



The Promise Institute
for Human Rights

UCLA School of Law

REPORT OF THE
EXPERT WORKSHOP ON

**INTERNATIONAL
CRIMINAL LAW &
THE PROTECTION OF
THE ENVIRONMENT**

APRIL 2020

On February 29, 2020, a group of scholars and practitioners came together at the Promise Institute for Human Rights at UCLA School of Law to explore the potential of international criminal law to protect the environment and halt or mitigate climate change.

Over the course of the day, the group discussed the options under current international criminal law to address environmental harm and how these might best be used. Reflecting on the limits of existing law, the group then went on to consider what the elements of an effective and plausible new crime might be.

The group resolved to continue working on the definition of new crime(s) and their practical implementation, and to deepen reflection on the legal, practical and political parameters of the project.

SESSION 1: INTRODUCTION & FRAMING

The day opened with a general discussion of the purpose and parameters of using international criminal law to protect the environment. The conversation centred on: what exactly should be criminalized; who should be criminally responsible; where and how the jurisdiction should be created; and finally why, or whether, international criminal law was an effective avenue.

WHAT

The group discussed the scope of acts to be prohibited: a broad definition which would capture responsibility for climate change, versus one more narrowly defined and limited to massive environmental damage. All agreed that it would be challenging to identify criminal acts contributing to climate change. Which kinds of acts (which actors) should be targeted? How would causation be established? What would be the relevance of frameworks regulating some of these same acts in national and transnational jurisdictions?

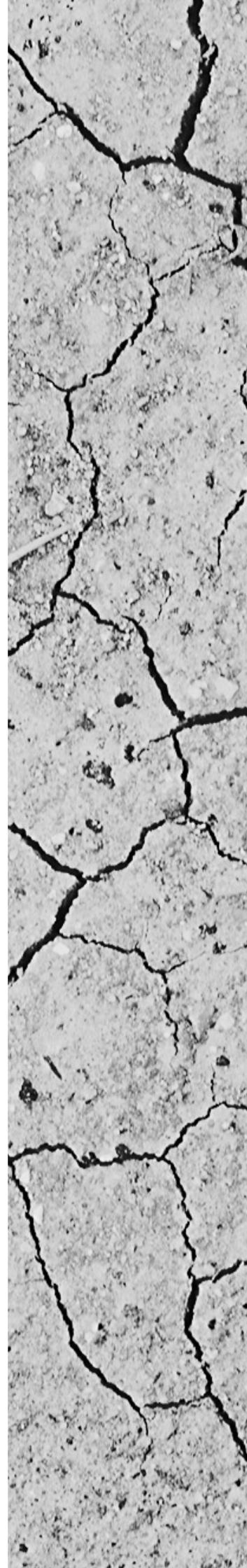
With regard to causation, it was noted that scientific evidence currently emerging from civil actions against carbon majors was strengthening the causation chain between those actors and global warming. It was further noted that international criminal law does not generally apply a “but for” standard in determining causation (and that *mens rea* might be more of a problem). In support of a broader definition, participants also referred to the practical difficulty of separating climate change from other forms of environmental harm, which are often closely linked. Questions were also raised about the value of the project if it failed to address the major environmental threat facing humanity, and it was noted in particular that this approach would lose the support of small island developing states.

WHO

In the context of a broader climate change crime, it was agreed that the definition would need to exclude small individual actors who are inevitably contributing to climate change through their everyday activities.

Although the fossil fuel industry would seem a natural target of the criminalisation, it was noted that if the International Criminal Court (ICC) were the chosen forum, only natural, not legal, persons could be held liable.

Beyond the ICC, the draft Crimes Against Humanity Convention, the Malabo Protocol to the African Charter on Human and People Rights and the draft Legally Binding Instrument to Regulate the Activities of Transnational Corporations and Other Business Enterprises were mentioned as examples of instruments creating corporate liability for international crimes.





WHERE & HOW

Conversation focused on an amendment to the Rome Statute, with alternatives such as a new convention or a protocol to the Paris Agreement seeming less feasible. There were concerns about the ICC's capacity to take on jurisdiction over a new crime, although it was noted that a crime established in the Rome Statute would create a mosaic of national fora through the complementarity principle. The group exchanged views on whether the addition of a crime of environmental destruction would increase or decrease the legitimacy of the court. Some participants warned about over-reliance on the ICC, and suggested that a multi-pronged approach might be most effective. The elaboration of a set of principles was considered, although an argument was made that prohibition had been the most effective approach in environmental protection so far. It was noted that any new crime should take into account existing international law frameworks and avoid contributing to the fragmentation of international law.

