

# **Environmental crimes under the Rome Statute: Is the ICC an appropriate mechanism to address the global environmental crisis?**

Dr Carrie McDougall  
Melbourne Law School, University of Melbourne

## Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction (Article 6(c))

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group in whole or in part.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

# Crime against humanity of other inhumane acts (Article 7(1)(k))

1. The perpetrator inflicted great suffering or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. 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.

# War crime of excessive incidental death, injury or damage (Article 8(2)(b)(iv))

In the context of an international armed conflict:

“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or **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.”

# A New Environmental Crime

- \* States Parties have already acknowledged that harm to the environment can fall within the definition of ‘the most serious crimes of concern to the international community as a whole’.
- \* Any State Party can submit amendment.
- \* Under Article 121(3) amendments on which consensus cannot be reached require a two-third majority.
- \* Entry into force is governed by Article 121(5) – States Parties must ratify an amendment to give ICC jurisdiction over crimes committed on their territory and by their nationals.

# Working Group on Amendments

- \* First step: submission to the WGA.
- \* WGA Terms of Reference: '[i]n the case of a proposal for a new crime, the WGA particularly considers whether the crime can be characterised as one of the most serious crimes of concern to the international community as a whole, and whether the crime is based on an existing prohibition under international law.'

# Factors for Success

- \* Based on an existing prohibition under international law – ideally drawing on provisions that contemplate criminalisation
  - = inclusion of ‘unlawful’ in definition
  - = elements specify that the perpetrator’s conduct was contrary to international law.
- \* Sufficiently grave to warrant, and otherwise be appropriate for, inclusion in the ICC’s jurisdiction
  - = widespread, long-term and severe environmental damage.
  - = reference to transboundary damage or damage to the global commons.

# Factors for success

- \* Definition characterised by clarity and certainty.
- \* Conformity with Rome Statute drafting conventions (and reliance on agreed language where possible).



# Factors for Success

- \* Minimise evidentiary challenges relating to environmental damage caused by aggregate factors.
  - = jurisdictional limiting clause modelled on the definition of war crimes.
- \* Avoid the need to prove that the perpetrator intended to destroy the environment.
  - = mental element based on actual or constructive knowledge.
- \* Avoid unnecessary complications relating to any asserted right to a healthy environment or impact on humans.

# Criminal Damage of the Environment

Article 8ter (1): The Court shall have jurisdiction in respect of criminal damage of the environment in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

(2): For the purpose of this Statute, “criminal damage of the environment” means unlawfully caused widespread, long-term and severe damage to the natural environment.

(3): For the purpose of paragraph 1, it is understood that “widespread” incorporates a requirement of transboundary damage or damage to the global commons.

# Elements

1. The perpetrator caused, or on a systematic basis significantly contributed to, widespread, long-term and severe damage to the natural environment.
2. The perpetrator knew or should have known that his or her conduct would cause, or contribute to, widespread, long-term and severe damage to the natural environment.
3. The perpetrator's conduct was contrary to international law.
4. The perpetrator was aware of the factual circumstances that established such conduct was inconsistent with international law.

# Advocacy points

- \* *Inclusion under the Rome Statute can reasonably be expected to have a real deterrent effect:* most environmental harm is committed by rational economic actors on the basis of a cost-benefit analysis; a criminal sentence is one cost of business that can't be passed onto the consumer.
- \* *Prosecution by an international tribunal is necessary to reach perpetrators:* in most cases, when shared resources and global commons suffer environmental harm, no individual state will have standing to bring legal action against any State responsible, and States will likely have difficulty exercising extraterritorial criminal jurisdiction over an individual perpetrator.

# Advocacy points

- \* *Prosecution by an international tribunal would reflect the collective interest that the international community has in taking action to prevent the most devastating examples of environmental harm: it is now beyond argument that environmental harm poses a risk to human security, which in turn poses a threat to international peace and security;*

# Advocacy points

- \* *Any suggestion that the Court would be overburdened as a result of the inclusion of a new crime is overstated: there is no evidence that a flood of cases might be expected; while the Court will need to prioritise its work carefully going forward, the crimes it is able to investigate and prosecute need to respond to all types of threats to human security that are of concern to States Parties.*

# Advocacy points

- \* *Judges wouldn't need to be environmental law experts, they need to be international criminal law experts: of course expert evidence in relation to damage suffered and causation would need to be gathered – but there are many other examples where the Court relies on expert, technical evidence.*
- \* Coordinated domestic criminalisation would assist.

# Broader strategic advantages

- \* Underscore your intention to strengthen international environmental law protections.
- \* Use the proposal as leverage in negotiations in other fora (eg BBNJ; UNFCCC; any new instrument to address the impact of sea level rises on maritime boundaries).
- \* Enhance your protection by contributing to the strengthening of the international rules-based order at a time it is under threat.
- \* Enhance your credentials as good international citizens – resulting good will on the part of other States that may help when you pursue your priorities.