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THE GREEN LEVIATHAN: EVALUATING THE LEGAL AND GEOPOLITICAL FEASIBILITY OF ECOCIDE AS THE FIFTH CRIME AGAINST PEACE

Author: **Kurbanaliyev Sardor Alidjanovich**
Institution: Tashkent International University
Field of Study: Jurisprudence (Law), 2nd-year student
Phone: +99890-451-53-05 Email: sardorkurbon@gmail.com

Abstract. This article critically assesses the legal viability of amending the Rome Statute to include "Ecocide" as the fifth international crime, alongside Genocide, Crimes Against Humanity, War Crimes, and Aggression. While the moral imperative of the Anthropocene is clear, the legal pathway is obstructed by the strict "mens rea" requirements of international criminal law and the procedural inertia of the Assembly of States Parties. By analyzing the 2021 Independent Expert Panel (IEP) definition and the 2024 EU Environmental Crime Directive, the article argues that for Ecocide to be prosecutable, the International Criminal Court (ICC) must lower the threshold of intent from "specific intent" to "dolus eventualis" (recklessness). Furthermore, it posits that the principle of Complementarity (Article 17) presents a unique paradox for environmental crimes, potentially allowing states to shield corporate actors through "sham" regulatory fines. The article concludes that while the amendment is legally mature, its utility will be primarily normative rather than punitive without a concurrent expansion of corporate criminal liability.

Introduction. International Criminal Law (ICL) was forged in the aftermath of World War II to prosecute acts of mass atrocity committed by humans against humans. The "Nuremberg Promise" was that individuals—not just abstract state entities—would be held accountable for the "supreme crime" of aggression and the horrors of genocide. However, as we navigate the mid-2020s, the greatest threat to global security is no longer solely military aggression, but the systemic, industrial destruction of the biosphere. From the burning of the Amazon rainforest to the radioactive contamination of conflict zones, environmental destruction has reached a scale that threatens the "peace, security, and well-being of the world"—the very preamble of the Rome Statute.[1]

Yet, the International Criminal Court (ICC) remains legally impotent to address these catastrophes during peacetime. Currently, environmental destruction is only prosecutable as a **War Crime** under Article 8(2)(b)(iv) of the Rome Statute. This provision is famously restrictive: it criminalizes widespread, long-term, and severe damage to the natural environment only if it is committed during an international armed conflict and is "clearly excessive" in relation to the concrete and direct military advantage anticipated.[2]

This creates a "War Nexus" requirement that leaves a gaping lacuna: the vast majority of environmental destruction occurs not during war, but during "peaceful" commercial activity. A CEO authorizing the dumping of toxic waste that poisons a river delta faces no liability under the Rome Statute, whereas a General bombing that same river might. This article examines the proposal to close this gap by amending the Rome Statute to include **Ecocide** as a stand-alone fifth crime. It evaluates the "legal feasibility" of this amendment through four lenses: the definition (the actus reus), the mental element (the mens rea), the jurisdictional hurdles (Complementarity), and the amendment procedure (Article 121).

For decades, the primary obstacle to criminalizing Ecocide was the lack of legal precision. "Destruction of nature" was dismissed by legal positivists as too vague for criminal law, which

requires strict specificity (nullum crimen sine lege). However, this deadlock was broken in June 2021 by the **Independent Expert Panel (IEP)** convened by the Stop Ecocide Foundation. Their drafted definition provided the "statutory certainty" required for a serious debate.

The "Wanton" Standard The IEP proposed adding Article 8 ter to the Rome Statute, defining Ecocide as:

"Unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[3]

This definition is a masterstroke of legal drafting because it introduces a proportionality test via the term "wanton." The definition explicitly defines "wanton" as acting with reckless disregard for damage which would be "clearly excessive in relation to the social and economic benefits anticipated." This is the **crucible of feasibility**. It acknowledges that some environmental damage is necessary for modern civilization (e.g., building a hospital requires clearing land). It asks the Court to perform a balancing act: is the economic value of a gold mine worth the poisoning of an aquifer? By borrowing the "proportionality" language from the Law of Armed Conflict (LOAC), the IEP made the definition familiar to ICC judges.

The Thresholds: Severe, Widespread, Long-term The definition requires the damage to be "Severe" AND either "Widespread" OR "Long-term."

1. **Severe:** Defined as "grave impacts" on human life or natural resources.
2. **Widespread:** Extending beyond a limited geographic area, crossing state boundaries, or suffered by an entire ecosystem.
3. **Long-term:** Irreversible or not capable of natural recovery within a reasonable period.

This disjunctive "OR" is critical. Under the 1977 ENMOD Convention (which bans environmental warfare), the standard is "widespread, long-term, AND severe." This cumulative standard is nearly impossible to prove. By switching to "widespread OR long-term," the IEP definition widens the net. A nuclear accident that is localized but permanent (Long-term) would qualify, as would a massive oil spill that is temporary but covers an entire ocean (Widespread).

The most formidable legal hurdle is not the act but the mind. Article 30 of the Rome Statute establishes the default mens rea (mental element) for crimes: "intent and knowledge." This means the Prosecutor must prove that the perpetrator intended to cause the specific consequence, or was aware that it would occur in the ordinary course of events.[4]

In the context of corporate ecocide, "specific intent" is a nearly impossible bar to clear. Corporate executives rarely intend to destroy the environment. Their intent is to maximize shareholder value; the pollution is merely a collateral side effect (an externality). If a CEO cuts safety budgets to save money, resulting in a tailings dam collapse, they can argue in court: "My intent was profit, not destruction. I hoped the dam would hold." Under a strict reading of Article 30, this defense works.

For Ecocide to be practically justiciable, the Assembly of States Parties (ASP) must interpret the mens rea requirement as including **dolus eventualis** (recklessness). This legal concept creates liability when an actor foresees a risk and accepts it, even if they do not desire the outcome.

