

To: Office of the Prosecutor of the
International Criminal Court

Attention: Draft Policy on Environmental Crime

By email: OTP.Policies@icc-cpi.int

By post: n/a



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Prepared by Students for Climate Solutions NZ International Litigation Team
Supported by Our Children's Trust

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INTRODUCTION

Interest and Expertise of the Submitters

Students for Climate Solutions (SCS)

1. Students for Climate Solutions (SCS) is a student and youth-based organization committed to addressing environmental and climatic harm through policy and strategic litigation.¹
2. In 2022, SCS filed an Article 15 communication with the Office of the Prosecutor (OTP, the Office) requesting the OTP open an investigation into the senior executives of BP (the BP Submission) alleging they had committed a crime against humanity for knowingly causing and perpetuating climate change.² The application was dismissed on the grounds that the Court did not have the requisite jurisdiction.
3. SCS believes in utilising the tools of international criminal and humanitarian law to bring about justice and accountability to the climate crisis and severe environmental harm and degradation.

Our Children's Trust (OCT)

4. Our Children's Trust (OCT) is a non-profit public interest law firm acting on behalf on behalf of over 180 youth clients in 12 different jurisdictions across the globe securing binding and enforceable legal rights to a safe climate system, with an emphasis on effectively presenting climate science to courts and international bodies worldwide.
5. The legal work to secure this fundamental right is informed and supported by expert reports and testimony of over 40 prominent scientists, including Nobel Prize Laureates and authors with the Intergovernmental Panel on Climate Change (IPCC). These leading experts provide authoritative findings on critical issues such as the direct effects of rising carbon dioxide levels on human rights, safe and just planetary boundaries, and the feasibility and

¹ Students for Climate Solutions (<https://www.studentsforclimatesolutions.org.nz/>), at 'home page'.

² Students for Climate Solutions NZ and UK Youth Climate Coalition "Request to Open Investigations & Request for Reparation regarding the Crime Against Humanity of Climate Change" (communication to the Office of the Prosecutor pursuant to art 15 of the Rome Statute, 12 December 2022).

benefits of immediate emission reductions by States resulting in the provision of effective legal remedies.³

6. OCT believes that courts have a critical role in providing effective remedy that address the direct, widespread, severe, and even grave harms resulting from the climate crisis.

Summary

7. SCS and OCT (which may be referred to as “we” throughout this submission) welcome the production and contents of the current Draft Policy on Environmental Crimes Under the Rome Statute. We commend the Office in its efforts to recognise the pervasive harm environmental damage has on individual communities during times of both war and peace and their effort in capturing this throughout the Rome Statute.
8. Based on the submissions below SCS and OCT respectfully suggest that the final policy:
 - a) Expand the Scope of Article 7 to address environmental harm that contributes to and results from climate change; and
 - b) Identify corporate responsibility in respect of climate change; and
 - c) Centre the rights of children and young people in the final policy; and
 - d) Recognize that climate change jeopardizes life and well-being both *directly* and *indirectly*.

³ Scientific evidence submitted has led courts to issue judgments in rights-based climate cases grounded in the best available science and resulted in the provision of effective legal remedies such as in the landmark Supreme Court opinion in *Held v. Montana* and the first-of-its-kind constitutional climate settlement in *Navahine v. Hawai‘i Department of Transportation*. See, Supreme Court of the State of Montana, *Held et al. v. State of Montana*, DA23-0575, Opinion (18 Dec 2024) <https://static1.squarespace.com/static/655a2d016eb74e41dc292ed5/t/67632011c1785d7e7d8a8ac7/1734549521873/Opinion+-+Published.pdf> affirming Montana First Judicial District Court, *Held et al. v. State of Montana*, CDV-2020-307, Findings of Fact, Conclusions of Law, and Order (14 Aug. 2023) ; and Hawai‘i Circuit Court for the First Circuit, *Navahine v. Department of Transportation, State of Hawai‘i*, 1CCV-22-0000631, Settlement Agreement and Release (20 Jun. 2024) <https://navahinevhawaiiidot.ourchildrenstrust.org/wp-content/uploads/2024/06/495-2024-6-20-Joint-Stipulation-and-Order-Re-Settlement.pdf>; https://heldvmontana.ourchildrenstrust.org/wp-content/uploads/2024/05/Doc-405_2023.08.14-Findings-of-Fact-Conclusions-of-Law-and-Order.pdf; and Hawai‘i Circuit Court for the First Circuit, *Navahine v. Department of Transportation, State of Hawai‘i*, 1CCV-22-0000631, Settlement Agreement and Release (20 Jun. 2024) <https://navahinevhawaiiidot.ourchildrenstrust.org/wp-content/uploads/2024/06/495-2024-6-20-Joint-Stipulation-and-Order-Re-Settlement.pdf>.

