

**To:** Mr Karim Khan KC, Prosecutor, International Criminal Court

Via email: [otpecpolicy@icc-cpi.int](mailto:otpecpolicy@icc-cpi.int)

**From:** ICC Bar Association Working Group on Ecocide

**Date:** 21 February 2025

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**Re: *Submissions on behalf of the ICC Bar Association Ecocide Working Group in response to public consultation on the OTP Draft Policy on Environmental Crimes***

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## **1. Background**

- 1.1 On 18 December 2024, the ICC Prosecutor called for a second round of comments on a new policy initiative by the Office of the Prosecutor to advance accountability for environmental crimes under the Rome Statute. Specifically, this second round of consultations *“aims to solicit more specific and focused feedback on the text of the draft policy itself.”*
- 1.2 The first round of consultations, launched in February 2024, has already yielded in 80 submissions assisting the OTP drafting process. The ICC Bar Association Ecocide Working Group (**ICCBA EWG**)<sup>1</sup> did not make submissions in the first round of consultations, however, provides these discrete submissions for the consideration of the Prosecutor in response to the second call for submissions.

## **2. General submissions**

- 2.1 As a starting point, the ICCBA EWG is supportive of the Draft Policy Paper on Environmental Crimes (**Draft Policy**) so long as it results in the perpetrators of environmental crimes in conflict actually being charged where the evidence exists to support those charges, but stresses that it is equally supportive of the inclusion of Ecocide as a fifth crime in the Rome Statute. The ICCBA EWG is of the view that accountability for crimes against the environment can be pursued through the current methods available in the Rome Statute in parallel to future accountability measures when the crime of Ecocide is adopted as a fifth crime. Indeed, it may still be some time before Ecocide becomes an active crime in the Rome Statute, and heinous crimes against the environment continue in many States under the jurisdiction of the ICC in the present day. It is important that perpetrators of those crimes are prosecuted. We note that the elements for environmental crimes under the current framework and the future crime of Ecocide will be different, but the facts and evidence for both will likely overlap. As such, the need for the OTP to pursue environmental crimes in the present day is crucial in ensuring perpetrators are held to account.
- 2.2 Although the Draft Policy states that *“if a sufficient causal link exists between a perpetrator’s intentional actions and an objective element of a Rome Statute crime, these*

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<sup>1</sup> The ICCBA EWG was formed in January 2024 by the ICCBA Executive Council (**EC**) and advises the ICCBA EC and President on issues relating to the inclusion of the crime of Ecocide in the Rome Statute and ancillary associated matters.

constitute crimes both during armed conflict **and in times of peace** within the established legal framework of the Statute” [emphasis added],<sup>2</sup> it is difficult to reconcile how a crime under the jurisdiction of the Court can constitute a crime during peace. The chapeau element of crimes against humanity requires there to be a ‘widespread or systematic attack against the civilian population’ and for a crime constituting a war crime, it must occur in the context of an international or non-international armed conflict. Neither of those contexts correlate with the notion or time of peace. This is precisely why the crime of Ecocide – which will capture criminal acts against the environment in both peace time *and* conflict – is supported by the ICCBA EWG.

2.3 The ICCBA EWG strongly supports the goals established in the Introduction of the Draft Policy. Objectives set to be achieved are fundamental to effective environmental policy:

- a. To affirm the Prosecutor’s commitment to the rigorous investigation and prosecution of environmental crimes, thereby remedying the historical neglect of such crimes;*
- b. To emphasise that numerous crimes under the Rome Statute may be committed by means of or result in damage to the environment;*
- c. To emphasise the Prosecutor’s commitment to establishing an institutional framework that facilitates effective investigation and prosecution of environmental crimes – including through recruitment, training, external collaboration, and meaningful implementation, monitoring, and evaluation measures;*
- d. To encourage and support national efforts to repress environmental crimes and other activities involving unlawful environmental damage;*
- e. To cooperate with and coordinate civil society organisations and other non-State actors whose expertise or access to information enables them to support law enforcement action at the international or national level;*
- f. To engage with corporate and other private actors in order to put them on notice of legal risks related to their activities and to their supply chains or portfolios;*
- g. To contribute to the development of international jurisprudence and best practices concerning the prosecution of environmental crimes at the ICC and beyond.*

