

ECOCIDE AMENDMENTS PROPOSAL

PREAMBLE

The Proposing State(s),

Conscious that all peoples have the right to a healthy, safe and livable environment, and that a wholesome environment is necessary for the survival of humanity,

Conscious that parts and systems of the environment, referred to herein as the global commons, cannot be said to belong to any nation(s) nor to any generation(s) of human beings,

Conscious that the safety of the planet is the responsibility of the international community as a whole;

Conscious that the global commons may be negatively affected by actions occurring both inside and outside national boundaries,

Conscious that disparities of national legislation, as well as of national capacity or willingness to pursue environmental crimes, tend to enable, perpetuate, and magnify such crimes worldwide,

Conscious that serious crimes against the environment, whether in peacetime or wartime, threaten the peace, international security, and safety of the planet,

Concerned that significant and durable harms to the environment pose a direct threat to the Human Rights of current and future human populations, including the rights of indigenous people to pursue their customary livelihoods,

Concerned that deprivations of ecosystem functions can threaten the wellbeing and survival of misinformed or uninformed human populations,

Considering that numerous prohibitions against environmentally harmful activity exist under customary and treaty-made international law,

Considering that the protection of the global commons is most effectively addressed by a comprehensive and transnational system and that the International Criminal Court offers an appropriate framework for the enforcement of such an important system of enforcement,

Decides to propose the amendment to Article 5 of the Rome Statute of the International Criminal Court contained in Annex II (p. 3) to the present document, which is subject to Article 121, paragraph 5, of the Statute,

Decides to propose amendments to Articles 8 *ter*, 9 (with Elements), 15, 17, 20, 21 *bis*, 25, 33, 36, 42, 43, 53, 65, 75, 77, and 121 to the Rome Statute of the International Criminal Court contained in Annex II (p. 4).

ANNEX I

Summary of General Features of Annex II Amendments

[Editors' Note: Summary is not part of amendment text]

1. promulgates general duty of care for ecocide crimes and victims
2. does not require intent or knowledge on part of accused
3. gravity threshold is determined by the ICC in consideration of best available scientific knowledge provided by UNEP and other relevant international agencies
4. operational principles: protection of global environment by means of global commons, Earth ecological systems, and planetary boundaries
5. includes jurisdiction over actions affecting global environment that arise from inside national territories
6. includes jurisdiction over damages to living and certain non-living entities
7. implements the precautionary principle
8. protects against environmental injustices
9. protects rights of future generations
10. includes liability of fictional persons
11. includes liability of superiors (*respondeat superior*)
12. includes shared responsibility for reparations to victims of anthropogenically caused environmental disasters
13. includes restorative justice process
14. expands competence of judges to include environmental law expertise
15. creates special deputy prosecutor for ecocide crimes
16. provides for universal jurisdiction over crime of ecocide
17. provides options for declaratory judgments, conservation orders, and transitional justice in ecocide cases

ANNEX II

(In the following proposed text, additions to the existing ICC Statute are indicated by underlining, excisions from the existing ICC Statute are indicated by strikethrough.)

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression;
- (e) The crime of ecocide.

[Editors' Comment: Currently 5(e) is the next available ordination in ICC Statute.]

Article 8 ter

[Editor's Comment: Currently 8 ter is the next available ordination in ICC Statute]

Crime of ecocide

1. For the purpose of this Statute, any person is guilty of ecocide who causes severe damage to:
 - (a) any part or system of the global commons, or
 - (b) an Earth's ecological system.

2. For the purpose of paragraph 1, "causes" means to be fully or partially responsible, by means of an action or a failure to act, wheresoever such action or failure to act may have occurred, and without consideration of the state of mind of the person responsible.

3. For the purpose of paragraph 1(a), "severe damage" means the introduction of or the removal of a material substance or a quantity of energy, as defined in paragraph 10 below, to an extent that exceeds planetary boundaries, or the violation of any international treaty covering the global commons.

4. For the purpose of paragraph 1(b), "severe damage" means elimination, obstruction, or reduction to an extent that undermines, or creates an increased risk of undermining, the resilience of Earth's ecosystem.

