to property. Similar considerations apply in the abstract as expressed above with respect to pillaging as a war crime, in that the gravity of the crime is variable and depends also on the consequences for the victims who were deprived of their property.⁴⁶² Further, the Chamber is of the view that in addition to the deprivation of the owner of the right of property, **destruction of property may also have additional gravity depending on the de facto economic, social, cultural or environmental function of the property destroyed.**"



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2.2. The crimes listed above are not intended to be an exhaustive list of all crimes that could be captured by the impending policy, however they are arguably more relevant to the policy in question.

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

3.1. Understanding and applying various modes of participation under Article 25 of the Rome Statute will depend on the case at hand and whether the evidence supports an argument of participation as a principal offender (the perpetrator) or as a secondary offender (that of complicity). Acknowledging that the ICC does not recognise joint criminal enterprise *per se*, the Rome Statute has incorporated a different form of common purpose liability called co-perpetration (Article 25(3)(a)), indirect co-perpetration (Article 25(3)(a)) and other forms of common purpose liability (Article 25(3)(d)) that may be relevant to the factual circumstances surrounding the alleged crimes.

3.2. Elements of each mode of liability described in the following sections must be proven in addition to the elements of the particular substantive crimes being charged and their chapeau requirements. Modes of liability can be proven “by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused”.

3.3. There is a tension between international criminal law and environmental law with respect to *mens rea*. Often in domestic settings, environmental crimes are strict liability offences, meaning that intention is not relevant to the commission and prosecution of the crime. This directly contrasts with Article 30 of the Rome Statute which requires that:

“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”

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3.4. This tension would exist where the offence of environmental damage is a crime in and of itself – an environmental crime. In this case, the OTP is seeking guidance on how to investigate and prosecute existing crimes in the Rome Statute that *could* be committed by means of, or that result in, environmental damage. With respect to Genocide, the *mens rea* element relates to proof of specific genocidal intent ‘to destroy, in whole or in part, a national, ethnical, racial or religious group’. Environmental damage can be the means in which to commit this crime – rather than direct killings of a population, stripping them of their land, food or water (‘conditions of life’) can lead to destruction of the affected group – proving that intention goes beyond the environmental damage itself.

3.5. Ideally, the wording of the war crime contained in Article 8(2)(b)(iv) would be amended to lower the threshold somewhat. Under this crime, the terms ‘widespread, long term and severe’ and ‘clearly excessive’ would be removed such that ‘damage to the natural environment’ could have a better chance at being utilised as a provision. Even with that proposed amendment, this crime only applies where environmental damage occurs in the course of international conduct, which effectively precludes cases where environmental damage occurs during peacetime or in the course of non-international conflict.

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

4.1. At appropriate stages of a prosecution, various types of evidence will be collected including from relevant environmental/subject matter experts to determine the presence and/or severity of environmental damage, and to elucidate findings as to its probable causes and relevance to the alleged crime. Some environmental damage may be obvious to the naked eye; however issues of contamination or pollution may not be, and specialised testing may be required to determine and interpret those findings.

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4.2. The OTP may wish to take into consideration expert evidence procedures of national courts, including specialised environmental courts for practice directions/notes or judges handbooks on how best to define environmental damage and conduct efficient and timely prosecutions in relation to environmental crimes.⁹ Additionally, research could be undertaken to survey and summarise best practice examples of environmental agencies who regularly investigate and prosecute environmental crimes including crimes related to environmental damage.

4.3. We note that the OTP will need to conduct capacity building and training on understanding environmental damage with respect to assigned crimes under the Rome Statute. We recommend that the OTP take structural and procedural measures to ensure internal expertise and support is available (see eg paras 93-98 of the 2023 OTP Policy on Gender Based Crimes).

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

5.1. The principle of complementarity applies to the existing range of crimes under the Rome Statute that environmental damage would fall within. Where there are crimes that result in environmental damage or where alleged crimes under the Rome Statute have an environmental aspect to them, the OTP may choose to intervene if there is a clear case of unwillingness or inability for that State to genuinely prosecute.

5.2. Absent of any new prosecutions that relevantly enliven the forthcoming environmental crime policy, the OTP could step into a leadership role to support States in understanding how environmental damage is linked to international crimes. The OTP should continue its interactions with States to support investigations and prosecutions and improve anti-impunity strategies while

⁹ Land and Environment Court of New South Wales, *Practice Note – Class 5 Proceedings* https://lec.nsw.gov.au/documents/practice-notes/Practice_Note_Class_5_Proceedings_10.12.20.pdf.



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providing education on this topic. It may be useful to consult with states on its capabilities to assess environmental damage and resources needed to carry out such investigations alongside existing prosecutions (if relevant). The proposed Complementarity and Cooperation Forum could provide an opportunity to further exchange with states on domestic prosecution of environmental damage.¹⁰

5.3. Additionally, the ICC should remain vigilant and ensure that follow-up steps are taken where appropriate and to exercise its jurisdiction and bolster alleged crimes under the Rome Statute by considering the role of environmental damage to said allegations.

¹⁰ International Criminal Court, Draft Policy on Complementarity and Cooperation (September 2023) https://www.icc-cpi.int/sites/default/files/2023-10/DRAFT-Complementarity-and-Cooperation-Policy-Paper_September-2023%20%281%29.pdf.

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