

PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: SERIOUS ENVIRONMENTAL HARM AS AN INTERNATIONAL CRIME

Why Is It Important to Consider Serious Environmental Harm As Crime Under International Law & Why Is This Relevant To Asia?

In recent decades, the human-environment relationship has gained increased attention. Various human activities—including pollution, armed conflict, use of nuclear weapons, (over)-exploitation of natural resources, and waste dumping—cause significant environmental damage. This environmental damage—for the purposes of this primer described as ‘serious environmental harm’—can directly and indirectly affect human life across multiple jurisdictions.

Asia has been, and continues to be, the site of serious environmental harm that has yet to be accounted for. This includes: the nuclear bombings of the Japanese cities Hiroshima and Nagasaki during the World War II; the use of the toxic herbicide Agent Orange during the Vietnam War; the devastating after-effects to Central Asian countries of the [1986 Chernobyl incident](#) and the [disappearance of the Aral Sea](#); and the disproportionate impact of climate change on Pacific Island States.

Nevertheless, Asia is also at the forefront of initiatives to address, and prevent impunity for, serious environmental harm. In response to the use of Agent Orange, [Vietnam became the first country in the world to criminalize ‘ecocide’ domestically](#) (see below), followed by [Kazakhstan](#), [Tajikistan](#), and [Kyrgyz Republic](#)’s domestic adoption of the crime in order to prevent catastrophes similar to Chernobyl. Finally, [urged by Pacific Island students, Vanuatu led the advocacy](#) for seeking an [Advisory Opinion from the International Court of Justice](#) on State obligations under international law regarding climate change.

Can Existing International Criminal Law Be Used To Account For Serious Environmental Harm?

Article 8(2)(b)(iv) is the only provision in the [Rome Statute](#) to explicitly address the environment. Under Article 8(2)(b)(iv), it is a [war crime](#) in the context of international armed conflict to cause ‘widespread, long-term and severe damage to the natural environment’ (mirroring Articles 35(3) and 55(1) of [Geneva Conventions Additional Protocol I](#)).

Rome Statute Article 6(c)—describing ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ as a ‘[genocidal act](#)’—has been [interpreted by the International Criminal Court \(ICC\) Pre-Trial Chamber](#) to include the environmental harm of contaminating wells and water pumps. This is despite the fact that environmental harm is not explicitly recognized as an element of ‘[genocide](#)’ under either the [Genocide Convention](#) or the Rome Statute.

Finally, although Article 7 [crimes against humanity](#) does not explicitly mention the environment, scholars suggest that conduct under Article 7(1)(b), (d), (h), and (k) may be used creatively to account for serious environmental harm (see [here](#), [here](#), [here](#) and [here](#)).¹

All existing Rome Statute crimes are limited in ensuring accountability for the vastness and complexity of serious environmental harm. This is because: Article 8(2)(b)(iv) only addresses [international—and not non-international—armed conflict](#), excluding [the contexts in which most incidents of serious environmental harms occur](#); Article 6 ‘genocide’ requires the very high evidential bar of ‘genocidal intent’; and Article 7 crimes against humanity provisions are [anthropocentric](#), meaning that [environmental harm through this crime is addressed specifically because of its impact on humans and not for its own sake](#).

¹ There is also [growing demand for the inclusion](#) of ‘environmental destruction’ including mineral extraction as a crime against humanity in the International Law Commission’s (ILC) [Draft Articles on Prevention and Punishment of Crimes Against Humanity](#).

Nevertheless, the ICC's Office of the Prosecutor (OTP) is working to maximise the potential of the Rome Statute over environmental crimes. This is seen in the OTP's Policy Papers [on Preliminary Examinations \(2013\)](#) and [Case Selection and Prioritization \(2016\)](#) which provide for particular consideration to cases involving environmental damage. Likewise, at time of writing, the OTP has [launched](#) a public consultation for its forthcoming Policy Paper on accountability for environmental crimes under the Rome Statute.

Has Serious Environmental Harm As A Crime Under International Law Been Prosecuted Before?

Serious environmental harm has rarely been prosecuted—either internationally or domestically—as an international crime. Internationally, following World War II, nine German civilian officials in occupied Poland were charged with 'ruthless exploitation of Polish forestry',² and General Alfred Jodl was convicted for war crimes as a result of 'scorched earth policies' in Norway, Moscow and Leningrad.³ However, many other examples of World War II environmental harm—including bombings of the Japanese cities of Hiroshima and Nagasaki—have not been prosecuted.