5. For the purpose of Paragraph 1, "severe damage" means the persistence of the damage in time, or of the consequential environmental effects arising from the damage, or of an increased risk of consequential environmental effects arising from the damage, as determined by the United Nations Environmental Programme, or other internationally recognized institution specializing in global environmental monitoring science.

[Editors' Comment: Requires coordination with a Global Commons Trusteeship Commission within the UNEP, or similar institutions]

6. For the purpose of Paragraph 1(a), “any part or system of the global commons” means:
- (a) the oceans and seas that extend beyond national borders or are completely external to national borders, and the marine chemistry within these areas;
 - (b) the atmosphere and atmospheric chemistry over non-territorial waters and land masses;
 - (c) the seabeds beyond territorial waters;
 - (d) the Arctic;
 - (e) the Antarctic;
 - (f) rivers that cross international borders;
 - (g) species migrations that cross international borders or cross other geographical areas defined in this Paragraph (6) as being part of the global commons;
 - (h) space beyond the Earth’s atmosphere;
 - (i) biogeochemical cycles that cross national borders including but not limited to:
 - (i) the Nitrogen cycle,
 - (ii) the Carbon cycle,
 - (iii) the Mercury cycle,
 - (iv) the Sulfur cycle,
 - (v) the Chlorine cycle,
 - (vi) the Oxygen cycle,
 - (vii) the Phosphorous cycle,
 - (viii) the Potassium cycle,
 - (ix) the Hydrogen cycle,
 - (x) the Hydrologic cycle;
 - (j) natural resource reserves that extend beyond national borders or are completely external to national borders;
 - (k) gene pools of transnational animal and plant species;
 - (l) biodiversity within any of the geographical areas defined in this Paragraph (6) as being part of the global commons.
7. For the purpose of paragraphs 1(b), “ecological system” include but not limited :
- (a) Supporting processes such as nutrient and elemental recycling, primary production, clean air, clean water, and soil formation,

(b) Provisioning sources such as nutritious food, habitat, raw materials, biodiversity and genetic resources, minerals, water for irrigation, medicinal resources, and energy,

(c) Regulating processes such as waste decomposition, air and water purification, pest and disease controls,

(d) Cultural functions of Earth's ecosystem such as spiritual enrichment, cognitive development and psychological repair, recreational experiences, scientific knowledge, and aesthetic pleasure.

8. For the purpose of paragraph 3, an "introduction or removal" may occur inside or outside any national boundary.

9. For the purpose of paragraph 3, "a material substance or a quantity of energy" means any substance, biomass, life form, genetic material, element, chemical compound, mineral, or amount of energy.

10. For the purpose of paragraph 3, "exceeds planetary boundaries" means to interfere with or alter any part of the environment in a manner that exceeds the limits defined pursuant to paragraph 12 per se, or would exceed these defined limits if repeated en masse and at the same rate by the rest of humanity, including but not limited to interferences and alterations which could:

(a) Destroy or deplete natural ecosystems or the biodiversity of ecosystems;

(b) Perturb surface hydrology or groundwater resources;

(c) Change natural biogeochemical cycles, including greenhouse gas, nitrogen, or phosphorus balances;

(d) Release chemicals or waste into the environment, including ozone-depleting chemicals and radioactive particles;

11. For the purpose of paragraph 3, the extent and magnitude of planetary boundaries shall be determined by the United Nations Environmental Programme, or other internationally recognized institutions specializing in global environmental sustainability science.

Immediately upon the adoption of this paragraph and quinquennially thereafter, the

Assembly of States Parties shall make the necessary arrangements to obtain and make known to the public via all necessary channels the Schedule of Planetary Boundaries, which shall then become a part of this paragraph as if printed herein. Each Schedule shall include as many boundaries as then current scientific knowledge allows.

[Editors' Comment: Requires coordination with a Global Commons Trusteeship Commission within the UNEP or similar institution]

12. For the purpose of paragraphs 4 and 5, "increased risk" shall be evaluated on the basis of both the amount of increase in probability of the consequential environmental effects as well as the severity of the possible consequential environmental effects, and said evaluation may be a factor in determining the applicable reparations and/or penalties imposed on the offender by the Court pursuant to Articles 75 and 77.

