

Open Public Consultation of the Office of the Prosecutor, International Criminal Court

Conservation-Litigation.org Contribution to the *Policy paper on accountability for environmental crimes under the Rome Statute*

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Executive Summary

There are growing demands for legal responses that not only punish and deter environmental offenders, but that also help to remedy harm when it occurs. Although legislation and procedures vary widely, many countries also have existing provisions to secure on-the-ground remedial actions – such as habitat restoration, apologies, compensation and species conservation – including via and alongside criminal prosecutions. Cases remain rare, but are emerging globally, and expanding the scope of the International Criminal Court to also recognise the importance of remedies is a timely and impactful step.

In this submission from [Conservation-Litigation.org](https://www.conservation-litigation.org) – a global network of scientists, lawyers and conservationists, artists and activists focused on operationalising environmental liability provisions to secure remedies for harm to the environment – we provide comments and recommendations for how to maximise offenders’ accountability and help secure meaningful remedies to environmental harms caused by international crimes under the Rome Statute.

These comments are intended to help inform the Office of the Prosecutor as they develop their new *Policy paper on accountability for environmental crimes under the Rome Statute*. In particular, we highlight the following considerations for policy development:

- Provisions to secure remedies following harm to the environment already exist in many countries – including within criminal law prosecutions – but remain under-utilised in many jurisdictions. These provide legal bases and examples for ICC to consider how best to address environmental harm within its jurisdiction.
- The understanding and acknowledgment of environmental harms caused by international crimes should encompass the cascading impacts (e.g., on ecosystems, wellbeing, species survival) and account for the different values that humans hold for the environment – not only a monetary loss;
- Legal remedies that respond to these environmental harms must also be diverse and consider on-the-ground actions such as habitat restoration, species conservation, educational/cultural programming, apologies, and not be limited to compensatory monetary payments;
- In order for remedies to be meaningful, it is necessary to ensure that cases and Court Orders are specific about the remedial actions required and related timelines, so that Court Orders are implemented and monitored, and
- Meaningfully responding to environmental harms can be best operationalised via a remedy-oriented legal framework. The importance of developing this framework and related resources will increase if ecocide becomes recognised as an international crime under the Rome Statute.

Introduction

Humanity is facing a triple planetary crisis: climate change, pollution, and biodiversity loss, with a range of cascading impacts on nature and human wellbeing. There are growing demands for legal responses that more meaningfully respond to these impacts.

Across jurisdictions, there are broadly two main, complementary legal responses to environmental harm:

1. Provisions that punish and deter offenders, through actions such as fines and imprisonment, which are traditionally associated with criminal enforcement and administrative sanctions, and
2. Provisions that – following environmental harm – provide remedies for the environment. This can involve remedial actions such as habitat restoration, species rehabilitation, public apologies, pollution clean-up, and investments into cultural/education activities. These are associated with a range of provisions found across areas of law, including civil, criminal, administrative legislation and Constitutional protections. These can be broadly referred to as “liability provisions for remedies that address environmental harm” defined as “legal responsibility that a Party has for the harm they caused to the environment, including water, air, soil, and biodiversity. It is most frequently used in the context of pollution, but may be used to require responsibility for other drivers of environmental harm, such as the international crimes covered by the Rome Statute.”

Criminal sanctions are important, but often weakly reflect environmental harms. Moreover, their traditional focus on punishment and deterrence means that the environment and victims are rarely made “whole”. These are growing demands on legal systems – including the International Criminal Court (ICC) – not only to tighten regulations and strengthen enforcement, but also hold responsible parties legally responsible for remedying the harms they cause.¹

Many countries have existing provisions that can help secure such remedies for nature. Legislation and procedures vary widely across jurisdictions, and these provisions are found across areas of law, including embedded within Constitutions; within sector laws (e.g., Forestry Codes, provisions for hazardous materials); within specific environmental liability legislation, and within Criminal Codes. Across contexts, these provisions allow government agencies, victims, and sometimes citizens and civil society groups to request remedies for those who harm the environment, vastly expanding legal responses to harm beyond punishment.

Related provisions remain under-utilised, though remedies are directly relevant to harms caused by crimes recognised under the Rome Statute. Moreover, widespread policy discussions about the potential to introduce Ecocide as an additional international crime under the ICC would further increase the importance of securing remedies for harm to nature. Nevertheless, related provisions have been in many jurisdictions to secure remedies across contexts, such as

¹ Jones, C.A., Pendergrass, J., Broderick, J., Phelps, J., 2015. Tropical conservation and liability for environmental harm. *Environmental Law Reporter* 45:11032.

marine oil pollution, industrial accidents, climate change, deforestation, wildlife trade². Notably, there are also recent cases at the international level under the International Court of Justice³.

