

To: Office of the Prosecutor of the
International Criminal Court

Attention: Proposed Policy on
Environment Crime

By email: OTP.Policies@icc-cpi.int

By post: n/a



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INTRODUCTION

Glossary

1. Environment: The sum total of all the living and non-living elements and their effects that influence human life.
2. Environmental humanitarian atrocity: A humanitarian atrocity (severe and widespread suffering) characterised by its conduct or harm having an environmental character.
3. Climate systems: The atmosphere, lithosphere, hydrosphere, cryosphere and biosphere.

Who is SFCS?

1. Students for Climate Solutions (SFCS) is a student organisation committed to addressing environmental and climatic harm through policy and strategic litigation.¹
2. In 2022, SFCS filed an Article 15 communication with the Office of the Prosecutor (OTP) requesting the OTP open an investigation into the senior executives of BP (the BP

¹ <https://www.studentsforclimatesolutions.org.nz/> at 'home page'.

Submission) alleging they had committed a crime against humanity for knowingly causing and perpetuating climate change.²

3. SFCS believes in utilising the tools of international criminal and humanitarian law to bring about justice and accountability to the climate crisis and severe environmental harm and degradation.

The Importance of Environmental Crimes

4. Environmental harm is now widely recognised as being capable of attracting criminal sanction, with the active development of domestic criminal and international jurisprudence on the issue.³
5. SFCS welcomes and encourages the OTP's development of a policy on the environment and appreciates the acknowledgement of the unique role civil society organisations have in shaping this policy.
6. Environmental harm has local, regional and global implications which make its definition and subsequent prosecution complex. We believe the OTP is uniquely placed to address the various dimensions of environmental harm in the absence of adequate municipal legal protections.

The Nexus between Humanitarian Atrocities and the Environment

7. International Humanitarian Law (IHL) and International Criminal Law (ICL) are intimately related but distinct disciplines of the international legal framework. Environmental humanitarian atrocities are informed by both systems, meaning an understanding and appreciation of their interrelationship is required to adequately address their conduct and harm. The environment is therefore a tool and a medium that humanitarian atrocities occur on. Harm done to the environment is capable of being harm discussed as an act under the Rome Statute.
8. We submit that harm caused by different acts relating to the environment are capable of qualifying as harm attracting protection under Article 7(1)(k).

² News Article, NZ Students ask for Oil Company Execs to be Declared Criminals. (2022). <https://www.stuff.co.nz/environment/climate-news/130905413/nz-students-ask-for-oil-company-execs-to-be-declare-d-criminals>

³ Rob White: The criminalisation of environmental harm, Criminal Justice Matters, 74:1, 35-37 (2008) DOI: 10.1080/09627250802476817.

9. Article 7(1)(k) identifies “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” that are “committed as part of a widespread or systematic attack directed against any civilian population”⁴ as an enumerated act capable of qualifying as a crime against humanity. In the contexts of environmental harm, numerous acts are capable of this definition, including mass deforestation, the wide-scale burning of crops or pollution of waterways, and potentially acts of climate change that are able to be sufficiently proven to be caused by human influence, such as sea level rise.
10. This is because these acts are of a “similar character causing great suffering” given these communities face starvation, persecution, displacement and mental injury due to the commission of these acts.⁵ They also qualify as ‘widespread’ meaning the “large-scale nature of the attack and the number of targeted persons”⁶ or ‘systematic’ meaning “pursuant to or in furtherance of a State or organizational policy to commit such attack” which is conceptualised as “the organised nature of the acts of violence and the improbability of their random occurrence”.⁷
11. We submit that in accordance with identifying acts of environmental harm as acts capable of attracting protection under Article 7(1)(k), acts committed against indigenous persons and/or young persons are particularly relevant. This is due to the fact that these acts of environmental harm are frequently acts of resource exploitation at the expense of the

⁴ Article 7(1)

⁵ Pablo Fajardo Mendoza and Eduardo Bernabé Toledo “Communication Situation in Ecuador” (communication to the Office of the Prosecutor pursuant to art 15 of the Rome Statute, 23 October 2014); AllRise “Communication under Article 15 of the Rome Statute of the International Criminal Court regarding the Commission of Crimes Against Humanity against Environmental Dependents and Defenders in the Brazilian Legal Amazon from January 2019 to present, perpetrated by Brazilian President Jair Messias Bolsonaro and certain former and current principal actors of his administration” (communication to the Office of the Prosecutor pursuant to art 15 of the Rome Statute, 12 October 2021); and Students for Climate Solutions NZ and UK Youth Climate Coalition “Request to Open Investigations & Request for Reparation regarding the Crime Against Humanity of Climate Change” (communication to the Office of the Prosecutor pursuant to art 15 of the Rome Statute, 12 December 2022)

⁶ *Prosecutor v Ongwen (Judgment)*, ICC Trial Chamber, ICC-02/04-01/15-1762-Red, 04 February 2021, at [2681]; see also *Prosecutor v Bemba (Judgment)* ICC Trial Chamber, ICC-01/05-01/08-3343, 21 March 2016, at [163]; and *Prosecutor v Ntaganda (Judgment)* ICC Trial Chamber, ICC-01/04-02/06-2359, 08 July 2019, at [691].

