FROM ECOCRIMES TO ECOCIDE

PROTECTIN THE ENVIRONMENT THROUGH CRIMINAL LAW

Under the supervision of

Professor Laurent NEYRET

Foreword

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The idea to initiate a collaborative research dedicated to the protection of the environment through criminal law has arisen after giving serious thoughts to the transformation of the concept of crime against humanity in the environmental field, which resulted in a proposal for a new international crime: the crime of ecocide.

The analysis of the desirability and feasibility of establishing such a crime at the international level involved working more broadly on the protection of the environment through criminal law. Indeed, if the crime of ecocide were to be included in the category of the most serious crimes, this involved the determination of its specific features compared to those of the other environmental crimes. Such an endeavour required the bringing together of a number of specialists from various disciplines, including criminal law, environmental law, international law, as well as human rights law and comparative law. The team of sixteen jurists - scholars, lawyers, judges - of six different nationalities, worked for three years independently to put forward proposals for setting up a graduated and effective system of protection of the environment through criminal law.

The initial goal was to make a diagnosis of the level of protection of the environment under the existing criminal law, both under domestic and international law. To do this, the research group has benefited from the valuable work of students of the Clinique du droit de Sciences Po (Law Clinic of Sciences Po) headed up by Manon Garin who undertook an inventory of texts and scholarly writings concerning the fight against environmental crime in all legal systems[1]. Moreover, a good understanding of the legitimacy and effectiveness of criminal environmental law involved comparing theory with practice. A team of journalists of the newspaper *Le Monde*, led by Marie-Béatrice Baudet and Serge Michel, respectively awarded with the prizes Grand reporter and Albert Londres Prize agreed to conduct investigations in nearly ten countries to uncover the levers of environmental crime in an unprecedented way for a research group in the field of law. Their work allowed five illegal channels to be traced back, ranging from trafficking in rosewood to the illegal exploitation of tin mines, including the trafficking of e-waste and the trafficking of wild tigers. The result of these investigations was published in the newspaper *Le Monde* in a series of publications entitled "Ecocide" between January and February 2015 and also in a book entitled "Les prédateurs – La nature face au crime organisé"[2]. Finally, it should be noted that a good understanding of all the issues related to environmental crime required listening to what operational stakeholders had to say regarding these matters. This has ultimately led the legal team to hold meetings with members of Interpol, the European Commission, the French Ministry of Justice, the French Central Office against Attacks towards the Environment and Public Health, as well as representatives of that States that are affected by environmental crime, prosecutors specialized in environmental matters, representatives of associations for the protection of the environment and representatives of companies. In this first

[1] https://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr.ecole-de-droit/files/rapport_ecocide_project.pdf(last accessed April 2016)
[2] Ed. Ateliers Henry Dougier, October 2015.

phase of this study in which an inventory of all related legal matters was drawn up, journalistic investigations were carried out and discussions were held with stakeholders, it became clear that there were a number of gaps in the criminal legislation concerning the protection of the environment.

During the second phase, in order to close the loopholes in the law, each member of the research group has worked on proposals for changes within their specialty, all this being enriched by the fresh perspective of the other team members. This work led to the drafting of specific articles that were published in the framework of French version of this research[3], with a series of proposals emerging therefrom. These proposals were collected and made coherent by Isabelle Fouchard through the preparation of the two draft international conventions, one dealing with ordinary environmental crimes, the so-called ecocrimes, and the other one concerning extraordinary environmental crimes, based upon the notion of ecocide. This book contains the text of the above draft conventions (Part I) and a consolidated report containing 35 proposals for "a more effective punishment of crimes against the environment" (Part II).

We express the hope that this project will become a driving force for the establishment of an environmental criminal justice of the 21st century in full awareness of the critical challenges facing the planet and humanity.

[3] L. Neyret (dir.), Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015.

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PART I

DRAFT INTERNATIONAL CONVENTIONS

INTRODUCTION

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The following draft conventions are the result of a collective work carried out during a period of more than two years by a team of sixteen jurists specialized in environmental law, criminal law, international criminal law and international human rights law. The multidisciplinary nature of the team has had a crucial impact on the conduct of the research activities, which also contributed to go far beyond of its starting point - the study of the ecocide - to include the development of two draft international conventions. The conduct of this research has been marked by several stages.

On the merit, it cannot fail to be noticed that, the environment has for a long time not been considered a legal interest important enough to deserve legal protection of a criminal law nature: at the national level, the regulation of environmental damage is basically deemed to be a violation of an administrative law nature; at the international level, environmental law contains only a few criminal law provisions. Yet, an awareness of the fact that this "criminal law gap" concerning environmental crime, coupled with the general phenomenon of internationalization of crime, has contributed to quantitative (ever increasing statistics of environmental crime) and qualitative developments (transnational organized crime, linked to other types of international crime, such as smuggling or corruption). These developments have shown the increasing inability of States to prevent and repress transnational crime, acting alone, and highlighted a greater need for intergovernmental cooperation in criminal matters on the issue.

Moreover, the choice to tackle environmental crime based upon a comprehensive approach has led to distinguish between "ordinary"and "extraordinary" forms of this crime, reflecting the distinction among international crimes, in the context of which a distinction is drawn between transnational crimes (ecocrimes) and supranational crimes (ecocide) and requiring differentiated prevention and repression regimes. Nevertheless, the question arose as to how to move forward towards this criminalization of the most serious violations to the environment at the national and international levels.

According to Émile Durkheim, "it should not be presumed that an act hurts the collective consciousness because it is criminal, but rather that it is criminal because it hurts the collective consciousness. We do not condemn that act because it is a crime, but it is a crime because we condemn it"[4]. Once the act is characterized as a "crime" by (domesticor international) criminal law, the two proposals converge and mutually reinforce. But as long as the legislator has not established the criminal nature of the acts concerned, those acts that might offend collective consciousness –such as serious environmental offenses - do not constitute, however, crimes in the legal sense of the term. There is, thus, always a stage in the criminalization process where the domestic or international community calls for, or even requires, that such a morally reprehensible

4 E. DURKHEIM, *De la division du travail social*, 5thed., Quadrige, Paris, PUF, 1998, p. 48.

behavior be characterized by the legislator as an offense from a legal viewpoint. The expression of this collective consciousness is more or less clear, compelling, depending on the values at stake - life, physical integrity, property - and depending on the circumstances of the current state of criminal affairs. The protection of the environment is an area in which the voice of the collective consciousness has struggled to emerge and made itself heard. The environment has a paramount importance, although its relevance has been undermined as a result of an anthropocentric approach and the inability to collectively understand the finite character of natural resources and the existing interdependence between human life and its environment.

A first conclusion of the research conducted is that the protection of the environment is today at a turning point which calls, in relation with the most serious forms of crime, for a global response based upon criminal law, drawing on both the national and international law systems. In that regard, States, which create criminal and international law, still have to make a decision to show their intent to respond to this call.

On the form, the role of researchers is to examine the existing law, identify gaps or mismatches with reality and make proposals on the basis of both the existing legislation and the future regulations that could be established. Draft international conventions were, thus, considered a proactive way to provide an account of the entire range of legal tools to which States can resort - both under domestic and international law - to ensure an effective protection of the environment from a criminal law perspective. Some provisions are directly drawn upon existing international criminal law conventions, including those dealing with the fight against terrorism, corruption and transnational organized crime, which contain mechanisms of effective criminal prosecution - jurisdiction, extradition, etc. (*inspiration*). Other provisions innovate in order to meet the realities and the specifities of environmental crime - for example, the general offense of endangerment concerning ecocrimes. Subsequently, these provisions could serve as an model for other instruments - for instance, the criminal liability of legal persons for the crime of ecocide (innovation).

If recourse to a convention on international cooperation in criminal matters is a relatively classic instrument concerning transnational crimes, such a convention is of a more sensitive nature when dealing with supranational crime whose customary character has not yet been completely established. Nevertheless, the purpose of these draft conventions was to provide proposals that permit to achieve a balance between the existing and prospective mechanisms allowing for a phased response: a draft convention focused on pragmatism that prompts a reaction in the short or medium-term concerning ecocrimes and a draft convention focusing on the future that induces a reflection on the recognition in the long run of a crime of ecocide.

Draft

Convention against Environmental Crime

(*Ecocrimes* Convention)

Preamble

The States Parties,

Recognizing that preservation of the natural environment is crucial to the future of mankind,

Concerned about the rise in environmental crimes and their effects, which are increasingly extending beyond the borders of the States in which those crimes are being committed,

Concerned about the strong and increasing links between environmental crime and other forms of international crimes, such as transnational organized crime, illicit trafficking, money-laundering or even corruption and in full compliance with texts already adopted by the United Nations,

Recognizing that environmental crime has an impact not only on the environment but also on national peace, security and economies as well as negative health and social implications which are liable to compromise sustainable development,

Determined to combat such crimes in an efficient and responsive manner, which requires a comprehensive and multidisciplinary approach in order to preserve the environment and human health,

Recognizing that differences in national laws and capabilities create the conditions that give rise to environmental crime and thus make it necessary to increase international cooperation, taking into account the common but differentiated responsibilities of States,

Noting that a number of international and regional instruments addresses the issue of the protection of the environment without establishing systems of appropriate sanctions in order to ensure full compliance with the laws for the protection of the environment,

Recognizing that such compliance can and should be strengthened by the availability of criminal sanctions, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law,

Noting also the existence of a number of international conventions regulating cooperation on criminal procedures, but that none of them deals specifically with the protection of the environment and determined to strengthen the use of criminal law in its different dimensions, both preventive and punitive, without prejudice to all other means available, namely, civil and administrative remedies, in order to ensure, particularly the restoration of damage to the environment and compensation for the victims,

Noting the initiatives in this regard of a number of international organizations and, in particular, those of the United Nations Environment Programme, the United Nations Office on Drugs and Crime and Interpol,

Affirming that States are responsible for the fulfillment of their international obligations concerning protection and preservation of the environment, and are liable in accordance with international law,

Convinced that effective measures, especially of a penal nature, should be taken immediately to promote cooperation in order to prevent and combat environmental crimes more effectively;

Have agreed as follows:

Chapter 1 General provisions

Article 1 - Use of terms

For the purposes of this Convention: p

1. "Illegal" means:

    a) Any behavior contrary to the law of the State in whose territory the illegal act is committed, characterized by the infringement of a law, an administrative regulation, or a decision taken by a competent authority concerning the protection of the environment;
    b) Any other behavior is also deemed illegal:
        i) Where the acts have been committed by a foreign physical or legal person in a State whose environmental laws establish a level of protection clearly lower than that established in the State of nationality of the physical person or the State where the legal persona has its registered office or even the State from which the wastes have come;
        ii) Where the acts have been committed under the guise of an authorization or a permit having been obtained or being held by means of corruption, abuse of a public official position or threats within the meaning of United Nations Convention against Corruption.

2. "Ecosystems" mean the dynamic complexes of plant, animal and micro-organism communities and their non-living environments interacting as functional units.

3. "Legal person" means any entity having legal personality according to the applicable law, except for States or public entities exercising State authority and public international organizations.

4. "Foreign legal persons" mean:

a) A legal person whose registered offices is situated in a State other than the one in which such legal person or one of its subsidiaries commits the prohibited behavior, or
b) A legal person whose registered office is situated in the State where the prohibited behavior is committed but that undertakes its activities in the course of which that behavior is carried out through a foreign legal person or one of its subsidiaries.

For the purposes of determining the nationality of a legal person, a State shall be able to take into account the criterion based upon the registered office as well as the place where the legal person performs its main activities or it has its main administrative center.

Article 2 - Scope of application

1. This Convention shall apply to the prevention and punishment of crimes established in articles 3 and 4, as well as the compensation of their consequences.

2. The present Convention is without prejudice to the norms applicable to the crime of ecocide and violations to the administrative regulation dealing with the protection of the environment.

Chapter 2 Repressive measures

Article 3 – Crimes against the Environment

1. Each State Party shall adopt such legislative and other measures as may be necessary to ensure that the endangerment of the environment, resulting from the following illegal acts committed intentionally or with at least serious negligence constitute a crime:

(a) the discharge, emission or introduction of a quantity of substances or ionizing radiation into air or the atmosphere, soil, water or the aquatic environments;

(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker in the framework of any activity related to the waste management;

(c) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used;

(d) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances;

(e) the production, import, export, placing on the market or use of ozone-depleting substances;

(f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species;

(g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the acts concern a negligible quantity of such specimens and have a negligible impact on the conservation status of the species;

(h) any other act of a similar nature liable to put the environment at risk.

2. Where the acts listed in the previous paragraph create a risk of causing substantial damage to ecosystems by affecting their composition, structure and functioning, they are deemed to endanger the environment:

3. The act of causing a substantial damage to ecosystems by affecting their composition, structure and functioning constitutes an aggravating factor.

Article 4 – Crimes against Persons

1. Each State Party shall adopt such legislative and other measures as may be necessary to ensure that the endangerment of the life of persons, resulting from the following acts committed intentionally or with at least serious negligence constitute a crime :

(a) the discharge, emission or introduction of a quantity of substances or ionizing radiation into air or the atmosphere, soil, water or the aquatic environments;

(b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker in the framework of any activity related to the waste management;

(c) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used;

(d) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances;

(e) any other act of a similar nature liable to cause the death or serious injuries to individuals.

2. Where the acts listed in the previous paragraph create a risk of causing the death or serious injuries to persons, they are deemed to endanger the life of persons:

3. The act of causing death or serious injury to any person as a result of the acts listed in paragraph 1 constitutes an aggravating factor.

Article 5 – Participation in Crimes

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a crime, consistent with its legal principles, participation in any capacity such as an accomplice, assistant or instigator in a crime established in accordance with this Convention.

2. Each State Party shall adopt such measures as may be necessary to establish as a crime, consistent with its legal principles, participation in organized criminal group within the meaning of art. 5 of the United Nations Convention against Transnational Organized Crime: Where one or more of the crimes referred to in this Convention are committed by a structured group, within the meaning of art. 2 of the United Nations Convention against Transnational Organized Crime, and such crimes are recurrent and related, directly or indirectly, to the obtaining of a financial or other material benefit, they will be regarded as equivalent to a "serious crime" within the meaning of the aforementioned Convention regardless of the sanction established for the crime.

Article 6 – Liability of legal persons

1. Each State Party shall adopt such measure as may be necessary, consistent with its legal principles, to ensure that legal persons can be held criminally liable for the crimes established in accordance with this Convention, where those crimes have been committed for their benefit, by any person who has a leading position with the legal person concerned, acting either individually or as part of the organ of the legal person, based upon:

a) a power of representation of the legal person;
b) an authority to take decisions on behalf of the legal person; or
c) an authority to exercise control within the legal person.

2. Each State Party shall adopt such measure as may be necessary, consistent with its legal principles, to ensure that legal persons can be held criminally liable where their lack of supervision or control has made possible the commission for their benefit of a crime established by this Convention.

3. Subject to the legal principles of the State Party, the liability of legal persons may be of a criminal, civil or administrative nature.

4. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal prosecution against natural persons who have participated in the commission of a crime within the meaning of art. 5, and the crimes referred to in arts. 3 and 4.

Article 7 – Sanctions against natural persons

1. States Parties shall adopt such measures as may be necessary to impose effective, proportionate and dissuasive sanctions on natural persons convicted for the crimes established in accordance with this Convention and ensure restoration of damage to the environment and compensation for victims.

2. States Parties shall make the crimes established in accordance with this Convention punishable, taking into account their extreme seriousness. For the purposes of sentencing and determining the gravity of the sanction, State Parties shall take into account the following criteria:

a) The economic benefit obtained from the crime, including the savings resulting from failure to adopt environmental protection measures;
b) The level of responsibility of the perpetrator of the crime, the fact that he/she has committed the crime in course of the activities carried out by a legal person or his/her status of public official;
c) The prompt restoration of damage and compensation of victims;
d) The organized nature of the crime.

3. The restoration of damage may take the form of:

a) Measures of reinstatement;
b) Damages;
c) Compliance programmes;
d) Provisioning the Environment Fund;
e) Local development measures;
f) And, depending on the circumstances, symbolic restoration measures adapted to the cultural dimension of the damage caused to the environment, which may take the form of making an apology to the harmed communities.

Article 8 – Sanctions against legal persons

1. States Parties shall take such measures as may be necessary to impose effective, proportionate and dissuasive sanctions on the legal persons convicted for the crimes established in accordance with this Convention and ensure restoration of damage to the environment and compensation for victims.

2. States Parties shall adopt such measures as may be necessary to impose effective, proportionate and dissuasive penalties on the legal persons convicted for any of the crimes established in accordance with this Convention. In particular, States Parties shall consider establishing the following sanctions:

a) Monetary fines;
b) Orders of prohibitions, especially:
    - The dissolution of the legal person;
    - The temporary or permanent closure of the premises or establishments of the legal person;
    - The temporary or permanent suspension of all or part of the activities carried out by the legal person in the course of which the crime has been committed, incited or covered up;
    - The withdrawal of licenses; authorizations or concessions;
    - The prohibition against receiving public subsidies and financing and entering into contracts with public administrations.

c) Publication of the conviction. Where there are a number of unidentified victims, such publication shall ensure that victims become aware of their right to claim compensation;
d) Appointment of a judicial officer to ensure that the legal person concerned takes the organizational measures aimed at preventing additional crimes against the environment or that it diligently implements the restoration or compensation measures.

3. Restoration of damage may take the form of:

a) Measures of reinstatement;
b) Damages;
c) Compliance programmes;
d) Provisioning the Environment Fund;
e) Local development measures;
f) And, depending on the circumstances, symbolic restoration measures adapted to the cultural dimension of the damage caused to the environment which may take the form of making an apology to the harmed communities.

4. States Parties shall adopt such measures as may be necessary to prevent sanctions or the harmful consequences that arise therefrom from being insured.

Article 9 – Criteria for the determination of sanctions on legal persons

1. For the purposes of sentencing, priority consideration should be given to the restoration of the damage and the compensation of victims.

2. Where the fine would put at risk the solvency of the legal person, jeopardize the job security or the restoration of the damage caused, State Parties may adopt measures to allow payments to be made in installments. In these cases, and in accordance with their internal law, State Parties can also give priority to restoration of damage caused by the legal person that committed the crime.

3. State Parties shall take into account the following criteria for sentencing and determining the gravity of the sanction:

a) The economic benefit obtained from the crime, including the savings resulting from failure to adopt environmental protection measures;

b) The lack of or the inadequate monitoring internal measures that could have prevented the commission of the crime.
c) The repeated crimes against the environment committed within the premises of or by the legal person. To this end, sanctions imposed on legal persons by other authorities shall be taken into account:
d) The organized nature of the crime;
e) The cooperation by the legal person in the criminal proceedings, especially in the establishment of criminal liability;
f) The prompt restoration of damage and the assistance provided to victims;
g) The expeditious adoption of monitoring internal measures aimed at preventing similar crimes.

4. The dissolution of the legal person and the permanent closure of its premises or the cessation of its operations shall only be ordered where the legal person will be considered as belonging to an organized criminal group within the meaning of the United Nations Convention against Transnational Organized Crime.

Article 10 – Suspension of enforcement of sanctions, evidence and procedural agreements

1. States Parties may consider, in accordance with the fundamental principles of their domestic law, the feasibility of neither imposing any sanctions, nor enforce them nor prosecute the legal person concerned, where the latter has taken voluntarily, in a manner as required and without delay, its internal organizational measures, namely:

a) It has notified the competent authorities of the commission of one of the crimes defined in this Convention, that has been perpetrated by one of its employees or leaders;
b) It has restored or endeavored to restore the damage caused by it, especially, the harm caused to the victims;

2. In those cases, the decision not to impose any sanctions, nor enforce them or nor prosecute the legal person concerned can be subject to the fulfilment of certain conditions, namely:

a) The appointment of a public supervisor responsible for monitoring the appropriate preventive measures adopted by the entity as well as the restoration of the damage caused or investigating the underlying causes that led to the commission of the crime against the environment;
b) Payment of an amount providing an offset to the benefit obtained by the legal person as a result of the commission of the crime or the failure to respect the environmental legislation.

Article 11 Confiscation and seizure

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from crimes covered by this Convention or property

the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in crimes covered by this Convention.

2. States Parties shall consider the possibility of seizing the proceeds of crime derived from crimes covered by this Convention. The proceeds of the crime also include the savings that may result from the lack of the adoption of measures aimed at protecting the environment.

3. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

4. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled may also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

7. For the purposes of this article and article 17 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

8. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 12 – Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the crimes established in accordance with this Convention where:

a) The acts have been committed in the territory under the jurisdiction of the State concerned; or

b) The result of the crime takes place in any territory under the jurisdiction of the State concerned; or
c) The crime is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the crime is committed.
d) The crime is committed by nationals of that State; or
e) The crime is committed by a legal person that has its registered office or performs its main activities or has its main administrative center in the territory of the aforementioned State; or
f) The crime is committed against nationals of that State Party and that that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction in cases where the alleged perpetrator of a crime established in this Convention is present in its territory and it does not extradite that person, pursuant to art. 15, to any of the States Parties which have established their jurisdiction in accordance with paragraph 1.

3. When more than one State Party claims jurisdiction over the crimes established in this Convention, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

4. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 13 Investigation and prosecution

1. Upon being satisfied that the circumstances so warrant, after having examined all information available to it, the State Party in whose territory a person suspected of committing a crime referred to in arts. 3 and 4 is present shall take the appropriate measures so as to ensure his/her custody or take any other legal measures as required to ensure that person's presence in its territory. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. The State concerned shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he/she is a national, or if that person is a stateless person, the representative of the State in the territory of which that person habitually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in paragraph 1 of art. 12 of the fact that that person is in custody

and the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 2 of the present article shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 14 Participation of civil society

Each State Party shall take any measures as may be necessary to foster, in accordance with its internal law, access to information for civil society and grant any group, foundation or association which, according to their statutes, aims at the protection of the environment, the right to participate in the criminal proceedings concerning the crimes referred to in this Convention.

Article 15 – Extradite or prosecute

1. The State Party in the territory under whose jurisdiction a person alleged to have committed a crime referred to in arts. 3 and 4 is found shall, if it does not extradite that person, submit the case to its competent authorities for the purpose of prosecution.

2. Those authorities shall take their decision in the same manner as in the case of any other crime of a serious nature under the law of that State.

3. Any person regarding whom proceedings are being carried out in connection with the crimes referred to in arts. 3 and 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 16 Extradition

1. The crimes set forth in arts.3 and 4 shall be deemed to be included as extraditable crimes in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. The States Parties undertake to include such crimes as extraditable crimes in every extradition treaty to be concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the crimes referred to in art. 3 and 4. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the crimes referred to in arts. 3 and 4 as extraditable crimes between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the crimes referred to in arts. 3 and 4 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 12.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to the crimes established in arts. 3 and 4 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.

6. The crimes referred to in arts. 3 and 4 shall not be regarded, for the purposes of extradition or mutual legal assistance between State Parties, as political crimes or as crimes connected with a political crime or as crimes inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such a crime may not be refused on the sole ground that it concerns a political crime or a crime connected with a political crime or a crime inspired by political motives.

Article 17 Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the crimes covered by this Convention.

2. Mutual legal assistance shall be based on the principle of mutual recognition of judgments and judicial decisions of the State Parties.

3. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the crimes for which a legal person may be held liable in accordance with article 6 of this Convention in the requesting State Party.

4. Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party, or both of them, by virtue of being violations of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

5. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute a crime under the national law of the requested State Party.

6. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Central authorities shall ensure the speedy and proper execution or transmission of the requests received.

7. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. In urgent circumstances and where agreed by the States

Parties, requests may be made orally, but shall be confirmed in writing forthwith.

8. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

9. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, public policy or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar crime, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

10. Reasons shall be given for any refusal of mutual legal assistance. Before refusing a request of mutual legal assistance or postponing its execution pursuant to paragraph 11 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

11. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an on-going investigation, prosecution or judicial proceeding.

Chapter 3 Preventive measures

Article 18 – Cooperation on prevention

1. States Parties shall cooperate in the prevention of the crimes established in this Convention by taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of those crimes within or outside their territories.

2. States Parties shall further cooperate in the prevention of the crimes established by this Convention by exchanging accurate and verified information in accordance with their national legislation, and coordinating administrative and other measures taken.

3. States Parties may exchange information through the regional and international organizations involved in the fight against organized environmental crimes, particularly, Interpol, Europol or the United Nations Office on Drugs and Crime (UNODC).

4. States Parties provide or strengthen adequate training for the relevant professionals dealing with those identified as perpetrators or potential perpetrators and the victims of the crimes established in this Convention.

5. States Parties shall endeavor to promote public awareness regarding the existence, causes and gravity of and the threat posed by environmental crimes. Information may be disseminated where appropriate through the mass media and shall include measures to promote public participation in preventing and combating such crimes.

6. Each State Party shall inform the Secretary of this Convention the name and address of the authority or authorities that can assist other States Parties in developing measures to prevent the crimes established by this Convention.

7. States Parties shall, as appropriate, collaborate with each other and relevant international and regional organizations in promoting and developing the measures referred to in this chapter.

Chapter 4 Implementation of the Convention

Article 19 Protection of sovereignty

States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its national law.

Article 20 Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. Each State Party may adopt more strict or severe measures than those provided for in this Convention for the prevention and combat of the most serious crimes against the environment.

3. The provisions of this Convention shall be applied and construed in accordance with the rules of general international law and the international environmental law principles, particularly the principle of common but differentiated responsibilities.

Article 21 – Review of compliance with provisions

1. The Assembly of State Parties shall adopt by consensus arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention.

2. These arrangements shall allow for appropriate public involvement and provide for the possibility of considering communications from members of the public concerning issues related to the this Convention.

3. The procedure adopted by consensus for reviewing compliance with the provisions of this Convention shall apply without prejudice to the procedure for the settlement of disputes provided for in art. 22. To the fullest extent possible, States Parties shall apply the procedures for reviewing compliance with the provisions of this Convention prior to resorting to the settlement of disputes procedures.

Article 22 – Settlement of disputes

1. If a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States concerned shall endeavor to settle the dispute through negotiation or by any other means of dispute settlement acceptable to the parties to the dispute. Moreover, States Parties shall seek the best solution for the state of the environment and the respect for their norms by first applying, within the limits of what is appropriate, the procedure for reviewing compliance with the provisions of the Convention as set forth in art. 21.

2. Upon signature, ratification, acceptance or approval of this Convention or accession thereto, or at any time thereafter, a State may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any State Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Submission of the dispute to arbitration.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute shall not be submitted to the International Court of Justice, unless the parties have agreed otherwise.

Article 23 – Confiscation measures

1. If a dispute or a situation has been duly submitted to a court, tribunal or the body in charge of reviewing compliance with the provisions of this Convention, and if the aforementioned court, tribunal or body considers that *prima facie*, has jurisdiction under the provisions of this Convention, it may prescribe any provisional measures which it considers appropriate under the circumstances to prevent serious damage to the environment or preserve the respective rights of the parties to the dispute pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute or any member of the public concerned and entitled to submit communications. Provisional measures may be prescribed, modified or revoked under this article only after the parties have been given an opportunity to be heard.

4. The court, tribunal or the body in charge of reviewing compliance with the provisions of this Convention shall, without delay, notify the parties to the dispute and, as appropriate, any other parties considered to have an interest in the dispute, of any provisional measure adopted or any other decision modifying or revoking such measure.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under art. 22 , any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Court of Justice may prescribe, modify and revoke provisional measures pursuant to this provision, if the Court considers that *prima facie* the tribunal that is to be constituted would have jurisdiction and that the urgency of the situation so requires Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

Chapter 5 Final Clauses

Due to the lack of specificity inherent to the legal field concerning environmental crimes, final clauses shall not be developed here.

Draft

Convention against Ecocide

(*Ecocide* Convention)

Preamble

The States Parties to this Convention,

Recognizing that all peoples are united by a shared destiny and that their environment constitutes a common good for present and future generations, whose protection is crucial to the survival of mankind,

Recognizing that the future of mankind and the sustainability of the planet is the responsibility of the international community in its entirety,

Concerned about the rise in intentional offences against the environment and the serious and lasting consequences, which are sometimes irreparable for the ecological balances and human populations,

Recognizing that differences in national laws and capabilities create the conditions that give rise to environmental crime worldwide,

Noting that a number of international and regional instruments addresses the issue of the protection of the environment without establishing systems of appropriate sanctions for the preservation of the safety of the planet,

Concerned about the strong and increasing links between environmental crime and other forms of international crimes, such as transnational organized crime, illicit trafficking, money-laundering or even corruption and in full compliance with texts already adopted by the United Nations,

Recognizing that the most serious crimes against the environment threaten international peace and security and the safety of the planet,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention and reparation of the consequences of such crimes,

Determined to consider the establishment of an international criminal jurisdiction complementary to the national criminal jurisdictions to try the crime of ecocide,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Determined to these ends to strengthen the conditions for judicial cooperation in criminal matters amongst States and to ensure that the most serious international crimes against the environment, which characterize the crime of ecocide, are subject to appropriate criminal sanctions,

Have agreed as follows:

Chapter 1 General provisions

Article 1 - Scope of application

1. The provisions of this Convention shall apply to the most serious crimes against the environment that, both in times of peace and in times of armed conflict, have an impact on the safety of the planet.

2. The present Convention is without prejudice to the relevant rules of international humanitarian law prohibiting environmental damage in time of armed conflict.

Chapter 2 Repressive measures

Article 2 – Definition of Ecocide

1. For the purpose of this Convention, ecocide means the intentional acts committed in the context of a widespread and systematic action that have an adverse impact on the safety of the planet, such acts being defined as follows:

a) the discharge, emission or introduction of a quantity of substances or ionizing radiation into air or atmosphere, soil, water or the aquatic environments;

b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker in the framework of any activity related to the waste management;

c) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used;

d) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances;

e) the killing, destruction, possession or taking of specimens of wild fauna or flora species whether protected or not;

f) other acts of a similar character committed intentionally that adversely affect the safety of the planet.

2. The acts referred to in paragraph 1 adversely affecting the safety of the planet when they cause:

a) a widespread, constant and serious degradation of the quality of air or the atmosphere, the quality of soil or the quality of water, the fauna and flora or their ecological functions; or

b) death, permanent disabilities or other incurable serious illnesses to a population or they strip permanently the latter of their lands, territories or resources;

3. The acts referred to in paragraph 1 must have been committed intentionally and with the knowledge of the widespread and systematic nature of the actions in whose framework the aforementioned acts are being carried out. These acts shall also be deemed intentional where their perpetrator either knew or should have known that there existed a high probability that such acts may adversely affect the safety of the planet.

Article 3 – Participation in the crime of ecocide

Each State Party shall take the appropriate legislative and other measures for ensuring that any person can be held liable for the crime of ecocide, provided that he/she intentionally:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission, particularly through the creation of false documents or the forgery of documents;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime of ecocide; or

(ii) Be made in full knowledge of the intention of the group to commit the crime;

(e) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.

Article 4 – Non-applicability of statute of limitations

Statute of limitations does not apply to the crime of ecocide.

Article 5 –Criminal liability of legal persons

1. Each State Party shall adopt such measure as may be necessary, consistent with its legal principles, to ensure that a legal person can be held criminally liable for the crime of ecocide, where such a crime has been committed for its benefit, by any person who has a leading position with the legal person concerned, acting either individually or as part of the organ of the legal person, based upon:

a) a power of representation of the legal person;
b) an authority to take decisions on behalf of the legal person; or
c) an authority to exercise control within the legal person.

2. Each State Party shall adopt such measure as may be necessary, consistent with its legal principles, to ensure that a legal person can be held criminally liable where its lack of supervision or control has made possible the commission of a crime of ecocide for its benefit.

3. The liability of a legal person under paragraphs 1 and 2 shall not exclude criminal prosecution against natural persons who have participated in the commission of a crime of ecocide referred to in article 3.

4. "Legal person" means any entity having legal personality according to the applicable law, except for States or public entities exercising State authority and public international organizations.

Article 6 – Sanctions against natural persons

1. States Parties shall adopt such measures as may be necessary to impose effective, proportionate and dissuasive sanctions on the natural persons convicted for the crime of ecocide and ensure restoration of damage to the environment and compensation for victims.

2. States Parties shall make the crime of ecocide punishable by appropriate sanctions which shall take into account the extreme seriousness of the crime. Such sanctions may include imprisonment, the imposition of a monetary fine, a forfeiture of proceeds, property and assets

derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

3. For the purposes of sentencing and determining the gravity of the sanction, State Parties shall take into account the following criteria:

a) The economic benefit from the crime, including the savings resulting from failure to adopt environmental protection measures;
b) The level of responsibility of the perpetrator of the crime, the fact that he/she has committed the crime in course of the activities carried out by a legal person or his/her status of public official;
c) The prompt restoration of damage and compensation of victims;
d) The organized nature of the crime.

4. The restoration of damage may take the form of:

a) Measures of reinstatement,
b) Damages,
c) Compliance programmes,
d) Provisioning the Environment Fund,
e) Local development measures
f) And, depending on the circumstances, symbolic restoration measures adapted to the cultural dimension of the damage caused to the environment which may take the form of making an apology to the harmed communities.

Article 7 – Sanctions against legal persons

1. States Parties shall adopt such measures as may be necessary to impose effective, proportionate and dissuasive sanctions on the legal persons convicted for the crime of ecocide and ensure restoration of damage to the environment and compensation for victims.

2. States Parties shall adopt such measures as may be necessary to impose effective, proportionate and dissuasive sanctions on the legal persons convicted for the crime of ecocide. In particular, States Parties shall consider establishing the following sanctions:

a) Monetary fines;
b) Orders of prohibitions, especially:
    a. The dissolution of the legal person;
    b. The temporary or permanent closure of the premises or establishments of the legal person;
    c. The temporary or permanent suspension of all or part of the activities carried out by the legal person in the course of which the crime has been committed, incited or covered up;
    d. The withdrawal of licenses; authorizations or concessions;
    e. The prohibition against receiving public subsidies and financing and entering into contracts with public administrations.

c) Publication of the conviction. Where there are a number of unidentified victims, such publication shall ensure that the victims become aware of their right to claim compensation;
d) Appointment of a judicial officer to ensure that the legal person concerned takes the organizational measures aimed at preventing additional crimes against the environment or diligently implementing restoration or compensation measures.

3. Restoration of damage may take the form of:

a) Measures of reinstatement,
b) Damages,
c) Compliance programmes,
d) Provisioning the Environment Fund,
e) Local development measures
f) And, depending on the circumstances, symbolic restoration measures adapted to the cultural dimension of the damage caused to the environment which may take the form of making an apology to the harmed communities.

4. States Parties shall adopt such measures as may be necessary to prevent those sanctions or the harmful damage that arise therefrom from being insured.

Article 8 – Criteria for the determination of sanctions on legal persons

1. For the purposes of sentencing and determining the sanction, priority consideration should be given to the restoration of the damage and the compensation of victims.

2. Where the fine would put at risk the solvency of the legal person, jeopardize the job security or the restoration of the damage caused, State Parties may adopt measures to allow for payment to be made in installments. In these cases, and in accordance with their internal law, State Parties can also give priority to restoration of the damage caused by the legal person that committed the crime.

3. State Parties shall take into account the following criteria for sentencing and determining the gravity of the sanction:

a) The economic benefit obtained from the crime, including the savings resulting from failure to adopt environmental protection measures;
b) The lack of or the inadequate monitoring internal measures that could have prevented the commission of the crime.
c) The repeated crimes against the environment committed within the premises of or by the legal person. To this end, sanctions imposed on legal persons by other authorities shall be taken into account:
d) The organized nature of the crime;
e) The cooperation by the legal person in the criminal proceedings, especially in the establishment of criminal liability;
f) The prompt restoration of damage and the assistance provided to victims;
g) The expeditious adoption of monitoring internal measures aimed at preventing similar crimes.

4. The dissolution of the legal person and the permanent closure of its premises or the cessation of its operations shall only be ordered where the legal person will have been created to commit the alleged crimes or where it will be considered as belonging to an organized criminal group within the meaning of the United Nations Convention against Transnational Organized Crime.

Article 9 - Confiscation and seizure

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from crimes covered by this Convention or property the value of which corresponds to that of such proceeds; The proceeds of the crime also include the savings the savings resulting from failure to adopt environmental protection measures;

(b) Property, equipment or other instrumentalities used in or destined for use in crimes covered by this Convention.

2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

6. For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

7. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

8. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the

domestic law of a State Party.

Article 10 – Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the crime of ecocide in the following cases:

a) Where the acts have been committed in the territory under the jurisdiction of the State concerned; or
b) Where the result of the crime takes place in any territory under the jurisdiction of the State concerned; or
c) Where the crime is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the crime is committed.
d) Where the crime is committed by nationals of that State; or
e) Where the crime is committed by a legal person having its registered office or its principal activity or its main administrative center in its territory; or
f) Where the crime is committed against nationals of that State Party and that that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction in cases where the alleged perpetrator of a crime of ecocide is present in its territory and it does not extradite that person, pursuant to art. 15, to any of the States Parties which have established their jurisdiction in accordance with paragraph 1.

3. Where more than one State claims jurisdiction over a crime of ecocide, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

4. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 11 - Investigation and prosecution

1. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the perpetrator or alleged perpetrator of the commission of a crime of ecocide is present shall take the appropriate measures under its national law so as to ensure that person’s presence for the purpose of prosecution or extradition. The custody and other measures shall be in accordance with the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. The State concerned shall immediately make a preliminary enquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he/she is a national, or if that person is a stateless person, the representative of the State in the territory of which that person habitually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in paragraph 1 of art. 10 of the fact that that person is in custody and the circumstances which warrant that person's detention. The State which makes the investigation referred to in paragraph 2 of the present article shall promptly inform the aforementioned States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

5. The State concerned shall notify the International Prosecutor for the Environment referred to in art. 17 of these circumstances, within the shortest possible period of time.

Article 12 - Participation of civil society

Each State Party shall take any measures as may be necessary to foster, in accordance with its internal law, access to information for civil society and grant any group, foundation or association which, according to their statutes, aims to protect the environment, the right to participate in criminal proceedings concerning the crime of ecocide.

Article 13 - Extradite or prosecute

1. The State Party in the territory under whose jurisdiction a person alleged to have committed a crime of ecocide is found shall, if it does not extradite that person, submit the case to its competent authorities for the purpose of prosecution.

2. Those authorities shall take their decision in the same manner as in the case of any other crime of a grave nature under the law of that State.

3. Any person regarding whom proceedings are being carried out in connection with the crime of ecocide shall be guaranteed fair treatment at all stages of the proceedings.

Article - 14 Extradition

1. The crime of ecocide shall be deemed to be included as an extraditable crime in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. The States Parties undertake to include such crime as an extraditable crime in every extradition treaty to be concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the crime of ecocide. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the crime of ecocide as an extraditable crime between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the crime of ecocide shall be treated, for the purposes of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of the States that have established jurisdiction in accordance with article 10.

5. The crime of ecocide may not be regarded, for the purposes of extradition or mutual legal assistance between States Parties, as a political crime or as a crime connected with a political crime or as a crime inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such a crime may not be refused on the sole ground that it concerns a political crime or a crime connected with a political crime or a crime inspired by political motives.

Article 15 - Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the crime of ecocide covered by this Convention.

2. Mutual legal assistance shall be based on the principle of mutual recognition of judgments and judicial decisions of the State Parties.

3. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the crimes for which a legal person may be held liable in accordance with article 5 of this Convention in the requesting State Party.

4. Mutual assistance shall also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party by virtue of being violations of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

5. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute a crime under the national law of the requested State Party.

6. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Central authorities shall ensure the speedy and proper execution or transmission of the requests received.

7. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

8. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

9. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, public policy or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar crime, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

10. Reasons shall be given for any refusal of mutual legal assistance. Before refusing a request of mutual legal assistance or postponing its execution pursuant to paragraph 11 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

11. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

Article 16 – International cooperation

1. The State Parties shall afford each other, in accordance with the provisions of relevant international instruments on international cooperation in criminal matters and with their domestic law, the widest measure of cooperation in investigations and judicial proceedings relating to the crime of ecocide.

2. State Parties shall cooperate actively with International Prosecutor's Office for the Environment referred to in art. 17 in investigations and judicial proceedings relating to the crime of ecocide.

Article 17 – International Prosecutor for the Environment

1. The Assembly of State Parties shall elect the International Prosecutor for the Environment for a term of five years, who will act independently and his/her role will be complementary to that of the national prosecuting authorities.

