Response to the Draft Policy on Environmental Crimes under the Rome Statute of 18 December 2024

21 February 2025

Initiative led by Maud Sarlième
Coordinated by Dr Pauline Martini

Authors: Maud Sarlième and Dr Pauline Martini

The authors thank Prof. Kingsley Abbott (Institute for Commonwealth Studies), Flaviano Bianchini (Source International), Dr Pablo Gavira Díaz (International Nuremberg Principles Academy), Prof. Dr Christoph Safferling (International Nuremberg Principles Academy), Catherine Savard (University of Oxford), Dr Rupert Stuart-Smith (Oxford Sustainable Law Programme), and Prof. Thom Wetzer (Oxford Sustainable Law Programme) for their insights and support.

1. Introduction

1. We welcome the Office of the Prosecutor (OTP) for its continued initiative in developing this important draft policy paper on environmental crimes (Draft Policy Paper) and for its commitment to advancing accountability in this critical area.
2. We also commend the OTP's consultative approach in shaping the draft policy, reflecting a strong commitment to transparency and inclusivity. We encourage further engagement with civil society, victim groups, and affected communities (including Indigenous and Tribal Peoples)—particularly in the Global South—to ensure their meaningful participation before the policy is finalised. This will help ensure that the policy effectively integrates relevant contextual considerations and enhances its impact for those most affected by environmental crimes, particularly in their efforts to seek redress.
3. After reviewing the Draft Policy Paper, we would like to respectfully offer some observations for consideration. Specifically, we have identified a few areas where further clarity or refinement could enhance the overall coherence of the policy. These include:
    a. the nature and scope of the definition of environmental crimes (*Section 2*);
    b. the conducts that should be considered as amounting to environmental crimes (*Section 3*);
    c. certain aspects of the proposed approach to establishing conducts amounting to environmental crimes (*Section 4*);
    d. the victims of such conducts (*Section 5*); and
    e. the complementarity assessment (*Section 6*).

2. Definition of Environmental Crimes

4. The OTP Draft Policy Paper, under paragraph 24, defines "environmental crimes" as crimes listed in Article 5 of the Rome Statute that are either committed by means of, or result in, environmental damage. The paper further specifies the following categories:
    - **Paragraph 24(a):** "The crime in article 8(2)(b)(iv) of the Rome Statute, which expressly refers to environmental damage as part of its *legal elements*."
    - **Paragraph 24(b):** "Rome Statute crimes committed by means of environmental damage, making the damage a *material fact* relevant to establishing an element of the crime and/or the *actus reus* of a mode of liability."
    - **Paragraph 24(c):** "Rome Statute crimes resulting in environmental damage, making the damage *contextual information* relevant to assessing the gravity or the impact of the crime, and for informing selection and prioritisation, sentencing, and reparations."
5. While we welcome the OTP's approach in addressing environmental crimes, we recommend providing further clarification on the terms "environmental damage as a relevant material fact" (para 24(b)) and "environmental damage as contextual information" (para 24(c)).
6. The current wording leaves ambiguity as to how these concepts should be applied in practice within the legal framework of the Rome Statute. This ambiguity becomes more pronounced when considering the Draft Policy Paper as a whole, where these terms appear central to determining the scope of prosecution for environmental crimes.

7. As noted in paragraph 26 of the Draft Policy Paper, the prosecution of environmental crimes—whether committed by means of or resulting in environmental damage— "takes place within the prescribed legal framework of the Rome Statute", with the Elements of Crimes and the Rules of Procedure and Evidence serving as tools for interpretation. This structure is essential to ensure legal certainty and a consistent application of the law.

8. However, the Draft Policy Paper includes several references to environmental damage as "posing a direct and imminent threat to both human and non-human life" (para 2), impacting "the health and well-being of a particular ecosystem's non-human as well as human inhabitants" (para 23), and considering "direct and indirect human and non-human victims" (para 29) or the number and kind of human and non-human victims of an act of aggression (para 54).

