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SUBJECT: Comment on OTP Environmental Crimes Policy

Dear Mr. Khan and Professor Heller,

This letter transmits the views of the National Institute of Military Justice (NIMJ) regarding the ICC Office of the Prosecutor's Environmental Crimes Policy.

### **Interest of NIMJ**

NIMJ, founded in 1991, is a civil society organization in the United States. NIMJ is not affiliated with the U.S. government or any other government. NIMJ is dedicated to the fair administration of justice for members of the armed forces, which includes considerations for investigating and prosecuting war crimes. NIMJ has engaged in expert consultations, policy papers, academic conferences, and amicus briefs on many of the vital issues of the day relating to military justice. NIMJ comprises an executive board and a group of distinguished fellows, fellows, and 25 international fellows. NIMJ does not stand for any one point of view, whether pro-prosecution, defense, or victim, or for or against any particular national government or tribunal. NIMJ stands for the progressive development of laws and policies affecting military discipline and military justice.

NIMJ began with a sole focus on military justice in the United States but has grown with a focus on accountability for military misconduct worldwide. NIMJ's affiliate Global Military Justice Reform blog chronicles military justice developments worldwide and has a readership in 195 countries. NIMJ has been asked to perform several international expert consultations in recent years. For example, in 2021, NIMJ submitted an amicus brief and oral argument in the *Ongwen* case to this Court's Appeals Chamber; our insights into military discipline, affirmative defenses, and duress were favorably cited ten times in the final decision.

The category of environmental crimes includes an essential subset of environmental crimes committed during armed conflict. It does not only regard **Article 8(2)(b)(iv) Rome Statute** that addresses explicitly the natural environment. Such crimes often involve members of national armed forces or paramilitary forces. Military members might be involved because of their acts (including the commission of war crimes), omissions, investigations, or even preventative efforts and responses to environmental atrocities. For those reasons, NIMJ believes that its insights into military misconduct and military codes of discipline can positively contribute to the OTP's formulation of an environmental crimes policy.

## NIMJ's Input

Without necessitating any further amendments to the Rome Statute, NIMJ would like to make three points regarding the OTP's development of a policy initiative on environmental crimes:

### 1. The environment as a civilian object

The principle of distinction from international humanitarian law (IHL) represents customary law and applies to international and non-international armed conflicts. Art. 52(1) Additional Protocol I to the Geneva Conventions (AP I) defines it as follows: "*civilian objects are all objects which are not military objectives [ . . . ].*" Distinction requires that military forces distinguish between military objectives and civilian objects when authorized to use force.

The principle of distinction is well imbued within national militaries and even paramilitary forces. For example, the U.S. Department of Defense Law of War Manual (2023).<sup>1</sup>

The distinction often focuses on civilian personnel and structures. However, it is essential to note that "civilian objects" also encompass environmental components.<sup>2</sup> The environment,

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<sup>1</sup> Argentina, *Leyes de Guerra*, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, 23 April 1990, § 4.01; Australia, *The Manual of the Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, § 5.4; see also §§ 2.11 and 9.13; Benin, *Le Droit de la Guerre*, III fascicules, Forces Armées du Bénin, Ministère de la Défense nationale, 1995, Fascicule II, p. 5 and Fascicule III, p. 11; China, *Criminal Law of the People's Republic of China*, 1979, as amended in 2002, Article 446;; Colombia, *Manual de Derecho Operacional – Manual FF.MM. 3-41 Público*, Primera Edición 2009, Comando General de las Fuerzas Militares, aprobado por el Comandante General de las Fuerzas Armadas por Disposición Número 056, 7 December 2009, pp. 145–146; France, *Manuel de droit des conflits armés*, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001, p. 13; Germany, *Humanitarian Law in Armed Conflicts – Manual*, Joint Service Regulation (ZDv) 15/2, May 2013, DSK AV230100262 , edited by the Federal Ministry of Defence of the Federal Republic of Germany, § 406 ff; Israel, *Rules of Warfare on the Battlefield*, Military Advocate-General's Corps Command, IDF School of Military Law, Second Edition, 2006, p. 29; Russian Federation, *Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation*, Ministry of Defence of the Russian Federation, Moscow, 8 August 2001, § 17; US, DOD Law of War Manual, July 2023, available at <https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF> (last accessed 16 March 2024).