2. The Prosecutor shall be competent to investigate and collect evidence in relation to alleged acts of ecocide of which the Office of the International Prosecutor has been notified by the national authorities of the State Parties, regional and international organizations involved in the fight against environmental crimes, civil society or GREEN.

3. State Parties shall appoint a national prosecutor who shall act as the correspondent of the International Prosecutor for the Environment.

4. The International Prosecutor for the Environment shall support national authorities and contribute to the coordination of investigations and prosecutions.

Article 18 – International Criminal Court for the Environment

State Parties shall cooperate with the aim of establishing an International Criminal Court for the Environment which shall be complementary to national jurisdictions and shall have jurisdiction over the crime of ecocide.

Chapter 3 Preventive measures

Article 19 – International Cooperation on prevention

1. States Parties shall cooperate in the prevention of the crime of ecocide by taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of those crimes within or outside their territories.

2. States Parties shall further cooperate in the prevention of the crime of ecocide by exchanging accurate and verified information in accordance with their national legislation, and coordinating administrative and other measures taken.

3. States Parties may exchange information through the regional and international institutions involved in the fight against organized environmental crimes, particularly, Interpol, Europol or the United Nations Office on Drugs and Crime (UNODC).

4. States Parties provide or strengthen adequate training to the relevant for the relevant professionals dealing with those identified as perpetrators or potential perpetrators and the victims of the crime of ecocide.

5. States Parties shall endeavor to promote public awareness regarding the existence, causes and gravity of and the threat posed by environmental crimes. Information may be disseminated where appropriate through the mass media and shall include measures to promote public participation in preventing and combating such crime.

6. Each State Party shall inform the Secretary of this Convention the name and address of the authority or authorities that can assist other States Parties in developing measures to prevent the crime of ecocide.

7. States Parties shall, as appropriate, collaborate with each other and relevant international and regional organizations in promoting and developing the measures referred to in this chapter.

Article 20 – Group for Research and Enquiry on Environmental matters (GREEN)

1. The Group for Research and Enquiry on Environmental matters ("GREEN") establishes material facts that may be liable to fall within the definition of the crime of ecocide and delivers opinions on international environmental crimes.

2. GREEN shall act at the request of one or more States Parties, the Secretariat of the Convention, the International Prosecutor for the Environment, or any other organizations that have to deal with the most serious crimes against the environment or on the basis of a communication from the civil society.

3. GREEN shall be composed of 20 members elected by the States Parties according to an equitable geographical representation. The members of GREEN shall serve in their personal capacity. They shall be of high moral character and have a recognized expertise in environmental matters.

4. GREEN may request from States Parties and national, regional and international organizations all such information and assistance that it deems appropriate to enable it to carry out its mandate.

5. GREEN issues an annual activity report.

Chapter 4 Implementation of the Convention

Article 21 - Protection of sovereignty

1. The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its national law.

Article 22 - Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating most serious crimes against the environment.

3. The provisions of this Convention shall be applied and construed in accordance with the rules of general international law and the international environmental law principles, particularly the principle of common but differentiated responsibilities.

Article 23 – Review of compliance with the provisions of the Convention

1. The Assembly of State Parties shall adopt by consensus arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention.

2. These arrangements shall allow for appropriate public involvement and provide for the possibility to consider communications from members of the public concerning issues related to this Convention.

3. The procedure adopted by consensus for reviewing compliance with the provisions of this Convention is applied without prejudice to the procedure for the settlement of disputes. To the fullest extent possible, the States Parties shall first apply the procedures for reviewing the compliance with the provisions of this Convention prior to resorting to the settlement of disputes procedures.

Article 24 – Settlement of disputes

1. If a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute. Moreover, the States Parties shall seek the best solution for the state of the environment and the respect for their rights by first applying, and within the limits of what is appropriate, the procedure for reviewing the compliance with the provisions of this Convention as set forth in art. 25.

2. Upon signature, ratification, acceptance or approval of this Convention or accession thereto, or at any time thereafter, a State may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Submission of the dispute to arbitration.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute shall not be submitted to the International Court of Justice, unless the parties to the dispute agree otherwise.

Article 25 – Provisional measures

1. If a dispute or a situation has been duly submitted to a court, tribunal or the body in charge of reviewing compliance with the provisions of this Convention, and if the aforementioned court, tribunal or body considers that *prima facie*, it has jurisdiction under the provisions of this Convention, it may prescribe any provisional measures which it considers appropriate under the circumstances to prevent serious harm to the environment or preserve the respective rights of the parties to the dispute pending the final decision.

2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.

3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute or any member of the public concerned and entitled to submit communications. Provisional measures may be prescribed, modified or revoked under this article only after the parties have been given an opportunity to be heard.

4. The court, tribunal or the body in charge of reviewing the compliance with the provisions of this Convention shall without delay, notify the parties to the dispute and, as appropriate, any other parties considered to have an interest in the dispute, of any provisional measure adopted or any decision modifying or revoking such measure.

5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under art. 26, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Court of Justice may prescribe, modify and revoke provisional measures pursuant to this provision, if the Court considers that *prima facie* the tribunal that is to be constituted would have jurisdiction and that the urgency of the situation so requires Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.

6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

Chapter 5 Final Provision

Due to the lack of specificity inherent to legal field concerning the crime of ecocide, final provisions shall not be developed here.

PART II

THIRTY-FIVE PROPOSALS FOR A MORE EFFECTIVE PUNISHMENT OF CRIMES AGAINST THE ENVIRONMENT

CONSOLIDATED REPORT

Isabelle FOUCHARD and Laurent NEYRET

INTRODUCTION

A plea for help– The reports of relevant organizations engaged in the fight against environmental crime are increasing in number[5] and converge on a call for the application of criminal law to protect the environment, which is increasingly facing threats by criminal attacks of all kinds, be they trafficking of waste, trafficking in protected species or even the illicit exploitation of natural resources as such the wood or precious metals. Such collective awareness suggests that we are at a crucial moment in the forging of an appropriate response based upon criminal law to reinforce the protection of the environment and human life. To ensure this, jurists face a threefold challenge: knowing the purpose of environmental criminal law, identifying the problematic of environmental crime, and developing a draft for the protection of the environment through criminal law.

Knowing the purpose of environmental criminal law: The environmental crime – Environmental crime encompasses all offenses threatening or causing damage to the environment, whether having or not an impact on individuals. For a long time, this type of crime remained confidential, given the limited harmful consequences that resulted from that kind of crimes. Only oil spills and some isolated industrial accidents had media and social significant impact. Things changed when ecological risks took on a potentially catastrophic dimension, in view of their spatial and temporal magnitude, with their effects being capable of impacting the whole world, that is, when they have become **global risks**[6]**.** This is so, whether we consider the mass destruction of protected fauna species, the destruction of natural resources such as the forests or even the widespread and permanent pollution of natural spaces caused by the extraction of oil, gold, diamonds or tin. Most of these crimes has taken on an international dimension as they have points of attachment among several States and the most serious forms of these crimes have an impact on the safety of the planet.

The worsening impact of human actions on the environment was accompanied by the recognition of the shared destiny that unites mankind to the quality of its environment. Thus, in Italy for example, the population living along the shoreline of uncontrolled waste disposal sites where the Mafia has been spilling toxic waste during years is now suffering from serious illnesses. Many States, and particularly the most developed ones, have attempted to take measures to raise the level of legal protection of the environment, but these measures may have had a perverse effect paving the way to the creation of parallel criminal markets, offering those who were to comply with environmental obligations, such as the treatment of waste, a less costly manner of discharging their duties.

Increased dangerous activities for the environment led to a proliferation of legal rules

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[5] See, in particular, "Mafia: New EU-Eurojust report reveals organized crime groups behind environmental crimes", Press release, 21 November 2014, available at www.eurojust.europa.eu; "Environmental Compliance and Enforcement Committee: Meeting and Events – Final Report, February 2014 », Resolution n° 3, AG-2014-RES-03, 3-7 November 2014 ; Communication from the Commission to the Council and the European Parliament on the EU Approach against Wildlife Trafficking/COM/2014/064 final; "Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade", IFAW Annual Report, September 2013, available at: http://www.ifaw.org (last accessed November 2014); UNITED NATIONS OFFICE ON DRUG AND CRIME, « Wildlife and forest crime », 2012, in particular, p. 135, available at: http://www.cites.org/sites/default/files/eng/resources/pub/Wildlife_Crime_Analytic_Toolkit.pdf (last accessed November 2014).

[6] M. DELMAS-MARTY, *Les forces imaginantes du droit. Le relatif et l'universel*, Paris, ed. du Seuil, 2004, p. 353.

that combine administrative and criminal law as well as civil liability law, this being true for the national, regional and international level. When it comes to taking stock, it can be noted that the application of criminal law for the protection of the environment is ineffective[7]. This is due, in particular, to the fact that environmental obligations and sanctions are scattered throughout different texts which lack clarity or also to the lack of coordination between the investigating and the judicial authorities in this field. Moreover, at the international level, the disparity in content and sanctions of environmental obligations from one jurisdiction to another paves the way for the parties concerned to embark on a genuine form of *forum shopping*. **The profitability of international environmental crime** is even exceptional as it generates estimated annual profits raging between USD 30 to 213 billion dollars per year[8] **ranking fourth in the world illicit activities** after drug trafficking, counterfeiting and trafficking in human beings[9]. Nevertheless, statistics show that environmental crime is rarely prosecuted by national authorities[10].

Given this diagnosis that shows existing gaps in legislation concerned, **a graduated response is required**. This in its turn should imply a better regulation of those activities posing a risk to the environment, an improved compensation for environmental damages, and ultimately a more efficient prosecution mechanism concerning crimes against the environment. The desirability of strengthening the role that criminal law has to play in the protection of the environment is derived from a number of instruments, such as the European Directive 2008/99/EC on the protection of the environment through criminal law, which states that "the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment" and that "[s]uch compliance […] should be strengthened by the availability of criminal penalties". It should be noted that **criminal law should be "the solution of last resort"** according to the Explanatory Report to the 1998 Convention of the Council of Europe on the Protection of the Environment through Criminal Law. Indeed, under Article 8 of the Declaration of the Rights of Man and the Citizen, criminal law shall provide for such punishments only as are strictly necessary, particularly when the values affected, the damage caused or the degree of misconduct are sufficiently serious to justify social disapproval. Against this background, considering a common system of protection of the environment through criminal law should not diminish the importance of putting in place other systems of protection, whether framed as environmental policy law or as law of civil wrongs. Moreover, in addition to being graduated, the criminal law response to fight environmental crimes should be adapted to the international dimension of such crimes and vary depending on whether these are of a transnational or of a supranational nature[11]. In the case of transnational crimes, which concern the international community due to

[7] O. BOSKOVIC (dir.), *L'efficacité du droit de l'environnement*, Paris, Dalloz, 2010.
[8] The environmental crime crisis, UNEP-Interpol, 2014 (http://www.unep.org/unea/docs/RRAcrimecrisis.pdf, (last accessed November 2014).
[9] J. HAKEN, « Transnational Crime in the Developing World », Washington D.C., Global Financial Security, available at: http://www.gfintegrity.org (last accessed November 2014).
[10] "Mafia: New EU-Eurojust report reveals organized crime groups behind environmental crimes", *op. cit*.
[11] I. FOUCHARD, *Crimes internationaux*, Bruxelles, Bruylant, 2014 ; « De l'utilité de la distinction entre les crimes supranationaux et transnationaux », *RIEJ*, 2013/2, vol. 71, p. 49.

their potential transboundary consequences, an internationalization process of the national criminal law systems is required, which warrants a harmonization and coordination of the criminal law responses at the national level, leaving States with some room for maneuver. As far as supranational crimes are concerned, which are the most singular ones, drawing the attention of the world community in view of the importance of the values affected, namely, the safety of the planet, a criminalization process should be established in order to elevate the most serious crimes against the environment among the supranational crimes capable of giving rise to international criminal responsibility, irrespective of internal law provisions.

Whatever the route taken towards the implementation of a criminalization process, efforts should be made to remain as relevant as possible to the specifities of the parties concerned in the perpetration of environmental crimes.

Identifying the parties concerned in the commission of environmental crimes – As to perpetrators of environmental offenses, it should be noted that in addition to natural persons, such as poachers who destroy a protected species, environmental protection laws are often violated by legal persons, and more particularly, corporations. On this last point, it should be noted that the illegal activities of these corporations typically take place as part of their main legal activities, and especially, that these actors simply act "under the simplest and least costly conditions for them"[12] "without having an ill will against the social order"[13].

As for **transnational companies** engaged in environmental-related activities, they may take advantage from the disparities in national legislation to reduce their costs and increase their profits and, most often, they do that without being sanctioned, in the absence of a global environmental criminal justice, to the detriment of the ecological balance and the populations of the most vulnerable countries. This is the case of the American company Chevron which, due to lack of cooperation between the United States and Ecuador, has managed to bar the enforcement of the judgment rendered against it by the Ecuadorian court that ordered payment of a compensation amounting to more than USD 9 billion, as a result of the pollution and the criminal offenses against the health of the population living by an oil pipeline that has been exploited by that company for decades in Ecuador. Therefore, a suitable response based on criminal law requires to take into account the peculiarities of some perpetrators of environmental offenses, such as transnational corporations, whose activities are based upon an international network, and implies, among other things, making efforts aimed at achieving international harmonization of environmental criminal law, enhanced cooperation among States, and more generally, a global environmental criminal justice in order to tackle these crimes that have already become global.

Beyond transnational corporations, environmental crime is becoming of increasing importance for the **mafias**. The relevant international organizations such as Interpol,

[12] D. GUIHAL, *Droit répressif de l'environnement*, 3e éd., Paris, Economica, 2008, p. 193.
[13] *Ibid*.

Europol and the United Nations Office on Drugs and Crime unanimously agree that the illegal trade in wildlife, wood or other waste is linked to organized crime. In this connection, the United Nations Secretary-General stated in 2013 that the organized crime against wildlife was a **threat to the peace and sustainable security**[14]**.** Indeed, it was shown that the income of environmental crime could fund **rebel groups** or **terrorist activities**. Furthermore, illicit environmental trafficking and **drug trafficking** do overlap at a certain point, with criminals making use of the routes and concealment methods developed by **narcotics trafficking** to facilitate their illicit trade of wildlife, waste, natural resources or rare metals. Given the increased organized environmental crime at the international level, the low level of detection of environmental crimes as compared to the high level of profits derived there from, the establishment of harmonized criminal system is required. This should take into account the specificities of the Mafia-like criminal practices through, in particular, adequate inquiry and investigation techniques, international cooperation in police and judicial investigations, or the establishment of appropriately deterrent sanctions.

As far as **victims of environmental crimes** are concerned, they have a double special feature that should be understood correctly, as the above victims relate to the environment itself and are often part of vulnerable populations. Given that the environment has no legal personality, it should be represented in court by guardians that defend its interests. However, to date, civil society has not yet been recognized as having legal standing to institute criminal proceedings in cases of environmental offenses even though its action would make it possible to overcome the inertia of public authorities. By way of illustration, in Madagascar, associations for the protection of the environment increasingly made statements to denounce the trafficking of precious wood and make public the names of those responsible for those crimes who are known to everyone, although prosecution is almost non-existent due, in particular, to the fact that, the above associations are not being authorized to file a civil suit before the courts of that country. Therefore, a strengthening of the powers of guardians of nature to issue warnings and take action is required for a better protection of the environment through criminal law. Moreover, environmental crimes can lead to widespread damage, such as what happened in Côte d'Ivoire, where nearly one hundred thousand persons have suffered health problems following the spill of toxic waste by the Dutch company Trafigura off the coast of Abidjan. However many victims have not received full compensation for the harm they suffered, since the largest part of that compensation has not been redistributed by the Ivorian State after the conclusion of an agreement with the company responsible for the damage. This example illustrates the need for greater involvement of victims in the process of compensation for the damage caused by environmental activities of a criminal nature and for more effective measures aimed at ensuring that the victims themselves are the beneficiaries of compensation.

As for **States**, they play a critical role in the evolution of environmental crime. As combating environmental crime requires political will, **the territory of a given State will**

[14] « La nature du crime – Répercussions du commerce illicite d'espèces sauvages sur la sécurité mondiale », *op. cit.*, p. 13.

be more or less attractive for the perpetrators of all kinds of trafficking depending on degree of criminalization and punishment of dangerous behaviors for the environment, or on the willingness to take measures for the detection and prosecution of offenses. Naturally, the level of domestic protection of the environment through criminal law will depend quite often on the degree of development of the State, given that criminal markets such as the illicit exploitation of natural resources or waste trafficking are sources of employment for those countries with high rates of unemployment. Against this background, taking measures aimed at the strengthening of the protection of the environment at the international level implies a conception of the law in terms of **common but differentiated responsibilities**[15]**.** This means that, if States are united in the fight against environmental crime, the strictness of requirements that should be requested from them must be graduated according to their respective capabilities in relation with their national context. The most developed States are therefore invited to assist the most vulnerable ones in their quest for an enhanced protection of the environment. This can be achieved either in a direct manner by providing financial, legal and operational assistance or in an indirect way by making the disbursement of financial support conditional on the strengthening of the penalties against damage caused to the environment, following the pattern that the World Bank could set in the near future vis-à-vis Madagascar in connection with the combat against the trafficking of precious wood. In some case, environmental crime may also be linked to State actors involved in the commission of offenses, as in the case of the Congolese army that would reportedly have taken part in cases of poaching[16]. More importantly, acts of bribery of officials are often in connection with the trafficking of natural resources or minerals such as tin, with the illegally extracted quantities of that mineral becoming legal after the involvement of corrupt intermediaries, as is the case in Indonesia[17]. Such a finding showing the absence of any policies or rules of protection of the environment represents an invitation to start searching for the appropriate corrective measures to strengthen the fundamental interests of the environment and those of mankind.

Putting together a project of a system for the protection of the environment through criminal law, between utopia and realism– Building a system of protection of the environment through criminal law that is both, legitimate and useful implies, first of all, striking the right balance between two forces, which *a priori* are divergent, utopia and realism. Indeed, some degree of utopia is certainly necessary for the conception of the ideals and fundamental values that should guide the future legal instruments upon which national and international criminal law shall be based and for devising the appropriate legal mechanisms that take into account the specific features of environmental crime. Likewise, some degree of realism is necessary to take into consideration the specific characteristics of both, criminal and international law, being also aware of the requirements of legal security and predictability, the diversity of national contexts and

[15] See Principle 8 of the Rio Declaration on Environment and Development, 12 August 1992.
[16] « La nature du crime – Répercussions du commerce illicite d'espèces sauvages sur la sécurité mondiale », *op. cit.* p. 14.
[17] See "Projet Écocide", *Le Monde*, 2015, enquiry by J. BOUISSOU.

the complexity of international relations. Between realism and utopia, tomorrow's criminal environmental law lies at the crossroads between innovation and continuity.

Then, putting in place a project for the protection of the environment through criminal law requires doing away with the legal divisive lines that exist nowadays. Indeed, such a project is to be conceived at the confluence of several disciplines, including not only criminal law, environmental law and international law, but also human rights law and economic law, all these disciplines being understood through the prism of comparative law.

Finally, laying the foundations of the future criminal environmental law requires, first and foremost, identifying and regulating the specific criteria necessary for putting in place a legitimate and useful criminal law system, where, to date, the aforementioned criteria are vague and disjointed. Once this clarification has been provided, it will be possible to propose the adequate ways of improving criminal environmental law to take into account the ordinary and extraordinary crimes, both at a national and international level. Consequently, two avenues of research can be pursued concerning, on the one hand, the streamlining of the protection of the environment through criminal law (title 1) and on the other hand, the adaptation of criminal law to the specificities of environmental crime (tilte 2).

TITRE 1

TOWARDS A STREAMLINING PROCESS OF THE PROTECTION OF THE ENVIRONMENT THROUGH CRIMINAL LAW

The establishment of a legitimate and useful criminal law system for the protection of the environment in a more effective manner implies, firstly, providing a critical assessment of the response offered by the legal system to environmental crime (Chapter 1) before proceeding to propose possible ways of improvement (Chapter 2).

CHAPTER 1
THE DIAGNOSIS: A NEED FOR IMPROVEMENT

The diagnosis must require a quantitative and qualitative assessment of the main features of current environmental crime (I) to better identify legal gaps in this field (II).

