



## COMMENT ON THE ICC OFFICE OF THE PROSECUTOR DRAFT POLICY ON ENVIRONMENTAL CRIMES UNDER THE ROME STATUTE

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### I. Introduction

Amnesty International submitted a comment in 2024 welcoming the policy initiative by the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) to advance accountability for environmental crimes under the Rome Statute and providing preliminary feedback on key procedural and substantive issues raised by the policy.<sup>1</sup> The OTP has since published a Draft Policy on Environmental Crimes under the Rome Statute (“Draft Policy”) and launched a second public consultation on the policy initiative.<sup>2</sup> Amnesty International appreciates the opportunity to provide further comment on the text of this Draft Policy with the aim of strengthening the policy as well as its implementation.

Amnesty International welcomes the ICC’s commitment to advance accountability for environmental crimes, as well as the critical and leading role that the institution can play towards such accountability as demonstrated through its present policy development. Amnesty International reiterates its support for the ICC and continues to call on the Assembly of States Parties to the Rome Statute to fulfil its role to support and defend the Court as it fulfils its mandate.<sup>3</sup>

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<sup>1</sup> Amnesty International, Comment on ICC-OTP Policy on Environmental Crimes, 22 March 2024, <https://www.amnesty.org/en/documents/ior30/7864/2024/en/> (Index: IOR 30/7864/2024).

<sup>2</sup> Office of the Prosecutor of the International Criminal Court, Draft Policy on Environmental Crimes under the Rome Statute, 18 December 2024 [hereinafter Draft Policy on Environmental Crimes], <https://www.icc-cpi.int/sites/default/files/2024-12/2024-12-18-OTP-Policy-Environmental-Crime.pdf>; Office of the Prosecutor of the International Criminal Court, ICC Office of the Prosecutor launches second public consultation on a policy initiative to advance accountability for environmental crimes under the Rome Statute, 18 December 2024, <https://www.icc-cpi.int/news/icc-office-prosecutor-launches-second-public-consultation-policy-initiative-advance>.

<sup>3</sup> Amnesty International, Key recommendations: 23rd Session of the Assembly of States Parties to the Rome Statute, 28 November 2024, <https://www.amnesty.org/en/documents/ior53/8787/2024/en/> (Index: IOR 53/8787/2024).

## II. The Draft Policy on Environmental Crimes is a significant step forward

Amnesty International commends the OTP on a Draft Policy that demonstrates a strong commitment to advancing accountability for environmental crimes under the Rome Statute in recognition that harm to the environment and harm to humanity are inextricably entwined because, as the Draft Policy explains, “the natural environment forms the bedrock of life itself.”<sup>4</sup>

The present Draft Policy appears to reflect a number of recommendations provided in Amnesty International’s prior comment, notably that “the OTP focus its attention on both State and non-State actors as likely perpetrators of environmental crimes including the role and responsibility of corporate actors in particular.”<sup>5</sup> This focus is reflected in the Draft Policy’s objective of having the OTP “engage with corporate and private actors in order to put them on notice of legal risks related to their activities and to their supply chains or portfolios.”<sup>6</sup>

The present policy marks the first time that the OTP has committed to considering the pursuit of accountability of corporate actors through its pledge to “consider the broader socio-economic context in which Rome Statute crimes are committed and seek to identify not only the principal perpetrators of the crime, but also those who are responsible for facilitating or materially supporting them” including “investors, lenders, insurers and supply chain actors, when acting with the requisite intent and knowledge.”<sup>7</sup> In that regard, the OTP rightly acknowledges that, while it cannot hold a corporation responsible as a legal person, it can and should exercise its jurisdiction over “individual corporate officers who satisfy the requirements of territorial or nationality jurisdiction and are personally responsible for the commission of an environmental crime pursuant to articles 25 or 28 of the Statute.”<sup>8</sup>

This policy objective of identifying, engaging with, and considering accountability for corporate actors as part of the OTP’s mandate with respect to environmental crimes under the Rome Statute is operationalized in various aspects of the Draft Policy. The Draft Policy reflects Amnesty International’s recommendation to request information from corporate actors that may be involved in environmental crimes by providing that: “If the Office has information that a corporation, an individual corporate actor, or other private actor is involved in environmental crimes, the Office may, if appropriate and consistent with its powers under the Statute, directly engage with the relevant actor or corporation.”<sup>9</sup> While the substance of these engagements will

