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Civil Society Open Letter to Inform the New ICC OTP Policy on Environmental Crimes with a Gender Lens

March 2024

We, the undersigned civil society organizations and academic institutions, respectfully share this submission with the International Criminal Court (ICC) Office of the Prosecutor (OTP) to inform the development of the new Policy Paper on Environmental Crimes. We welcome this initiative and the opportunity for consultation at the outset. We hope this comprehensive policy will further establish a shared and core understanding of environmental crimes and become a meaningful tool for accountability and transparency.

Significant progress has been made in recent years in recognizing the continuum of historical and longstanding discrimination and fundamental rights deprivations experienced by particular groups, including women, girls, and/including lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+)¹ persons. The new policy must recognize the links between gender-based harms and environmental crimes. This means that the ICC must consider gender when applying the Rome Statute in relation to environmental crimes. In particular, the new policy must ensure meaningful recognition of the impacts of environmental crimes on Indigenous Peoples and People of African Descent across the globe, especially women, girls, and/including LGBTQI+ persons.

The ICC has an essential declaratory and expressive function in recording humanity's moral opposition to the most serious crimes of concern. Indiscriminate logging, waste mismanagement, and dumping in rivers and aquifers are some examples of crimes that occur both in peacetime and conflict, and that put flora, fauna, and people's survival at risk. Some of these crimes are linked to the most profitable economic activities in the world. A new policy detailing the OTP's understanding of environmental crimes would enhance accountability and justice for such crimes while increasing awareness of its global condemnation. In addition to shedding light on individual criminal responsibility for environmental crimes, the OTP Policy on Environmental Crimes will complement other international efforts responding to environmental harms. For instance, upcoming Advisory Opinions of the International Court of Justice (ICJ) and the Interamerican Court of Human Rights (IACtHR) will contribute by addressing the State's obligations with respect to climate change.

This submission provides general recommendations for the OTP to consider when drafting its Policy Paper on Environmental Crimes and shares some opportunities and challenges in charging environmental crimes. It seeks to contribute to the debate on addressing environmental harm in line with a contemporary reading of the Rome Statute, rooted in established International Human Rights Law (IHRL) and International Criminal Law (ICL). With a better understanding of how human rights and criminal law interplay, we can strengthen work to support victims² and survivors and end cycles of environmental crimes and their impacts on gender-based harms in communities across the globe.

In this regard, we respectfully submit the following key points and priorities for incorporation within the Policy Paper.

¹ While the acronym LGBTQI+ is inclusive of a broad range of persons, it is not exhaustive, nor is it the universally standard acronym. The plus sign represents people who identify with the broader LGBTQI community but use other terms for self-identification.

² We recognize that persons who experience crimes or harms may identify with the term "victim" or with the term "survivor."

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Key points for consideration:

1. Definition of environment, environmental crimes, and/or environmental harm:

The first step to any justice process is agreement on what constitutes a crime or wrongdoing, including those that amount to environmental crimes or have environmental dimensions. A comprehensive definition must move away from the anthropocentrically oriented Rome Statute while considering human rights developments and the perspectives of those marginalized, including by gender, race, and ethnicity. To do so, the ICC must elucidate its **understanding of the terms "environment" and "environmental harm"** within the new policy.

The environment is a broad concept. Establishing a precise reading of the environment and environmental harm requires a multifaceted evaluation incorporating the customs, traditions, rules, and legal systems of Indigenous Peoples and of People of African Descent. The ICC's decisions should integrate Indigenous Peoples and People of African Descent's worldviews, acknowledging the profound and symbiotic relationship they maintain with the territory, which is indispensable for their physical, cultural, and spiritual survival. An all-encompassing definition will aid investigators and judges in evaluating compliance with criminal legal criteria, such as the severity and proportionality of damages, in accordance with International Human Rights law.

2. Intersection between environmental crimes and gender:

Accountability mechanisms should investigate, prosecute, and repair environmental crimes while addressing the varied intersections of **environmental crime and gender** rooted in International Human Rights Law and recognizing multiple and intersecting forms of discrimination. Adopting a gendered lens sheds light on the different ways in which women, men, children, and/including LGBTQI+ persons, particularly those who identify as Indigenous Peoples and People of African Descent, are impacted by environmental crimes.