⁷ *Prosecutor v Harun and Abd-Al-Rahman*, at [62]; *Prosecutor v Kordić & Čerkez (Appeal Judgment)* ICTY Appeal Chamber, IT-95-14/2-A, 17 December 2004, at [94]; and *Prosecutor v Blagojevic & Jokic (Judgment)* ICTY Trial Chamber, IT-02-60-T, 17 January 2005, at [545]-[546].

rights of those persons who rely on those environments for their subsistence and culture, and the degree to which these groups are harmed falls within the scope of the OTP.

Framing Environmental Crimes and the Rome Statute

Conceptions of Environmental Crime

12. Environmental crimes are not explicitly provided for in the Rome Statute insofar as damage to the environment per se is not criminalised.
13. Crimes within the Rome Statute scheme which have an environmental nexus can be framed in one of two ways. They are either acts of environmental damage that are in themselves a crime within the jurisdiction of the Court *or* are acts which themselves a crime within the jurisdiction which incidentally are caused by or result in environmental damage.
14. The first conception requires the act of environmental harm to be considered a criminal offence in its own right. This is not necessarily an obstacle in all cases, particularly for offences such as murder, extermination and persecution where the means of committing the offence is immaterial except that the acts (or “means of committing the offence”) must be shown to be causative of the result (i.e. death in the case of murder and extermination or the severe deprivation of fundamental rights on the basis of membership of a particular group in the case of persecution).
15. The second conception invokes little to no evidential burden with respect to the environmental nexus except where the environmental effects are relied on at sentencing as aggravating factors or where a charge might be challenged on admissibility grounds, particularly in relation to the gravity assessment. There might also be challenges with respect to the second conception where a state challenges a case on the basis of the principle of complementarity due to some of the effects having been managed through municipal environmental regulations or other non-criminal procedures.
16. The remainder of these submissions refer to the above conceptions. They shall be referred to as follows:
 - a. “First conception” or “causative conception”: where the act of environmental damage constitutes the alleged Rome Statute offending.

- b. “Second conception” or “incidental conception” where the act constituting the alleged Rome Statute offending incidentally is caused by or results in environmental damage.
- c. “Environmental crime(s)”, except where the context requires otherwise, refers to all crimes with an environmental nexus.

Rome Statute Crimes, the War-Nexus, and the Corporate Veil

- 17. The majority of these submissions focus on the role of the OTP in preventing impunity for environmental crimes in peacetime and crimes against humanity in particular.
- 18. The Rome Statute gives the Court jurisdiction of offending that occurs during war *and* with respect to the crime of genocide and crimes against humanity, outside of war (peace time).
- 19. These submissions note at the outset that art 7 of the Statute *pierces the corporate veil* and gives jurisdiction over both state, quasi-state and non-state actors including those in corporate settings.
- 20. It is noted that a large number of environmental crimes within the jurisdiction of the Court occur outside of wartime and are committed by non-state actors (although this does not detract from the crimes committed by state actors or during wartime).

SUBMISSIONS

Environmental Crimes within the Court’s Jurisdiction

War Crimes

- 21. Article 8(2)(b)(iv) is the only offence that makes specific reference to an environmental crime. It provides jurisdiction for the investigation and prosecution of an attack during international armed conflict causing “widespread, long-term and severe damage to the natural environment [...] of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”
- 22. The structure and text of the offence is substantially similar in terms to the crime against the environment proposed by the International Law Commission in the Draft Code of Crimes Against the Peace and Security of Mankind. The draft text was considered by Tomuschat who stated “massive interference with hazardous processes forming part of

the production patterns of industrialised societies would constitute the core substance of a provision governing crimes against the environment.”