WHY

Fundamental questions were raised about the effectiveness of international criminal law to halt environmental destruction and climate change. Participants pointed to the prospective nature of any new crime, which would leave historic actions untouched, and queried whether the individual approach of criminal law was appropriate to the systemic nature of climate change. Others were drawn to the symbolic value and advocacy potential of characterizing destruction of the environment as an international crime. It was argued that the threat of international prosecution could have a particular deterrent effect on corporate behaviour, and that just one prosecution would be needed to catalyse behaviour change due to low corporate tolerance for reputational risk. Others called for closer examination of this assumption, for example by assessing how companies react to domestic environmental prosecutions. The anthropocentric nature of (most) international criminal law was raised as a challenge to the framing of an ecocentric crime, and this thread ran through the day's conversations.

SESSION 2: THE USE OF EXISTING INTERNATIONAL CRIMINAL LAW

The second session examined the potential of existing international criminal law to capture environmental destruction. The session opened with an examination of crimes against humanity under article 7 of the Rome Statute, and how this could apply to a specific example of mining activities that were poisoning the inhabitants of a town in Latin America. The following issues were highlighted in the presentation and subsequent discussion.

Depending on their effects, acts like pollution might fall within the category of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” identified in article 7(1)(k). This was generally felt to be the most promising avenue for environmental crimes.

Identifying the underlying value protected by the enumerated acts is helpful in assessing similar character, and it was noted that article 7(1)(j), prohibiting the crime of apartheid, might be of particular relevance here as it demonstrates that systemic actions with social and economic consequences are included in the purview of article 7.

There was discussion of the meaning of “attack” in the chapeau requirement that the enumerated acts be committed as part of a widespread or systematic attack directed against any civilian population. While it is understood that “attack” requires deliberate harm, it was argued that the harm could be a known by-product of another primary activity, and analogy was made to the Krupp case and others at Nuremberg where the use of slave labour in the pursuit of profit was prosecuted. With respect to the requirement that this be “directed against a civilian population”, it was suggested that jurisprudence requiring the civilian population to be the primary object of the attack could be distinguished.



Participants considered whether the requirement in article 7(2)(a) that the conduct be pursuant to or in furtherance of a state or organizational policy might encompass corporate policy. There was also discussion of the extent to which tolerance of actions damaging the environment by a state would be adequate to constitute state policy, bearing in mind the requirement in the Elements of Crimes that the state or organization “actively promote or encourage such an attack”.

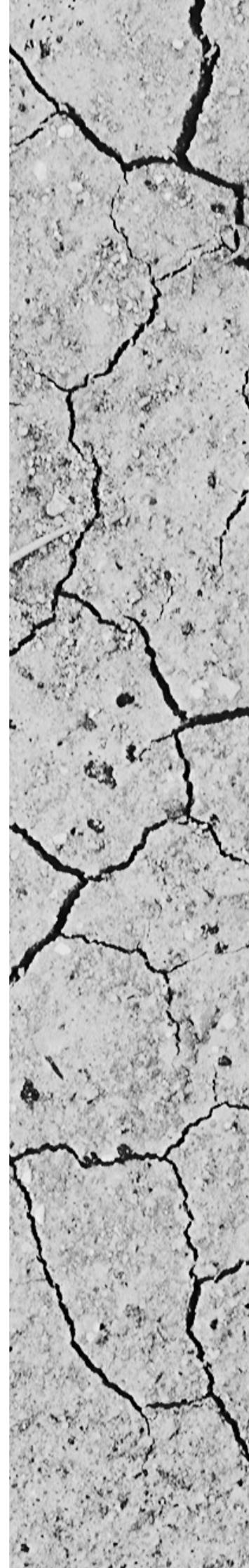
Finally a number of perceptual rather than legal challenges to using article 7 of the statute to protect the environment were surveyed. These included the requirement that international crimes be of a similar gravity to those prosecuted at Nuremberg, and the need to avoid the perception that the law or the mandate of the ICC was being impermissibly extended. Objections could also be anticipated on the basis that the ICC was already overloaded and had limited capacity. From a strategic point of view, it was suggested that investigations of crimes against environmental defenders, or of other crimes against humanity with links to climate change – rather than cases of pure environmental harm – should be encouraged as a way for the ICC to start to engage with environmental destruction.

In summary, it was felt that certain instances of pollution, although not climate change per se, might be prohibited by current article 7, and that analogy to the crime of apartheid could offer a way to include more systemic harm in the category of “other inhumane acts”. The group's analysis of lacunae in the existing law naturally led to a discussion of how it might be amended. This was more fully addressed in Session 3.

SESSION 3: WHAT MIGHT A NEW CRIME LOOK LIKE?