- **Environmental degradation is a driver of gender-based violence (GBV):** Environmental damage and the scarcity of natural resources that derive thereof threaten ecosystems and people's livelihoods, aggravating issues such as biodiversity decline, food insecurity, poverty, displacement, violence, and erosion of traditional and cultural knowledge. Girls, women, and/including LGBTQI+ persons are more likely to live in poverty due to structural racism and discrimination. They are more vulnerable to the impacts of environmental damage and other environmental hazards, often magnified by intersecting forms of discrimination. The ensuing strain and competition over limited resources within communities and households magnify gender-based inequalities marked by discrimination and exploitation. Various manifestations of GBV are framed as survival strategies.
- **Environmental crimes increase GBV:** Environmental crimes set the stage for intensified GBV used as a tool for control and the reinforcement of power imbalances in peacetime and armed conflict. For instance, perpetrators use gender-based violence to assert control over natural resources and to diminish the efforts of those working towards a safe and healthy environment. Indigenous Peoples and People of African Descent, especially women and/including LGBTQI+ persons human rights defenders, are at special risk.³

³ IUCN, Women Environmental Human Rights Defenders: Facing gender-based violence in defense of land, natural resources, and human rights, (2020), <https://genderandenvironment.org/women-environmental-human-rights-defenders-facing-gender->

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3. Environmental crimes within the Rome Statute framework

- The Rome Statute **does not directly address harm to the environment**, apart from article 8(2)(b)(iv), which includes as a war crime the act of:

“intentionally launching an attack in the knowledge that such attack will cause [...] 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.”

The provision only applies in international armed conflict and is constricted by elements that render the likelihood of any conviction negligible. For instance, Article 8(2)(b)(iv) demands a very high threshold of injury to the environment before an act would fall within the scope of the crime.

Even if these standards were met, Article 8(2)(b)(iv) requires a proportionality test. The environmental damage must be ‘clearly excessive’ concerning the anticipated military advantage. Yet, there are no standards to weigh military advantage against environmental destruction in ICL, creating a ‘virtual nullity.’ The OTP has an opportunity to address the uncertainties as to what ‘excessive environmental damage’ means while ensuring a human rights approach incorporating the customs, traditions, rules, and legal systems of Indigenous Peoples and of People of African Descent.

- Assessing which substantive crimes under the Rome Statute may encompass environmental damage is critically important to evaluate the merits of utilizing the ICC as a forum for redress for harm to the natural environment. There are several anthropocentric crimes under the Rome Statute, ranging from war crimes to crimes against humanity to genocide, which could be used to provide incidental protection to the environment, avoiding the restrictions of Article 8(2)(b)(iv).

4. Adopting a green criminology approach:

- Applying a **“green criminology approach”** will enable the ICC to incorporate environmental considerations into the core crimes outlined in the Rome Statute, even when the Statute does not explicitly reference the environment. The approach seeks to recognize environmental destruction as a means to commit, for example, crimes against humanity (CAH) under Article 7. However, prosecution under these provisions without an innovative and inclusive interpretation risks leaving the full extent of the harm to the environment *per se* unrecognized. A “green criminology approach” is a tool for studying, analyzing, and ensuring accountability for environmental crimes and often overlooked wider environmental harms. This approach calls attention to the role of power dynamics in determining a breach of the law, those who are liable, and those who are disproportionately affected.