9. It is unclear what is meant by these references to "non-human threats", "non-human impacts", and "non-human victims". These terms suggest the possibility of treating the destruction of ecosystems or harm to non-human life as an independent crime, regardless of its impact on humans. In other words, it would mean that damage to ecosystems or species would be criminalised based on the intrinsic value of the environment separate from any human consequences such as health issues, displacement, or loss of livelihood. Such an interpretation would significantly broaden the scope of environmental crimes beyond the immediate focus on human harm, representing a substantial expansion of the Rome Statute—similar to an amendment that would include ecocide.

10. Yet, in paragraph 10 of the Draft Policy Paper, and in its consultation call, the OTP indicates that "[t]he Office's mandate is structured by the Statute as it currently exists. The prosecution of environmental crimes is thus distinct from proposals to amend the Statute to criminalise ecocide". This distinction raises questions about how the OTP's broad approach to environmental damage in the Draft Policy Paper aligns with the Rome Statute as it currently stands, particularly if it moves towards criminalising environmental harm that does not affect human populations —and potentially raising concerns regarding the ICC's jurisdiction.

11. While we recognize the importance of protecting the environment, we suggest that environmental damage should fall within the ICC's jurisdiction only when there is evidence of a direct or indirect impact on humans. Unless the OTP adopts a broader understanding of the "indirect" nature of the impact, this proposed interpretation would limit the Court's scope to environmental harms connected to human suffering. Harms and threats to non-human entities with no direct or indirect impact on humans—arguably better addressed by the growing movement advocating for the rights of nature—would remain outside the ICC's remit.

12. This approach aligns with the spirit and letter of the Rome Statute, focusing the ICC's jurisdiction over environmental crimes on damage that affects humans. This would establish and strengthen the interconnections between environmental, climate, and human health.

13. This approach also ensures that the ICC's mandate remains consistent with the principles of international criminal law and the protection of human rights, while adapting to the growing gravity of the environmental and climate crisis. Expanding the scope of jurisdiction to include non-human victims without any link to human harm would result in legal uncertainties and potential overreach. We thus recommend refining the language to clearly

limit the ICC's jurisdiction to environmental damage that has a demonstrable impact on human health and well-being.[1]

14. Finally, to further improve visibility and transparency regarding the OTP's systematic approach to handling environmental crimes, from the preliminary examination process through to investigations and prosecutions, we advise that the OTP provides specific examples to illustrate "environmental damage as a relevant material fact" or "contextual information".

15. These examples should not be used or construed in a way that would prejudge whether the alleged facts might eventually be considered criminal, but only to clarify the limits of the scope of the ICC jurisdiction over environmental damage to the public and the OTP. Whether environmental damage qualify as relevant "material facts" or "contextual information" for the commission of one or more of the crimes listed in Article 5 of the Rome Statute will ultimately depend on a more detailed legal and factual analysis of all the elements of the relevant crimes.

3. Conducts Amounting to Environmental Crimes

3.1. The Illegal Character of Exploitation of Natural Resources and Dispossession of Land

16. The Draft Policy Paper references the "illegal exploitation of natural resources" and "illegal dispossession of land" in various contexts, including as:

- Establishing environmental damage (para 6);
- Contributing to genocide by depriving a group of the means to survive (para 31);
- Determining a widespread or systematic attack for crimes against humanity (para 32);
- Depriving a group of fundamental rights under Article 7(1)(h) (para 38);
- Causing great physical and mental suffering under Article 7(1)(k) (para 40);
- Assessing the nexus with armed conflict in the context of war crimes (para 41);
- Leading to deprivation of objects indispensable for survival in the crime of starvation (para 49); and
- Serving as consequences of the crime of aggression (para 53).

17. While we welcome the references to "exploitation of natural resources" and "dispossession of land" as causes of environmental damage, we advise against using the term "illegal" to describe the exploitation of natural resources and dispossession of land for two reasons. First, the term raises the issue of which legal framework would be used to determine the legality of such actions. Second, it excludes scenarios in which exploitation or dispossession, though potentially harmful, is considered legal under specific national laws. This presents a challenge because many situations involving exploitation or dispossession that could qualify as international crimes are actually lawful under domestic law.