Domestically, the Iraqi High Tribunal established in 2003 had jurisdiction over serious environmental crimes because its founding statute followed the Rome Statute. Under the Tribunal, some individuals were [convicted](#) in 2006 of the war crime of causing 'large scaled, long-term damage to the environment'—however, those convicted did not include Iraqi leader Saddam Hussein. The Tribunal did not elaborate on this decision. Further, and at time of writing, there is a [pending case](#) in Sweden against the company Lundin Energy and its two former executives for their complicity in war crimes—including charges of environmental degradation—in Sudan between 1999 and 2003.

Outside these cases, almost all instances of serious environmental damage end up with [civil claims](#), human rights violations (for example, as a [violation of the right to life](#)), or simply a [breach of environmental regulations](#).

What Is 'Ecocide' & Is It An International Crime?

The term 'ecocide' was first coined by American biologist Arthur Galston in the 1970s [in the context of the use of the toxic herbicide Agent Orange by US during the Vietnam War](#) and its severe environmental and human consequences. The term 'ecocide' [derives from](#) the Greek *oikos* which means 'home', and Latin *caedere* which means 'kill'. The crime has been recognised in domestic criminal law (see above on Vietnam and Central Asia), but has yet to be widely recognised as a crime under international law.

There are currently multiple proposed definitions for the international crime of 'ecocide' (see proposals [here](#), [here](#), [here](#) and [here](#)).⁴ Most definitions agree that for conduct to be 'ecocide', the extent of environmental damage must be at least severe and *either* widespread *or* long-term. This is as opposed to existing law protecting the environment (art 8(2)(b)(IV) Rome Statute, Additional Protocol to the 1949 Geneva Conventions) which requires all three elements (severe, widespread *and* long-term).

However, consensus is lacking on other key aspects of the definition, including: (i) the method of defining the crime (a single general formula or list of acts related to various environmental concerns); (ii) the required mental element (should direct intent be required or is knowledge of the likelihood of damage enough?); and (iii) whether conduct lawful under international/national law but causing severe environmental damage could nevertheless amount to an ecocide.

To move discussion forward, [Vanuatu and the Maldives called on ICC States Parties](#) in December 2019 to seriously consider recognizing the crime of ecocide. Belgium [joined](#) this call in 2020. [The UN Secretary General](#), the [UN High Commissioner for Human Rights](#), and several political representatives of ICC Member States have since publicly stated the importance of considering ecocide as a standalone international crime (see [here](#), [here](#),

² United Nations War Crimes Commission (1948) Case No 7150 496; Richard Falk, *Revitalizing International Law* (1989) 171-72.

³ Tara Smith '[Creating a Framework for the Prosecution of Environmental Crimes in the International Criminal Law](#)' citing Tara Weinstein, 'Prosecuting Attacks That Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?' *Georgetown International Environmental Law Review*, 17/4, 697-722 at 704.

⁴ See also Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepherd-Walwyn 2010).

[here](#), and [here](#)).⁵ Most recently, Vanuatu, Fiji and Samoa [jointly submitted a proposal](#) to amend the Rome Statute to the ICC Assembly of States Parties Working Group on Amendments in September 2024.⁶

However, even if the Rome Statute were amended to recognize ecocide, only 19 Asia-Pacific States are party to the Rome Statute, ([roughly 35% of the region compared to 75% of States from all other regions](#)). Likewise, India and China—some of the biggest greenhouse gas emitters—are not members of the Court. Therefore, the Court's limited jurisdiction in the region highlights the importance of alternative routes for accountability through domestic incorporation of environmental crimes.

Could Existing International Criminal Law Be Used To Address Climate Change?

Existing international criminal law does not yet offer adequate protection against climate change. As noted above, the only explicit mention of the environment in the Rome Statute is limited to damage caused during an armed conflict. Moreover, the Rome Statute [does not cover the responsibility of corporations, the main contributors of global fossil CO² emissions](#), and any newly added crime—including ecocide—[would not apply retrospectively](#) to past emissions. Lastly, there are [concerns whether the individual criminal responsibility](#)—which forms the essence of international criminal law—can effectively address the systemic nature climate change and the multitude of actors involved.

This said, beyond individual criminal responsibility under international law, there are on-going efforts towards complementary forms of accountability. These include (as noted above) seeking clarification in the International Court of Justice on [State obligations under international law for climate change](#) and using domestic legal frameworks such as constitutional and tort law, [including crucially in the so-called Global South](#).

⁵ Notably in Asia, Bangladesh is [discussing](#) the possibility of codifying ecocide domestically and actively [engaging](#) in global talks on the issue.

⁶ In order to amend the Rome Statute, any signatory State can submit a formal proposal and the Assembly of States Parties must achieve either a consensus or a majority vote to adopt the proposal. But if the amendment concerns any of the core crimes or an addition of a new one, it will only apply to those States which subsequently ratify it.