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- **Crimes against humanity could be committed by or through environmental harm, understood/or not as a non-military attack.**⁴
 - Persecution is a crime against humanity potentially applicable to environmental harm under Article 7(1)(h) and 7(2)(g) of the Rome Statute. As the crime requires intentional and severe deprivation of fundamental rights, it allows judges to include International Human Rights Law in the analysis, specifically the human right to a clean, healthy, and sustainable environment. The Human Rights Council has recognized the human right to a clean, healthy, and sustainable environment.⁵ Although the recognition of a right to a healthy environment is not uniform, it is well established that the commission of serious environmental harm can gravely impact fundamental rights, including the rights to life, security, health, private and family life, and home, property, and the rights to adequate food and water. Consequently, a perpetrator could commit persecution when severely depriving civilians of the human right to a clean, healthy, and sustainable environment.
 - The crime against humanity most applicable to environmental harm is Article 7(1)(k), “other inhumane acts.”⁶ Specifically, other inhumane acts under the Rome Statute are those “of a similar character [as the crimes against humanity listed under article 7] intentionally causing great suffering or serious injury to body or mental or physical health.” Environmental harm constitutes inhumane acts if they cause great suffering or harm, for example, where a feature of the natural environment is essential to the survival of a person or a group. If the perpetrator is aware of the harm that would likely result from his/her actions affecting the environment, this could lead to great suffering and, thereby, to a conviction.
- Indigenous Peoples and People of African Descent, particularly women, play a vital role in stewarding and protecting the lands they inhabit. When assessing CAH, the environment must be recognized and understood as the fundamental basis of their culture, spiritual life, integrity, and economic survival. For instance, damage to rivers or forests in which they live or dispossessing or forcibly displacing them of their land (either directly or indirectly) might cause serious mental suffering. In sync with the above-mentioned Point 1, the environment cannot be considered a matter of possession and production but a material and spiritual element that people must fully enjoy to preserve as a cultural legacy they may transmit to future generations. Alternatively, even without some special significance of the environment, using activities that harm the environment, such as toxic emissions, could cause sufficient harm to constitute other inhumane acts.⁷

⁴ ICC, Elements of Crimes, Introduction to article 7 of the Statute, p. 3, “Concerning the definition of the term ‘attack’, the Elements of Crimes clarify that it does not necessarily equate with a “military attack”. ICC, Pre-Trial Chamber II, Prosecutor v. Jean-Pierre Bemba Gombo, (June 15, 2009), ¶75, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

⁵ Human Rights Council, The human right to a clean, healthy, and sustainable environment, A/HRC/RES/48/13, (October 18, 2021). *See also*, UN General Assembly, The human right to a clean, healthy, and sustainable environment, A/76/L.75, (July 26, 2022).

⁶ “Other inhumane acts” as an environmental crime is of comparable gravity to the listed crimes against humanity and avoids unduly restricting the Statute’s application. *See e.g.*, Special Court for Sierra Leon, Appeals Chamber, Prosecutor v. Brima et al., (February 22, 2008), ¶183.

⁷ *See e.g.*, United Nations Human Rights Committee, Portillo Cáceres v. Paraguay, CCPR/C/126/D/2751/2016. The Committee identified human rights violations arising from the use of illegal chemicals by agribusinesses, resulting in the death of one community member and causing severe health issues among others, including symptoms such as nausea, dizziness, headaches, fever, stomach pains, vomiting, diarrhea, coughing, and skin lesions. Additionally, the contamination led to the destruction of fruit trees, crops, and farm animals. The Committee’s findings suggest that such harm could be construed as significant enough to constitute the crime of other inhumane acts, contingent upon demonstrating the requisite *mens rea*.

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5. A green criminology approach and the role of state and non-state actors:

- A green criminology approach includes recognizing **extractive industries and megaprojects** as one of the leading causes of environmental harm and, therefore, the role of corporations and state actors as perpetrators of environmental crimes.⁸ Consequently, a green criminology approach leads to the understanding that a CAH can be committed pursuant to a corporation's plan and not only a state or a non-state armed actor's plan or policy. Officers of that corporation could be prosecuted for crimes against humanity.⁹

Companies who invest in countries without understanding the environmental impacts of their actions risk being complicit in the commission of ICC core crimes when their actions reach the level that the Statute requires. The new policy paper is a decisive step towards creating an accountability mechanism for the primary ecological wrongdoers.

During peacetime and armed conflict, extractive industries and megaprojects – whether illegal or not under national law – rely on achieving profitability through large-scale production, frequently leading to the deterioration of local economies, land dispossession, forced displacement, loss of local livelihoods, and severe degradation of natural resources. This, in turn, affects the social fabric and corresponding gender roles within communities, contributing to the emergence of GBV. Gender-based crimes are used against victims to enforce gender regulations and impose gender stereotypes, for example, on roles, behaviors, activities, or attributes. Gender regulations often intersect with other discriminatory regulations used to reinforce systems of oppression, including, but not limited to, racism, ethnicity, nationality, religion, immigration status, class, or disability status.