23. Tomuschat argued the following acts might fall within the scope of the offence:⁸

- a. Scorched earth tactics [examples given: (1) the igniting of Kuwaiti oilfields by Iraqi troops; and (2) other scorched earth tactics resorted to by terrorists outside an armed conflict];⁹
- b. the sinking of fully loaded oil tankers with its well-known consequences for the marine environment [examples given: “To date, the disasters that have occurred—suffice it to mention the Exxon Valdez or more recently the Sea Empress—have resulted from human negligence. If, however, a leakage were produced deliberately, the international community would have to judge such an act as an attack on its collective interests...”];¹⁰
- c. “Any use of nuclear devices for criminal purposes by private gangs or other factions, in particular terrorist groups”;¹¹
- d. [Potentially] atmospheric testing of nuclear bombs or grenades (done today, with knowledge of the widespread and long-term impacts of human and natural health).¹²

24. He argued the following acts would likely not fall within the scope of the proposed crime against the environment:

- a. Harm to the environment by accumulation, where an infinite multitude of separate actions cause damage not individually, but conjunctively in their combination, and where all people contribute to some degree to the phenomenon [example given: the burning of fossil fuels (insofar as the “act” would be the emission of greenhouse gases)];¹³
- b. Matters of distribution of natural resources (as opposed to instances where such resources have been damaged) [example given: the diversion of international rivers or the reduction of the quantities of water carried by them];¹⁴

⁸ https://legal.un.org/ilc/documentation/english/ilc_xlviii_dc_crd3.pdf

⁹ At [47].

¹⁰ At [47].

¹¹ At [48].

¹² At [49].

¹³ At [45].

¹⁴ At [46].

- c. Underground nuclear testing;¹⁵ and
 - d. Acts likely to cause the extinction of individual species.¹⁶
25. With respect to art 8(2)(b)(iv), the OTP is encouraged to consider the scope of the proposed crime against the environment as a starting point for the types of acts which are within the scope of art 8 of the Rome Statute. That starting point should then be read in the context of developments in international humanitarian and criminal law, international environmental law, and customary international law, particularly with respect to the law of armed conflict.
26. It is submitted war crimes involving the “widespread, long-term and severe damage to the natural environment” should be treated as significantly aggravated given the continuing nature of the harm suffered by the victims (and in certain circumstances the regional and global communities as a whole) of the offending.
27. The OTP should be careful in considering the law in respect of the element that an attack must be “clearly excessive in relation to the concrete and direct overall military advantage anticipated” and not treat environmental damage as incidental to the nature of war.
28. Further, the jurisprudence (including that from the International Military Tribunals, particularly the *Hostages* case regarding scorched-earth tactics in Finmark) should be read in the context of international customary law and the law of armed conflict at the time of those decisions. The international community as a whole has since developed extensive legal regimes concerning the protection, management and sanctions for the destruction of the natural environment. International criminal law with respect to the law of armed conflict should ensure it develops consistently with the rest of the international legal regime.

Crimes Against Humanity

General Rules of Interpretation

29. The text of the Rome Statute must be strictly constructed and be interpreted in accordance with Part 3 of the Statute. It must further be interpreted in accordance with

¹⁵ https://legal.un.org/ilc/documentation/english/ilc_xlviii_dc_crd3.pdf at [50].

¹⁶ https://legal.un.org/ilc/documentation/english/ilc_xlviii_dc_crd3.pdf at [29].

the general rules of treaties provided by the Vienna Convention on the Law of Treaties 1969. This affects the Court's jurisdiction over persons, across time and with respect to locality.

30. The restrictions on interpretation affect the characterisation of certain environmental acts as crimes within the jurisdiction of the Court. The rules have the effect of limiting the sorts of environmental crimes, particularly those which fall within the causative conception of environmental crime.

Jurisdiction - Subject Matter

Introduction

31. While every case must be considered on its facts, SFCS submits the following four crimes against humanity are most likely to include acts with an environmental nexus:
 - a. Article 7(1)(a)-(b): Murder and Extermination;
 - b. Article 7(1)(d): Forced Displacement and Deportation;
 - c. Article 7(1)(h): Persecution; and
 - d. Article 7(1)(k): Other Inhumane Acts.
32. First conception crimes require a causation nexus between the act affecting the environment and the corresponding harm suffered by the victims of the crime. In the context of the above listed crimes, there are a number of acts which clearly offer a nexus with environmental acts.
33. With respect to murder and extermination, the primary issue is establishing the requisite mens rea standard for the perpetrators. The question of factual causation simply requires a link between the human act and the environmental humanitarian atrocity.
34. The more challenging but relevant offences are forced displacement and deportation, and persecution.
 - a. Forced displacement and deportation will require an assessment of whether any transfer was forced within the meaning of art 7(1)(k) and whether an act causing environmental degradation fits within the meaning of "expulsion or other coercive acts." In the context of localised cases of forced displacement the causative issues is less challenging, however, where the forced displacement is induced by the

regional or global impacts of coercive acts, there is a significantly more challenging causative nexus that must be established.