2.4 The ICCBA EWG is of the view that the Draft Policy must lead the way to ensure recognition of the nature, gravity and impact of environmental crimes on its victims with specific focus on indigenous, aboriginal and tribal peoples, and marginalised groups based on intersecting criteria including race, ethnicity or culture. Indigenous victims of environmental crimes are, more often than not, the most hard-affected, being persons whose very survival is most impacted after the horror of conflict has dissipated. The ICCBA EWG is supportive of the Prosecutor’s express intention to include *seeking input from women, Indigenous Peoples, youth, persons with disabilities, displaced groups. Children may also be engaged by qualified experts, where appropriate.*<sup>3</sup>

2.5 In some circumstances, victims of environmental crimes - particularly those of indigenous background – hold important cultural information which could assist the Prosecutor’s investigation and prosecution of environmental crimes. These same persons may also be represented by ICCBA Counsel in matters where they are recognised as victims for the purposes of proceedings. The ICCBA EWG encourages an open and cooperative dialogue

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<sup>2</sup> Draft Policy at [5].

<sup>3</sup> Draft Policy at [73].

between the Office of the Prosecutor and Counsel representing victims of environmental crimes.

- 2.6 As noted at [2] of the Draft Policy, *“the right to a healthy environment has been endorsed by the UN General Assembly and is recognised by the constitutions or national legislation of more than 125 states.”* The Draft Policy also recognises that human-induced environmental damage has reached unprecedented levels resulting in imminent threat to both human and non-human life.<sup>4</sup> In December 2020, the UN Secretary General spoke of *“humanity waging a war on nature”* in reference to consumption and production systems are destroying the environment. In our submission, this characterisation should extend also to the impact of war and conflict on the environment.
- 2.7 In July 2022, with 161 votes in favour and eight abstaining, the UN General Assembly recognised the right to a clean, healthy and sustainable environment as a human right.<sup>5</sup> The UN General Assembly highlighted the importance of respecting, protecting, and fulfilling this fundamental right. It noted that *“the right to a clean, healthy and sustainable environment is related to other rights and existing international law”*, and called upon international organisations to *“adopt policies, to enhance international cooperation, strengthen capacity-building (...) in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.”* By committing to the investigation and prosecution of environmental crimes under the jurisdiction of the Court, the Prosecutor will be assisting in the answering that call.
- 2.8 The Rome Statute, coupled with the Elements of Crimes, provide the substantive law foundation which can be applied to environmental crimes, albeit limited to those committed in the context of war and conflict. The incorporation of the 28 July 2022 UN General Assembly Resolution should be essential step in accountability for environmental crimes in accordance with Article 21(3) of the Rome Statute, which mandates application and interpretation of the Rome Statute in a manner that is consistent with internationally recognised human rights.<sup>6</sup>
- 2.9 We note that to date, Article 8(2)(b)(iv) has yet to be charged in any of the proceedings before the ICC. There may be evidentiary or strategic reasons for this which the public is not privy to and note that the Prosecutor would need to prove that there was a high level of damage to the environment before an act leading to it could satisfy the elements of the crime and pass the proportionality test as enshrined in international humanitarian law. That said, there are cases where evidence has been used to bring other charges could also prove widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. For example, the ‘scorched earth policy’ perpetuated by the Janjaweed in Darfur was used as evidence to underpin charges of crimes against humanity and war crimes against Omar Al Bashir,<sup>7</sup> but the Article 8(2)(b)(iv) was not charged. Equally so, no public charges exist which make accountable those responsible for the destruction of the

<sup>4</sup> Draft Policy at [3].

<sup>5</sup> [GA/12437](#), Seventy-sixth Session, 97<sup>th</sup> Meeting, 28 July 2022.

<sup>6</sup> Accepting R2hE is proposed by the Oxford University, International Nuremberg Academy, Institute of Commonwealth studies, Oxford Sustainable Law Program in the Comment on OTP Environmental Crimes Policy, 16 March 2024.

<sup>7</sup> Prosecutor v. Omar al Bashir, ICC-02/05-157-AnxA, at [271].

Kakhovka Dam in Ukraine in June 2023, which on the face of it, would seem to constitute widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. It may be that charges are pending.