Comments

The possibility for the ICC to demand broader legal accountability for environmental crimes, and to secure more meaningful on-the-ground remedies to environmental harm has transformative potential. In considering the new *Policy paper on accountability for environmental crimes under the Rome Statute*, we believe the following issues could be considered:

1) Criminal prosecutions can provide access to broader remedies

Criminal prosecutions are typically associated with punishment and deterrence, and far less often with remedies. However, in many countries criminal prosecutions for crimes that resulted in environmental harm can be coupled with provisions to secure remedies. Provisions allowing for this already exist in some countries – including within criminal law prosecutions – but remain under-utilised in many jurisdictions.⁴ In some countries, these provisions for remedies can be used alongside traditional criminal law, and in others they are combined legal procedures. These provide a legal basis and examples for the ICC to consider how best to address environmental harm within its jurisdiction.

2) Environmental harms reflect cascading impacts and diverse values – beyond monetary losses.

Identifying remedies to environmental harm first requires an understanding of the harm itself, which is often too narrowly perceived. International crimes are likely to involve environmental harms with cascading impacts for people across scales, the State and the environment that should be explicitly recognised. These include impacts on private and public interests, and harm to specific individuals and sites, as well as cascading impacts on ecosystems, species survival, natural processes, the State, human wellbeing, livelihoods, and the broader public.

However, harms are often narrowly conceptualised – in legislation and in practice by lawyers and judges. In particular, there is a common, but narrow and incomplete focus on harm related to monetary losses, such as loss to tax revenue and the monetary value of any lost assets. There is equally a tendency to focus on price and fine schedules, and market prices and ecosystem service accounting to help facilitate legal processes, but these are rarely meaningful in the

² Phelps, J., Aravind, S., Cheyne, S., Dabrowski Pedrini, I., Fajrini, R., Jones, C.A., Lees, A.C., Mance, A., Nagara, G., Nugraha, T.P., Pendergrass, J., Purnamasari, U., Rodriguez, M., Saputra, R., Sharp, S.P., Sokolowki, A., Webb, E.L. 2021a. Environmental liability litigation could remedy biodiversity loss. *Conservation Letters* 14:e12821.

³ Certain Activities carried out by Nicaragua in the Border Area, Costa Rica v Nicaragua, Compensation owed by Nicaragua to Costa Rica, ICJ GL No 150, [2018] ICJ Rep 15, ICGJ 520 (ICJ 2018), 2nd February 2018, United Nations [UN]; International Court of Justice [ICJ]

⁴ Conservation-Litigation.org has undertaken legal analyses of these provisions for access to remedies in Indonesia, Liberia, Cameroon, Thailand, Georgia, Mexico, Brazil, Philippines, Uganda and India. URL: <https://www.conservation-litigation.org/country-analyses>

context of complex ecosystems. This is significant because the links between environment and wellbeing are increasingly recognised, including the importance of cultural, scientific, bequest, intrinsic values. Research – including highlighted in the 2022 Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services “Values Report” – increasingly highlights that importance of nature to human quality of life are far more diverse and important, although they have been systematically overlooked by most policy processes at national and international levels.⁵

Accounting for these diverse harms in cases and Court Orders is likely to require more plural ways of valuing nature, many of which cannot be defined and evaluated using traditional metrics such as monetary valuation.⁶ Importantly, legal practitioners are often not fully familiar with the complexities of environmental harm and values, and this presents challenges to developing and operationalising cases and verdicts.⁷

3) Meaningful remedies to environmental harm require diverse actions

A more accurate, expanded, less economic view of environmental harms necessarily leads to an expanded view of what remedies are appropriate in response to those harms. Although remedies to harm are often conceptualised in terms of compensatory monetary payments, in most contexts this neither reflects the most accurate science nor the most appropriate response.⁸ Although remedies may sometimes involve compensatory payments (e.g., to pay victims for lost livelihoods or land/resources), this approach is very incomplete because it confounds payments with remediation. Similarly, efforts to put a monetary value on lost ecosystem services may provide little to secure on-the-ground improvements to remedy harm, and are also highly uncertain, expensive to undertake, incomplete.

In contrast, meaningful remedies are likely to require that offenders undertake, or cover the costs of undertaking actions such as habitat restoration, species conservation, and pollution control.⁹ Importantly, other non-financial remedies, such as apologies, support to cultural and educational activities, can play an important role in remedying the impacts of environmental harm on broader human wellbeing. These remedial actions should reflect the diversity and cascade of harms to resources and values that result from a case. Yet, plaintiffs globally,

⁵ IPBES. 2022. Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the work of its ninth session. Addendum: Summary for policymakers of the methodological assessment regarding the diverse conceptualization of multiple values of nature and its benefits, including biodiversity and ecosystem functions and services (assessment of the diverse values and valuation of nature). Bonn, Germany, 3–9 July 2022. URL: <https://www.ipbes.net/the-values-assessment#:~:text=ZH-Summary-for%20policymakers%20%2D%20Values.>

⁶ Schulz, C., Martin-Ortega, J., 2018. Quantifying relational values—why not?. *Current Opinion in Environmental Sustainability* 35:15-21.