- b. Persecution is a particularly complex offence with respect to environmental crimes. While it is possible for any group to be persecuted based on the prohibited grounds, indigenous persons are particularly vulnerable to persecution by environmental crimes. The OTP is encouraged to consider explicitly the meaning of to be “severely deprived” of “fundamental rights” for the purposes of art 7(1)(h), particularly in relation to the rights of indigenous persons given their cultural, spiritual and often subsistential relation to their natural environment.
 - c. Furthermore, the OTP is encouraged to turn their mind to the issue of a group being “targeted”. In this context, SFCS submits the OTP should accept that the meaning of “target” should be broad and be read in light of art 30 which permits oblique intent.
35. The question of other inhumane acts is particularly complex and is addressed under a separate heading.

Brief Analysis of art 7

36. Any act alleged to be an offence must fit within the definition of one of the enumerated offences in art 7(1)(a)-(k) and satisfy the chapeau in art 7(1).
37. The chapeau states that "crime against humanity means any of the [enumerated] acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”
38. The chapeau is made of three separate elements which are each analysed separately. The first element is that the acts be committed “as part of a widespread or systematic attack”, the second element is that the “attack [be] directed against any civilian population” and the third element is that the perpetrator committed the acts “with knowledge of the attack”.

Widespread or Systematic Requirement

39. Part of the essence of crimes against humanity are that they form part of a widespread *or* systematic attack. The requirement is disjunctive.

40. With respect to the need for the attack to be systematic, it is noted it is a separate requirement to the element prescribed by art 7(2)(a), that an attack be “pursuant to or in furtherance of a State or organizational policy to commit such attack.”
41. The requisite degree of structure of the organisation is a question as to *who* was the perpetrator, and is separate to the analysis as to the nature or character of the offending.
42. Despite that, the Pre-Trial Chamber has held that “the existence of a State or organisational policy is an element from which the systematic nature can be inferred.”
43. The meaning of systematic refers to “the organised nature of the acts of violence and the improbability of their random occurrence.”
44. The Court looks to the evidence to infer the organised nature, looking to whether any attacks share a common pattern, are coordinated, and whether there are a series of acts contributing to the overall attack.
45. Further reference has been made to the “existence of “patterns of crimes” reflected in the non-accidental repetition of similar criminal conduct on a regular basis.”
46. With respect to the need for the attack to be “widespread”, it has been held to refer “to the large-scale nature of the attack and the number of targeted persons.”
47. Despite that, “the assessment of whether the attack is widespread is neither exclusively quantitative nor geographical, but must be carried out on the basis of all the relevant facts of the case.”
48. This requirement is strongly dependent on the facts of a specific case. There is little principle to consider which is specific to environmental crimes or the context of climate change.
49. It warrants comment that the question of the widespread character of an attack will likely limit the types of acts (in the context of climate change) to those that have ramifications across a broad geographical area.
50. Crimes with a nexus to the natural environment, potentially more so than other crimes, will likely require evidence as to the broad effect of the environmental act. It will be insufficient, except in rare situations, to show that a small neighbourhood has experienced the noxious effects of a certain behaviour.
51. However, despite the notion that the crimes must be of a widespread scale, the Court has previously accepted that acts which included the “abduction of hundreds of civilians”

amounted to crimes against humanity. The Court has also accepted attacks on a village that resulted in approximately 200 victims satisfied the widespread threshold.

52. The chapeau in art 7(1) requires that any crime against humanity be an “attack directed against a civilian population”. This element of the charge has attracted significant controversy regarding the extent to which it limits the scope of art 7. There are two key aspects to this element: firstly, what does it mean for an attack to be *directed* against a civilian population, and secondly, what is a “civilian population”.
53. The question of who the target is, is conceptually challenging in the context of acts which have effects globally, or even regionally. The issue however, is less complex than it prima facie appears to be. The fundamental problem to be answered is who has been harmed to a criminal degree and were they a primary target of the systematic policy which gave rise to the harm (“attack” in this context meaning “act which caused the harm”[1]).[2] Acts can have repercussions for an array of persons, but those who suffer the criminal harm are the only ones with whom the criminal law is concerned.