- 2.10 It is important that pursuing environmental crimes under the jurisdiction of the ICC becomes a reality and does not simply remain a policy consideration for the Prosecution Office. Indeed, now is the time to act to ensure that impunity for environmental crimes – at least in the context of conflict - is not tolerated.

### 3. Complementarity

- 3.1 The ICCBA EWG is supportive of the Prosecutor's approach to complementarity *vis-à-vis* the investigation and prosecution of environmental crimes, insofar that accountability for crimes impacting the environment in the context of conflict must be pursued. All too often, the focus on the environment is not given the attention it deserves and impunity continues to persist. A proactive approach in applying the requisite pressure to investigate and prosecute environmental crimes domestically is a must. As such, it is open to the Prosecutor to include in the Office of the Prosecutor's Annual Report a section which outlines the measure taken under the principle of complementarity which relate to the preliminary investigation, investigation and prosecution of environmental crimes.
- 3.2 The ICCBA EWG also notes that if the crime of Ecocide is adopted in the Rome Statute as a fifth category of crime, it would place upon Member States the obligation to enshrine a mirror crime in domestic jurisdiction. An already-established robust complementarity process for environmental crimes in the context of conflict will only aid for a broader and wide-ranging crime which will capture crimes against the environment in the form of Ecocide in non-conflict situations.
- 3.3 According to the well-defined principle of complementarity enshrined in the Rome Statute in the context of admissibility of cases under Article 17 and 18, the Court will only act when national courts are unable or unwilling to exercise their jurisdiction. Contributing to the rationale behind the complementarity principle is to ensure the avoidance of arbitrary investigations and prosecutions which are best placed with domestic jurisdictions. The International Criminal Court is, after all, a court of last resort.
- 3.4 In April 2024, the Prosecutor launched the OTP's **Public Policy on Complementarity**, which establishes "*guidelines and guiding principles for the same*", particularly in the second chapter:

*Among other provisions of the Statute, it regulates the situation in which the ICC and national authorities take "simultaneous measures". This includes provisions that foresee situations in which the ICC and national authorities could be investigating or prosecuting "simultaneously" two different, but "possibly" interconnected cases; These situations would require consultation, coordination or postponement to ensure that both activities can continue. In addition, ICC investigations may often overlap with national lines of inquiry into serious crimes under national law.*

- 3.5 The OTP policy on complementarity also highlights, importantly, cooperation of Member States:

*Complementarity and cooperation are essential to the full realization of all the possibilities of the Rome Statute system. At the same time, their responsible implementation, as proposed in this policy, will ensure proper management of the workload of the Court as a permanent institution with a potentially universal vocation, but with limited resources.*

- 3.6 States have the primary responsibility to investigate international crimes which include international environmental crimes, and the intervention of the ICC will be justified only when the State is unwilling or unable to investigate and prosecute those environmental crimes.
- 3.7 Although the above-mentioned principle is linked to admissibility and activates the jurisdiction of the Court when a State is unwilling or cannot investigate and prosecute international crimes (environmental crimes, in this case), the relationship between the ICC and States and their courts is important. There are times where the ICC must intervene, and this is the case in relation to international environmental crimes too.
- 3.8 In cases of suspected international environmental crimes, the Prosecutor may initiate proceedings in the following cases:
  - (a) When the State does not initiate proceedings. Following the early jurisprudence of the Court, consideration must be given to some key initial questions:
    - Are there ongoing investigations or proceedings?
    - Have there been previous investigations relating to the alleged criminal conduct?
    - Did the State which has jurisdiction made a decision not to prosecute the person in question?
  - (b) When there is no national or domestic forum law regulating activities harmful to the environment.
  - (c) When existing national law may give rise to violations of international human rights law, such as regulations that may allow overexploitation of natural resources or in an unsustainable manner.
  - (d) In cases of non-compliance or inapplicability of national law regulating activities harmful to the environment.
- 3.9 It is important to keep in mind, in the context of complementarity, that the existence of national non-criminal procedures (including civil or administrative) against persons responsible for environmental offences, does not immediately imply a State's blanket unwillingness or inability to do justice in a genuine manner. In this regard, the absence of a criminal process does not necessarily equate to a situation of impunity, which can be defined as the impossibility, *de jure* or *de facto*, of holding the perpetrators of violations accountable. In these cases, the Prosecutor will need to carefully consider whether further prosecution by the ICC is necessary.