18. Even if "[e]very legal system in the world currently protects the environment against at least some kinds of harm" (as stated in paragraph 1 of the Draft Policy Paper), there are significant variations between domestic legal systems in terms of the nature, scope,

[1] Environmental damage that has impacts on non-human victims should however remain relevant in the OTP's gravity assessment under Article 17(1)(d) of the Rome Statute (see Sarlième et al, "Comment on OTP Environmental Crimes Policy" (Institute of Commonwealth Studies, International Nuremberg Principles Academy and Oxford Sustainable Law Programme, 16 March 2024) paras 139-140).

interpretation and enforcement of environmental protection laws, and what may be considered legal extraction of resources or legal dispossession of land under one legal system may be deemed entirely illegal under another. These differences highlight the complex and varied nature of environmental legal frameworks across jurisdictions.

19. States may have "pledged to leverage all forms of criminal justice to prevent and combat crimes that affect the environment and to work toward the achievement of the 2030 Agenda for Sustainable Development" (as recalled in paragraph 3 of the Draft Policy Paper), their efforts have yet to fully prove effective in addressing environmental crimes. Regional initiatives in Europe[2] and elsewhere reflect ongoing progress but challenges remain substantial in enhancing cooperation and tackling environmental degradation.

20. Multilateral environmental agreements also highlight the limitations of the current framework. While treaties designed to limit climate change and safeguard natural resources have proliferated over the past five decades (as noted in paragraph 1 of the Draft Policy Paper), their implementation and enforcement remain inconsistent. Even if fully implemented, they would still leave behind a fragmented legal framework with significant gaps in international environmental law and related instruments.[3]

21. In light of these challenges, we recommend replacing the adjective "illegal" by "unsustainable" in relation to the exploitation of natural resources. This would grant the OTP greater discretion to assess whether the exploitation of natural resources may amount to an international crime, irrespective of differing legal standards.

22. Similarly, to address the concern raised above, we recommend removing the qualifier "illegal" from references to dispossession of land as potential international crime. However, we invite the OTP to consider whether the dispossession occurred without grounds permitted under international law when determining whether such conduct could amount to an international crime.

23. In conclusion, given the complex legal and practical realities surrounding environmental harm within the framework of international criminal law, removing the term "illegal" allows for a more adaptable approach to addressing environmental crimes. Beyond circumventing the challenges posed by the diversity of domestic legal systems and the limitations of international environmental law, this approach would also empower the OTP to assess the broader impacts of environmental exploitation and land dispossession, thereby contributing more effectively to global accountability efforts.

3.2. Relationship between Environmental Damage, and "Illegal Exploitation of Natural Resources" and "Illegal Dispossession of Land"

24. Regarding the references to exploitation of natural resources and dispossession of land, we note that the Draft Policy Paper creates potential confusion about the relationship between environmental damage, exploitation of natural resources, and dispossession of land, and how these elements are treated in the context of environmental crimes under the Rome Statute.

---

[2] See e.g. the draft Convention on the Protection of the Environment through Criminal Law and its Explanatory Report: approve by the European Committee on Crime Problems (CDPC), at its 86th Plenary meeting (20-22 November 2024). See also the European Union new Environmental Crime Directive, adopted on 11 April 2024 and entered into force on 20 May 2024.

[3] See e.g. UNGA, "Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment" (30 November 2018) A/73/419, which highlights these gaps and calls for a more cohesive approach.

25. In addition to addressing environmental damage itself, the Draft Policy Paper recognizes the "illegal exploitation of natural resources" and "illegal dispossession of land" as factors that contribute to environmental harm. However, the current framework does not clearly distinguish between these actions as causes of environmental damage and those that serve as means to enable or facilitate such damage. For example, the illegal exploitation of natural resources, such as logging or mining, is presented as a direct cause of environmental harm. In contrast, the illegal dispossession of land is framed as an act that leads to subsequent environmental damage, but not as a direct cause of harm in itself.