The challenge of crafting a crime against the environment within the anthropocentric system of international criminal law was a recurring theme in the discussions. However, it was pointed out that there is already an ecocentric provision in article 8(2)(b)(iv) of the Rome Statute, which criminalises attacks causing widespread, long-term and severe damage to the natural environment during international armed conflict. More fundamentally, a question was raised as to whether the opposition of anthropocentric to ecocentric is a false distinction, as “the environment” refers to an environment that sustains human (and other) life; the planet itself is not at risk. It was agreed that foregrounding harm to humans resulting from environmental damage would be important both legally and strategically.

A second persistent theme concerned how to criminalise acts which at a certain level would be permissible and regulated within national and international systems, particularly in relation to an emissions or climate change crime. While the fact that an act is permitted under national law has no relevance to genocide or war crimes, it was noted that this can be of relevance to some crimes against humanity. It was felt that closer examination of international environmental law approaches to this problem would be helpful. Associated with this was the question of gravity and how to circumscribe the category of perpetrators. Solutions discussed included introducing elements of fraud or corruption and/or a proportionality test or threshold into the definition of the crime. With regard to the latter, it was also suggested that the existing gravity criterion in the Rome Statute might be an adequate filter.





It was felt that both pollution and emissions (climate change) should be addressed, perhaps through separate crimes, with pollution being significantly easier to capture.

There were divergent views on the importance of including corporate criminal liability, given the likely challenges in amending the Rome Statute to that effect. Some felt that holding individual business leaders accountable might have an equivalent deterrent impact.

Finally, there was discussion of how to deal with the historical burden of emissions in the context of a forward-looking criminal law regime, and whether the UNFCCC Common But Differentiated Responsibilities principle could be drawn upon. Participants reflected on the extent to which global north-south equity issues might arise, noting the difference between a criminal rather than state responsibility context, and how this might be addressed. The language of a number of drafts and published proposals for an international crime against the environment were reviewed (see annex).

It was felt that the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind had the advantage of simplicity and authority in its article 26, "Wilful and Severe Damage to the Environment", which reads:

"An individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced."

A number of concrete suggestions emerged as ways forward within the Rome Statute system. The first and likely easiest (the “low-hanging fruit” strategy) involved small amendments to existing articles of the statute. This would include creating a crime equivalent to article 8(2) (b)(iv) that would apply in non-international armed conflict and adding a new enumerated act to article 7. Any new enumerated act would be bound by the parameters of article 7 and the requirement to match the others in character discussed in session 2, above. It might draw on the language of the International Law Commission (ILC) draft article 26. This approach has the advantage of familiarity, as it could build on the experience of the several amendments made to article 8 (war crimes).

The other suggestions focused on crafting a new crime of environmental destruction by amending article 5 (crimes within the jurisdiction of the court) and introducing an article 8 ter. The most popular proposals involved either simply using the language of ILC draft article 26 or using ILC draft article 26 as the chapeau and adding a number of enumerated acts. It was also suggested that ILC draft article 26 – as chapeau or stand-alone crime – could be modified by removing the qualification “long-term”, as this is hard to determine and could be captured by “severe”, and possibly by adding definitions of “widespread” and “severe”. There was also discussion of replacing “wilfully causes” with “very substantially contributes to”. It was remarked that the article 30 Rome Statute provisions on intent would apply to any new crime.

Participants were also interested to explore regional and national possibilities for criminalisation, and the example of the Malabo Protocol in particular was discussed.



SESSION 4: INCREASING THE CAPACITY OF THE ICC TO ADDRESS ENVIRONMENTAL DESTRUCTION

The group considered the lack of concrete engagement with issues of environmental destruction at the ICC. This was despite the September 2016 Office of the Prosecutor (OTP) policy paper on case selection and prioritisation, which provides that Rome Statute crimes committed by or resulting in destruction of the environment or the illegal exploitation of natural resources will be given particular consideration as part of the assessment of gravity,* and also despite the submission of communications including elements of environmental destruction, notably concerning Cambodia and Brazil.

A range of proposals were made to build the capacity of the court to address environmental destruction, noting that changes would be most likely to come about if driven by civil society demands. An analogy was made with sexual and gender-based violence, where an effective broad-based movement led to the appointment of a special adviser to the Prosecutor and an OTP policy paper on sexual and gender-based crimes.