The IEP definition attempts to embed this by using the phrase "knowledge that there is a substantial likelihood." This is a "constructive knowledge" standard. It implies that if a CEO ignores scientific reports warning of a 40% chance of a spill, they are liable. However, conservative judges at the ICC have historically been reluctant to expand mens rea without explicit statutory authorization. Legal feasibility, therefore, depends on whether the Amendment explicitly overrides Article 30 to permit recklessness standards. Without this, the

crime becomes a "paper tiger," capable of catching only "environmental terrorists" (who are rare) while missing "negligent corporations" (who are common).

A unique challenge for Ecocide lies in the ICC's principle of **Complementarity** (Article 17). The ICC is a court of last resort; it can only intervene when a national legal system is "unwilling or unable" to genuinely prosecute.[5]

In genocide cases, "unwillingness" is usually clear: the dictator controls the courts and refuses to prosecute his own soldiers. In ecocide cases, the dynamic is subtler. Imagine a multinational corporation causes a massive oil spill in a developing nation. The national government, dependent on that corporation for tax revenue, might "investigate" the spill and impose a $10 million regulatory fine. The corporation pays the fine. The ICC Prosecutor then attempts to step in. The corporation argues: "We have already been prosecuted and punished domestically. The case is inadmissible under Article 17."

This creates a **Double Jeopardy** (ne bis in idem) problem. Is a regulatory fine a "genuine prosecution"? Article 17(2) allows the ICC to intervene if the domestic proceedings were for the purpose of "shielding the person concerned from criminal responsibility." However, proving that a government imposed a fine specifically to shield a CEO from the ICC is an evidentiary nightmare. This structural feature of the Rome Statute suggests that Ecocide might be easily blocked by states performing "sham" administrative actions to preempt international criminal trials.

Even if the definition and intent standards are perfected, amending the Rome Statute is a geopolitical nightmare governed by **Article 121**.[6]

The "Opt-Out" Clause (Article 121(5)) The true "poison pill" of the amendment process is Article 121(5). It states that an amendment enters into force only for those states that accept it. Crucially, the Court cannot exercise jurisdiction over a crime committed by nationals of a state that has not accepted the amendment, nor on the territory of a state that has not accepted it.

This creates a massive feasibility gap. The world's largest polluters—China, the United States, Russia, and India—are not parties to the Rome Statute. Furthermore, major resource-exporting State Parties (like Brazil, Canada, or Australia) may simply refuse to ratify the Ecocide amendment to protect their mining industries.

1. **Scenario:** If France ratifies Ecocide but Brazil does not, the ICC cannot prosecute a Brazilian CEO for destroying the Amazon in Brazil.
2. **The Loophole:** The ICC could prosecute a French CEO operating in Brazil (if France ratified).

This creates a "patchwork jurisdiction." While it wouldn't catch every polluter immediately, it would create a chilling effect for multinational corporations headquartered in ratifying states (mostly the EU). It essentially exports the EU's environmental standards globally via the threat of criminal liability for their citizens abroad.

The Rome Statute currently prosecutes **natural persons** (individuals), not legal entities (corporations). The ICC has no jurisdiction over companies. This is a severe limitation for Ecocide, which is inherently an industrial crime.

To prosecute Ecocide, the Prosecutor must link the massive environmental damage directly to the specific decisions of a CEO or Minister of Environment. In complex corporate structures, decision-making is diffuse. A CEO can claim, "The safety failure was the decision of the local manager, not the Board." Without the ability to indict the corporation itself (and seize its assets), the ICC is fighting with one hand tied behind its back. While the **Malabo Protocol** (proposed for the African Court of Justice) includes corporate liability,[7] the Rome Statute does not.

Amending the Statute to include corporate liability would require a separate, even more controversial amendment process that would likely face fierce opposition from the global business lobby.

The strongest argument for feasibility comes from the European Union. In 2024, the EU adopted the revised **Environmental Crime Directive (Directive 2024/1205)**.[8] While not amending the Rome Statute directly, the Directive adopted a "qualified offense" comparable to ecocide, punishable by up to 10 years in prison for destruction comparable to ecocide.

This serves as a "proof of concept." It demonstrates that:

1. The definition of "severe environmental damage" can be codified in Western legal systems without destroying the economy.
2. There is a sufficient "State Practice" emerging to support the amendment.

The "Brussels Effect" suggests that once the EU standardizes these laws, multinational companies will adjust their compliance standards globally to meet the strictest requirement. If a company must avoid ecocide to operate in Europe, it will likely apply those safety protocols in Africa and South America to standardize operations, indirectly achieving the ICC's goals.

Conclusion. Is amending the Rome Statute to include Ecocide feasible? **Legally, yes.** The IEP definition provides a robust template that balances environmental necessity with economic proportionality. The 2024 EU Directive proves that the actus reus is codifiable.

However, **practically**, the hurdle is immense. The "Opt-Out" regime of Article 121(5) ensures that the worst offenders (nations heavily reliant on extractive industries) will simply refuse to ratify the amendment, shielding their nationals from prosecution. Furthermore, the strict mens rea of Article 30 and the lack of corporate liability render the Court a clumsy instrument for addressing corporate negligence.

Therefore, the value of Ecocide as the 5th crime is primarily **normative**, not punitive. It signals a shift in the jus cogens norms of international law, declaring that the destruction of the earth is malum in se (wrong in itself). It transforms the environment from a "resource to be managed" into a "subject of protection." It may not fill the docks of The Hague with CEOs in 2027, but it will strip them of their legitimacy, influence global insurance markets (making ecocidal projects uninsurable), and empower domestic courts to exercise universal jurisdiction.

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