26. This distinction raises an important conceptual issue. Paragraphs 24(b) and (c) of the Draft Policy Paper imply that environmental damage can either be committed or result from actions that directly cause harm (para 24(b) *as means of*, e.g. exploitation of resources) or actions that serve as precursors to that harm (para 24(c) *resulting in*, e.g. land dispossession). However, both categories potentially involve actions that ultimately contribute to environmental degradation, whether through direct harm or by enabling future harmful activities. The extraction of natural resources often leads to significant environmental damage, such as deforestation, habitat destruction, and pollution. The dispossession of land, in many cases, can be an equally significant driver of environmental harm, including as a key enabler of resource exploitation, like large-scale agriculture, logging, or mining that directly degrade ecosystems and contribute to biodiversity loss. Treating these actions as separate without clarifying their relationship creates ambiguity in how the OTP would prosecute environmental crimes.

27. To resolve this issue, we recommend that the OTP revise its approach to clarify that "environmental damage" should encompass both actions that directly cause harm (e.g. resource extraction like logging or mining) and those that facilitate harm (e.g. land dispossession). This would provide a more coherent and comprehensive understanding of environmental crimes under the Rome Statute, ensuring that all forms of conduct leading to environmental damage impacting humans are considered within the policy's framework. By refining this conceptual framework, the OTP could improve the policy's clarity and consistency, strengthen its capacity to address a broader range of environmental crimes, and enhance the Rome Statute's ability to protect the environment and prevent related harms.

3.3. Right to Property as Falling under the Scope of Articles 21(3) and 7(1)(h)

28. We suggest adding the right to property to the list of relevant rights for the ICC's interpretation of the Rome Statute under Article 21(3) in the context of environmental crimes, as outlined in paragraph 27 of the Draft Policy Paper. Likewise, we recommend including the right to property in paragraph 38 of the Draft Policy Paper within the enumeration of fundamental rights whose deprivation may constitute the crime of persecution, pursuant to Article 7(1)(h).

29. First, this approach would be consistent with paragraph 5 of the Draft Policy Paper, which states that "the Rome Statute primarily focuses on safeguarding the integrity of human life and *property*" (emphasis added).

30. Second, the right to property is one of the numerous fundamental rights affected by crimes committed by means of or that result in environmental damage. As paragraph 48 of the Draft Policy Paper mentions, land and natural resources are owned "for example, by a government, a local community, or a private individual". The right to property of such individual and groups can be violated in the context of environmental crimes committed by means of conducts such as the unsustainable exploitation of natural resources, mass deforestation, water and land pollution or contamination, and the dispossession of land.

31. Against this backdrop, we invite the OTP to adopt an interpretation of the right to property that aligns with regional human rights instruments and jurisprudence, in accordance with Article 21(3) of the Rome Statute. However, we note that the contours of this right, as defined by regional case law, may vary from one region to another. For instance, the Inter-American Court of Human Rights recognises Indigenous and Tribal Peoples' right to communal property over their lands, territories, and natural resources,[4] whereas it is unclear whether the right to communal property has been recognised before the African Court on Human and Peoples' Rights or the European Court of Human Rights. In this context, we encourage the OTP to consider deprivations of the right to communal property as potential indicators that an international crime may have been committed, such as the crimes of persecution, pillage, or destruction of property.[5]

32. Finally, we support and encourage the OTP's commitment to engaging and consult with grassroots communities and civil society organisations[6] on their understanding of property and the impacts of infringements on this right, particularly regarding their social, economic, cultural, and spiritual lives.

4. Establishment of the Conduct

4.1. Causal Link

33. As regards the necessary causal link between the perpetrator's conduct and the material elements of a crime, we note an inconsistency between the Executive Summary and paragraph 5 of the Draft Policy Paper. The Executive Summary refers to a "direct causal link", whereas paragraph 5 mentions a "sufficient causal link". We invite the OTP to clarify which terms it intends to adopt, given the legal and evidentiary implications discussed below. The distinction is significant, as the threshold for scientific evidence required to establish the causal link differs substantially between the two terms.

34. Establishing causation in cases involving environmental crimes typically involves a two-step process, akin to proving two separate causal links: first, linking the conduct to environmental damage; and second, linking the environmental damage to human harm. While proving the first link may suffice to establish an environmental crime, we argue that, under the Rome Statute's anthropocentric framework, the second link—demonstrating harm to humans—is also required for the conduct to qualify as an international crime.[7]

35. The chain of causation between conduct and human harm may be disrupted when either of these links is weakened. This can occur due to two main factors.