Who could be the target for the purposes of art 7

54. With respect to crimes against humanity, ICL concerns itself with the primary, as opposed to incidental, victims. The Appeal Chamber of the Special Court for Sierra Leone held in respect of this element that “when the target of an attack is the civilian population, the purpose of the attack is immaterial.”
55. The jurisprudence on crimes against humanity from courts that assessed charges which required a war nexus, or for charges before the ICC committed by military personnel must be read in the context of the decision. The meaning of “target” in an armed conflict context takes a different conceptual meaning when applied to a true scenario of peacetime.
56. The confusion that has arisen is the conflation between the target of the attack and the purpose of the attack. The question of whether a civilian population was targeted in armed conflict situations required an analysis of whether the civilians harmed were the targets as opposed to those in a military role.
57. Absent of any nexus to armed conflict, the multiple commission of acts referred to in art 7, irrespective of the purpose of those acts, will almost always be an “attack directed

against any civilian population” except in the limited situation of an attack against military personnel or persons who have a “duty to maintain public order and have the legitimate means to exercise force” during peacetime.

58. Applying this to the issue of climate change as a crime against humanity, or potentially environmental destruction more broadly, the question is not whether the perpetrator of the act that causes and perpetuates climate change (or caused serious environmental degradation) had the suffering of the *civilian* population as its object when committing those acts, but whether the *civilian* population suffering the harm as a result of those acts were the target, in the sense that the perpetrator directly intended or was “aware that [the consequence] will occur in the ordinary course of events”. This has been interpreted as meaning that the requisite mental element be *dolus directus* in the first or second degree (in other words, direct or oblique intention, but not subjective recklessness).
59. The meaning of “civilian population” is also a potential obstacle. There are two aspects to this term: “civilian” and “population”.
60. With respect to the latter, the courts and tribunals have held that the inclusion of the word “population” entails that the attack cannot be directed against a limited group of random people. It does not need to target or affect every person in a geographic area, but it must be sufficiently broad as to give meaning to the word population.
61. What might fit more comfortably with orthodox principle would be delimiting the “civilian populations” that constitute the victim targeted by the attack to those who are particularly vulnerable and who can be identified as having experienced “great suffering or serious injury to body, mental health or physical health” by reason of the effects of climate change.
62. This might, depending on the circumstances, include those who have been forcibly displaced by rising sea-levels, those who have suffered serious injury or death by reason of natural disasters aggravated by climate change (although this gives rise to serious evidential challenges as to attribution science in relation to natural disasters).
63. It might also include those who have suffered locally or regionally by acts that contribute to climate change (such as the indigenous persons in the Oriente region of Ecuador or the Brazilian Amazon).

Who could be the perpetrator for the purposes of art 7

64. Article 7(2)(a) provides that for an attack to fall within the scope of art 7, it must be “pursuant to or in furtherance of a State or organizational policy to commit such attack.” The Court has adopted the view that the art 7(2)(a) requirement presupposes the organisation:

has sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts referred to in article 7(2)(a) of the Statute. [...] by no means can it be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of a private entity consisting of a group of persons pursuing the objective of attacking a civilian population; in other words, of a group not necessarily endowed with a well-developed structure that could be described as quasi-State.

65. Clearly leaders of corporations or other non-state organisations fall within the scope of art 7. While Mr Sang, a radio host accused of contributing to the mass violence which took place in Kenya following national elections between 2005 and 2009, was ultimately not tried due to witness interference preventing the trial from continuing, the charges were accepted and the Court did not consider his position outside of the state or quasi-state institutions to be an obstacle to prosecution.

66. With respect to climate change, the challenge becomes identifying *which* organisation and *who* in the organisation should or could be liable for their acts which cause or contribute to climate change.

67. The question of *which* organisation largely rests on the questions as to causation and the issue of what actually *is* causing and perpetuating climate change.

68. With respect to *who*, the issue is largely a case-by-case issue which depends on the individuals who are most responsible for the harm.

Article 7(1)(k) - Other Inhumane Offences

69. It is now clear that there are perpetrators of environmental degradation that cause “great suffering, or serious injury to body or to mental or physical health.”

70. These acts can include localised cases of severe humanitarian suffering as a result of environmental acts (such as the Bhopal disaster (although that was determined on the

basis of negligence)), regional cases of severe suffering (such as the impact of oil operations on the Oriente water basin - see <https://doi.org/10.1016/j.gsd.2021.100566>), or global impacts (such as the impact of climate misinformation on sea-level rise and the resulting forced displacement).