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<sup>4</sup> Amnesty International also notes with appreciation the Draft Policy’s recognition that the term “world” in the Rome Statute’s preambular commitment to holding criminally responsible the perpetrators of “grave crimes [that] threaten the peace, security and well-being of the world” is “not limited to humanity and extends to the natural environment.” Draft Policy on Environmental Crimes, paras. 1-11.

<sup>5</sup> Amnesty International, Comment on ICC-OTP Policy on Environmental Crimes, 22 March 2024, <https://www.amnesty.org/en/documents/ior30/7864/2024/en/> (Index: IOR 30/7864/2024).

<sup>6</sup> Draft Policy on Environmental Crimes, para. 12.

<sup>7</sup> Draft Policy on Environmental Crimes, para. 79. With respect to *mens rea*, the Draft Policy correctly states that “[w]hat matters for the purpose 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* and that they otherwise fulfil the mental elements of the crime(s) charged.” Draft Policy on Environmental Crimes, para. 83 (emphasis added).

<sup>8</sup> Draft Policy on Environmental Crimes, para. 28.

<sup>9</sup> Draft Policy on Environmental Crimes, para. 94.

undoubtedly remain confidential, their significance as a mechanism for deterrence cannot be understated. As the OTP rightly explains, “directly engag[ing]” with a corporation has “various advantages” including “putting them on notice”, prompting them to conduct human rights due diligence in line with international human rights law and standards,<sup>10</sup> and “encouraging them to cease the illegal activities causing environmental damage or to disengage from those involved in such activities” in light of the “legal, financial, and reputational risks associated with their activities”.<sup>11</sup>

Moreover, the OTP states in the Draft Policy that it “may share [information] with national law enforcement authorities” upon learning that “individuals or organizations involved in ongoing environmental crimes are enabled in their activities by receiving support or financing from third parties or corporations.”<sup>12</sup> Such cooperation between the OTP and national prosecutors is integral to the successful implementation of this policy and its aims, recognising for example that the ICC’s jurisdiction and capacity may be limited compared to that of national authorities who may have a broader jurisdictional remit and more resources to address environmental crimes within their jurisdictions.

The Draft Policy goes further in advancing this policy objective by setting out aspects of the OTP’s interpretation of the Rome Statute as it applies to corporate actors that may be responsible for environmental crimes. This interpretive guidance may have a bearing not only on the OTP’s practice but also serve as persuasive authority that influences the prosecution of international crimes on the national and regional levels, as well as by other international justice mechanisms.

For instance, with respect to crimes against humanity, the Draft Policy states that “[c]rimes against humanity involving the environment can ... be committed not only by government officials but also by non-state actors such as members of rebel groups, terrorist groups, and – critical in the environmental context – corporations.”<sup>13</sup> The OTP also recognizes the significance of mental suffering for establishing “other inhumane acts” under Article 7(1)(k) of the Rome Statute due to “the central role that the environment plays in the social, cultural, and religious life of many people, particularly members of Indigenous Peoples.”<sup>14</sup> As victims and survivors of international crimes commonly face challenges to establish a causal link between the physical harm they have experienced and the conduct of an alleged perpetrator, including that of corporate actors, the OTP’s recognition of the significance of mental suffering with respect to environmental crimes should provide supplementary means for establishing causation that ensures access to justice for affected communities. This recognition aligns with the Draft Policy’s broader commitment to “apply an intersectional approach to environmental crimes” and

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<sup>10</sup> United Nations Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 2011, Principle 17 [hereinafter UN Guiding Principles].