I. – TAKING STOCK OF DEVELOPMENTS IN ENVIRONMENTAL CRIME

Definition of environmental crime – Environmental crime means every and any offenses that pose a threat to or cause damage to the environment, regardless of whether they have an impact on individuals. These can also be referred to as "ecocrimes", which is defined by the Larousse dictionary, as any and all acts punished by law that cause damage to the environment. In any event, these concepts refer to a heterogeneous reality, which brings together under one banner, ordinary and extraordinary crimes[18], combining in this way banality and tragedy[19].

Ordinary crimes include poaching, the discharge of agricultural effluents in a river or the illegal abandonment of hazardous waste in nature. This type of offenses is the result of actions or omissions, intentional or negligent conduct of either natural or moral persons. These ordinary crimes may be committed and cause damage on the territory of a single State, or be of a transnational nature on account of the nationality of their perpetrators or the damage caused on the territory of more than one State. They can also be committed in the framework of organized criminal networks, such as other illicit trafficking.

Extraordinary crimes include exceptional conduct that causes extremely serious damage. In times of war, one thinks of the use of Agent Orange during the Vietnam War[20] or the destruction of oil wells in Kuwait by the army of Saddam Hussein. In times of peace, the most serious environmental offenses take the form of various types of international trafficking, such as the trafficking of toxic waste, as illustrated by the Probo Koala case in 2006, the trafficking in natural resources, such as the trafficking of rosewood from Madagascar or the trafficking in mining resources, as for instance, Indonesian tin, the trafficking of products derived from protected species, such as elephants, rhinos or tigers, or the trafficking of hazardous substances, such as pesticides. Such trafficking entails serious and irreversible consequences for the environment, ranging from the extinction of species to the degradation of ecosystems[21], the consequences of which for the local populations can be devastating, depriving them of their livelihoods or exposing them to serious health risks. Moreover, it should be reminded that these problems have an impact on the humanity as a whole, to the extent that they affect their development and survival conditions.

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[18] L. NEYRET, « Pour la reconnaissance du crime d'écocide », *in* « Le droit répressif : quelles perspectives pour le droit de l'environnement ? », *RJE*, 2014, special issue, p. 179, in particular, p. 180.
[19] G. GUIDICELLI-DELAGE, « Propos conclusifs », *in* « Le droit répressif : quelles perspectives pour le droit de l'environnement ? », *RJE*, 2014, special issue, p. 242.
[20] D. ZIERLER, *The Invention of Ecocide*, Athens, The University of Georgia Press, 2011.
[21] A definition of ecosystems can be found in art. 1(2), of the Draft Ecocrimes *Convention*.

Increased environmental crime in France– In France, the number of offenses against environmental law that were detected between 2010 and 2012 has increased by nearly 20%, reaching a total of about 70,000 infringements[22]. It should be noted that between 2011 and 2012, the increase has been above 40% only for the violations related to the protection of the fauna and flora, particularly in the area of hunting. The latest figures show a decrease in violations between 2012 and 2013 of about 5,3%, although such a minor decrease does not mean that there has been an inversion of the crime curve. Moreover, if only the offenses against the natural environment are taken into acccount, figures show that there has been an increase of 14% between 2012 and 2013[23].

Dramatic increase in transnational environmental crime– At the international level, environmental crime continues to be on the rise.

According to a report published jointly by the United Nations Environment Programme (UNEP) and INTERPOL in 2014, environmental crime generated estimated profits, ranging from 30 to USD 213 billion per year[24]. The European Commission[25] indicated that the number of elephants killed has doubled over the last decade and that the world's tiger population has decreased from 100,000 a century ago to less than 3,500 today. All recent reports on the subject converge on this point, as in the case of the report published in 2013 by the International Fund for Animal Welfare (IFAW) [26], which gives account of an "alarming proliferation of illegal catch of wild animals", so much so that an American study has shown that the illicit trade in wild life species, including woods and fish, ranks fourth worldwide among illicit activities, right after narcotics trafficking, counterfeiting and human trafficking, outgrowing trafficking in petroleum products, works of art or even arms[27]. This type of crime is considered by INTERPOL as being so serious that it has launched the Operation Infra Terra 2014[28], whereby a call is made on public at large with a view to locating throughout the world approximately 10 persons on the run from justice for having committed serious offenses against the environment. By way of illustration, an Italian national is highly sought for illegal transport and discharge of toxic wastes and he is also linked to the commission of kidnapping acts and illegal possession of arms. To date, the aforementioned operation led to the arrest of several fugitives, including the head of an international network of trafficking of ivory in Tanzania in December 2014.

The international dimension of environmental crime is due to the fact that there exists a great number of connecting factors of these crimes among several States. These may include, for example, the trafficking of rosewood from Madagascar[29], a species whose

[22] INHESJ/ONDRP, Rapport 2013, Fiche thématique n° 21.
[23] INHESJ/ONRDP, Rapport 2014.
[24] The environmental crime crisis, UNEP-Interpol, 2014 (http://www.unep.org/unea/docs/RRAcrimecrisis.pdf, (last accessed November 2014).
[25] COM(2014) 64 final.
[26] « La nature du crime – Répercussions du commerce illicite d'espèces sauvages sur la sécurité mondiale », available at: http://www.ifaw.org, (last accessed November 2014).
[27] J. HAKEN, *Transnational Crime in the Developing World*, *op. cit*.
[28] http://www.interpol.int.
[29] See « Projet *Écocide* », *Le Monde*, 2015, inquiry by L. CARAMEL.

trade is prohibited by both, Malagasy law and international law. Yet, this precious wood is much coveted in China where some persons are willing to pay hundreds of thousands of Dollars to sleep on a replica of a bed of the emperors of the Ming or Qing dynasties. Such market value explains the existence of a crime network that starts in the Madagascar forest, a UNESCO World Heritage site where wood is cut illegally. Subsequently, the wood is transported out of the country by means of disguised corruption of the Malagasy administration before passing through Zanzibar where the relevant authorities issue a shipping certificate, without determining the species of the wood in question, after which it is shipped to Kenya, before being shipped to Hong Kong where customs authorities do not seem very inquisitive about the species of the imported wood, to finally arrive in China, where the wood is transformed into traditional pieces of furniture, although Chinas has ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which bans trade of rosewood.

Recently, the European Commission raised concerns about this evolution of the transnational environmental crime to such an extent that it established in 2014[30], a consultation on how the European Union could combat the dramatic increase in trafficking in wildlife. In addition to directly threaten the environment, this form of crime pose a threat to security as it relies on organized crime that perpetrates all kinds of offenses, such as murder, corruption, fraud or theft. A United Nations report[31] even showed that the profits generated by certain environmental offenses, such as the trafficking in ivory and rhino horn were used by militias in Africa, in particular to buy arms, affecting thus the political stability of entire regions.

Towards a better assessment of the scale of environmental crime– Even if indicators are consistent with data showing an increase in serious international environmental crime, the fact remained that, according to the representatives of the CITES Convention, "assessing the scale of wildlife crime is very difficult […] partly because wildlife crime remains outside 'mainstream' crime and, so, it is not recorded in the way that drug-trafficking, murder, rape or burglaries are"[32]. Quoting an author, environmental crime is a "major criminal market, albeit little known"[33]. Against this background and to ensure the establishment of a legitimate and efficient common system of protection of the environment through criminal law, it would be appropriate to improve the tools required for quantitative and qualitative measurement of environmental crime, both at a national and international level. To that end, efforts have recently been made in the framework of the European Project EJOLT (Environmental Justice Organisations, Liabilities and Trade), which has started mapping environmental conflicts throughout the world[34], taking the form of a true atlas of the environmental justice.

[30] COM(2014) 64 final.
[31] Report of the Secretary-General, 20 may 2013, S/2013/297; Security Council resolution 2121 (2013).
[32] http://www.cites.org/fra/prog/iccwc.php/Wildlife-Crime (last accessed November 2014).
[33] M. R. ROUDAUT, *Marchés criminels – Un acteur global*, Paris, PUF, 2010, pp. 41 et s.
[34] http://www.cites.org/fra/prog/iccwc.php/Wildlife-Crime (last accessed November 2014).

Proposal n° 1. Development of tools adapted to measure environmental crime, at the national, regional and international level in order to compare the systems of protection in terms of effectiveness and identify good practices.

Importance of the challenges posed by ecocrime– There exist numerous challenges linked to environmental crime.

These challenges are of **an environmental nature** because the damage that they cause to the environment also erodes biodiversity. This holds true for both, the most serious kinds of trafficking and the most common offenses, which as a result of a process of synergy and accumulation can have a catastrophic impact on the balance of the ecosystems of the planet.

Ecocrimes also pose health challenges[35], as people's health and more widely, that of humanity in its entirety is very often affected as a result of the degradation of the environment. In Italy, for example, there has been a proven abnormally high death rate of people from Naples and Caserta, which is linked to the illegal discharge of hazardous waste. Furthermore, some global health crises can be linked to the illegal trade of animals or parts of carcasses that may place human populations at the risk of contracting diseases as serious as SARS, avian flu or the Ebola virus. In Europe, the use of counterfeit pesticides, which contain prohibited products, as they are extremely dangerous for human beings, is on the rise. 36 In addition to involuntary damage caused to life, attacks deliberately committed against the life of those who, in particular, contribute to fight against environmental crime, should also be taken into account. Thus, at least 1,000 park wardens of sites, where protected species are hosted, were killed in 35 countries in the last decade37.

Environmental crime also poses **economic challenges**. Often, the breach of environmental legislation is motivated by the search for lower costs. For example, taking advantage of environmental dumping effects can cause illegal export of toxic waste to cost up to ten times cheaper than recycling them in the country where they had been produced. Illicit international trafficking accounts for extremely lucrative criminal markets, involving little risk of being punished, in comparison with, for example, markets for drug trafficking. Moreover, it suffices to recall that estimates of profits generated by environmental crime range from USD 30 to 70 billion per year.38 As for the loss of biodiversity, it should be noted that this deprives some local communities of their economic resources, such as the sale of their products of hunting, fishing or agriculture or the income they obtain from tourism.

Environmental crime also poses significant **social** challenges. This is reflected in the fact that the environmental crime market clearly creates wealth and jobs, patterned after,

[35] M. R. ROUDAUT, *op. cit.*, p. 65.
[36] See « Projet Écocide », *Le Monde*, 2015, inquiry by R. BARROUX.
[37] "La nature du crime – Répercussions du commerce illicite d'espèces sauvages sur la sécurité mondiale", available at: http://www.ifaw.org, p. 5 (last accessed November 2014).
[38] "Mafia: New EU-Eurojust report reveals organized crime groups behind environmental crimes," *op. cit*.

for example[39], the industry of recycling of electronic waste in China, but also destroys jobs just like the crisis facing farmers in Campania, since their lands, which have been fertile for a long time, have been polluted as a result of the dumping of toxic waste by the Camorra, preventing the sale of products, such as mozzarella or vegetables now unfit for consumption.

Finally, it should be mentioned that the ecocrimes committed in some developing countries pose undeniable **security** problems. Organized crime, be it of an Italian, African, Russian, Chinese or even Colombian origin, takes hold of the environmental market. Mafia criminal networks pervades all kind of trafficking. Consequently, protected animals or protected animal products, such as tiger[40], rhinos or pangolins can be purchased from poachers with the funds obtained from the sale of drugs or exchanged for narcotics. The United Nations and Interpol report that the funds obtained from crimes may also be used for financing rebel groups or terrorist movements. There are connections between the civil wars in Africa and the plundering of natural resources. It was also reported that Islamists based in Bangladesh and affiliated with al-Qaida were suspected of financing the poaching of tigers, rhinos, elephants, and other endangered species to support terrorist activities.41 This is reflected in the fact that natural resources are becoming strategic issues that can trigger armed conflicts (e.g., timber and diamonds in the Republic of the Congo), carrying with them the consequential destabilization of entire regions. This illustrates the undeniable geopolitical implications of ecocrime. The most serious environmental crime may therefore constitute a new threat to public security and even peace.

The increase in environmental crime, both at the national and international level, is due to fact that criminal law has fallen behind in the development of norms to protect the environment. Against this background criminals can make significant profits without severe, effective and dissuasive penalties being imposed on them[42].

II. – RECOGNITION OF SHORTCOMINGS OF EXISTING CRIMINAL LAW

Gaps in environmental criminal law in France –As for the protection of the environment through criminal law an author has not hesitated to speak of the "**chronic inefficiency**"[43], despite the excessive number of environmental offenses provided by law. Such a lack of effectiveness is due to several reasons.

Above all, one of the weaknesses of environmental criminal law is its **lack of accessibility and clarity**. Indeed, sanctions for environmental crimes are scattered throughout a number of codes, such as the Environmental Code, the Rural Code, the Forest Code or the Penal Code, which weakens accessibility. Moreover, clarity of environmental

[39] See « Projet Écocide », *Le Monde*, 2015, inquiry by G. VAN KOTE.
[40] See « Projet Écocide », *Le Monde*, 2015, inquiry by M.-B. BAUDET.
[41] « La nature du crime – Répercussions du commerce illicite d'espèces sauvages sur la sécurité mondiale », *op. cit.* p. 12.
[42] See « Strategic Project on Environmental Crime », November 2014, available at: http://www.eurojust.europa.eu (last accessed November 2014).
[43] D. CHILSTEIN, « L'efficacité du droit pénal de l'environnement », *inL'efficacité du droit de l'environnement, op. cit,* pp. 67 et seq., in particular, p. 72.

criminal law is made difficult as a result of the **frequent use of incrimination by reference**, that is, the law concerned provides for the sanction and outlines the prohibited behavior, but the definition of the latter is provided for in another law. By way of illustration, section L. 218-11 of the Environmental Code establishes "a fine of EUR 50,000 for any captain or person responsible aboard a ship who is found guilty of discharging polluting substances in contravention of the provisions contained in the MARPOL Convention, in particular, Regulations 15 and 34 of Annex I on the Control of discharge of oil or in violation of the Regulation 13 of Annex II concerning the control of discharges of residues of noxious liquid substances transported in bulk". In the same vein, section L. 173-3 of the Environmental Code enacted by means of the Ordinance of 15 January 2012 imposes a sanction of three-year imprisonment and a fine of EUR 150,000, in particular: "(2) the behaviors referred to […] in section L. 173-2", which criminalize "the carrying out of an operation or activity, the operation of a facility or a work or the undertaking of works subject to a declaration, authorization or exemption according to sections L. 332-3, L. 332-9, L. 332-17, L. 411-2, L. 413-3 and L. 512-8, and a declaration under section L 214-3 without acting in accordance with the notice to comply issued pursuant to section L.171-7 or section L.171-8".

Beyond the criminalization by reference, **criminal environmental law is highly technical**, as it is mainly built upon scientific norms rather than legal concepts. It follows from this that this is a branch of law that is deeply influenced by its close dependence on science and technology. Indeed, this field of law often poses challenges for most persons to achieve a minimum basic understanding of it, be it the public at large, operators or even legal professionals, including judges. For the latter, there is no doubt that their legal education on environmental issues is very poor, taking into account the technical nature of this branch of law.

Moreover, in practice, **only a minority of offenses is used by judges**, often feeling uncomfortable when it comes to punishing the perpetrators of breaches of environmental legislation. Thus, a report of the Court of Auditors has shown that, for example, in the area of water protection, out of the checks carried out by the State services, "only 1% leads to the imposition of sanctions"[44]. In 2012, only 7,595 convictions have been handed down in relation to environmental offenses[45]. Moreover, the quantum of penalties is rarely deterrent if compared to the profits that could be earned by the perpetration of environmental offenses. Thus, as far as waste is concerned, for example, the offense of providing the Administration with inaccurate information is punishable by a maximum of a two-year imprisonment and a EUR 75,000 fine[46], which is increased by five times for legal persons, when in practice the aforementioned fraud allows to masquerade fraudulent activities such as decontamination defects of hazardous waste, while still getting undue payment of public subsidies. In a recent judgment against which an appeal has been lodged, it appears that the Agency for the Environment and Energy

[44] COUR DES COMPTES, *Rapport annuel 2010*, Paris, La Documentation française, 2010, p. 625.
[45] Pôle d'évaluation des politiques pénales – DACG – October 2013.
[46] Sect.L. 541-48, 3° of the Environmental Code.

Development (ADEME) would have paid subsidies in favor of a company group engaged in decontamination activities on the basis of false declarations concerning the nature of waste polluted by PCBs, for an amount far higher than that of the fine applicable to the offense[47].

If this judgment is confirmed, this case will also be an opportunity to show that the lack of effectiveness of environmental criminal law is also due to inadequate controls by the relevant authorities. In the case at hand, it was a former employee who had alerted the authorities to the commission of wrongful acts concerning the dilution of waste polluted by PCBs within the company. Then, the judge hearing the case has not failed to criticize the very poor "quality of the controls" undertaken by the Administration, given that "despite the continuous failure of the [decontamination] process, the prefecture extended (...) the decontamination approval for the company (...) and "the laboratory of the police headquarters that was responsible, as also was the Regional Directorate for Industry, Research and the Environment [Direction Régionale de l'Industrie de la Recherche et de l'Environnement (DRIRE)] for controlling the activities of the company did not visit the facilities of the company that had been sending adulterated samples"[48]. This lack of control undoubtedly reduces the level of protection of the environment.

Another specific feature of environmental criminal law in France is that many criminal offenses in fact punish the mere breach of administrative rules of a preventive nature, regardless of whether a risk or damage to the environment can be proved. In practice, these offenses of a purely ancillary nature that may amount to "administrative infringements" are not effective. This is due, in particular, to the fact that the value that those rules are supposed to protect is much less related to the protection of the environment as such than to the compliance with administrative procedures themselves. Moreover, "courts are not generally willing to imposing penalties for preventive infringements"[49].This holds true in the environmental field, where a company leader is rarely sentenced to imprisonment for failing to request the authorization to operate a facility for whose operation a permit is required[50]. This, taken together with the existence of administrative sanctions for the same conduct, implies a double penalty, which is widely criticized[51].

Ultimately, **the French environmental criminal law system suffers from overabundance of norms**, and thus, recalling Montesquieu, "useless laws weaken the necessary laws"[52].Under these circumstances, **simplification efforts are needed**.

Environmental dumping– A study of comparative law in the area of fight against environmental crime provides a number of lessons.

In most States, criminal law is gaining momentum as a tool for the protection of the

[47] TGI Paris, 18 December 2013, n° 06118090012, *Env.*, June 2014, L. NEYRET'S OBS. 48.
[48] *Ibid*.
[49] D. CHILSTEIN, « L'efficacité du droit pénal de l'environnement », *inL'efficacité du droit de l'environnement, op. cit.*,pp. 67 et seq., in particular. p. 71.
[50] Art. L. 173-1, 3° of the Environmental Code.
[51] J.-M. COULON (dir.), « La dépénalisation de la vie des affaires », *inRapport au garde des Sceaux*, Paris, La Documentation française, 2008, p. 62.
[52] MONTESQUIEU, *De l'esprit des lois*, 1758.

environment. Most often, the criminal law system consists of ancillary criminal offenses subject to the non-compliance with sectoral administrative rules concerning different activities that pose a risk to the environment. In addition, there is an increasing number of autonomous offenses conceived for the protection of the environment as such. Sometimes these offenses are set forth in the criminal code or other specific laws[53]. This is also true for common crimes punishable in a general way in the United States of America, several countries in South America (Guatemala, Nicaragua, Panama, Mexico, Brazil, Venezuela, Colombia)[54] and also in Italy since May 2015[55]. The same applies to extraordinary crimes, such as the crime of ecocide, which is increasingly incorporated into the criminal code of over ten States, including Vietnam, the Russian Federation and the former Soviet republics. The aforementioned crime is most often defined as the act of massively destroying the flora and fauna, polluting the atmosphere or water, and, more broadly, committing any acts capable of causing an ecological disaster.

Regardless of the existence of a national criminal law system for the repression of environmental crime, the fact remains that in practice the application of this type of legislation varies from one State to another. For example, while rosewood trafficking is prohibited by criminal law in Madagascar, convictions imposed in connection with that illegal activity are extremely rare, taking into account that that trafficking is particularly prosperous between the island and Asia. This clearly reveals that for some States, in particular, developing countries, one thing is the provisions set forth in the respective codes, while their application in practice is quite another, as their implementation presents gaps, especially, due to the profits made as a result of the commission of environmental crimes.

Furthermore, the level of sanctions for environmental crimes varies from one State to another, giving rise to a real environmental dumping. This also serves as a catalyst for criminal activities. Therefore, no doubt that improving the fight against global environmental crime requires a harmonization of sanctions among States[56].