<sup>2</sup> E.g. ICRC (2020) Guidelines on the Protection of the Natural Environment in Armed Conflict, p. 19 ff, available

at <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating> (last accessed 29 February 2024). See also Hulme K (2010) Taking care to protect the environment against damage: a meaningless obligation?, IRRC 92(879), p. 678; Droegge C / Tougas M-L, (2013) The protection of the natural environment in armed conflict – existing rules and need for further legal protection, Nord. J. Int. Law. 82(1),

such as a forest or a lake, water springs, or agricultural lands, can be turned into a military objective and become a lawful target based on their “*nature, location, purpose or use,*” as codified in Art. 52(2) AP I. *Per se*, however, the environment and its components do not serve any military purpose. Hence, they constitute civilian objects that cannot be lawfully attacked, neither under IHL nor the Rome Statute (Art. 8(2)(b)(ii)), as long as the cardinal IHL principles are followed (military necessity, proportionality, etc.).<sup>3</sup>

## 2. Direct and indirect protection of the environment in armed conflict

The natural environment enjoys *specific* protection under IHL, e.g., based on Art. 35(3) and 55(1) AP I. IHL and the Rome Statute implicitly protect the environment and its components.<sup>4</sup> Additionally, the environment and its components are *implicitly* protected under IHL and the Rome Statute. The mirroring norms of the Rome Statute allow for an identical approach by the OTP, using the understanding of specific and implicit protection of the environment and its components about war crimes under Art. 8 Rome Statute:

Article 8(2)(b)(iv) of the Rome Statute covers the specific protection of the natural environment: “*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.*”

The Court shall have jurisdiction in respect of criminal damage to the environment when committed as part of a plan or policy or as part of a large-scale commission of such crimes. For this purpose, “criminal damage of the environment” means unlawfully causing widespread, long-term, and severe damage to the natural environment.

Additionally, **Article 8(2)(b)(ii) Rome Statute explicitly protects** the environment - “*Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.*” This is relevant to the prosecution of environmental harm in two ways: Firstly, if harm to non-combatants or their property were achieved by means of harming the environment secondly, if the environment is considered as a civilian object.

Several provisions of the Rome Statute **implicitly** address harm to the environment. These include, for example:

**Article 8(2)(a)(iv) Rome Statute** - “*Extensive destruction and appropriation of property,*

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p. 25 ff.; Dienelt A (2022), *Armed Conflicts and the Environment*, p. 70 ff.

<sup>3</sup> See e.g. Dienelt A (2022), *Armed Conflicts and the Environment*, p. 72.

<sup>4</sup> See ICRC (2020) *Guidelines on the Protection of the Natural Environment in Armed Conflict*, p. 22, available

at <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating> (last accessed 29 February 2024). See also Hulme K (2004), *War torn environment: interpreting the legal threshold*, p. 71 + 111; Sjöstedt B (2020), *The role of multilateral environmental agreements: A reconciliatory approach to environmental protection in armed conflict*, p. 27 + 95; Dienelt A (2022), *Armed Conflicts and the Environment*, Chapter 2.2.1.

*not justified by military necessity and carried out unlawfully and wantonly,*” e.g., burning of parts of forest areas, parks or agricultural lands;

**Article 8(2)(b)(v) Rome Statute** - *“Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives,”* e.g., towns and villages usually encompass components of the environment, such as gardens, parks, water fountains and areas under cultivation;

**Article 8(2)(b)(xiii) Rome Statute** - *“Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war,”* e.g., burning of parts of forest areas, parks or agricultural lands;

**Article 8(2)(b)(xvi) Rome Statute** - *“Pillaging a town or place, even when taken by assault,”* e.g., looting, plundering, and exploitation of natural resources;<sup>5</sup>