<sup>11</sup> Draft Policy on Environmental Crimes, para. 95. In encouraging corporate actors to disengage from those involved in illegal activities that have caused environmental damage, the OTP should be aware that such disengagement should be achieved responsibly such that it does not — to the greatest extent feasible and in accordance with the law — exacerbate tensions within a conflict-affected setting or lead to other adverse consequences such as further criminality or violations of human rights. For example, “[w]hen transferring ownership,” a company seeking to disengage should, “assess the human rights capacities of the buyer and request, including through contractual terms, that the buyer put specific human rights-related policies and procedures in place to enable them to operate responsibly in a conflict-affected context.” See United Nations Development Programme, Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide, 2022, <https://tinyurl.com/4ycpp4w9>, pp. 35-36.

<sup>12</sup> Draft Policy on Environmental Crimes, para. 90.

<sup>13</sup> Draft Policy on Environmental Crimes, para. 33.

<sup>14</sup> Draft Policy on Environmental Crimes, para. 40.

“emphasise the rights of individual members of groups that have a particularly close connection with the natural environment, particularly Indigenous Peoples” in “analysing environmental crimes.”<sup>15</sup>

With respect to war crimes, the Draft Policy states that the chapeau element of the nexus to an armed conflict does not require that the perpetrator “intended the act in question to further the armed conflict”, which it notes is “important in the environmental context because officers of a corporation may take advantage of the existence of an armed conflict to engage in environmental damage, illegal exploitation of natural resources, or illegal dispossession of land without its members intending these acts to further the conflict.”<sup>16</sup> The OTP also affirms that “corporate actors ... may ... commit the war crime of pillaging by engaging in the illegal exploitation of natural resources or the illegal dispossession of land”.<sup>17</sup> The pillage of natural resources by corporations, and associated environmental damage, is rampant around the world and has been subject to considerable academic study.<sup>18</sup> Amnesty International welcomes the OTP addressing the issue in the Draft Policy as well as any forthcoming efforts to investigate and, where appropriate, prosecute corporate actors for the war crime of pillage.

Finally, the Draft Policy clarifies that “[i]f environmental crimes are committed through corporate structures, senior corporate officers may potentially qualify as non-military superiors for purposes of article 28(b).”<sup>19</sup> This, in Amnesty International's reading, is the first time the OTP has acknowledged that the doctrine of civilian superior responsibility applies in the corporate context, as it has primarily applied with respect to civilian leaders that supervise a military command structure.<sup>20</sup> Such an application could prove groundbreaking because it should open the doors to holding responsible corporate directors that may not have engaged or ordered others to engage in criminal activity directly but were aware or consciously disregarded information which clearly indicated that their subordinates were engaged in such activity. This interpretation should also reinforce the responsibility of corporations to create policies and conduct human rights due diligence to ensure that those higher up in the corporate structure cannot overlook clearly unlawful activity by subordinates, including in subsidiary companies and across business partners in their value chain.<sup>21</sup>

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<sup>15</sup> Draft Policy on Environmental Crimes, paras. 8, 56. It is important that the OTP also commits to “take[] into account a variety of perspectives and experiences related to environmental damage and its impact throughout the course of its investigations” including by “seeking input from women, Indigenous Peoples, youth, persons with disabilities, displaced persons, and other vulnerable or marginalised groups.” Draft Policy on Environmental Crimes, para. 73.

<sup>16</sup> Draft Policy on Environmental Crimes, para. 41.

<sup>17</sup> Draft Policy on Environmental Crimes, para. 48.

<sup>18</sup> James G. Stewart, Corporate War Crimes: Prosecuting the Pillage of Natural Resources, 2010, [https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1338&context=fac\\_pubs](https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1338&context=fac_pubs).

<sup>19</sup> Draft Policy on Environmental Crimes, para. 82.

<sup>20</sup> See, e.g., International Criminal Tribunal for Rwanda, Prosecutor v. Ignace Bagilishema, Judgment, 3 July 2002, paras. 50-58. See also International Criminal Tribunal for Rwanda, Prosecutor v. Alfred Musema, Judgment, 27 January 2000, paras. 127-148 (applying the doctrine of civilian superior responsibility in a corporate context).

<sup>21</sup> UN Guiding Principles, Principle 17.

### **III. The Draft Policy on Environmental Crimes has areas that can be strengthened**

Amnesty International recommends that the Draft Policy be strengthened particularly with respect to the OTP's planned implementation of the policy.