SUBSTANTIVE SUBMISSION

A Expanding use of Article 7

9. We welcome the Draft Policy's identification of the multiple ways environmental harm can satisfy the elements of a crime against humanity under Article 7.
10. We remain concerned that a potentially large portion of environmental harm goes un contemplated by the Office, that being the harms that causes and result from climate change.
11. The Draft policy articulates that an act that "involves or results in environmental damage in a manner prohibited by article 7(1) may be charged as a crime against humanity" provided the elements of the crime are met.⁴ Many acts of environmental damage can contribute to or result from climate change. Whilst the Draft Policy directly contemplates environmental harm that may cause or be a result of climate change,⁵ we submit that the final policy explicitly contemplates the pervasive role climate change will have in determining the commission of environmental crimes.
12. Climate change related harm is relevant in a majority of enumerated acts of 7(1), but is most prevalent in articles 7(1)(d) and 7(1)(k) given these articles contemplate the perpetrator's knowledge that their actions would result in the ordinary course of events.
 - a) Knowledge that the consequence would occur in the ordinary course of events (under 7(1)(d) and 7(1)(k)) has been interpreted as meaning that the requisite mental element be *dolus directus* in the first or second degree (direct or oblique intention, but not subjective recklessness).
 - b) This degree of knowledge could implicate a number of perpetrators who contribute to climate change, including those who forcibly displace communities through contributing to climate change that has caused sea level rise. It also contemplates victims who have suffered serious injury or death by reason of natural disasters aggravated by climate change, or those who have suffered locally or regionally by acts that contribute to climate change (such as the Indigenous persons in the Oriente region of Ecuador or the Brazilian Amazon).

⁴ Draft Policy on Environmental Crimes Under the Rome Statute (2024), at [32].

⁵ At [34] to [40].

- c) An outstanding factor yet to be agreed upon would be the evidential challenges in international criminal law regarding attribution of certain acts of environmental damage that contribute to or result from climate change that in turn qualify or contribute to crimes against humanity. The ability to attribute harm from a certain act to certain harm increases with the ability to measure the impacts of an act and/or trace the origins of harm.⁶ However, the Office should not be deterred by the task of attributing greenhouse gas emissions. Rather, the Office should be satisfied that the act(s) being criminalized is the pursuance of a state or corporate policy that interferes in the global climatic system at a widespread scale, with knowledge that “great suffering or serious injury” would occur in the ordinary course of events.
 - d) As such, the evidential onus falls on the Office to prove there was no intervening act which prevents liability for the perpetrator causing harm through their substantial contribution to climate change. This approach accords with orthodox conceptions of the de minimis rule and its role in avoiding absurd outcomes.⁷
13. We also submit that in the final policy the Office consider incorporating the right to a clean, healthy and sustainable environment in their general principles to be consistent with the growing global practice.⁸ If requested, we would be pleased to provide a brief annex highlighting key findings.

B Identify corporate responsibility in respect of climate change

14. As outlined in our first submission to the court during initial consultations, a key challenge of criminalizing acts of environmental destruction that contribute to and/or result from climate change is identifying *which* organization and *who* in the organization should be liable for their acts which cause or contribute to climate change.
15. We welcome the Office’s direct contemplation and emphasis on the role corporations and corporate actors have to play in crimes against humanity involving the environment.⁹

⁶ William Ferris “Causing and perpetuating climate change as a crime against humanity: obstacles, limits and challenges facing the prosecution of Rome Statute crimes involving the natural environment” (LLB Research Dissertation, Victoria University of Wellington, 2024), at 20.