Shortcomings of international or European environmental law– Under international law, there are no major environmental crimes except for the commission of a war crime as a result of an intentional attack that causes severe damage to the natural environment as provided for in the Statute of the International Criminal Court that has never been applied to date. This crime applies only in the context of international armed conflicts. Its application is therefore excluded in case of internal armed conflicts or in peacetime.

In addition, **international environmental law is not a uniform law. It is indeed scattered throughout a number of disjointed and sectoral** texts seeking to regulate areas as diverse as the prevention of pollution from ships (Marpol Convention, 1973),

[53] See the contribution by R. ESTUPIÑAN-SILVA and the study carried out by Clinique de droit de Sciences Po in the framework of this project, available at: http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr.ecole-de-droit/files/rapport_ecocide_project.pdf (last accessed November 2014).

[54] The Colombian Criminal Code of 2000 contains a specific Title on offenses against natural resources and the environment.

[55] Legge 22 maggio 2015, n° 68, Disposizioni in materia di delitti contro l'ambiente (Act of 22 May 2015, nº 68, Provisions concerning offenses against the environment).

[56] On this matter, see *infra*, title 2, chap. 4 : L. Siracusa, La leffe 22 maggio 2015, n° 68 sugli « Ecodelitt » : una svolta « quasi » epocale per il dirrito penale dell'ambiente, http://www.penalecontemporaneo.it/upload/1436268186SIRACUSA_2015a.pdf

the transboundary movements of hazardous wastes and their disposal (Basel Convention, 1989) or the international trade in endangered species (CITES, 1993). More specifically, these texts leave considerable room for maneuver for State Parties to punish harmful acts to the environment, thus referring to the obligation to take "appropriate measures" or the obligation to "severely punish" those acts. As for European law, in the absence of effective ratification of the Convention on the Protection of the Environment through Criminal Law of the Council of Europe, 1998, the reference text is the 2008/99 Directive on the protection of the environment through criminal law that enumerates acts against the environment, urging EU states to criminalize them. It should be noted that the acts constituting a criminal offense under the European Directive must be "unlawful", which means that they are violations whose recognition as such are dependent on internal regulations that may vary from one State to another. Undoubtedly, this method of incrimination restricts the harmonization of repression of environmental crime in the European Union. As for the type and *quantum* of sanctions to be imposed, here again, the text of the 2008/99 Directive is vague in that it urges the States to take the necessary measures to ensure that the offenses are punishable "by effective, proportionate and dissuasive criminal penalties". Additionally, it should be noted that the norms concerning the acts outlined in international or European criminal law are not directly applicable in the States concerned and, consequently, they must be incorporated into the national legislation concerning the repression of the incriminated conduct.

Regardless of the aforementioned texts, in case of deficient action by the States in the fight against environmental crime, human rights courts do not hesitate to hold those States liable for breaching their positive obligation to protect the environment[57], which is not complied with, for example, when a State has failed to undertake proper investigations to find the perpetrators of the offenses in question. The purpose of aforementioned conviction for liability is to prompt States to enact effective criminal legislation with a view to preventing abuse. Even if such decisions by human rights courts are positive actions, they are still rare and therefore need be encouraged.

Ultimately, considering the state of development of international and European law, there is no comprehensive treatment of environmental crime and the related sanctions. These deficiencies leave the field open to address the fight against environmental crime in different ways depending on the type of crime and varying from one State to another, which creates fertile ground for the development of environmental crime. As indicated in a report carried out on behalf of the Committee on European Affairs of the French National Assembly concerning the fight against trafficking of endangered species, the fact that the "European legislation [...] is scattered throughout in a myriad texts undermines the clarity of its objectives and the effectiveness of its policy"[58].Moreover, the report adds that "the level of sanctions for the trafficking in wildlife varies greatly among Member States. In some of them, the maximum sanction is less than one year of

[57] See the contribution by K. MARTIN-CHENUT and C. PERRUSO, "La contribution des systèmes régionaux de protection des droits de l'homme à la pénalisation des atteintes à l'environnement".
[58] http://www.cites.org/fra/prog/iccwc.php/Wildlife-Crime (last accessed November 2014).

imprisonment, which limits the expected deterrent effect of sanctions, often prevents the use of potentially useful tools for transboundary or national investigations and for legal cooperation among Member States, including the European Arrest Warrant [...]. "

After showing the gaps in national legislation and international and European law concerning the fight against environmental crime, it remains to consider the ways conducive to improving the protection of the environment through criminal law.

CHAPTER 2
CORRECTIVE MEASURES: MEANS OF IMPROVEMENT

Need for streamlining environmental criminal law as a precondition for the establishment of adequate criminal policies - There exist various weaknesses in the protection of the environment through the existing criminal legislation. These can relate to the ancillary character of the offenses vis-à-vis administrative law rules, which often vary from one State to another and are stripped of any violation of a social value worthy of protection through criminal law, the lack of clarity in the definition of offenses due to the fact that they are very closely linked to technical rules, the lack of consistence of environmental criminal offenses within and among States, the lack of will and/or capacity of developing countries to control a profitable crime, or the inadequacy of the means used by developed States to fight environmental crimes.

To overcome the gaps of positive law, it is necessary to conceive a common system for the legitimate and effective protection of the environment through criminal law (I). Upon such a basis, it will be possible to launch two initiatives of criminal policy from a dual perspective of simplification and internationalization of criminal environmental law (II).

I. – STREAMLINING OF THE CRIMINAL LAW SYSTEM FOR THE PROTECTION OF THE ENVIRONMENT

Streamlining criteria concerning the criminal system for the protection of the environment– Proposing a rational criminal system for the protection of the environment that is both legitimate and effective implies the identification of the conclusive criteria for criminalization in environmental matters. Several criteria exist that are based upon those previously proposed by the Commission on the Reform of the French Criminal Code[59]. Founded on the principles of justice and utility, adapted to the peculiarities of criminal environmental law and the preparation of international instruments, these criteria refer to the foundation, structure and functions of the right to punish in a context of increasing risks[60].

Such proportionality criteria favor the establishment of a severity scale by combining the nature of the protected value (A), the damage suffered (B), the conduct of the perpetrator (C) and negligence (D), thus contributing to the streamlining of the penal classification of environmental offenses and at the same time of their regime. Such criteria are present in positive law, both national and international law, but seldom articulated as such. The proposal for a fair and consistent common system for the protection of the environment through criminal law requires the identification and harmonization of the above criteria.

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[59] M. DELMAS-MARTY, *Les grands systèmes de politique criminelle*, Paris, PUF, 1992. For a recapitulation of these criteria: J.-M. COULON (dir.), « La dépénalisation de la vie des affaires », *in Rapport au garde des Sceaux*, Paris, La Documentation française, 2008, p. 15.

[60] See contribution by L. D'AMBROSIO *in* Décocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 87.

A. – *The scale of protected values: Towards a distinction between ecocrimes and ecocide*

Need for punishment in order to fight environmental crime– To what extent is the environment a value that warrants protection through criminal law? This question refers to the principle of necessity of penalties as set out in Article 8 of the Declaration of the Rights of Man and of the Citizen that states: "[t]he law should establish only penalties that are strictly and evidently necessary." Furthermore, as pointed out by an author, "is it possible to provide a single answer" [61], while environmental crime involves multiple factors where odor nuisances, acts of poaching and trafficking of all kinds that threaten the survival some species cross paths? The answer certainly lies in the streamlining of the classification of environmental offenses. In this regard, there exists a dichotomy between common and extraordinary crimes, that is, between the ecocrimes and ecocide.

Proposal for drawing a distinction between ecocrimes and ecocide– The summa divisio of ecocrimes and ecocide is based upon the fact that there exist, on one hand, ordinary environmental crimes against which the authorities fight on a daily basis[62], and on the other, exceptional environmental crimes that are deemed the most serious crimes, just like the crime of genocide or the crimes against humanity, thus warranting a specific criminal response. In order to establish the main features of a criminal response adapted to each type of crime, it is important to clearly determine the legally protected interests in connection with the environment. In the current state of criminal law, these values are not clearly identified. Furthermore, they are subject to a regrettable confusion between the simple guarantee of compliance with administrative rules, the protection of the environment as such or the protection of individuals from an environmental dimension. Therefore, putting in place a fair and useful criminal system for the protection of the environment requires the identification of the values that are worthy of protection. Depending on the scale of identified values, the criminalization pattern may vary as to whether or not the infringing conduct requires the finding of a willful misconduct, a proven damage, or even its illicit nature. In the same vein, the criminal policy system will show difference, for example, depending on whether harmonization or unification of such offenses is addressed.

Based upon the analysis of national, European and international law instruments concerning the environment and the practice of national courts or that of regional human rights courts, two categories of values can be sorted in ascending order of hierarchy that correspond to the dichotomy between ecocrimes and ecocide. This concerns, on the one hand, the compliance with administrative rules and several relative values (1), and on the other, the observance of the valuecalled “safety of the planet”, which deserves enhanced protection(2).

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[61] G. GIUDICELLI-DELAGE, « Propos conclusifs », *in* « Le droit répressif : quelles perspectives pour le droit de l’environnement ? », *RJE*, 2014, special issue, p. 242, in particular, p. 246.
[62] *Ibid*.

1. – *Compliance with administrative rules and values deserving relative protection*

Ecocrimes: a multifaceted category – Ecocrimes have many aspects and they are of a multifaceted nature. "Good and evilmixes"[63], as well as deference to administrative rules mixes with the protection of ecosystems and human health. To reflect the diversity of the values protected through environmental offenses that fall within the category of common crimes, and to infer therefrom a classification of environmental crimes, a threefold approach should be taken based upon an administrative, an ecological and a health dimension.

Protection of administrative regulations– Based upon a purely administrative law approach, the numerous ancillary criminal offenses that punish non-compliance with the administrative regulations can only be justified as a means to ensure some discipline in respect of the administration. A typical example of this model of protection of the environment through administrative law is set forth in section L. 173-1 of the Environmental Code, which provides that performing an activity or operation, or setting up a facility or a structure "without the authorization, registration, licensing, approval or certification" as required by law is punished with one year imprisonment and a EUR 75,000 fine. From a social consistency perspective of such a value, the offenses here do not concern at all those values that are well known in the field of criminal law, such as the protection of life by means of offenses against persons or the protection of assets by means of offenses against property. It can even be affirmed that **police prosecution in the environmental field have no ethical basis at all**. Thus, as expressed by Mr Girod as from the year 1974, the increasing number of purely technical environmental norms "results in a set of norms subject to technical knowledge, from which no lasting principle can be drawn upon"[64].This absence of ethics in support of ancillary environmental offenses certainly explains the practice of criminal judges who rarely enforce this type of offenses. The fragile legitimacy of environmental administrative offenses might lead, on the one hand, at the national level, to strengthen support for the decriminalization of some of the aforementioned offenses, and, on the other, at the international level, to exclude such offenses from any international instrument for the protection of the environment through criminal law.

Protection of the environment– Based upon an ecological approach, there are criminal offenses developed for punishing damage to the environment, which are scattered throughout different codes.

The French Criminal Code establishes the crime of ecological terrorism which is defined as an act of terrorism where "it is committed intentionally in connection with an individual or collective undertaking whose aim is to seriously disturb public order through intimidation or terror" and which consists of "introducing into the atmosphere, on the ground, in the soil, in foodstuff or its ingredients, or in waters, including territorial

[63] G. GUIDICELLI-DELAGE, « Propos conclusifs », *in* « Le droit répressif : quelles perspectives pour le droit de l'environnement ? », *RJE*, 2014, special issue, p. 242, in particular, p. 246.
[64] P. GIROD, *La réparation du dommage écologique*, Paris, LGDJ, 1974, p. 239.

waters, any substance liable to imperil human or animal health or the natural environment[65]. The French Criminal Code, other than the aforementioned environmental criminalization related to particular circumstances, contains no general offense of endangerment or damage to the environment, unlike other foreign criminal codes such as the Colombian Criminal code that provides for a specific title dealing with environmental crime[66].

The French Environmental Code does provide for environmental offenses, taking the form, for example, of soil or water pollution crimes, or crimes concerning the destruction of protected species. Such offenses are part of the transposition process into the national legal system of the 2008 directive on the protection of the environment through criminal law that requires Member States to establish specific offenses concerning a number of diverse behaviors, such as "the collection, transport, recovery or disposal of waste", "the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used", "which causes or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants" or "the killing, destruction, possession or taking of specimens of wild fauna or flora species".

Those environmental offenses are the indirect reflection of the **protection of the environmental value as such.** The integration of environmental ethics into criminal law expressly appears in the 2008 Directive on the protection of the environment through criminal law that refers in its preamble to a "social disapproval" against threats on the environment and aims to "ensure a more effective protection of the environment", based upon an ecocentric approach to criminal law.

Protection of individuals – According to a health approach to environmental protection[67], criminal offenses that punish attacks on personal integrity are scattered throughout ordinary criminal laws and environmental criminal laws.

In general criminal law, a number of criminal actions can be instituted where risks are posed or injuries are caused to individuals through the environment. As such, in French law reference can be made to the offenses of endangerment of persons[68], offenses against life[69] or offenses against the physical integrity of persons[70]. Given the increasing remarkable impact of environmental pollution on health[71], enforcement of such offenses should increase. Furthermore, exposing persons to bodily harm or causing injuries to their physical integrity as a result of a forest fire, or a fire in woodland, heathland, bush, plantations, or land used for reforestation are aggravating factors that increase the

[65] Art.. 421-2 of the French Criminal Code.
[66] See the contribution by R. ESTUPIÑAN-SILVA *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 19.
[67] L. NEYRET, « Santé et droit de l'environnement »,*in*« Lasanté et le droit », *RGDM*, 2010, Special issue, p. 71.
[68] Art. 223-1 of the French Criminal Code.
[69] Art. 221-6 of the French Criminal Code.
[70] Art. 222-19 of the French Criminal Code
[71] See Les dix ans de l'Appel de Paris, Unesco, November 14, 2014, signed by many scientists around the world and which provides: "Art. 1: The development of numerous current diseases is the result of the deterioration of the environment; Art. 2: Chemical pollution represents a serious threat to children; Art. 3: As our own health, that of our children and future generations is under threat, the Human race itself is in serious danger".

quantum of penalties that shall be imposed on the perpetrators[72]. In case of arson causing bodily injury the penalty is increased to thirty years of imprisonment and a EUR 200,000 fine.

Likewise, as for environmental criminal law, the protection of the physical integrity of individuals is set forth in different texts. Specifically, the European Directive of 2008 on the protection of the environment through criminal law provides for the obligation to criminalize "the collection, transport, recovery or disposal of waste [...], which causes or is likely to cause death or serious injury to any person". In the same vein, the French Environmental Code establishes a punishment for the offense of water pollution that produces "harmful effects on health"[73] and sets forth an aggravating factor for the offense of unlawful operation of a company, which is subject to authorization, registration or declaration, the fact that such operation results in "serious damage to the health or safety of persons"[74].

The underlying protected value is, thus, the physical integrity of individuals and, more specifically, human health, irrespective of whether offenses concern harm to persons, damage to property, where such offense is capable of being applied when the damage is caused through the environment, or whether the offenses concerned are environmental crimes *stricto sensu* intentionally aimed at causing harm to public health, with this element being a prerequisite for the establishment of the offense or an aggravating factor. This refers to the right that everyone has to live in a balanced environment which "shows due respect for health" as enshrined in Article 1 of the Charter for the Environment. In such a context, the protection of the environment through criminal law is primarily intended to protect people in general and their health, in particular, with such a protection being essentially anthropocentric.

The protection of the environment in itself, or the protection of the persons in their relation to the environment, as proposed here, constitute two relative values that could be balanced with other interests, in particular economic interests. This is specifically evidenced by the requirement that the conduct in question should be unlawful which is linked to the weighing of interests by the Administration. In this regard, the case law of the European Court of Human Rights that relies on the right to respect private and family life and domicile[75] to justify the protection of the environment and individuals in their environmental dimension, has to be considered against the background of the possibility that exceptions to such right were made with the view to achieving a legitimate purpose[76], which may involve national security, public safety or economic well-being. Consequently, the greater drawback caused by the expansion of an airport was considered admissible in view of the legitimate purpose of the project, which was the fostering the "economic well-being of the region"[77].

Finally, the identification of the values protected by environmental criminal law

[72] Arts. 322-5 and 322-6 of the French Criminal Code.
[73] Art.. L. 216-6, 3° of the Environmental Code.
[74] Art. L. 173-3, 3° of the Environmental Code.
[75] Art. 8 of the ECHR.
[76] Art. 8(3). of the ECHR.
[77] European Court ECHR, *Flamenbaum and Others v. France* (3675/04 et 23264/04), 13 December 2012.

provides a number of lessons to be learnt.

Acknowledgment of the weak basis for the establishment of administrative offenses– On the one hand, this acknowledgment allowed highlighting the weak justification for the establishment of administrative offenses, which are of a pure ancillary nature and lack any ethical basis.

Proposal to draw a distinction between damage to the environment and harm to persons–On the other hand, it was shown that the offenses, which can be grouped into the single classification of ecocrimes, protected a duality of values, namely, the environment as such and individuals in an environmental perspective. This difference in values allows for the distinction, within the notion of ecocrimes, between subcategories of offenses: damage to the environment and the ensuing harm caused to persons. By streamlining the classification of ecocrimes, the goals pursued concerning each offense become clearer, which makes the choosing of the conditions that give rise to criminal responsibility easier.

Beyond a multifaceted and sectoral approach of the protection of the environment and persons through criminal law, at present a comprehensive approach is required in order to deal with the emergence of global crimes that threaten the safety of the planet.

2. – *The observance of a value deserving enhanced protection: the safety of the planet*

The ecocide: a category of an indivisible nature– While the category of ecocrimes is broad and multifaceted as it relates to varied legally protected interests of different kinds, the category of ecocide can only be narrow[78] and indivisible in that it aims to protect a global value in line with the protection of human dignity based on the notion of crime against humanity. At present, resort can be had to only few responses when faced with extremely serious damage to the environment, despite the emergence of a newly protected value at the international level: the safety of the planet.

Protection of the safety of the planet– Based upon a comprehensive approach, linking the essential interests of humanity and those of the planet, a new protected value, which can be described as the safety of the planet, emerges in the framework of customary international law[79]. Such a value is enshrined in numerous instruments of international law, European law and domestic law laying down a principle of prohibition against causing serious damage to the environment. The foregoing is rooted in the notion that the natural environment is a common and global public good for present and future generations, whose protection conditions the survival of humanity.

At the international level, in general, the Stockholm Declaration of 1972 and the Rio Declaration of 1992 set forth a principle of human responsibility towards safeguarding natural heritage. More specifically, other instruments, such as the 1976 Convention[80] on

[78] G. GUIDICELLI-DELAGE, « Propos conclusifs », *in* « Le droit répressif : quelles perspectives pour le droit de l'environnement ? », *RJE*, 2014, special issue, p. 242, in particular, p. 250.
[79] M. DELMAS-MARTY, *Les forces imaginantes du droit (IV) – Vers une communauté de valeurs ?*, Paris, éd. du Seuil, 2011, p. 99.
[80] Art. 1(3), para.1er.

the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) or the 1977 Protocol I[81] additional to the Geneva Conventions relating to the protection of victims of international armed conflicts set forth the obligation not to engage in military use of environmental modification techniques having widespread, long-lasting or severe effects on the natural environment. In maritime law, the 1982 United Nations Convention on the Law of the Sea lays down the general obligation of States to "[…] protect[…] and preserv[e] the marine environment"[82].Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples of 2007 provides that "[i]ndigenous peoples have the right to the conservation and protection of the environment"[83]. This text shows that there is an overlap between the protection of the environment and the protection of humanity in that it relates to one of the specific features of human beings, which consists of undertaking obligations and taking on the responsibilities involved. The upper turning point of the protection of the environment through criminal law in the framework of international law is reflected in war crimes perpetrated by intentionally launching an attack on the natural environment as set forth in the Rome Statute of 1998 establishing the International Criminal Court, which defines war crimes as the act of "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental [...] 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"[84].Given that the Rome Statute provides for such a crime, this is included in the category of the most serious crimes "of concern to the international community as a whole" and that "threaten the peace, security and well-being of the world"[85].

At the European level, the Treaty on European Union establishes that the Union shall define common policies to "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources"[86].In the same vein, the Charter of Fundamental Rights of 2000 requires to integrate into the European Union policies a "high level of environmental protection and the improvement of the quality of the environment […] in accordance with the principle of sustainable development"[87].In criminal matters, this translates into the idea that "there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage" to the environment[88].