⁷ Fajrini, R., Nichols, R.M., Phelps, J., 2022. Poacher pays? Judges' liability decisions in a mock trial about environmental harm caused by illegal wildlife trade. *Biological Conservation* 266:109445.

⁸ Phelps, J., Aravind, S., Cheyne, S., Dabrowski Pedrini, I., Fajrini, R., Jones, C.A., Lees, A.C., Mance, A., Nagara, G., Nugraha, T.P., Pendergrass, J., Purnamasari, U., Rodriguez, M., Saputra, R., Sharp, S.P., Sokolowki, A., Webb, E.L. 2021a. Environmental liability litigation could remedy biodiversity loss. *Conservation Letters* 14:e12821.

⁹ See Jones, C.A., DiPinto, L., 2018. The role of ecosystem services in USA natural resource liability litigation. *Ecosystem Services* 29:333-351.

including prosecutors, often face challenges with developing and interpreting remedies (ie. damage claims) because they often lack technical scientific expertise, and national legislation rarely directs practitioners on how to develop damage claims. Article 75 of the Rome Statute already allows for reparation¹⁰ and can develop meaningful responses to harm that go beyond monetary compensation.

4) Implementation of the remedies is important

In order for remedies to be meaningful, they need to be operationalised on-the-ground. There is a risk, already observed in a number of countries, that monies recovered in order to facilitate remedial actions, are paid but never operationalised. It is necessary to identify mechanisms to help ensure that cases and Court Orders are specific about the remedial actions required in response to identified harms, and that Court Orders are implemented and monitored.

¹⁰ ICC Rome Statute. URL: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

Recommendations

We recommend that the Office of the Public Prosecutor, in developing its *Policy paper on accountability for environmental crimes under the Rome Statute*:

1) Consider a meaningful approach to defining environmental harms

Commission a study to understand the harms caused by crimes under the Rome Statute, considering diverse cascading impacts and plural values.

Draw on existing, multi-disciplinary expertise and resources, including via the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, to help ensure that the latest science on human values for nature and environmental harm are reflected in any legal definitions, thresholds and resources.

2) Co-develop guidelines on identifying remedies (damage claims)

Co-develop advisory guidelines to support both plaintiffs and ICC judges in the development and adjudication of claims, specifically related to the identification and formulation of meaningful remedies, to ensure these reflect diverse types of values and remedies.

Develop example claims for remedies, to help guide practitioners and increase access to justice.

3) Provide guidance on operationalising remedies

Identify strategies to help plaintiffs and ICC judges increase the likelihood that remedies are operationalised on-the-ground, such as examples and templates for developing time-bound remedial plans and monitoring. Such practical resources are

About Conservation-Litigation.org

[Conservation-Litigation.org](https://www.conservation-litigation.org) is a global network of lawyers, scientists, conservationists, artists and activists exploring new, creative legal responses to the biodiversity crisis. Coordinated out of Lancaster University, we support precedent-setting strategic environmental liability litigation — using existing laws to hold environmental offenders legally responsible for remedying the harm they cause. This means that offenders can be ordered to restore habitats, fund animal rehabilitation, compensate affected communities, and issue apologies. Such cases are legally possible – but still rare – in most countries.

Legal analyses that show how it can be done.

We collaborate with lawyers around the world to undertake country-specific baseline legal analyses. These cut through the legal jargon to reveal "hidden" rights, and show others how they can build environmental liability cases for biodiversity. We have helped overcome legal barriers in Georgia, Thailand, Indonesia, Cameroon and Liberia, so their existing laws can finally be used to protect biodiversity.

High-visibility, precedent-setting cases.

We then support government agencies, citizens and NGOs to bring globally strategic lawsuits that benefit biodiversity and hold offenders accountable. We provide technical support, funding, case examples and scientific expertise. We have supported proof-of-concept litigation in Indonesia and Nepal. We are supporting 5 in-country partners to bring new, precedent-setting cases in Indonesia, Italy, Cameroon, Liberia and India. These form the start of a global Green Wave movement of legal action for biodiversity.

Build capacity to facilitate future cases.

We support not only plaintiffs, but also train judges, lawyers and students to navigate the law and science involved in environmental liability cases. We built the 1st Community of Practice that includes resources for future plaintiffs, "lessons learned", international community building, and training for judges across Asia-Pacific.