As it stands, the Draft Policy provides that each of its two prosecution pillars will "appoint a Focal Point for environmental crimes" based on "individual expertise and interest" that will "have ownership of the implementation of this Policy for annual recommendations to the Prosecutor."<sup>22</sup> The OTP then plans to "integrate the principles, objectives, and procedures set out in this Policy into its internal regulatory and operational framework" and to "consistently monitor its practices and procedures to ensure that it conducts effective preliminary examinations, investigations, and prosecutions of environmental crimes and other activities in accordance with this Policy."<sup>23</sup>

Amnesty International observes that the practical application of the policy may be hampered without dedicated resources and expert capacity to advance accountability for environmental crimes under the Rome Statute. In Amnesty International's view, if the OTP will require such capacity, it should request such in its annual budget proposal to the Assembly. Of course, we note with regret that the Assembly's annual budget appropriation decisions generally indicate that states have not been willing to properly fund the ICC, and we recognise that the OTP has had to find creative solutions to fulfil its mandate. However, these unfortunate realities notwithstanding, in our view the proposal to place the burden of implementing aspects of this policy upon two Focal Points who will be relied upon to train and direct the efforts of staff members throughout the OTP, among other priorities, will likely lead to ineffective or inefficient implementation of this policy. This concern is underscored by the OTP's acknowledgment of its "need to strengthen its in-house expertise on environmental crimes committed in both conflict and non-conflict situations."<sup>24</sup> Amnesty International encourages the OTP to request of the Assembly the budget that it requires to fully implement its mandate and activities, including as they relate to the implementation of the present policy. In addition, the OTP should consider seeking external expertise on environmental crimes from national law enforcement authorities, members of civil society, and legal experts, particularly those who work closely with communities most affected by environmental damage including Indigenous and Tribal Peoples and other marginalized groups.

Amnesty International also reiterates its recommendation, from its earlier submission to the Draft Policy initiative, that the final policy on environmental crimes include a commitment by the OTP to public and regular reporting about the policy's implementation. In line with our call for greater transparency, consistency and inclusivity in the OTP's approach across all of its policies,<sup>25</sup> Amnesty International continues to urge the OTP to commit to regular, detailed,

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<sup>22</sup> Draft Policy on Environmental Crimes, para. 63.

<sup>23</sup> Draft Policy on Environmental Crimes, para. 67.

<sup>24</sup> Draft Policy on Environmental Crimes, para. 66.

<sup>25</sup> Amnesty International, Submission to ICC-OTP Public Consultation on Policy on Complementarity and Cooperation, 20 November 2023, <https://www.amnesty.org/en/documents/ior53/7482/2023/en/> (Index: OR 53/7482/2023), p. 10.

situation-specific public reporting on its preliminary examinations, investigations, and any other context in which it is advancing accountability for environmental crimes.

Amnesty International recognizes that strategic and operational elements of the OTP's investigative and prosecutorial work must remain confidential and that the Office has a duty to ensure the confidentiality of information and the protection of persons according to the requirements of the Rome Statute, the ICC Rules of Procedure and Evidence, and the Code of Conduct for the Office of the Prosecutor.<sup>26</sup> Nonetheless, Amnesty International believes that public and regular reporting on the broad steps taken to integrate and implement the policy at each stage of the Office's work is essential. Such reporting should include identifying situations in which environmental crimes have been identified, detailing how and which national law enforcement authorities have been engaged with respect to said crimes, and providing public information on the number of requests for information that have been submitted to corporate actors.

A practice of public reporting, including with respect to environmental crimes, is crucial to promoting accountability, transparency, and predictability in the OTP's work and would serve to demonstrate that its environmental crimes policy is operationalized and implemented effectively. Public reporting may also encourage States Parties to meet their Rome Statute obligations, deter environmental crimes by State and non-State actors, and inform engagement by civil society actors as well as other relevant stakeholders with the ICC.

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<sup>26</sup> Rome Statute of the International Criminal Court, Article 54; ICC Rules of Procedure and Evidence, Rule 6; Code of Conduct for the Office of the Prosecutor, 5 September 2013, Section 7.