At the national level, the most serious environmental crimes are being increasingly incorporated into national legislation. This is the case in French law with the incorporation of a provision dealing with war crimes perpetrated as a result of intentionally launching an attack on the environment[89], or also in the legal system of over

[81] Art. 35(3).
[82] Art. 192.
[83] Art. 29.
[84] Art. 8(2)(b)(iv).
[85] See the preamble of the Rome Statute.
[86] Art. 21(2)(f).
[87] Art. 37.
[88] Whereas 5 of the 2008/99 Directive of 19 November 2008 on the protection of the environment through criminal law.
[89] Art. 461-28 of Criminal Code.

ten other countries, which introduced into their criminal law codes the crime of ecocide covering the large-scale destruction of fauna and flora, the pollution of the air or water, and, more broadly, the commission of any act likely to cause an environmental disaster. This type of offenses illustrates the idea embodied in the French Criminal Code according to which "natural balance" and "environment" fall within the category of "fundamental interests of the nation"[90].

Proposal to elevate the crime of ecocide to the rank of the most serious crimes– Ultimately, the disjointed international, European and national texts referred to above contribute to the global disapproval[91] of criminal conducts that cause widespread, long-term and severe damage to the environment to the point of upsetting the ecological balance or threatening the survival of mankind. Such overall responsibility, that is both spatial and temporal, and at the same time relates to the protection of environment and individuals, is part of a set of values that constitutes a comprehensive value itself, that is, the safety of the planet. Here again the notion put forward in the Stockholm Declaration of 1972 that "Man is both creature and moulder of his environment", which illustrates the dual notion of the shared destiny between mankind and the environment and the responsibility of mankind towards the environment. The protection of the safety of the planet through criminal law certainly involves the establishment of a new offense that would be elevated to the rank of the most serious international crimes and considered as a crime of ecocide.

The protection of **the safety of the planet could be put on the same footing as that of human dignity**. It would then be a value in relation to which no margin of appreciation at the national level could be discussed or accepted. Consequently, an initiative for the harmonization of criminal law should be put in place in order to make ecocide a supranational crime elevated to the rank of the most serious crimes.

Coordination between ecocrimes and ecocide– According to an author[92], the coordination between ecocrimes and ecocide could be carried out patterned after other *summa divisio* in the legal field. Thus, in the same way things and furniture are residual categories, ecocrimes would be the residual category of crimes. In other words, "whatever does not constitute a serious damage intentionally caused to the environment, endangering the safety of the planet and the balance of the biosphere"[93] would fall under the category of ordinary crimes.

Following the development of the basic categories of a classification of environmental offenses based upon the hierarchy of the protected values[94], it is desirable to continue the streamlining process by resorting to the use of other criteria for the establishment of offenses, and particularly, to the severity of the damage caused.

Proposal n° 2. Proposal for a classification of environmental offenses (see the

[90] Art. 410-1 of Criminal Code.
[91] M. DELMAS-MARTY, foreword to this work.
[92] G. GUIDICELLI-DELAGE, « Propos conclusifs », *in* « Le droit répressif : quelles perspectives pour le droit de l'environnement ? », *RJE*, 2014, special issue, p. 242, in particular, p. 246.
[93] *Ibid*.
[94] See below the Comparative Table of environmental offenses.

Comparative Table of environmental offenses, *infra*, p. 452)

2.1. Distinguishing administrative offenses, ecocrimes and ecocide

2.2. Distinguishing, within the notion of ecocrimes, damage to the environment and injuries caused to individuals

2.3. Elevating ecocide to the rank of the most serious international crimes

B. – *Scale of gravity of the damage*

The classification of environmental offenses according to a graduation of the protected values can be refined applying another criterion, which is that of the graduation of the damage caused. Such criterion is present in the existing legislation, although it is seldom specified, as is the case with the value protected by means of different types of environmental crime. With a view to establishing a common system of protection of the environment through criminal law, identification of the different types of damage that each category of offense should prevent or punish, is required. Such an exercise "requires finding a new balance between the requirements of the principle of necessity, which is the founding principle of criminal law, and the requirements of the principle of prevention, which is the founding principle of environmental law"[95].

This involves the determination of the degree of damage above which an environmental crime is deemed to exist. The response varies depending on the type of crime concerned within the notion of ecocrimes (A) or on whether the crime dealt with constitutes an ecocide (B).

1. – *Ecocrimes: From endangerment to proven damage*

No risk of damage concerning violations of administrative law– In existing positive law, in the area of purely ancillary offenses to administrative regulations, evidence of proven damage caused to the environment or to physical persons, or even a simple risk of causing damage, is irrelevant. In other words, the criminal conviction will be handed down, irrespective of whether the conduct at issue caused the damage or created a risk that damage may occur. It would be advisable to consider whether environmental criminal law can be applied in the case that an unlawful act is perpetrated without any occurrence of damage and even without creating any risk. Would administrative sanctions not be more appropriate?

Punishment of the risk of damage in case of endangerment of the environment and the life of individuals– In the environmental field, as is also the case in health matters, the adage that prevention is better than cure deserves to be applied to its maximum extent given the importance of the interests at stake. Under French law, the prevention principle, which states that "[e]veryone shall [...] avoid the occurrence of any damage which he or

[95] See the contribution by L. D'AMBROSIO *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 87.

she may cause to the environment"[96] has constitutional rank.

This explains the tendency of environmental criminal law to punish those behaviors that create a simple risk that damage to the environment or health may occur, regardless whether such risk materializes or not. This type of offenses, purely formal, is contained in foreign legislation[97], in French law[98] or in the European Directive of 2008 on the protection of the environment through criminal law that criminalizes a number of unlawful behaviors that are "likely" to cause different kinds of damage to the environment or health. French criminal law concerning environmental terrorism punishes the act of introducing into the environment "any substance liable to imperil human or animal health or the natural environment", the occurrence of damage having no bearing here for the incrimination of the conduct and its punishment.99 Furthermore, under French law, even though some texts require evidence of proven damage as a condition for the conviction of the agent, according to case law the mere risk that damage may be caused is enough. This is the case, for example, with the offense of damage to the fish fauna and its habitat,[100] as the Court of Cassation considered that that offense has been actually perpetrated despite the absence of fish mortality, simply because the act of spilling of substances in a stream poses a risk to fish life[101]. The Criminal Division of the Court of Cassation has even applied the general offense of endangerment of persons, provided for in the Criminal Code when dealing with water pollution offenses[102], removing the requirement to prove that "any persons" have been put at risk[103]. In France, the Lepage Report on Environmental Governance (Rapport Lepage sur la gouvernance écologique) submitted to the Minister of Ecology in 2008 had proposed to create an autonomous offense of endangerment of persons in connection with the offense of harm to health[104] as a result of environmental damage, which would have been incorporated into the Criminal Code, but that proposal was not acted upon. In any event, European law, the legislation of a number of States, as well as various academic proposals provide support for a generalized criminalization of endangering the environment and the natural persons.

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[96] Art. 3 of the Charter for the Environment.

[97] See R. ESTUPIÑAN-SILVA (coord.), « Report on the Ecocide Project », rédigé par M. GARIN, B. GLASENHARDT, R. HOUSTON, J. PHAM et R. ESTUPIÑAN-SILVA, Paris, Sciences Po Law Clinic, 7 December 2013, p. 153, pp. 36-66, available at: http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr.ecole-de-droit/files/rapport_ecocide_project.pdf (last accessed November 2014). See, in particular, arts. 416, 417, 420*ter* and 420*quater* of Mexican Criminal Code; art. 368 of Nicaraguan Criminal Code; art. 407 of Panamanian Criminal Code; art. 247 of Russian Criminal Code; art. 250 of Croatian Criminal Code; art. 218 Macedonian Criminal Code; art. 182 of Polish Criminal Code.

[98] For instance, as far as water pollution is concerned art. 218-73 of the Environmental Code punishes the "direct or indirect discharge or disposal of substances or organisms *harmful* to the conservation or reproduction of marine mammals, fish, crustaceans, shellfish, mollusks or vegetation, or *of such a nature* harmful as to make them unfit for consumption, […]".

[99] See also art. L. 218-19 of the Environmental Code. It also punishes, in relation with incidents at sea, "a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware".

[100] Art. L. 432-2, 3° of the Environmental Code.

[101] Cass. crim., 18 July 1995, n° 94-85249.

[102] Art. 121(-3)1 of the Criminal Code.

[103] Cass. crim., 19 October 2004, n° 04-82485.

[104] Report of the mission entrusted to Corinne Lepage on Environmental Governance, Ministry of Ecology, 2008, French Documentation, Proposal No. 58: Insertion of art. nº 223-1-1 to the new Criminal Code stating that: "the fact of exposing a person directly or indirectly, as a result of a criminal act against the environment, [...] to a risk of death or injuries likely to result in amputation, permanent disability, a permanent work disability, as a consequent of a flagrant violation of a particular duty of safety or due care set forth by law, regulation or an administrative act of a non-regulatory nature, or the commission of a specified piece of misconduct which exposed a person to a particularly serious risk of which they must have been aware, shall be punishable with one year imprisonment and a EUR 15.000 fine". For a proposal to recognize the offense of endangerment of the environment: L. NEYRET and N. REBOUL-MAUPIN (dir.), *Déclaration pour la protection juridique de l'environnement*, Paris, L'Harmattan, 2009, p. 88.

Generalization of the endangerment of the environment and natural persons– An alliance between criminal law and environmental law should lead to the strengthening of offenses involving endangerment so that behaviors deemed risky for the environment or health can be prosecuted, regardless of the actual occurrence of damage. In this context, it is primarily proposed to establish ecocrimes, regardless of whether they affect the environment itself or natural persons in their relationship to the environment, as specific offenses of endangerment. As a result therefrom, **the fact of creating a risk to the environment or exposing a person to risk of death or serious bodily harm would be enough for the offense to be deemed perpetrated**. Criminal punishment would then be imposed regardless of the occurrence of anydamage to the environment or human health.

To confine the offense of endangerment within reasonable limits, it would be advisable to **require a sufficient degree of gravity of the feared harm**. As far as the environment is concerned, such an offense would imply a "risk that substantial damage may be caused to ecosystems"[105] and as far persons are concerned, that offense would involve the risk of "causing death or serious injuries"[106]. This proposal is based upon the European Directive of 2008 on the protection of the environment through criminal law[107] and a number of foreign laws that provide for the danger threshold[108t]hat must be overrun for an offense to be established. To determine such a threshold, legislators and judges are expected to take into consideration the technical and scientific data provided by the experts. This approach involves a preponderance of criminal law vis-à-vis administrative law, as the danger threshold is set by the norm establishing the offense, with the administrative authorities being responsible for establishing the conditions necessary to prevent that such a threshold is reached[109].

If the occurrence of damage is not necessary for an offense of endangerment of the environment and bodily harm to persons is deemed to exist, on the contrary, the damage that may have been caused should be deemed an aggravating factor for the aforementioned offenses.

Aggravation of sanctions in case of occurrence of damage – In criminal environmental law, the occurrence of damage may constitute either a condition for the offense to be perpetrated or an aggravating factor for the imposition of sanctions. In the first case, reference is made to "strict liability offenses" (“infractions de résultat), such as offenses against wildlife subject to proof of "interference with conservation" of non-domestic animal species or non-cultivated plant life or natural habitats[110]. As discussed above, in this regard, as far as common offenses are concerned, it would be advisable to legitimate the application of criminal law upon the creation of a sufficiently serious risk. In this respect, the expansion of environmental "formal offenses" (“infraction formelles”) should result in the corresponding narrowing of environmental strict liability offenses.

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[105] See Art. 3(2) of the Draft Ecocrimes Convention.
[106] See Art. 4(1) of the Draft Ecocrimes Convention.
[107] See Art. 3(a) of the Directive where reference is made to the risk of causing "death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants".
[108] Art. 407 of Panamanian Criminal Code; Art. 182 of the Polish Criminal Code.
[109] See the contribution by L. D’AMBROSIO *in* Des écocrimes à l’écocide – Le droit pénal au secours de l’environnement, Bruylant, 2015, p. 87.
[110] Art. L. 415-3, 3° of the Environmental Code.

In the second case, the materialization of the intent, that is, the occurrence of damage constitutes an aggravating factor that will increase the quantum of the sanction. In this regard, in French positive law, the commission of an act of forest arson that causes the death of one or more persons is an offense punishable by up to ten years imprisonment and a EUR 150,000 fine, while the penalty is three years imprisonment and a EUR 45,000 fine in the event that neither persons nor the environment had been put at risk by the aforementioned act[111]. Streamlining ordinary environmental criminal law would certainly imply the generalization of proportionality between the sanction and the gravity of the damage, especially by aggravating the sanction in case of occurrence of damage to the environment[112] or harm to persons[113]. An important step in this direction has already been taken under French law as a result of the enactment of Ordinance No. 2012-34 of 11 January 2012 on simplification, reform and harmonization of the set of provisions concerning judicial and administrative enforcement powers provided for in the Environmental Code, incorporating into this code, Article L. 173-3, which increases the sanctions for certain environmental offenses[114] in case of occurrence of damage, and more specifically, when the alleged offenses "resulted in serious damage to the health or safety of persons or caused substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants". In any event, these harmonization efforts are flawed because they do not concern all environmental offenses; therefore, reference must always be made to other provisions scattered throughout different books of the Environmental Code[115.] In the future, it would be appropriate to bring to completion these efforts for the harmonization of the graduation of sanctions based upon the severity of damage criterion used in French law so that it can be extended it to all environmental offenses, by the enactment of an law of general application.

The reasoning according to which environmental criminal law should sanction the behaviors concerned only upon the commission of an act of endangerment of the environment or persons and increase sanctions upon occurrence of damage should be confined to common crimes. For the most serious environmental crimes, which are also likely to trigger exceptional legal mechanisms, the occurrence of a proven and particularly serious damage should be required.

2. – *The requirement of a particularly serious damage for the crime of ecocide*

The precedent of war crime as a result of an intentional attack on the environment– For the most serious crimes in respect of which exceptional rules of investigation, jurisdiction or statute of limitations can be applied, international criminal law requires an additional level of severity. Thus, in the existing positive law, the Rome Statute of 1998 establishing the International Criminal Court makes the war crime perpetrated by intentionally launching an attack on the environment subject to proof of the occurrence

[111] See Art. 322-5 of the French Criminal Code.
[112] See Art. 3(2) of the Draft Ecocrimes Convention.
[113] See Art. 4(2) of the Draft Ecocrimes Convention.
[114] See Art. L. 173-3, 3° of the Environmental Code.
[115] See also Art. L. 170-1 of the Environmental Code.

of "widespread, constant and severe damage to the natural environment".

The crime of ecocide conditional on proof of particularly serious damage– As demonstrated by an author, "while the occurrence of damage [...] is a variable that has no impact on determining whether an ecocrime has been perpetrated, but can only affect the quantum of the penalty, it [should] thus be a constitutive element of ecocide"[116].Indeed, the establishment of the endangerment of the safety of the planet as a supranational crime requires an additional level of severity as compared to common environmental crimes. In this respect, the crime of ecocide should be subject to either the occurrence of a "widespread, constant and severe degradation"[117] of the ecological balance or to "death, permanent disabilities or incurable serious illnesses caused to a population"[118] or to permanently [dispossession][119] of certain populations of their lands, territories or resources. This condition would be met in the event that toxic wastes are dumped in a natural area, causing a permanent destruction of its ecosystems, in case of poisoning of a population due to water or soil pollution, or in case of destruction of extensive areas of primary forests for export of species of precious woods and plantations for the production of palm oil.

The criteria of importance of the protected value and the severity of the damage should be additionally supported by that of the illegality of the conduct of the offender with a view to graduating the criminal response to the environmental crime.

C. – *Illegality of the Conduct concerned*

Nexus between the offense and the administrative regulations – In environmental matters, the application of criminal law may be made somehow conditional on proof of the illegal nature of the conduct concerned. This reveals that environmental criminal law will be easier or harder to implement, depending on whether this body of norms is ancillary or autonomous vis-à-vis administrative regulations, and that the establishment of a common system for the protection of the environment through criminal law requires a clarification of the relationship between criminal law and administrative law, all this being combined with the nature of the value protected by law.

The rule: the ancillary nature of environmental criminal law– Originally, environmental law falls within the scope of administrative law of immediate application, according to which those activities posing a risk to the environment must meet a number of conditions for them to be carried out. Yet, the criminal aspect of environmental law has essentially been developed as a set of norms ancillary to administrative regulations so that penalties can be imposed where administrative rules of immediate application are infringed, regardless of the socially reprehensible nature of the contested acts. This is explained[120] particularly by the fact that "the environment does not follow a clear and

[116] See contribution by L. D'AMBROSIO, *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 87.
[117] See Art. 2(2)(a) of the Draft Ecocide Convention.
[118] See Art. 2(2)(b) of the Draft Ecocide Convention.
[119] See Art. 2(2)(b) of the Draft Ecocide Convention.
[120] See in this regard, see the contribution by P. BEAUVAIS *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 3.

precise definition that can conform to Article 8 of the Declaration of Human Rights"[121].The constitutive elements of environmental offenses are not easily modeled. For example, the proscribed act typically targets an environmental damage or a potential environmental damage, but it is well known that such damage is hard to grasp[122]. As a result therefrom, environmental criminal law was conceived as a simple "crutch"[123] of administrative law. In practice, this means that environmental offenses constitute criminal offenses, with one of their constitutive elements being the infringement of sectoral administrative rules (regulations on water, soil, wastes, fauna and flora, etc.). In such a system, "the illegal conduct relating to the environment should not only be detrimental to the environment, it must above all infringe environmental regulations"[124].

The exception: the autonomous nature of environmental criminal law– There exist increasing autonomous offenses to protect the environment itself, and not only administrative rules concerning environment-related activities that are necessarily more restrictive. Sometimes these offenses are set forth in criminal codes or other national specific laws[125]. This is also true for ordinary crimes punishable in a general way in the United States of America, several countries in South America (Guatemala, Nicaragua, Panama, Mexico, Brazil, Venezuela, and Colombia)[126] or also in Italy since the enactment of a law in 2015. The same applies to extraordinary crimes, such as the crime of ecocide that was incorporated into the criminal code of over ten States, including Vietnam, the Russian Federation and some of the former Soviet republics. The aforementioned crime is most often defined as the act of massively destroying the flora and fauna, polluting the atmosphere or water, and, more broadly, committing any acts likely to cause an ecological disaster. According to French law, it should be noted that the crime of environmental terrorism is defined as the act of "introducing into the atmosphere, on the ground, in the soil, in foodstuff or its ingredients, or in waters, including territorial waters, any substance liable to imperil human or animal health or the natural environment"[127].

From excessive dependence on environmental criminal law to administrative regulations– The subordination relationship of offenses with respect to administrative rules is a particularity of environmental law, given the technical nature and complexity of the protected interest, although such a relationship has met with strong criticism. On the one hand, purely ancillary offenses, which are unrelated to any risk or damage caused to the environment or health, fall under a kind of criminal law that is not dictated by a desire to socially disapprove the acts concerned, but rather by administrative

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[121] See J.-H. ROBERT, « Rapport de synthèse », *in* A. GOGORZA et R. OLLARD (dir.), *Actes du colloque « La Protection pénale de l'environnement »*, Travaux de l'Institut de sciences criminelles, n° 4, Paris, ed. Cujas, 2014, p. 411.

[122] On this matter, see L. NEYRET and G. J. MARTIN (dir.), *Nomenclature des préjudices environnementaux*, Paris, LGDJ, 2012; "Le préjudice écologique comme levier de la réforme du droit des obligations", *D.*, 2012, p. 2673 ; "La réparation des préjudices aux générations futures," *in* J.-P. MARKUS (dir.), *Quelle responsabilité juridique envers les générations futures ?*, Thèmes et commentaires, Paris, Dalloz, 2012, p. 261.

[123] See G. J. MARTIN, "Environnement : nouveau Droit ou non-Droit", *in La nature politique ou les enjeux philosophiques de l'écologie*, Paris, L'Harmattan, 1993, p. 96.

[124] A. NIETO MARTIN, "Éléments pour un droit international pénal de l'environnement", *RSC*, 2012, p. 69.