**Article 8(2)(b)(xvii) + (xviii) Rome Statute** - *“Employing poison or poisoned weapons” & “Employing asphyxiating, poisonous or other gasses, and all analogous liquids, materials or devices,”* e.g., poisoning natural sources of water including communal wells.<sup>6</sup> Included could be the improper disposal of wastewater from a military base or using chemicals during operations that contaminate water sources for local communities. Additionally, some UXO (Unexploded Ordnance) and other remnants of war may include any of the analogous liquids or materials that remain in the environment for decades;

**Article 8(2)(b)(xxv) Rome Statute** - *“Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions,”* e.g., methods such as razing and destroying crops and means of sustenance of people living off the land leads to starvation of civilians. The food sources for many people include fruit, vegetables, cereals, animals, and fish, which constitute part of the environment. People also depend on natural wells for water sources. Further, many people also rely on the environment for their livelihoods.

### **3. Integrating psychological research on 'ecological grief,' 'environmental melancholia,' and 'solastalgia,' into sentencing for environmental crimes according to Art. 78(1) Rome Statute**

The environmental damages resulting from environmental crimes exert a profound and far-reaching impact on human lives and livelihood.<sup>7</sup> While many scientific discussions primarily

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<sup>5</sup> As it has been confirmed by the International Court of Justice in its case *DRC v Uganda*, in which the Court dealt with the illegal exploitation of DRC's natural resources by Ugandan military troops, ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment from 19 December 2005, ICJ Reports 2005, para. 245.

<sup>6</sup> Cf. Fleck D (ed) (2021), *Handbook of international humanitarian law*, OUP, Oxford, §6.3.; Sandoz Y (1975), *Des Armes Interdites en Droit de la Guerre*. Grounauer, Genève, pp. 11–14 + 27f.; Dienelt A (2022), *Armed Conflicts and the Environment*, p. 62.

<sup>7</sup> See, for example, Giovanni Chiarini, *Ecocide: From the Vietnam War to International Criminal*

focus on climate change, it is crucial to recognize that environmental damage can harm individuals, including their experience of 'ecological grief,' 'environmental melancholia,' and 'solastalgia'.

*Ecological grief:* Ecological grief has been described as “*the grief felt in relation to experienced or anticipated ecological losses, including the loss of species, ecosystems, and meaningful landscapes due to acute or chronic environmental change.*”<sup>8</sup> Ecological grief can relate to the “*loss of environmental knowledge refers to the disruption of personal and cultural identities that are constructed in relation to features and knowledge of the physical environment.*”<sup>9</sup>

*Environmental Melancholia:* Environmental Melancholia is described as “[*t*]he state of loss of relation with “nonhuman objects” in nature (e.g., rivers, fields, lakes, natural setting, etc.).”<sup>10</sup>

*Solastalgia:* The concept of solastalgia refers to “*a sense of desolation, detachment and grieving in response to losing an important place which is similar to homesickness whilst one is still at home,*”<sup>11</sup> and it occurs “*when people are confronted with irrevocable changes to landscapes that they feel connected to.*”<sup>12</sup>

Without further amending the Rome Statute, the aforementioned concepts bear significance for the Office of the Prosecutor (OTP). The commission of a crime under Art. 8(2)(b)(iv) Rome Statute, as well as any offenses indirectly leading to environmental harm, can profoundly affect victims, manifesting in experiences such as 'ecological grief,' 'environmental melancholia,' and 'solastalgia.'

In determining sentencing for a crime under Art. 8(2)(b)(iv) Rome Statute and any crimes

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Jurisdiction? Procedural Issues In-Between Environmental Science, Climate Change, and Law, 21 CORK L. REV. 1, 1 (2022).

<sup>8</sup> Cunsolo A., Ellis N.R. Ecological grief as a mental health response to climate change-related loss. *Nat. Clim. Chang.* 2018, 8, 275.