**Paragraph 41, in full: The impact of the crimes may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.*

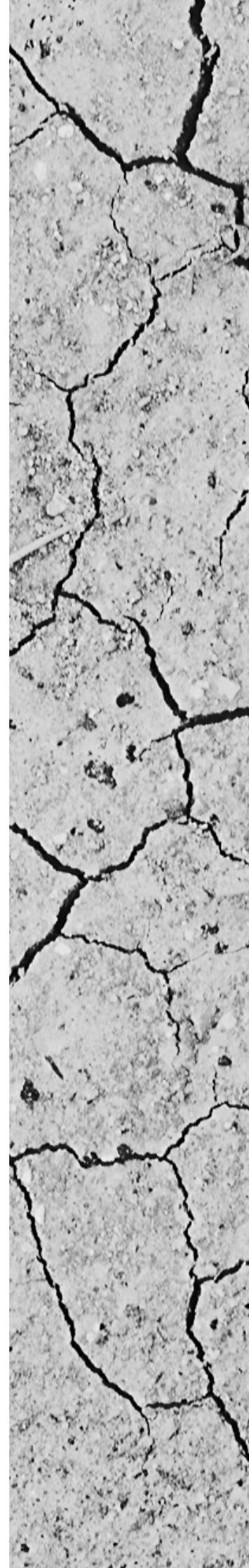
The appointment of a special advisor on environmental crimes, a policy paper on prosecuting environmental destruction and the introduction of performance measures and regular audits of prosecution of environmental crimes were all seen as useful measures to campaign for, whether under current law or following "green" amendments to the Statute.

The development of training programmes for investigation and prosecution staff, as well as for judges and Chambers legal officers was considered a practical step forward. These could be developed immediately and focus on the potential of the current Rome Statute to prosecute certain major environmental crimes.

It was noted that the election of a new Prosecutor at the end of 2020 offered an opportunity to introduce the protection of the environment into discussions about the future direction of the court. States Parties could be lobbied to include questions on environmental destruction in the formal interview procedure, and candidates could also be quizzed on their environmental vision by civil society groups who customarily run a parallel informal process.

WAY FORWARD

The conversation moved from building ICC capacity to the broader question of how to popularise the idea of environmental destruction as the next wave of international crimes. Some participants were already focused on building momentum with concerned states and with civil society groups. Interest was shown in exploring capacity-building of national and regional courts to tackle environmental destruction. It was agreed that more publications in a range of fora, as well as conferences and symposia were important to grow the conversation. The group agreed to work on proposed amendments to the ICC Statute, to explore capacity-building measures with the ICC, and to work towards a dedicated conference in The Hague.



ANNEX: SELECTED PREVIOUS DRAFTS OF THE CRIME OF ECOCIDE

Richard Falk, A Proposed International Convention on the Crime of Ecocide, 1973

The Contracting Parties confirm that ecocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.

In the present Convention, ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem:

- (a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
- (b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
- (c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or to enhance the prospects of diseases dangerous to human beings, animals or crops;
- (d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes; The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
- (e) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.

UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1985,

proposed broadening the definition of genocide to include ecocide:

Adverse alterations, often irreparable, to the environment – for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest – which threaten the existence of entire populations, whether deliberately or with criminal negligence.

International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, 1991

Article 26 - Willful and Severe Damage to the Environment

An individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced.

Polly Higgins proposed Model Law on Ecocide, 2011

The Crime of Ecocide

1. Acts or omissions committed in times of peace or conflict by any senior person within the course of State, corporate or any other entity's activity which cause, contribute to, or may be expected to cause or contribute to serious ecological, climate or cultural loss or damage to or destruction of ecosystem(s) of a given territory(ies), such that peaceful enjoyment by the inhabitants has been or will be severely diminished.
2. To establish seriousness, impact(s) must be widespread, long-term or severe.

Laurent Neyret et al., Draft Convention against Ecocide, 2015 [free translation]

Article 1 – Scope

1. The present Convention shall apply to the most serious crimes against the environment which, in peacetime as well as in situations of armed conflict, threaten the security of the planet (sûreté de la planète).
2. The present Convention is without prejudice to the relevant rules of international humanitarian law prohibiting attacks on the environment in armed conflict.

Article 2 – Definition of Ecocide [abbreviated]

1. For the purposes of the present Convention, ecocide means intentional acts committed as part of a widespread or systematic attack on the security of the planet, as follows:
 - a. release of radioactive (“ionising”) substances;
 - b. transport or disposal of waste;
 - c. factory production of dangerous substances;
 - d. production, transport, etc. of radioactive substances;
 - e. destruction, possession or capture of wild flora or fauna, whether protected or not;
 - f. other acts of a similar nature which threaten the security of the planet.
2. An act threatens the security of the planet if it causes:
 - a. widespread, long-term and severe damage to the air, atmosphere, earth, water, aquatic environment, fauna or flora or their ecological function, or
 - b. death, permanent disability or serious incurable disease to a population or if it dispossesses them in the long-term of their land, territory or resources.
3. The acts listed in paragraph 1 must be committed intentionally and with knowledge of the widespread or systematic attack of which they are part. These acts are also considered intentional if the perpetrator knew or should have known that there was a high probability that they would threaten the security of the planet.



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