[125] See the contribution by R. ESTUPIÑAN-SILVA and the study carried out by Clinique de droit de Sciences Po in the framework of this project, available at: http://www.sciencespo.fr/ecole-de-droit/sites/sciencespo.fr.ecole-de-droit/files/rapport_ecocide_project.pdf (last accessed November 2014).

[126] The Colombian Criminal Code of 2000 contains a specific Title on offenses against natural resources and the environment.

[127] Art. 421-2 of Criminal Code.

contingencies. On the other hand, the requirement of illegality as a condition precedent for the application of environmental criminal law, which is often present in texts for the harmonization of norms, such as the 2008/99 Directive or the Convention of the Council of Europe of 1998, contributes to the ineffectiveness of such norms, as they leave a considerable margin of discretion to the States. Indeed, the same behavior could be considered illegal in one state and lawful in another, given the national margin of discretion according to which a variable level for the protection of the environment is established, depending on the situation of each country. For all these reasons, it is important to rethink the role of illegality in environmental offenses, as well as its definition in the interests of harmonizing the protection of the environment through criminal law.

Streamlining the role of illegality in the framework of the environmental criminal law– In order to put in place a coherent and progressive system of protection of the environment through criminal law, it should be advisable to streamline the requirement of illegality as a condition for criminal responsibility, depending on the value protected by the type of criminal offense concerned, which leads to insist upon the above requirement of illegality for cases concerning damage to the environment and to abandon it when dealing with offenses against human health and the safety of the planet. In any event, and regardless of whether the subordination relationship between criminal environmental law and administrative law is strong or weak, the role and functions of each of these branches of law remain the same: "criminal law establishes the threshold that polluting activities should meet for their impact on the ecosystem balance to be considered socially unacceptable"[128] and "administrative law, on its part, must continueto establish the conditions and requirements that human activities must comply with for them to bedeemed socially acceptable", despite their impact on the environment[129].

Maintaining the requirement of illegality in the case of environmental damage– With regard to offenses concerning environmental damage, the condition of illegality as a constitutive element of the offense should be considered as appropriate. As a preliminary matter, it should be noted that the requirement that wrongful conduct be committed by the agent is not justified by the principle of legality. Indeed, this principle is respected in light of the description of the proscribed conduct contained in the definition of the offense, where reference is made to the disposal of waste or the destruction of wild flora and fauna species[130]. The condition of illegality is founded on the search for coherence between administrative law and environmental criminal law, the former establishing the threshold of what is socially acceptable in terms of risk to the environment and health, taking into account the balance of the interests involved and the latter, which extends the former by sanctioning the socially unacceptable overrunning of the thresholds provided for by law and regulations. This thus follows the logic according to which the application of criminal law should be reserved for the most serious situations. In addition, **this alignment of**

[128] See the contribution by L. D'AMBROSIO *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 87.
[129] *Ibid*.
[130] For a complete description, see Art. 3 of the Draft Ecocrimes Convention.

criminal law and administrative law illustrates the specificity of the legal treatment of the environmental crime that must be in accordance with the weighing of interests concerned, namely, between environmental and health interests on the one hand, and ecological interests, on the other.

The requirement that the conduct at issue must be of an illegal nature in terms of environmental damage is apparent from both the Convention of the Council of Europe of 1998 and the 2008/99 Directive on the protection of the environment through criminal law. An international instrument on environmental criminal law dealing with environmental ecocrimes should be drawn upon the definition contained in those texts[131], according to which "illegal" means "any behavior contrary to the law of the State in whose territory the illegal act is committed, characterized by the infringement of a law, an administrative regulation, or a decision taken by a competent authority concerning the protection of the environment"[132]. In doing so, a margin of discretion and tolerance would be left to States Parties to the Convention with a view to adapting the system of protection of the environment through criminal law to national specificities. Still, the establishment of benchmark international norms, laying down minimum thresholds would be appropriate to limit the effects of the existing environmental dumping phenomenon. In this regard, it should be noted that the existing annexes of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) classify species according to the level of threat posed to them. Ultimately, the harmonization of criminal environmental law cannot be achieved by maintaining a subordination of environmental offenses to non-harmonized administrative regulations.

Refining the definition of illegality to avoid environmental dumping and to fight corruption–To remove the risk of a varying definitions of environmental violations resulting from the difference in the levels of administrative protection of the environment depending on the State concerned, which would lead to environmental dumping, it should advisable to clarify the concept of illegality. In this respect, a draft Convention against environmental crime should specify that the conduct at issue is also considered unlawful "where the acts have been committed by a foreign natural or legal person in a State whose environmental laws establish a level of protection clearly lower than that established in the State of nationality of the natural person or the State where the legal person has its registered office or even the State from which the wastes have come"[133]. Such a provision would help to neutralize legal arrangements and relocation of polluting activities to countries that are used as waste disposal sites[134]. Moreover, a common definition of the concept of "foreign legal person" and the determination of their nationality according to the criterion based not only upon the headquarters location, but also the principal place of business or the main administrative center, would also help strengthen this protection[135]. The combination of these elements would improve the harmonization of

[131] Art. 1 of the Convention of the Council of Europe of 1998 ; art. 2(a) of the Directive 2008/99.
[132] See art. 1 of the Draft Ecocrimes Convention.
[133] See art. 1 (1) (b)(i), of the Ecocrimes Convention .
[134] A. NIETO MARTIN, "Éléments pour un droit international pénal de l'environnement", *RSC*, 2012, p. 69.
[135] A definition of ecosystems can be found in art. 1(4) of the Draft Ecocrimes Convention.

environmental criminal law that in order to be effective requires a convergence of the administrative regulations on activities posing a risk to the environment.

In addition, investigations on environmental crime[136] show a high level of corruption or threats allowing criminals to invoke administrative authorizations to justify their activities. In such situations, the administrative authorization is used as a shield for criminal liability. Therefore, a convention against environmental crime should contain a specific provision requiring States to take specific measures to consider any conduct related to the environment as illegal "where the acts in question have been committed under the guise of an authorization or a permit having been obtained or being held by means of corruption, abuse of position of a public official or threatens within the meaning of United Nations Convention against Corruption"[137].

Abandoning the requirement of illegality for infringements to human health ***or safety of the planet***– As part of a gradual system of protection of the environment through criminal law based, among other things, upon a hierarchy of the values protected, the condition of illegality should be dispensed with when the conduct undermining the ecosystem balance affects also human health or the safety of the planet.

Regarding human health, the decision to abandon the condition of illegality is based upon the Convention of the Council of Europe[138] whose explanatory report states that "[a]dministrative consent must [...] [be] irrelevant in those cases where environmental use causes death or serious injury to any person or which creates a significant risk thereof"[139], whether committed intentionally or negligently. Indeed, also according to the report, there would be a "consensus among member States that the concrete endangerment of life and physical integrity of natural persons should, at least in certain areas, constitute a criminal offense." Such a process of establishing an autonomous criminal law vis-à-vis administrative law for cases where pollution causes or is likely to cause death or serious injury to any person is in line with legal writings[140] and an increasing number of national criminal laws. Among the latter, reference can be made to the paragraph 330 of the German Criminal Code which punishes the introduction into water, the atmosphere or the soil of substances that are likely to create a risk to public health or the risk of death to any person, or the American Clean Air Act that punishes the discharge into the atmosphere of hazardous substances to human health, regardless of the existence of proof of prior violations of administrative regulations[141].

In any event, the proposal to abandon the requirement of illegality in case of damage or threat to cause damage to human health would also be valid, all the more so in case of endangerment of the safety of the planet.

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[136] Enquiries published in *Le Monde* in January-February 2015 concerning the trafficking of rosewood, e-waste, illegal exploitation of tin, the trafficking of pesticides and the trafficking of tigers.

[137] See Art. 1(1)(b)(ii) of the Draft Ecocrimes Convention .

[138] See, in particular, Art. 2(1)(a) of the Convention of the Council of Europe.

[139] http://www.cites.org/fra/prog/iccwc.php/Wildlife-Crime (last accessed November 2014).

[140] M. FAURE, « Responsabilité pénale environnementale en Europe : *quo vadis* ? », *in* D. BERNARD, Y. CARTUYVELS, C. GUILLAIN, D. SCALIA and M. VAN DE KERCHOVE (dir.), *Fondements et objectifs des incriminations et des peines en droit européen et international*, Limal, Anthemis, 2014, p. 331.

[141] S.F. MANDIBERGet M. FAURE, « A graduated punishment approach to environmental crimes: beyond vindication of administrative authority in the United States and Europe », *Columbia Journal of Environmental Law*, 2009, vol. 34, n° 2, p. 485.

In addition to resting on the graduation of the value, damage and conduct of the agent, the establishment of a legitimate and effective system of protection of the environment through criminal law implies taking into account the severity of the misconduct involved.

B. – *Scale of severity of misconduct*

Severity of misconduct– The degree of social disapproval upon which a criminal policy regarding the protection of the environment is based will depend on the severity of the proven violations of the law. Consequently, in order to determine the severity concerned, it is advisable to take as a basis the psychological attitude of the perpetrator when carrying out the proscribed conduct It is then customary to distinguish between intentional offenses and non-intentional offenses because, as highlighted by an author, "if the act is intentional, it then arises from a marked hostility to the social order, unlike a non-intentional act which indicates, in turn, a mere indifference to that order"[142].Therefore, in the environmental field as in any other branch of the law, guilt and, accordingly, the level of sanctions should be gradual, proportionate to the level of hostility that the perpetrator has shown towards the socially protected environmental values. If the environmental criminal law instruments typically distinguish between "intentional offenses"[143] and "negligent offenses"[144] or offenses committed with "at least serious negligence"[145], by contrast, graduation of the corresponding sanctions is seldom made explicit. The establishment of a system of criminal sanctions that are commensurate with the gravity of the misconduct concerned presupposes the clarification of the severity scale of the criminal offenses.

Critical analysis of punishment of mere petty offenses– In French law, environmental petty offenses, which are at the lower end of the scale of gravity of acts of misconduct, are deemed to have been committed regardless of any proof of any mental element. This means that the mere material finding of the facts constituting the offense concerned carries with it the conviction its perpetrator/s,146 except in cases of force majeure. On closer examination, it would be advisable to consider whether the criminal prosecution is legitimate in the absence of any investigation concerning the intention of the perpetrator to defy social values, which leads to **address the possibility of decriminalization of environmental petty offenses by transferring the power of sentencing in case of the proven violations to the competent administrative authorities**.

Requirement that an offense be committed with at least serious negligence as international harmonization threshold for environmental criminal law– Non-intentional environmental petty offenses, which differ depending on the severity of the negligence of the perpetrator, are situated in the middle of the scale of gravity of acts of misconduct. This is explicitly stated in the Convention of the Council of Europe of 1998

[142] Y. MAYAUD, *Droit pénal général*, Paris, PUF, 2013, p. 251.
[143] Art. 2 of the Convention of the Council of Europe; Art. 3 of the Directive 2008/99.
[144] Art. 3 of the Convention of the Council of Europe.
[145] Art. 3 of the Directive 2008/99.
[146] D. GUIHAL, *Droit répressif de l'environnement, op. cit.*, p. 185.

on the protection of the environment through criminal law whereby a distinction is made between "mere negligence"[147] and "gross negligence"[148], or in the 2008/99 Directive that establishes a higher threshold by stating that the offense concerned must be committed with "at least serious negligence"[149]. Therefore, determining the optimal level of severity of negligence that severs to establish an international instrument for the harmonization of environmental criminal law presupposes clarification of the meaning of various relevant concepts.

Mere negligence[150] means "any neglect of care over which the offender has no control"[151].Consequently, the perpetrator acted in a reckless way even though the harmful consequences of his/her conduct were predictable. It is thus necessary to take as basis a diligent normal conduct, which can be outlined in any text. According to the Convention of the Council of Europe, such a neglect of care could be enough to give rise to the criminal responsibility of the perpetrator where the human health is at stake. From a more restrictive perspective, Directive 2008/99 does establish as an offense risky behaviors to human health or the environment that would be the result of mere misconduct.

Gross negligence presents an additional degree of severity. Although such misconduct is not defined in the instruments for the harmonization of environmental criminal law, French law can serve as a basis to refine its main features. Thus, such a qualified misconduct[152] is, in increasing order of severity, either "specified" where it involves exposing another person to a particularly serious risk of which one must have been aware or "deliberate" where it involves the violation in a manifestly deliberate manner of a duty of care or precaution laid down by statute or regulation. It is therefore requested from the offender to exercise an increased duty of care to prevent damage to the environment or any person. The Convention of the Council of Europe[153] provides that Member States can make a reservation regarding the severity of the required minimal misconduct and requires gross negligence rather than mere negligence in order to establish the criminal responsibility of the offender of the act concerned. The directive 2008/99is limited to establish as an offense only those acts that are committed with "at least serious negligence"[154.] Furthermore, it should be noted that proof of willful misconduct is made easier in the framework of a technical field such as environmental law due to the abundance of very specific technical regulations of which professionals are supposed to be aware[155]. Under French law, in case of accidental oil pollution of marine water, the willful misconduct of the perpetrator of the accident is an aggravating factor for the sanction that may be imposed[156].In any event, it is to be noted that the instruments for the harmonization of the protection of the environment through criminal law do not

[147] Art. 3(1) of the Convention of the Council of Europe.
[148] Art. 3(2) of the Convention of the Council of Europe.
[149] Art. 3 of the Directive 2008/99.
[150] Under French law, see art. 121(3)(3) of the Criminal Code.
[151] M. R. ROUDAUT, *op. cit.*, p. 273.
[152] In French law: Art. 121(3)(4) of the Criminal Code.
[153] Art. 3(2) of the Convention of the Council of Europe.
[154] Art. 3 of the Directive 2008/99.
[155] C. COURTAIGNE-DESLANDES, *L'adéquation du droit pénal à la protection de l'environnement*, thesis, Paris II, 2010, n° 370.
[156] Art. L. 218-19 II of the Environmental Code.

establish a definition of the meaning of the phrase [committed with] "at least serious negligence", which leaves a margin of discretion to States, so that national legal traditions can be taken into consideration.

Several lessons can be drawn from the existing instruments for the harmonization of environmental criminal law in connection with the gravity of misconduct. First, the requirement that the offense be committed with at least serious negligence reflects the current trend to allow that the punishment of mere misconduct in the framework of criminal prosecution become a civil compensation for damage[157]. Then, a harmonization system of environmental criminal law that would reduce the margin of discretion of States to establish a definition of environmental offenses should not encompass all possible situations, but only those presenting a sufficient degree of severity, which would warrant that an international instrument against environmental crime makes reference to the commission of an offense with "at least serious negligence"[158]. Finally, it does not seem appropriate to include a definition of "at least serious negligence" in an instrument for the harmonization of environmental criminal law, given the differing notions thereof that exist in different States and the need to allow States Parties to an international instrument to have a minimum margin of discretion.

Punishment of willful misconduct– Willful misconduct, which is at the top of the scale of gravity of misconduct, displays hostility to protected social values. There is no doubt that if a system of harmonization of environmental criminal law punishes non-intentional misconduct, that system will sanction all the more so willful misconduct. Anyway, the clarification of the scope of application of each of these types of misconduct presents the double challenge consisting of the graduation of sanctions and the criminalization of the most serious environmental crimes that constitute a crime of ecocide.

Towards a generalization of the graduation of the sanction according to the gravity of the offense concerned– Regarding the scale of sanctions depending on the gravity of the misconduct of the perpetrator of the damage caused or the risk of causing damage to the environment and human health, it should be noted that under French law, sanctions applicable in the event of marine pollution are more severe in case of deliberate discharges[159] than in case of sea accidents caused by recklessness, negligence or non-compliance with laws and regulations[160]. Nonetheless, such a graduation of criminal sanction based upon the severity of the misconduct is not general. So much so that an author is of the view that one of main weaknesses of the environmental criminal law lies in the fact that it does not provide for "a graduation of sanctions depending on the psychological attitude of the offender"[161]. Under these conditions, in the future, it would be appropriate in order to enhance the legitimacy of the environmental criminal law to provide for a graduation of sanctions that reflect the gravity of the misconduct of the

[157] See the contribution by L. D'AMBROSIO.
[158] See Art. 3(1) and Art. 4(1) of the Draft Ecocrimes Convention .
[159] Art. L. 218-11 of the Environmental Code provides for a EUR 50.000 fine where a discharge of polluting substances occurs.
[160] Art. L. 218-19 of the Environmental Code provides for a EUR 4.000 fine where any captain who causes to discharge polluting substances as a result of recklessness or non-compliance with laws and regulations.
[161] D. GUIHAL, *Droit répressif de l'environnement, op. cit*., p. 189.

perpetrator of the offense, that is to say, the level of hostility against the protected social values.

Towards a limitation of the crime of ecocide to only intentional acts– Both international law concerning war crime perpetrated by intentionally launching an attack on the environment[162] and comparative law on the crime of ecocide[163] restrict the qualification of these most serious crimes only to "intentionally committed" acts. Therefore, and given the exceptional nature of the mechanisms triggered by supranational criminal law[164], the crime of ecocide should be subject to proof of willful misconduct, which would limit the offense to the most serious situations and prevent conviction for the crime of ecocide as a result of a negligent or reckless conduct. Such a proposal follows on from the Rome Statute according to which "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge"[165].If this is applied to the crime of ecocide, criminal intention would rely on evidence of intent to commit the underlying offense (waste trafficking, discharge of hazardous substances, trafficking in protected species ...) and knowledge that the act concerned took place in the context of a widespread or systematic action[166].

In any case, the notion of intention should be refined in the field of environmental crime. Indeed, traditionally, the requirement of willful misconduct implies that the offender is not only aware of the proscribed behavior, the facts that contribute to the commission of the offense, but that he/she is also willing to violate the aforementioned proscribed behavior. Yet, if this is applied to the environmental field, such a requirement may be overly strict, to the extent that, in many cases, the destruction of the environment or the creation of the health risks are not the results sought by the perpetrator. In other words, environmental offenders "limit themselves to operate in the simplest and cheaper terms"[167] without a showing "evil will against the social order"[168]. To account for such a reality, French case law went so far as to establish a presumption of intention regarding environmental crimes, by stating that "the mere finding of a violation in the knowledge of a statutory or regulatory requirement shows that the perpetrator of that violation had a criminal intention"[169].

Regarding the intention required for the characterization of the crime of ecocide, it should be advisable to be more stringent, taking into account the particular mental state of the perpetrators of such a crime, whose direct goal usually consists of making

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[162] See Art. 8(2)(b), (iv), of the Rome Statute of the International Criminal Court, which defines as a war crime the act of "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental [...] 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".

[163] Art. 136 of the Criminal Code of the de la Republic of Moldova of 2002, which under the Title of Ecocide punishes the act of *intentionally and massively* destroying the flora and fauna, poisoning the atmosphere and water resources, and the perpetration of any other acts that could cause or lead to an ecological disaster.

[164] See I. FOUCHARD, *Crimes internationaux. Entre internationalisation du droit pénal et pénalisation du droit international*, Bruxelles, Bruylant, 2014 ; « De l'utilité de la distinction entre les crimes supranationaux et transnationaux », *RIEJ*, 2013/2, vol. 71, p. 49.

[165] See Art. 30(1) of the Draft Ecocrimes Convention,

[166] See *infra*, title 2.

[167] D. GUIHAL, *Droit répressif de l'environnement, op. cit.*, p. 193.

[168] *Ibid*.

[169] Cass. crim., 25 May 1994, n° 93-85158, *RSC*, 1995, p. 356, note by J. H. ROBERT.

considerable profits, rather than endangering the safety of the planet, which is just **an indirect consequence of the offense. For all these reasons, it would be appropriate that an international instrument against the crime of ecocide contains a suitable definition of notion of intention, which would be characterized by the fact that "the perpetrator either knew or should have known that there existed a high probability that [his/her acts] may adversely affect the safety of the planet**"[170].

The establishment of system of protection of the environment through criminal law commensurate with the importance of the protected value, the severity of the damage caused, the illegality of the conduct of the perpetrator and the gravity of his/her misconduct leads to propose two great initiatives of environmental criminal policy.

II. INTRODUCING TWO INITIATIVES OF ENVIRONMENTAL CRIMINAL POLICY

A legitimate and effective response to environmental crime necessarily requires a renewal of criminal policy at the national level and a re-design of that policy at the international level. More specifically, the aim is to propose the simplification of environmental criminal law by taking the example set by France (A), coupled with an initiative to internationalize the protection of the environment through criminal law on a worldwide basis (B), which will comprise various levels, ranging from cooperation to universalization.