71. The primary issue is whether they are “inhumane acts” in that the acts are “of a [nature and gravity] similar to any other act referred to in article 7, paragraph 1.”
72. The elements of art 7(1) offences are varied and distinct. The meaning of similar does not mean that the acts must be identical, derivative or expressly related or linked to one of the art 7(1) offences. This broadens the category. The OTP should consider art 7(1)(k) broadly and openly, taking a victim-centric approach. The limiting factors that apply after a prima facie analysis are the principles provided by Part III.
73. The OTP is encouraged to engage heavily with the meaning of “similar” in respect of other inhumane acts.
74. It is submitted that acts of direct environmental degradation (such as mass deforestation, intentional pollution or dumping of toxic substances or destruction of natural infrastructure (such as wetlands or fishing grounds) or human infrastructure in natural environments (such as dams, water runs, etc) on a widespread scale) are clearly other inhumane acts and are sufficiently similar to fit into the definition and easily overcome the hurdles in Part III.
75. Acts of indirect environmental degradation (such as policies of climate misinformation) satisfy the art 7(1)(k) requirements but will have to be carefully assessed against the Part III principles. It is submitted that the deceitful and malicious aspect of climate misinformation (as opposed to other indirect acts of environmental degradation) likely satisfies the Part III requirements, however, this should be expressly engaged with in the policy paper.

Admissibility (Gravity and Interests of Justice)

76. Article 53 in conjunction with art 17 and the Rules of Procedure sets out what is required to initiate an investigation into potential Rome Statute crimes committed in a particular situation. While the issue of admissibility includes questions of complementarity, it is addressed separately.

77. The focus of this section is on the threshold created by art 53(1)(c). The particular interests of the victim are best assessed against the facts of a specific situation.
78. Gravity is assessed based on the potential cases arising from the situation. The potential situations are defined against two parameters: the group of persons likely to be the subject of the investigation and the crimes that are likely to be the focus of the investigation.
79. With respect to the first parameter, the question is whether the Prosecutor has the ability to investigate those most responsible for the crimes, irrespective of their seniority or the hierarchy of the group responsible.
80. There is extensive jurisprudence with regard to the second parameter. It is recognised the Prosecutor must take into account both qualitative and quantitative considerations. There are four main criteria which have thus far formed part of the analysis:
- a. **the scale of the alleged crimes:** number of victims, geographical area affected, span and intensity of the alleged crimes over time;
 - b. **nature of the alleged crimes:** legal characterisation of the alleged conduct, human rights violated as a result of the alleged crimes;
 - c. **manner of commission of the alleged crimes:** means employed to execute the alleged crimes, whether the alleged crimes were committed with particular cruelty or brutality, whether they were committed on the basis of discriminatory motives, against a victim who is particularly defenceless or vulnerable, or pursuant to a plan or policy; and
 - d. **Impact of the alleged crimes:** harm caused to the victims and their families, extent of the damage caused, impact beyond the direct victims and their families or beyond the immediate damage.
81. In the context of environmental crime the gravity assessment largely plays the role of the *de minimis* exception by preventing absurd outcomes at ICL through delimiting the range of potential cases to those which are of sufficient scale and grave nature and where the manner of commission and impact of the alleged crimes are substantial enough to warrant intervention at ICL. It acts as a means of limiting those acts of environmental harm to those that cannot properly be dealt with at a municipal level and which properly shock the conscience of the international community.
82. The OTP is encouraged to consider the place of the gravity assessment beyond a eurocentric conception of environmental regulation as a simple off-shoot of property law

but to consider alternative and comparative approaches that place environmental harm as an attack on cultural, spiritual and social property beyond the quantitative measures of property value.

83. It is further submitted that the OTP must assess the gravity of environmental crimes by taking account of the continuing nature of the harm.

Obstacles and Hurdles: Key Legal Principles that Affect Environmental Crimes

Nullum crimen, nullum poena sine lege

84. The fundamental principles of *nullum crimen, nullum poena sine lege*, and a prospective approach, while essential to the functioning of the regime, are not in themselves an obstacle to criminalisation for acts of environmental destruction.
85. The maxim *nullum crimen sine lege* translates literally to “no crime without law”. Both the principles of *dubio pro reo* (that ambiguity shall be construed to the advantage of the accused) and of strict construction must be closely adhered to.
86. The principle prevents the extension of crimes by analogy. The ECHR qualified that finding stating “there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances [...] provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”
87. The fact is customary international law has not arrived at a point where destruction of the environment would per se be an international crime. In that sense there is a clear hurdle for the Prosecutor to prosecute acts of environment destruction as crimes against humanity. To do so adds an additional and complex causative element to the case. All claims that acts of environmental destruction are crimes against humanity will in practical effect require the Prosecutor to establish that the acts alleged to have caused the destruction fall within the scope of the art 7 and do not develop the law beyond what is “consistent with the essence of the offence and could reasonably be foreseen”.
88. In theory, this is no different to other complex cases where an established crime is committed through novel means, but in the case of serious environmental degradation, the forensic and legal burdens are significant.