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8, ~~and 8 bis~~, and 8 *ter*. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

[Editors' Comment: Currently 8 ter is the next available ordination in ICC Statute]

Elements

1. The perpetrator's act(s), directive(s), order(s), or the failures to so act, direct, or order caused a violation of the crime of ecocide. It shall be no defence against this element that there existed at the time of the alleged conduct a government or judicial regulation, policy, or permit allocation which authorized the allegedly ecocidal conduct.
2. The perpetrator was a person, as defined in Article 25(1)(A-D), in a position effectively to exercise control over or to direct the use of any process or equipment whose

deployment resulted in ecocide, or to exercise control over or to direct any other person that committed an act of ecocide.

3. There shall be no mental state element for the crime of ecocide pursuant to Article 8 *ter* (2). For determining appropriate sentences or reparations under Articles 75 and 77, the mental states of intentionality, negligence, knowingness, or unknowingness shall be considered as aggravating or mitigating factors. For purposes of this paragraph, negligence includes the failure to take reasonable steps to investigate, identify, or prevent the potentially ecocidal consequences of the alleged conduct.

[Editors' Comment: The Elements section appears in a separate document to the ICC Statute and is incorporated by reference of Article 9]

Article 15

Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information presented by any person on crimes within the jurisdiction of the Court.

Article 17

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

...

- (d) The case is not of sufficient gravity to justify further action by the Court. In cases brought under Article 5(e), the Court should consult with the United Nations Environmental Programme, or other internationally recognized agency specializing in environmental sustainability science, to make the determination of sufficient gravity.

[Editors' Comment: Requires cooperation with a Global Commons Trusteeship Commission within the UNEP, or similar institution]

Article 20

Ne bis in idem

...

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8, 8 bis or ~~8 bis~~ *ter* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: ...

[Editors' Comment: Currently 8 ter is the next available ordination in current ICC Statute]

Article 21 bis

Declaratory judgment

1. In cases brought under Article 5(e), and pursuant to any of the procedures described in Article 13, the Court may issue a Declaratory Judgment with regard to conduct which has not yet occurred but which is in active development stages.

2. The Court's rules of Procedure and Evidence shall apply to Declaratory Judgment proceedings. In addition, the Court may make provisional Rules applicable to Declaratory Judgment proceedings pursuant to Article 51(3).

3. There shall be no Penalties under Article 77 arising from the Declaratory Judgment proceedings described in this Article, except that Article 77 penalties may be ordered if the same case is converted to, or later re-filed as, an Article 77 case. The Court may also impose an order of attorney's fees and legal costs upon any party to a Declaratory Judgment proceeding upon a determination by the Court that the said party's claims, defences, or other filings are frivolous, fraudulent, or dilatory.

4. Declaratory Judgments may be introduced as evidence of the defendant's state of mind in subsequent proceedings before the Court.

Article 25

Criminal responsibility

1. The Court shall have jurisdiction over natural and fictional persons pursuant to this Statute.
 - (a) For the purposes of this Article 25 (1), fictional persons shall include: any company, corporation, partnership, venture, non-governmental organization, business organization, not-for-profit organization, or any government or other legal entity, except that no sovereign nation or its agents shall be considered a person unless the sovereign or its agent is the owner or operator, directly or indirectly, of an instrumentality engaging in the alleged conduct.
 - (b) For the purposes of this Article 25 (1), a person may also include:
 - i. Any director, partner, majority shareholder, officer, leader, and/or any other person, natural or fictional, within an organization who is in a position of superior responsibility making that person responsible for offences committed by persons under his or her direct authority,
 - ii. Any member of government, prime minister or minister who is in a position of superior responsibility making that person responsible for offences committed by persons under his or her direct authority,
 - (c) For the purposes of Article 25 (1)(B)(i) and (B)(ii), a person in a position of superior responsibility shall only be held responsible if he or she fails to take all necessary measures within his or her power to prevent or to stop the commission of the crime of ecocide by persons under his or her direct authority, or to submit the matter to the competent authorities for investigation.
 - (d) For purposes of this Article 25 (1), the Court's jurisdiction over persons may include one, or more than one, natural or fictional persons and any combination of natural and fictional persons.
 - e) For purposes of this Article 25 (1), where a person of superior responsibility is convicted of an offense by reason of his or her position of superior responsibility, as a consequence of the conviction, the organization to which he or she belongs may be held jointly responsible for the actions of the person with the superior responsibility.