⁷ Douglas Husak “The De Minimis ‘Defence’ to Criminal Liability” in R Duff and S Green (eds) *Philosophical Foundations of Criminal Law* (Oxford Academic, Oxford, 2011) 328.

⁸ Climate Rights International “Right to a Healthy Environment” found at: <https://cri.org/right-to-a-healthy-environment/>

⁹ Above n 1, at [33].

- a) The question of *which* organization largely rests on the questions as to causation and the issue of what actually *is* causing and perpetuating climate change.
- b) With respect to *who*, the issue is largely a case-by-case issue which depends on the individuals who are most responsible for the harm.
 - 1. SCS welcomes the Office's inclusion of the role of superior responsibility under article 28(b).
- c) We anticipate that given the possibility for climate change related harm to be considered under the Statute that the role superior responsibility has to play will become highly relevant to the Court. For example, the decision of corporate executives acting in their official capacity to pursue actions that are known to be harmful to the environment to an extent that satisfies enumerated acts under the Rome Statute despite being separate from the act itself should be contemplated by the final Policy.
- d) We do not anticipate claims before the court that singularly allege climate change to be an environmental crime despite the potential for it to qualify. Instead, the claims will likely be related to specific instances of environmental harm that are resultant of climate change to some degree.
- e) We submit that the Office should be open to contemplating, and articulating in their final policy, their approach regarding regional and global level harm, given the increasing pervasiveness of climate change related environmental harm, and contemplate the role corporate actors play in causing and contributing to regional and global harm.

C Center the Rights of Children and Young People in the Final Environmental Crimes Policy

- 16. SCS and OCT support the Draft Policy's emphasis on the rights of individual members of groups that have a particularly close connection with the natural environment, particularly Indigenous People.¹⁰
- 17. SCS and OCT urge the Office to also center the rights of children and young people in the executive summary of the final policy and the policy itself. Such an emphasis is justified—

¹⁰ Above n 1, at [4], [8], [29], and [86].

particularly in the context of climate-related crimes—because, factually children are harmed by climate change to a more intense degree than adults.¹¹

- a) For example, due to physiological differences between children and adults,¹² children die from exposure to extreme heat at 1.5 to 2 times the rate of adults.¹³
- b) Children are also vulnerable to certain types of climate-induced harm that do not apply to adults. For example, maternal exposure to heat during pregnancy greatly increases the newborn’s risk of dying or having a disability.¹⁴
- c) Children are also dependent on caregivers for their safety. They are less likely than adults to be able to find their way to safety or access food and safe drinking water alone—and if separated from caregivers, they are vulnerable to starvation, the elements, abuse, and trafficking.¹⁵ This could be the case in either peace or war time.

¹¹ See e.g. Samantha Ahdoot et al., *Global climate change and children’s health*, *Pediatrics*, 136:e1468-1484 at e1468-1469 (2015) <https://doi.org/10.1542/peds.2015-3233>. (“Children are a uniquely vulnerable group that suffers disproportionately from these effects.”); Perry E. Sheffield et al., *Global climate change and children’s health: Threats and strategies for prevention*, *Environ. Health Perspect.*, 119(3):291-298 at 296 (2011) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3059989/pdf/ehp-119-291.pdf> (“Effects on children and on other vulnerable populations are already—and are projected to continue to be—disproportionately heavy.”); Zulfiqar Ahmed Bhutta et al., *Climate change and global child health: What Can paediatricians do?* *Arch. Dis. Child.*, 104(5):417-418 at 417 (2019) <https://adc.bmj.com/content/archdischild/104/5/417.full.pdf>. (Children pay a disproportionate price for climate change [...]).