89. The alternative approach is to centre investigations solely on humanitarian atrocities and treat environmental damage as an incidental aggravating factor which goes towards the gravity and interests of justice considerations.
90. That approach would likely rule out many claims arising directly out of harm suffered because of climate change. However, it could apply to situations where agricultural or horticultural land is attacked, key water sources are polluted or other situations where the impact on the environment has the effect of causing a human atrocity.
91. The analysis of the Prosecutor in that context would centre on the impact of the loss of food, water or other key resources as the cause of suffering (such as forced hunger/famine, death, extermination, forced displacement, persecution), with the environmental damage being an incidental aggravating factor which increases the priority of the case relative to others and which elevates the culpability of the perpetrators.
92. This approach might also apply to cases where the Prosecutor wishes to bring a charge for forced displacement, as the damage to the environment will be incidental except in so far as it relates directly to the impetus for displacement.
93. The Prosecutor would not have to prove that the environmental degradation *actually* rendered the land uninhabitable, toxically polluted or otherwise damaged, the burden would only be to prove that the act caused the persons lawfully inhabiting the land to become displaced by way of physical force, threat or coercion.
94. In the case of forced flooding, mass forestry burns or other forms of mass-clearance of land, it is likely that there would be evidence to suggest the persons were displaced through physical force, threat (for example, if the persons had been given an unlawful ultimatum or warning), or coercion.
95. The factual burden would only be to prove sufficient linkage between the acts and the human atrocity (forced displacement). In an example of forced flooding, it might require proof that the accused destroyed a dam with the knowledge that in the ordinary course of events, such destruction would result in the forced displacement of persons living below the dam.
96. How this might apply to climate change induced forced displacement will require specific and further research.

97. To sum up, the principle of legality and the maxim *nullum crimen sine lege* are not obstacles to the prosecution of crimes against humanity caused by or resulting in environmental damage.
98. Furthermore, it does not restrict the development of jurisprudence to include new manners of committing the same acts which constitute a crime against humanity. The fact that a new method is used to achieve the same criminal result does not necessarily mean there has been an expansion to the scheme of the criminal law but that the existing criminal law has expanded to address novel circumstances.

Modes of Participation and Environmental Crimes

99. The modes of participation with respect to environmental crime, particularly for crimes committed without a war nexus, will likely require an application of art 28. Acts of mass deforestation, toxic pollution and other widespread activities causing environmental humanitarian atrocities are unlikely to be committed by individual leaders. In order to apply the policy on case selection's policies regarding the degree of responsibility the OTP should turn their mind to the application of art 28 to corporate decision-makers (including senior leaders and directors) as well as political decision makers.
100. There are a number of other acts which SCS submits the OTP should turn their mind to with respect to art 7(1)(k) that will require an application of other modes of participation:
- a. The crime against humanity of causing and perpetuating climate change through active misinformation, deceit, deception and other similar acts will require a simple application of primary liability to a large extent, however it may also require applications of rules of party liability, and where senior leaders have commissioned subordinates to undertake certain activities, art 28.
 - b. Crimes against humanity in relation to the forced displacement of persons in small and vulnerable geographies (for example through mass-mining, pollution and dumping in small remote islands) will likely require a similar application of rules of primary and secondary liability, as well as command responsibility under art 28.

101. The OTP is encouraged to expressly provide how it intends to consider corporate decision making against the rules regarding modes of participation in the Rome Statute regime.

Complementarity and Environmental Crimes

Addressing the Interplay between Criminal and Regulatory Regimes

102. Currently, destruction done to the environment is committed through means that are not typically considered criminal. Instead, these acts (e.g. pollution, fossil fuel emissions, etc.) are controlled by municipal regulatory regimes often modelled on international policy.
103. We submit that the ICC should not consider environmental harm, and thus environmental crime, to be addressed for the purposes of Article 17(1)(a), (b), and (c) merely because a corporate entity or individual(s) were acting within the lawful limits of a regulatory regime. Nor, we submit, because the dispute was heard through regulatory dispute resolution mechanisms (e.g. a domestic environmental court). This is because it is within the ICC's, and by extension, the OTP's, mandate to address both the *conduct* and *result* for complementarity to be satisfied.
104. In practice, this means that if domestic regulatory regimes intervened to stop environmental harm/crime from occurring, the OTP would not have jurisdiction to intervene. However, if domestic regulatory regimes prevented or dealt with the harm of the environmental crime, the OTP can intervene *if* the conduct is not addressed or not addressed adequately. Therefore, the determining question in ascertaining whether complementarity is satisfied in the case of environmental crimes is whether, despite the regulatory intervention, crimes within the OTP's jurisdiction have been committed. If the OTP has reasonable grounds to believe that crimes have been committed, we submit the OTP must engage with the state(s) to advise them that the municipal system needs to intervene, or the OTP will be forced to initiate investigations.
105. As for individual liability, depending on the nature of the crime, the OTP should be open to the possibility that the degree of individual participation or corporate command responsibility is of sufficient gravity according to Article 17(1)(d) that they have