<sup>9</sup> Hannah Comtesse, Verena Ertl, Sophie M. C. Hengst, Rita Rosner, and Geert E. Smid., Ecological Grief as a Response to Environmental Change: A Mental Health Risk or Functional Response?, *Int J Environ Res Public Health.* 2021 Jan; 18(2): 734.

<sup>10</sup> Paolo Cianconi, Batul Hanife, Francesco Grillo, Sophia Betro', Cokorda Bagus Jaya Lesmana, and Luigi Janiri, Eco-emotions and Psychoterratic Syndromes: Reshaping Mental Health Assessment Under Climate Change, *Yale J Biol Med.* 2023 Jun; 96(2): 211–226.

<sup>11</sup> Albrecht G., Sartore G., Connor L., Higginbotham N., Freeman S., Kelly B., Stain H., Tonna A., Pollard G. Solastalgia: The distress caused by environmental change. *Aus Psych.* 2007;15:95–98 , as mentioned in Hannah Comtesse, Verena Ertl, Sophie M. C. Hengst, Rita Rosner, and Geert E. Smid., Ecological Grief as a Response to Environmental Change: A Mental Health Risk or Functional Response?, *Int J Environ Res Public Health.* 2021 Jan; 18(2): 734. See, also, Albrecht G.A. *Earth Emotions: New Words for a New World.* Cornell University Press; Ithaca, NY, USA: 2019.

<sup>12</sup> Hannah Comtesse, Verena Ertl, Sophie M. C. Hengst, Rita Rosner, and Geert E. Smid., Ecological Grief as a Response to Environmental Change: A Mental Health Risk or Functional Response?, *Int J Environ Res Public Health.* 2021 Jan; 18(2): 734.

that result in 'ecological grief,' 'environmental melancholia,' and 'solastalgia' within a specific community or group of victims, the Court shall consider these negative additional effects when applying Art. 78(1) Rome Statute.

Art. 78(1) Rome Statute states that "*In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.*"

Consequently, 'ecological grief,' 'environmental melancholia,' and 'solastalgia' could arguably fall under the definition of "gravity" as per Art. 78 Rome Statute, and within the scope of "*the extent of the damage caused, particularly the harm inflicted on victims and their families*" under Rule 145(c) of the Rules of Procedure and Evidence (RPE).

Furthermore, if the impact is sufficiently broad, the crime may be considered one of "extreme gravity" under Art. 77(1)(b) Rome Statute, warranting life imprisonment. A gravity of harm interpretation would empower judges to impose stricter sentences on defendants for their crimes while acknowledging the additional (primarily psychological) impacts victims suffer. Importantly, this interpretation does not entail any amendments. We are not proposing the introduction of "environmental nostalgia" as a listed aggravating circumstance but rather advocate for a broader understanding of Art. 77, 78 Rome Statute, and Rule 145 RPE.

#### **4. What should the ICC's collaborative role be in minimizing or preventing environmental damage during military operations? The Prosecutor is uniquely positioned to influence both the prevention and prosecution of environmental damage.**

##### **a. Teaching and Advocacy:**

*Public engagement:* The Prosecutor can leverage speeches, press conferences, and social media to raise awareness about the environmental impact of crimes already under the ICC's jurisdiction (genocide, crimes against humanity, war crimes, aggression). For instance, highlighting how environmental destruction can displace populations or cause long-term harm can strengthen the connection.

*Policy development:* The Prosecutor's office can develop guidelines and best practices for national courts to handle environmental crimes within existing legal frameworks. A roadmap for domestic prosecutions and deterrence of future environmental offenses can aid international development of a consistent approach to a cross-national issue.

*Promotion of International Environmental Law:* Working with ICC member states, the prosecutor can promote the application of existing international environmental treaties

during wartime, such as the Ramsar Convention,<sup>13</sup> CITES, the World Heritage Convention, or the Biodiversity Convention.<sup>14</sup>

### **b. Cooperation and Capacity Building:**

*Partnerships:* The ICC prosecutor's office can partner with environmental experts to develop expertise in assessing and documenting environmental damage during conflict.