For instance, extractive industries and megaprojects increase sexual exploitation and the commodification of girls, women, and/including LGBTQI+ persons due to diminished economic opportunities and high concentrations of male workers. Large influxes of men to work in, for example, mines, renders women, children, and/including LGBTQI+ persons particularly vulnerable to being sold or coerced into sex work. The impact varies by community and is linked to gender roles and patriarchy. Indigenous Peoples and People of African Descent, particularly women, children, and/including LGBTQI+ persons, subject to various intersecting forms of marginalization and discrimination, face an elevated risk of GBV in extractive industries and megaprojects areas.

- Environmental crimes flourish in areas with limited state governance. Yet, limited state governance does not mean the absence of governance. **State and non-state actors, such as corporations and armed non-state actors, operate as environmental authorities** while ruling, e.g., access to water

⁸ UK and New Zealand students requested the ICC to open an investigation into oil major BP. Their communication claims the company's senior executives tried to maximise their oil profits despite the human suffering inflicted and an understanding of the risks. It argues that the widespread and harmful nature of climate change means classifying it as a crime against humanity is the only accurate legal definition. New Zealand Students for Climate solutions & UK Youth Youth Climate Coalition, Request to open investigations & request for reparations regarding the Crimes Against Humanity of Climate change, (December 2022), <https://shorturl.at/lvxKZ>. See also, Laura Baron-Mendoza, Yuri A. Romaña Rivas, José Saldaña Cuba & Nancy R. Tapia Torrado, Observaciones. Solicitud Opinión Consultiva CDH-OC-1-2023/561 Relativa a “Emergencia climática y Derechos Humanos”. Pregunta E., Centre For Human Rights and Legal Pluralism-McGill University, (Octubre, 2023), https://www.mcgill.ca/humanrights/files/humanrights/amicus_curiae_chrlp_chairhr.pdf.

⁹ Co-perpetrators are mutually aware and mutually accept the risk that executing their common plan will, in the ordinary course of events, result in the commission of the charged crime. For example, a corporation officer is liable when he/she was aware that the corporation's actions to generate profit could result in the commission of environmental crimes including the gendered impacts of such a crime. See e.g., ICC, Pre-Trial Chamber I, Prosecutor v. Lubanga, ICC-01/04-01/06, (January 29, 2007), ¶360-362.

MADRE

and food, and administering waste disposal and sanitation.¹⁰ Therefore, state and non-state actors, whether in armed conflict or peacetime, may also be perpetrators of environmental crimes regardless of the military nature of the attack.¹¹ As non-state actors, representatives of corporations may be liable under Articles 25 (individual responsibility) and 28 (command responsibility). In addition, a failed (state/corporation/rebel) environmental governance, along with natural resource scarcity, fosters the commission of crimes ranging from human trafficking, exploitative transactional sex, sexual violence, and forced and/or child labor to facilitate illicit activities.

6. Survivors' meaningful participation in accountability processes:

- Survivors and their communities need to inform and lead accountability processes for environmental crimes and linked gender-based crimes. Accountability must include meaningful participation of survivors in peace and transitional justice processes. Survivors play a key role in creating sustainable peace; their rights to participate in reparation mechanisms should be upheld. Accountability for environmental crimes must include prevention strategies that address gender inequality and harmful gender stereotypes, enabling women-led and/including LGBTQI+-led civil society organizations and human rights defenders to support their communities safely. Civil society organizations are experts on their communities and must be at the centre of all accountability and justice processes. Civil society can inform these processes with contextual knowledge crucial to understanding communities, including but not limited to the long-term impacts of colonialism; historical gender, racial, and ethnic discrimination; impacts of climate breakdown; and structural oppressions that non-local actors may not recognize.

Signatories

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Women's Environment & Development Organization (WEDO)

Women in Migration Network (WIMN)

Women's Initiatives for Gender Justice

Land is Life

Youth For Ecocide Law

New Internationalism Project, Institute for Policy Studies

Young Women Initiatives (YouWIn) (The Philippines)

Zenab for Women Development (Sudan)

Centro de Desarrollo Psicosocial – Taller de Vida (Colombia)

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¹⁰ Laura Baron-Mendoza, FARC-EP's Rebel Environmental Governance: creating legal legacies of War, Armed Groups and International Law, (June 2, 2023),

<https://www.armedgroups-internationallaw.org/2023/06/02/farc-eps-rebel-environmental-governance-creating-legal-legacies-of-war/>.

¹¹ ICC, Elements of Crimes, Introduction to article 7 of the Statute, p. 3.