jurisdiction to open investigations. This would require the individual(s) to satisfy the elements of a crime against humanity whereby the perpetrator knowingly inflicted “great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act”¹⁷ and where the act was of a “character similar to any other act”¹⁸ referred to in Article 7(1) and the perpetrator was “aware of the factual circumstances that established the character of the act”¹⁹ and the conduct was committed as part of a widespread or systematic attack directed against a civilian population and “the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population”.²⁰

Complementarity and the challenges where the conduct and result (as elements of actus reus) are not co-located and identifying when the OTP should intervene in Environmental Crimes

106. As previously stated, the ICC will not have jurisdiction to intervene where municipal courts or statutory/regulatory regimes are adequately addressing both the conduct and the resultant harm of an environmental crime. However, the nature of some environmental harm is so widespread as to be capable of having local, regional, and global impacts. We posit that there are three conceptions for when complementarity could be satisfied when the conduct and result are not co-located in cases of environmental harm, and thus submit these conceptions as to when the OTP should intervene in environmental crimes.

107. The first is acts of environmental destruction that are clearly a crime against humanity or are relevant aggravating factors. This may be mass deforestation or noxious pollution of essential resources (waterways or soil where crops are grown). These acts have potentially far-reaching impacts beyond a local jurisdictional level due to the nature of the environment that is harmed. Because of this, even if the local harm is before domestic courts, the OTP will have jurisdiction to intervene in relation to the potential regional and global level of harm as it satisfies Article 17(1)(d) and, as previously discussed, is capable of qualifying as a crime against humanity or as a relevant aggravating factor.

¹⁷ Elements of Crimes, art 7(1)(d), (h) and (k), art 7(1)(k)-1, at 8.

¹⁸ Article 7(1)(k)-2, at 8.

¹⁹ Article 7(1)(k)-3, at 9.

²⁰ Article 7(1)(k)-4/5, at 9.

108. Secondly, when there are crimes against humanity that are incidentally environmental crimes, the court will have jurisdiction to intervene as complementarity will be satisfied. This would cover situations such as bombing a civilian population, which would constitute both a crime against humanity and/or a war crime under the Statute. Such situations could also incidentally irreparably harm the environment in a way that could have regional or global impacts, thereby satisfying Article 17(1)(d) of the Statute.
109. Thirdly, there are potentially acts of deceit or disinformation that should be considered crimes against humanity and/or aggravating factors. This could involve expanding the current conceptions of the Rome Statute to address acts of climate change. This is the type of harm alleged in the BP submission, where it alleges that knowingly deceiving and misinforming the general public about the nature of burning fossil fuels in the pursuit of maximising profits amounts to climate change being considered a crime against humanity. Here, the act and the harm are not co-located and are therefore difficult to adequately address under domestic regimes, which places the ICC and other international courts in a unique position to investigate and prosecute such wide-scale environmental harm.

Identifying when the OTP should intervene in Environmental Disaster

110. A ‘disaster’ is a “serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts”.²¹ By definition, environmental disasters represent a broader category of environmental harm. Their causes are cumulative and complex in nature making them difficult to attribute to a single individual, company, or group of individuals or companies. This is especially relevant in the context of climate change where the frequency and intensity of environmental disasters is increasing due to significant anthropogenic influence in global climate systems, but the requisite conduct and harm are not co-located and are difficult to prove forensically.

²¹ United Nations General Assembly: Report of the Open-Ended Intergovernmental Expert Working Group on Indicators and Terminology Relating to Disaster Risk Reduction. A/71/644 (2016).

111. We submit that the OTP should only intervene in cases of environmental disasters when there is a reasonable suspicion that the environmental disaster was caused by human activities, and that the people whose conduct was possibly causative had knowledge of the causative likelihood.

KEY SOURCES

Key Statutes/Reports

Elements of Crimes

The Rome Statute

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Cases & Submissions

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Articles of Interest

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