[4] IACtHR, *Ivcher-Bronstein v. Peru* (6 February 2001) para 121; IACtHR, *Yakye Axa Indigenous Community v. Paraguay* (17 June 2005) para 137; IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador* (27 June 2012) para 145; IACtHR, *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and Their Members v. Panama* (14 October 2014) paras 111–112; IACtHR, *Garifuna Community of Punta Piedra and Its Members v. Honduras* (8 October 2015) para 165; IACtHR, *Triunfo de la Cruz Garifuna Community and Its Members v. Honduras* (8 October 2015) para 100; IACtHR, *Kaliña and Lokono Peoples v. Suriname* (25 November 2015) para 129; IACtHR, *Xucuru Indigenous People and Its Members v. Brazil* (5 February 2018) para 115; IACtHR, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (6 February 2020) para 94.

[5] We also invite the OTP to consider the fact that the lands over which Indigenous and Tribal Peoples have a right to communal property may also be recognised the status of legal personalities, and thereby of right-holders, under domestic legislation or jurisprudence.

[6] Paragraph 74 of the Draft Policy Paper.

[7] See paragraphs 8 to 13 of this document.

(a) Weakening of the first causal link (conduct → environmental damage) due to:

- **Multiple contributing factors to environmental damage**: e.g. several chemical plants discharge pollutants into the same river over an extended period. One particular plant engages in unsustainable resource exploitation (such as excessive wastewater dumping or illegal disposal of toxic substances) but its specific impact on water quality is difficult to isolate. The cumulative pollution from multiple sources complicates proving that this single actor's conduct contributed significantly to the environmental damage, i.e. contamination. Consequently, establishing a causal link between that actor's actions and adverse health effects on local populations relying on the river for drinking water or agriculture becomes highly complex.
- **Remoteness in time or space**: e.g. a river is deliberately diverted to support resource extraction, such as mining or large-scale agriculture. As a result, downstream communities lose access to their primary water source. Several months later, a severe drought affects a neighbouring region that previously relied on the river for irrigation and drinking water. The time lag and geographic distance between the initial water diversion and the drought make it difficult to establish a causal link between the conduct and the environmental damage.

(b) Weakening of the second causal link (environmental damage → human harm) due to:

- **Multiple causes of harm:** e.g. a community experiences rising cancer rates after prolonged exposure to both industrial air pollution and a toxic substance released into the local water supply. While scientific studies confirm that the toxic substance is harmful, proving that it was the primary cause of increased cancer cases (rather than the combined effects of air pollution, genetic predisposition, or other behavioural and environmental stressors) can be challenging. The presence of multiple potential causes may weaken the causal link between the specific water contamination and the observed human harm, making legal attribution more difficult.
- **Remoteness in time or space:** e.g. a mining operation releases heavy metals into a river, contaminating the water supply of downstream communities. However, the health effects (such as neurological disorders or cancers) may only become apparent decades later due to prolonged exposure and bioaccumulation. The long delay between the initial contamination and the onset of illnesses may make it difficult to establish a causal link between the two.

36. If a "direct causal link" is required, scientific evidence must demonstrate that the environmental damage and resulting human harm would not have occurred but for the perpetrator's conduct. This stricter standard demands a strong causal link in both steps, limiting prosecutions to cases where neither link is significantly weakened.

37. In contrast, a "sufficient causal link" requirement imposes a lower threshold, allowing for more prosecutions even if one or both causal links are weakened. This broader standard would enable the OTP to hold individuals accountable for human harm caused through environmental damage even where causation is more complex or indirect.