*Training for National Prosecutors:* The ICC can offer training programs for national prosecutors on incorporating environmental considerations into war crimes investigations.

*Cooperation with the UN Environment Programme (UNEP):* UNEP is the leading environmental authority within the United Nations system. It plays a critical role in raising awareness of armed conflict's environmental impacts and providing technical assistance to conflict parties in preventing and mitigating environmental damage. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA): OCHA views war-induced environmental damage as a "silent casualty"<sup>15</sup> of war that hinders future humanitarian efforts and prolongs suffering as damaged ecosystems limit resources for recovery.

### **c. Collaboration with NGOs and academics:**

*Outreach:* Partnerships with environmental organizations and legal scholars can lead to educational campaigns, workshops, and conferences. The outreach can educate the public, policymakers, and legal professionals about the gravity of environmental crimes and the ICC's potential role.

*International Committee of the Red Cross (ICRC):* The ICRC is a humanitarian organization that protects the rights of victims of armed conflict and promotes compliance with IHL. IHL includes provisions that protect the environment during armed conflict. The ICRC has produced guidance on the environmental rules applicable in armed conflicts and can provide expertise to the ICC on these issues.

### **d. Prosecution:**

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<sup>13</sup> See e.g. Resolution XIV.20, 14th Meeting of the Conference of the Contracting Parties to the Ramsar Convention on Wetlands, "The Ramsar Convention's response to environmental emergency in Ukraine relating to the damage of its Wetlands of International Importance (Ramsar Sites) stemming from the Russian Federation's aggression", available at [https://www.ramsar.org/sites/default/files/documents/library/xiv.20\\_ukraine\\_e.pdf](https://www.ramsar.org/sites/default/files/documents/library/xiv.20_ukraine_e.pdf) (last visited 14 March 2024). See also Wang M, "The Unprecedented Ramsar Resolution: Ukrainian Wetlands Protection in Armed Conflict," *Netherlands International Law Review* 2024, p.1.

<sup>14</sup> On the continued application of treaties in international environmental law, see Annex to Draft Art. 7 of the UN International Law Commission's Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries, *Yearbook of the ILC*, 2011, Vol. II, Part Two, UN Doc. A/66/10 from 2011. See also Dienelt A (2022), *Armed Conflicts and the Environment*, Chapter 4.2.

<sup>15</sup> <https://www.unocha.org/publications/report/world/environment-silent-casualty-armed-conflict-enar>.

*Strategic selection of cases:* The ICC prioritizes the most severe crimes. The Prosecutor can focus on environmental destruction linked to existing ICC crimes, building a stronger case and setting a precedent. After all, a prosecution should have a salutary effect on others beyond holding individuals accountable. Incorporating the environment as a “victim” in the investigative stage enables the prosecutor to select suitable cases with a significant environmental impact component to prosecute pour encourager les autres.

*Develop expertise:* The Prosecutor's office can build expertise in environmental law and forensics to gather evidence and effectively prosecute cases with complex environmental components. Exploring the support of citizen science and civic monitoring is helpful when documenting environmental damage and collecting data, even in conflict-affected areas.<sup>16</sup>

*Advocate for legal reform:* The Prosecutor’s advocacy for amendments to the Rome Statute, the ICC's founding treaty, should include the specific crime of ecocide. That change would broaden the ICC's jurisdiction and directly target severe environmental harm.

## **Conclusion**

We thank the OTP for considering our views. We would welcome the chance to consult further or provide any other assistance you may find helpful as you develop what we believe is an essential and much-needed policy that will lead to actions to implement it.

Sincerely,

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*/s/ Dr. Giovanni Chiarini*  
International Fellow, NIMJ

*/s/ Dr. Anne Dienelt*  
International Fellow, NIMJ

*/s/ Franklin D. Rosenblatt*  
President, NIMJ

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<sup>16</sup> Cf. Weir D, McQuillan D, Francis R A, "Civilian science: the potential of participatory environmental monitoring in areas affected by armed conflicts," *Environmental Monitoring and Assessment* (2019), p. 618.