...

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law, except as provided in Article 25(1)(A-D).

Article 33

Superior orders and prescription of law

...

1 (d) In cases involving the violation of Article 5(e), it shall not be a defence for any person charged with a violation of the law of ecocide that their infringing acts were, at the time of occurrence, approved, sanctioned, or authorized in any way by an existing governmental law or regulation in either the jurisdiction where the acts occurred or where the effects of the ecocide were manifested.

2. For the purposes of this article, orders to commit genocide or crimes against humanity or the crime of ecocide are manifestly unlawful.

Article 36

Qualifications, nomination and election of judges

3. (b) Every candidate for election to the Court shall:

...

(iii) Have, in consideration of article 5(e), preferably established competence in relevant areas of environmental law such as international environmental law and the law of environmental protection, and extensive experience in a professional legal capacity, which is of relevance to the judicial work of the Court;

Article 42

The Office of the Prosecutor

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors or Special Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. In cases involving violations of Article 5(e), the Prosecutor shall be assisted by one or more Special Deputy Prosecutors, who may be qualified as experts in the prosecution of environmental crimes. The Prosecutor and the Deputy or Special Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

Article 43

The Registry

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence and crimes of ecocide.

Article 53

Initiation of an investigation

2. ...

- (c) ...under Article 13, paragraph (b), or any person presenting information under Article 15, paragraph 1, of his or her conclusion...

3. (a) ... under Article 13, paragraph (b), or any person presenting information under Article 15, paragraph 1, the Pre-Trial Chamber...

Article 65

Proceedings on an admission of guilt

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court, except:

- (a) In cases brought under Article 5(e), the Prosecutor may submit to the Court a written plea bargain agreement whereby the accused agrees to make an admission of guilt in exchange for the imposition of a specified penalty as defined in Articles 77(3)(B) and/or 77(3)(C). If the Court approves the plea bargain agreement then the terms of such agreement shall be binding upon the Court and shall be so ordered as the Court's disposition of the case.

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation, transitional justice measures, and environmental restoration, including reimbursement for consequential losses arising from injury, loss of life, diminution of health or well-being, economic losses, ecosystem productivity and functions losses, or losses to cultural life. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and the environment and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation, and environmental restoration.

Article 77

Applicable penalties

3. In cases brought under Article 5(e), any person convicted of the crime of ecocide, or of aiding and abetting, counselling, or procuring the crime of ecocide, may be subjected to one or more of the following penalties:

- (a) Imprisonment as defined in subsection 1 of this Article,
- (b) Forfeiture of proceeds, property, and assets derived directly or indirectly from that crime as defined in subsection 1(b) of this Article
- (c) Reimbursement of attorney's fees and legal costs to prevailing parties,
- (d) Mandatory reparations to victims as set forth in Articles 75 and 79,
- (e) For fictional persons, Mandatory Dissolution,
- (f) Cessation of Operations Orders.

4. For purposes of this Statute:

- (a) "Mandatory Dissolution" of a fictional person shall mean the legal dissolution of the entity such that neither the entity, nor any substantially similar successor entity, continues to exist under the laws of any State or Non-State Party;
- b) a "Cessation of Operations Order" shall order the discontinuation and permanent cessation of certain operations and/or practices that are directly related to the ecocidal infractions before the Court.

Article 121

Amendments

...

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties, which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory, except the court may exercise its jurisdiction over the crime of ecocide when committed by nationals of any State or Non-State Party one year after the instruments of ratification or acceptance of amendments a) Article 5(e), b) 8 ter, and c) Elements of the Crime of Ecocide have been deposited with the Secretary-General of the United Nations by seven-eighths of the State Parties.

ACKNOWLEDGMENTS

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