4.2. Mens Rea

38. We invite the OTP to clarify the position on the *mens rea* required for environmental crimes to qualify as international crimes under the Rome Statute. Paragraphs 5 and 10 of the Draft Policy Paper refer to "a perpetrator's intentional actions" and "intentional environmental

destruction". These references could give the erroneous impression that environmental crimes necessarily require proof of direct intent as the *mens rea* for an act to be classified as an international crime. This interpretation diverges from the standards of intent and knowledge set forth under Article 30 of the Rome Statute, which requires that "the suspect has the actual intent or will bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions".[8]

39. We suggest that the OTP consider situations where environmental destruction is intentional, but the specific harm to humans—whether direct or indirect—was not the perpetrator's primary intent, even though they could not have been unaware that their actions would inevitably harm both the environment and the people dependent on it. In such cases, the perpetrator may not specifically intend, for example, the death or displacement of certain people, but they understand that their actions (such as mass deforestation, negligent industrial activities, or attacks on civilian infrastructure) will likely lead to devastating consequences for both the people and ecosystems affected.

40. In the absence of case law or specific provisions for environmental crimes, we strongly encourage the OTP to adopt the *mens rea* standard outlined in Article 30 of the Rome Statute. This clarification would align with paragraph 83 of the Draft Policy Paper, which states that "[w]hat matters for the purposes of the Statute is that the perpetrators meant to engage in their conduct and either meant to cause a consequence or were aware that the consequence would occur in the ordinary course of events." Adopting this standard would ensure consistency with the Statute's broader framework and provide a clear and unified approach to the prosecution of environmental crimes.

5. Victims of the Conduct

41. We welcome the OTP's recognition of vulnerable groups as those primarily affected by environmental crimes, as outlined in paragraphs 8 and 9 of the Draft Policy Paper. In particular, we support the OTP's focus on the rights of groups with a close connection to the natural environment, especially Indigenous Peoples. The emphasis on the deep cultural, spiritual, and economic ties of Indigenous Peoples to their land, as mentioned in paragraph 8 of the Draft Policy Paper, is critical for understanding the disproportionate impact of environmental crimes on these communities. However, we note the absence of a clear definition of Indigenous Peoples in the Draft Policy Paper, and we encourage the OTP to refer to established definitions, such as the C169 Convention on Indigenous and Tribal Peoples of 1989.

42. While the connection between Indigenous Peoples and the environment is uniquely profound, it is important to recognize that the survival of other groups is similarly closely linked to the environment. This includes Tribal Peoples, children, women, marginalized and disabled individuals, environmental defenders, and others whose social and economic well-being is closely tied to the natural environment, or, as noted in paragraph 9 of the Draft Policy Paper, whose ability to access resources influences their capacity to avoid or mitigate environmental harm. We encourage the OTP to also consider these groups as particularly vulnerable to the impacts of environmental crimes and reflect this understanding in its policy framework.

[8] *Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08, PTC II (15 June 2009) para 359.

43. To this end, the OTP could revise paragraphs 8 and 9 of the Draft Policy Paper to explicitly include, in addition to Indigenous and Tribal Peoples as defined in the C169 Convention on Indigenous and Tribal Peoples of 1989, women, children, marginalized and disabled individuals, environmental defenders, and others whose social and economic well-being is intrinsically linked to the natural environment. By broadening this definition, the OTP can ensure a more comprehensive understanding of vulnerability in the context of environmental harm, ensuring that all those affected by environmental crimes—particularly those without the resources to escape such harm—are adequately protected.

44. Similarly, we encourage the OTP to examine the rights of all vulnerable groups in their specific contexts and circumstances when analysing the impact of environmental damage on the exercise of these rights, including the right to property.[9]

6. Complementarity Assessment

45. We welcome the OTP's commitment to collaborate with national authorities to foster prosecutions of environmental crimes at the domestic level. We also appreciate its commitment to encourage domestic criminalisation of environmental crimes. However, in the absence of a clear legal framework defining environmental crimes at treaty-level,[10] we recommend the OTP to limit its efforts to encouraging domestic courts to address international crimes committed by means of or resulting in environmental destruction in a way that aligns with the letter and spirit of the Rome Statute.

46. Moreover, amongst the element listed as relevant for the OTP's gravity assessment in paragraph 29, we propose to include considerations as to "whether the environmental damage is potentially irreversible", a factor deemed relevant for the evaluation of the "character, gravity, and scale" of an act of aggression as per paragraph 54.

[9] See also paragraphs 28 to 32 of this document.
[10] See paragraphs 19-20 and 23 of this document and fn 3.