¹² See e.g. Zhiwei Xu et al., *Climate change and children’s health—A call for research on what works to protect children*, *Int. J. Environ. Res. Public Health*, 9:3298-3316 at 3299 (2012) (“Climate change poses a significant threat to children’s health because children have unique metabolism, behavior, physiology and development characteristics.”) <https://doi.org/10.3390/ijerph9093298>; Samantha Ahdoot et al., *Global climate change and children’s health*, *Pediatrics* 136(5):e1468-1484 at e1470 (2015) (Children’s “immature physiology and metabolism; incomplete development; higher exposure to air, food, and water per unit body weight; unique behavior patterns; and dependence on caregivers place children at much higher risk of climate-related health burdens than adults.”) <https://doi.org/10.1542/peds.2015-3233>; and Frederica Perera et al., *Climate Change, Fossil-Fuel Pollution, and Children’s Health*, *New Eng. J. Med.*, 386:2303- 2314 at 2304, Figure 2 (2022) (“The fetus, infant, and child are uniquely vulnerable to climate-related environmental impacts and air pollution owing to a host of biologic and behavioral factors.”) <https://www.nejm.org/doi/full/10.1056/NEJMra2117706>.

¹³ Joshua Graff Zivin et al., *Temperature extremes, health, and human capital*, *Future Child.*, 26(1):31-50 at 35 (2016) (Each additional 1°C rise in ambient temperature over 27°C to 29°C increases adult mortality by 2%-3%, and child mortality by approximately 1.5%–6%.) <https://files.eric.ed.gov/fulltext/EJ1101427.pdf>.

¹⁴ ^[5] See e.g. Matthew F. Chersich et al., *Associations between high temperatures in pregnancy and risk of preterm birth, low birth weight, and stillbirths: Systematic review and meta-analysis*, *BMJ*, 371; 1-13 (2020) <https://doi.org/10.1136/bmj.m3811>; and Tamás Hajdu et al., *Climate change and the mortality of the unborn*, *J. Environ. Econ. Manag.*, 118:1-12 (2023) <https://doi.org/10.1016/j.jeem.2022.102771>.

¹⁵ See e.g. Samantha Ahdoot et al., *Global climate change and children’s health*, *Pediatrics* 136(5):e1468-e1484 at e1470 (2015) <https://doi.org/10.1542/peds.2015-3233>; and Kristie L. Ebi, *Climate Change and Children*, *Pediatr. Clin. North Am.*, 54(2):213-226 at 213, 218 (2007) <https://doi.org/10.1016/j.pcl.2007.01.004> (restricted access, available upon request).

- d) Finally, children have more years left to live than adults do and will therefore be exposed to worse climate effects over a larger portion of their lives.¹⁶
18. Accordingly, we respectfully submit that the final policy should be more explicit in regarding the present direct impact of climate change and resulting environmental harm on children and young people as well as the impact on their future lives and livelihoods. As such, we implore the Office to consider how to reconcile and anticipate claims regarding climate change related environmental harm in the final policy.

D Recognize that Climate Change directly jeopardizes life and well-being

19. Currently, the draft policy recognizes that climate change *indirectly* jeopardizes life but does not sufficiently emphasize its *direct* harms to life and well-being, alongside the indirect impacts. This can be easily reconciled. To ensure clarity and accuracy, we respectfully suggest modifying the policy to state:
- "This damage poses a direct and imminent threat to both human and non-human life, as the natural environment forms the foundation of life itself. It also contributes to climate change, jeopardizing *human life and well-being directly* and indirectly."
20. We assume the OTP has access to scientific evidence documenting the direct impacts of climate change. However, if needed, we would be pleased to provide a brief annex highlighting key findings upon request.

¹⁶ See e.g. Perry E. Sheffield et al., *Global climate change and children's health: Threats and strategies for prevention*, Environ. Health Perspect., 119(3):291-298 at 292 (2011) <https://doi.org/10.1289/ehp.1002233>; and Francis Vergunst et al., *Climate change and children's mental health: A developmental perspective*, Clin. Psychol. Sci., 10(4):767–785 at 769-775, Figures 1 and 2 (2022) <https://doi.org/10.1177/21677026211040787>.