A. – *Simplification of environmental criminal law: the French example*

Streamlining the statistical knowledge of environmental crime and the sanctions provided for by law– Above all, a criminal policy can only be legitimate and effective if it is based upon a good knowledge of the state of crime and the legal practices in that field. However, to date, no "real-time dashboard regarding the conduct of proceedings" is available in France and "statistical results, in addition to being hardly legible, are weak as well[171]. For example, no surveys are available regarding the determination of the rates of dismissals of cases likely to be subject to prosecution in connection with environmental matters. The latest figures available date from 2003 and referred only to the seven prosecutor's offices in the Île-de-France region in relation to which that rate was 53% compared to the rate concerning prosecution in general, which was 32.5%[172]. Moreover, these conclusions are more widely replicated at the European level, as shown in a report by Eurojust released in November 2014 according to which "statistics show that environmental crime is seldom prosecuted by national authorities"[173]. Furthermore, there is no data available on the recidivism rate in connection with environmental matters[174]. Such conclusions have prompted a judge specialized in the field of

[170] See Art. 2(3)(b) of the Draft Ecocide Convention.
[171] D. GUIHAL, « Les conditions d'efficacité du droit pénal interne », *in* « Le droit répressif : quelles perspectives pour le droit de l'environnement ? », », *RJE*, 2014, special issue, p. 95, in particular, p. 97.
[172] D. GUIHAL, « La contribution du droit pénal à l'efficacité des normes environnementales », *in* G. J. MARTIN (dir.), *Droit et économie de l'environnement*, Paris, LexisNexis, 2015, upcoming publication.
[173] "Mafia: New EU-Eurojust report reveals organized crime groups behind environmental crimes," *op. cit.*
[174] *Ibid.*

environmental criminal law to state that "the statistical approach is disappointing", which has an impact on all stages of the judicial response. Therefore, an improvement of the protection of the environment through criminal law requires the development of statistical tools that enable to acquire a thorough knowledge of the evolution of environmental crime and the effectiveness of the sanctions imposed in this field.

Improving the assessment of environmental criminal law at later stages of the enactment procedure– To move from the vicious circle of accumulation of penalties for violation of the environmental legislation into the virtuous circle of simplification of environmental criminal law, it would be advisable to carry on an overall assessment of the environmental regulations at the later stages of their adoption procedure. Such an assessment would imply the identification of indicators of environmental performance, which would be identical to those used in all evaluation instances (administration bodies, commissions of inquiry, evaluation committees, courts, etc.), coupled with the obligation to coordinate their respective activities. Moreover, for most ambitious and costly environmental rules, whether criminal or not, it might be appropriate to insert review clauses in the law concerned, patterned after what happened in France with the law on bioethics or in Germany with the legislation providing for an administrative burden in excess of EUR 1 million or in the United Kingdom with those regulations requiring parliamentary enactment given their importance and general scope of application[175].

Simplifying environmental criminal law– **In 2013, in France, nearly 70% of established criminal violations were petty offenses**,176 namely minor infringements, particularly, those in respect of which no examination is carried out to ascertain whether an intention exists to violate any protected environmental values. Against this background, the practice of French environmental criminal law involves primarily strict liability offenses, in respect of which it has already been shown that they lacked legitimacy in terms of protection of the environment or health. Such a lack of legitimacy at the stage of establishment of the offense concerned is accompanied by a lack of effectiveness in its implementation phase as « courts are generally not willing to sanction preventive offenses »[177]. The overabundance of these purely administrative violations is also reflected on the environmental criminal law as a whole, thereby impairing its clarity and weakening the "necessary laws"[178]. Thus, this warrants the launching of an initiative for the simplification of the matter.

Decriminalization of environmental strict liability offenses and establishment of administrative sanctions– Putting in place a gradual and effective system of protection of the environment through criminal law would mean considering the decriminalization of mere infringements of administrative rules that neither have an impact nor pose even a proven risk to the environment or human health, by replacing convictions for an offense

[175] For a more general strengthening of the assessment of the norms at the later stages of their adoption, see "Rapport d'information fait au nom de la Mission d'information pour la simplification législative" by R. Juanico, 9 October 2014, Doc. AN n° 2268, p. 124 et seq.
[176] INHESJ/ONDRP, Rapport 2014.
[177] D. CHILSTEIN, « L'efficacité du droit pénal de l'environnement », *in L'efficacité du droit de l'environnement, op. cit.*,p. 67 et seq., in particular, p. 71.
[178] MONTESQUIEU, *De l'esprit des lois*, 1758 : « Les lois inutiles affaiblissent les lois nécessaires. »

with administrative sanction[179], thus following a development more widely advocated in the field of business law[180]. In doing so, this would lead to a double effect whereby, on the one hand, the administrative authorities, while avoiding double punishment for the same conduct[181] would strengthen the effectiveness of the sanctions for violation of the environmental administrative regulations, and on the other hand, the legitimacy of environmental criminal law would be enhanced, as this is now focused on the protection of clearly identified and prioritized social values, and no longer subjected to the power of enforcement of the administration.

Measures aimed at tightening administrative sanctions have already been adopted in the field of environmental law as a result of the enactment of the Ordinance of 11 January 2012 on simplification, reform and harmonization of the set of provisions concerning administrative and judicial enforcement powers set forth in the Environmental Code, especially, by providing that fines of a punitive nature are applicable to the various branches of environmental law. Such a process had been proposed to States, in particular by the Convention of the Council of Europe of 1998 on the protection of the environment through criminal law[182] and was adopted in Germany through Ordnungswidrigkeiten (OwiG), that is to say, regulatory offenses that only lead to administrative fines of a non-criminal nature, and also in Belgium, where a decree of 21 December 2007 decriminalized a number of violations of environmental regulations[183].

Administrative authorities are now to be relied upon for the effective application of such an arsenal of repressive measures. To that end, it would be appropriate to create an autonomous High Environmental Authority,184 that is, a real regulatory authority that will able to control and punish, if need be, the compliance with environmental administrative rules along the lines of agency that exists in the United States (the *United States Environmental Protection Agency* : EPA).

The tightening of administrative sanctions through the Ordinance of 2012 could have been accompanied by the decriminalization of strict liability offenses. This was not the case, but a future text could go in this direction, thus supporting the wider trend towards the decriminalization of the business sphere, including the latest illustration of it, which concerns competition law and consumer law185 as a result of the enactment of the Act Hamon of 17 March 2014[186].

Reserving criminal law for environmental offenses of a sufficiently serious nature–

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[179] C. COURTAIGNE-DESLANDES, *L'adéquation du droit pénal à la protection de l'environnement*, thesis, Paris II, 2010, n° 1465.

[180] J.-M. COULON (dir.), « La dépénalisation de la vie des affaires », *in Rapport au garde des Sceaux*, Paris, La Documentation française, 2008, p. 30.

[181] In the existing positive law, there exist both administrative sanctions and criminal penalties, which are sometimes identical and related to the same conduct, giving to rise to criticism : J.-M. COULON (dir.), « La dépénalisation de la vie des affaires », *in Rapport au garde des Sceaux*, Paris, La Documentation française, 2008, p. 62.

[182] Art. 4.

[183] M. FAURE, « Responsabilité environnementale en Europe : *quo vadis* ? », *in* D. BERNARD, Y. CARTUYVELS, C. GUILLAIN, D. SCALIA et M. VAN DE KERCHOVE (dir.), *Fondements et objectifs des incriminations et des peines en droit européen et international*, Limal, Anthemis, 2014, p. 331.

[184] Y. JEGOUZO (dir.), « Pour la réparation du préjudice écologique, Rapport du groupe de travail installé par Madame Christiane Taubira, Garde des sceaux », 17 September 2013, p. 25, available at: http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/134000619/0000.pdf.

[185] N. SAUPHANOR-BROUILLAUD, « Les sanctions des règles protectrices des consommateurs dans la loi relative à la consommation », *RDC*, 2014, p. 471.

[186] See VALLETTE-ERCOLE, « La loi n° 2014-344 du 17 mars 2014 relative à la consommation : entre dépénalisation et pénalisation », *Dr. pénal*, June 2014, étude 13.

The decriminalization of environmental law is also consistent with an approach of graduation of the legal response to the violation of the environmental legislation. In the case of a mere infringement of technical legislation without violation of a protected value, such as the environment or human health, the legal response must be of an administrative law nature so that criminal law becomes "the solution of last resort […] for deterring and preventing conduct which is most harmful to [the environment]"[187]. In addition to this criterion of legitimacy, an effectiveness criterion is to be taken into account, which serves as a basis to justify the decriminalization of environmental strict liability offenses,188 since it is recognized that offenses of a purely preventive nature, not subject to the occurrence of any damage or any risk that damage to the environment or harm to health may occur, are rarely applied by the criminal courts[189]. Moreover, this avoids a double punishment effect that can take place as a result of the accumulation of punitive sanctions for the same conduct, given the co-existence of administrative sanctions and criminal penalties and the lack of coordination between these two types of punishment[190].

Making the quantum of penalties proportionate to the importance of the interest affected, the conduct in bad faith and the organized commission of offenses–The Ordinance of 11 January 2012 on simplification, reform and harmonization of the set of provisions concerning administrative and judicial enforcement powers has tightened the sanctions for the commission of environmental offenses according to the criteria of gravity of the damage caused and the bad faith characterized by resistance to comply with injunctions issued by administrative authorities[191]. Furthermore, an aggravating factor in the organized commission of offenses has been introduced, having an impact both on the sanctions, which are increased to seven years of imprisonment and a EUR 150,000 fine and on criminal procedure in that it established specialized authorities with jurisdiction over offenses concerning the disposal of waste or the protection of the fauna and flora. In future and according to recent developments in field of criminal business law, it would be appropriate to enable courts to increase the fines that may be imposed on businesses with high rates of return, which intentionally perpetrate environmental offenses up to 10% of their annual turnover[192].

Creation of a National Network for environmental security and strengthening of controls on the part of relevant authorities– To better combat environmental crime and promote good practices in this area, Interpol[193] urges its Member States to create a national support group for the environmental security that would constitute a platform

[187] "Explanatory Report to the Convention on the Protection of Environment through Criminal Law", available at: http://conventions.coe.int/Treaty/en/Reports/Html/172.htm (last accessed November 2014).
[188] J.-M. COULON (dir.), « La dépénalisation de la vie des affaires », *in Rapport au garde des Sceaux*, Paris, La Documentation française, 2008, p. 62.
[189] D. CHILSTEIN, « L'efficacité du droit pénal de l'environnement », *in L'efficacité du droit de l'environnement, op. cit.*, pp. 67 et s.,in particular, p. 71.
[190] L. NEYRET, « La sanction en droit de l'environnement – Pour une théorie générale », *in* C. CHAINAIS and D. FENOUILLET, *Les sanctions en droit contemporain*, vol. 1, Paris, Dalloz, 2012, p. 533.
[191] D. GUIHAL, « Les conditions d'efficacité du droit pénal interne », *in* « Le droit répressif : quelles perspectives pour le droit de l'environnement ? », *RJE*, 2014, special issue, p. 95.
[192] In case of false description: art. L. 213-2 of the Consumer Code and in case of adulteration of food and drugs: art. L. 213-3 of the Consumer Code.
[193] « Environmental Compliance and Enforcement Committee: Meeting and Events – Final Report », February 2014, available at: www.interpol.int ; Resolution n° 3 AG-2014-RES-03, 3-7 November 2014.

for communication, cooperation and collaboration between the different competent authorities in combating environmental crime (investigators, prosecutors, experts …). The information collected should be shared with different stakeholders: customs authorities, environmental agencies or non-governmental organizations, as well as with other national, regional and international organizations of the same type. In line with such a proposal, France could establish a task force responsible for ensuring coordination among the different stakeholders involved in the fight against environmental crime. To be fully effective, such a network should be relayed by strengthening controls carried out by the relevant authorities in the fight against environmental crime, whether administrative, police or customs.

Towards a coordination of civil, administrative and criminal sanctions for environmental matters– Finally, a simplification of the environmental legislation should require the passage of rules aimed at coordinating all sanctions - be they of an administrative, civil or criminal character- in light of the goals pursued by each of them. Such a measure would encourage their "successive imposition"[194] whereby, for example, the operation of a facility, requiring an authorization for purposes of the protection of the environment without requesting such a permit would be subject to the administrative penalty of formal notice to comply, and then, in case of failure to act upon such a notice, to appropriate criminal sanctions, with, among other things, the imposition of sanction barring the persons concerned from operating the facility.

Circular of the Ministry of Justice of 21 April 2015: "Guidelines on criminal policy concerning damage to the environment" - On 21 April 2015, the Minister of Justice and Keeper of the Seals has issued a circular concerning the criminal policy aimed at improving and reinforcing the fight against damage to the environment. To achieve this, the aforementioned text specifies that a real doctrine of response based on criminal law should guide the measures taken by the Public Prosecutor's Office for damage to the environment. This doctrine includes, in particular the appointment of judiciary focal points (judges) in the prosecutor-general's offices and prosecutor's offices to facilitate the interaction with the administrative agencies concerned and foster coordination of actions and review of the assessment of the criminal policy implemented at the local level. The circular also advocates the systematic prosecution in cases of serious or irreversible damage. According to this text "the protection of the environment has become a major issue"[195] for the Ministry of Justice. The future will tell whether the objectives set by the circular will have finally been achieved.

B. – *Internationalization of the protection of the environment through criminal law*

Internationalization of environmental crime– The most serious and most profitable

[194] M. DELMAS-MARTY, *Les grands systèmes de politique criminelle*, Paris, PUF, 1992.
[195] http://www.justice.gouv.fr/la-garde-des-sceaux-10016/mieux-lutter-contre-les-atteintes-a-lenvironnement-28022.html : (last accessed November 2015).

environmental crimes have a an international dimension on two counts: on the one hand, some crimes fall within the category of transnational crimes[196], taking into account that their connecting factors, such as the place of commission of the offense, the place of the occurrence of the damage, the location of the assets or the residence of the offenders are scattered throughout several States. On the other hand, other environmental crimes fall within the category of supranational crimes, in that they violate values of a high degree of international protection, be it the crime of genocide perpetrated through an intentional pollution of the environment[197] or crimes against the safety of the planet.

The gaps in the fight against international environmental crime– The analysis of the existing legislation leads to the two-fold observation that there exist deficiencies in the fight against crimes of an international nature. At the national-law level[198], differences between legislative and judicial practices encourage environmental dumping. At the international law level of[199,] "the fact that the environmental crime phenomenon is not being addressed in a joint manner contributes to the inefficiency of a repressive system, which remains tied to the State, as the monopoly of the right to punish continues to be the distinctive feature of sovereignty"[200]. Given such gaps and the overall impact of environmental crimes that can even threaten ecological balances and human health, it is time to consider a common legal response. Such a response could be based upon the response already provided to similar criminal phenomena - such as drug trafficking, trafficking in human beings, counterfeiting or money laundering, - by means of international conventions on cooperation in criminal matters. This requires a graduated internationalization of the protection of the environment through criminal law, whose degree of protection varies depending on the importance of the protected value and is divided according to an increasing order of internationalization into three stages: cooperation, harmonization and unification[201].

1. – *International cooperation as a means of fighting environmental crime*

Towards an enhanced cooperation among the national agencies involved– The prerequisite for an effective intergovernmental cooperation is the establishment of competent national agencies, which are themselves effective at the national level. In November 2014, a report issued by Eurojust[202], which is the European body responsible for judicial cooperation matters, highlighted "the insufficient coordination among competent authorities at the national and international level". Indeed, sometimes the prosecutor's office may not receive the elements necessary for it to perform its duties

[196] See I. FOUCHARD, « De l'utilité de la distinction entre les crimes supranationaux et transnationaux », *RIEJ*, 2013/2, vol. 71, p. 49.
[197] See warrant of arrest for Omar Al Bashir issued on 12 July 2010 by the International Criminal Court prosecutor for the perpetration of the crime of genocide in Darfur, especially, for the acts of contamination of wells and water pumps, http://www.icc-cpi.int.
[198] See contribution by R. ESTUPIÑAN-SILVA *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 19.
[199] See in this regard, the contribution by P. BEAUVAIS *in* Des écocrimes à l'écocide, préc., p. 3.
[200] See foreword by M. DELMAS-MARTY *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. VII.
[201] M. DELMAS-MARTY, « À la recherche d'un langagecommun », *in* M. DELMAS-MARTY, G. GIUDICELLI-DELAGE and E. LAMBERT-ABDELGAWAD (dir.), *L'harmonisation des sanctions pénales en Europe*, coll. de l'UMR de droit comparé de Paris (colloquium of UMR on comparative law held in Paris), vol. 15, Paris, Société de législationcomparée, 2003, p. 373.
[202] See "Strategic Project on Environmental Crime", November 2014, available at: http://www.eurojust.europa.eu (last accessed November 2014).

from customs or veterinary services. Furthermore, Eurojust notes that "some Member States have not put in place adequate structures, such as units of police or prosecutor's offices working solely on cases concerning environmental crimes", which only exist in Sweden, the Netherlands and the United States. It should be noted, however, that since 2004, there exists in France a Gendarmerie Agency specializing in the investigations of environmental crime, named Office central de lutte contre les atteintes à l'environnement et la santé publique (OCLAESP) (Central office against attacks on the environment and public health). To overcome the current deficiencies, Eurojust proposes a better way of collecting relevant information through a "multidisciplinary approach and close cross-agency cooperation" and a "sharing of knowledge and best practices". The above body also proposed that "the coordination of investigationsand prosecutions should be done on a more regular basis through its early involvement - the further use of joint investigation teams, coordination meetings and coordination centerswould contribute to a more efficient handling of cross border environmental cases".

Towards an enhanced intergovernmental cooperation– Intergovernmental cooperation contributes to the effectiveness of a common system of protection of the environment through criminal law. This includes delegation of authority for enforcement and compliance with foreign decisions. To date, there is still room for improving such cooperation, as illustrated by the Chevron-Texaco case. Indeed, in this case[203], the American company first managed to ensure that the courts of its country declined jurisdiction in favor of the Ecuadorian courts for damage caused to the environment and public health in Ecuador. After having won its case regarding its request for relocation of the proceedings, Ecuadorian courts ordered Chevron-Texaco to pay over USD 9 billion for damages to the victims concerned. In order not to enforce this judgment and while the company has been sued before the United States courts because its assets were located in that country, Chevron-Texaco raised the issue of the fraudulent nature of the judicial process conducted in Ecuador, and prevailed. Based upon the above example, one perceives the adverse impact of a lack of international cooperation to combat environmental crime, and at the same time it becomes evident that there is a need to go beyond an approach purely based on State sovereignty concerning the protection of the environment so that a supportive and cooperative approach can be taken instead.

Towards an enhanced cooperation of the regional and international agencies concerned– The strengthening of the coordination of the means of fighting environmental crime involves not only States, but also, more broadly, all the stakeholders involved that should combine their competencies and efforts in the framework of operational networks, both regionally and internationally. It is already possible to rely upon existing bodies for coordination and exchange of information, such as **Interpol** at the international level or **Europol** and **Eurojust** at the European level. These institutions took up this question of environmental crime and all of them have come to the same finding that there exists a

[203] See the contribution by K. MARTIN-CHENUT and C. PERRUSO, "L'affaire *Chevron-Texaco* et l'apport des projets de Conventions *Écocrimes* et *Écocide* à la responsabilisation pénale des entreprises transnationales".

lack of cooperation among States and stakeholders in the fight against environmental crime and to the same proposal on the strengthening that cooperation.

In its report of February 2014 on environmental compliance, Interpol[204] encouraged its members to create a Group of intergovernmental support for environmental security, which is responsible, among other things, to ensure communication and collaboration among all national and international partners to combat environmental crime. Moreover, States are invited to "ensure that the useful police and operational information that is collected during investigations be provided" to Interpol for its recording in the databases of the organization.

It should be noted that an **International Consortium on Combating Wildlife Crime (ICCWC)** [205] has been created, encompassing five intergovernmental organizations (the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Secretariat, INTERPOL, the United Nations Office on Drugs and Crime, the World Bank and the World Customs Organization). The goal of this consortium is to provide coordinated support to the national wildlife law enforcement agencies and the regional networks that act in defense of natural resources. It also supports poor and marginalized rural communities so that they preserve their livelihoods.

In order for cooperation among States and stakeholders in the fight against environmental crime to be efficient and effective, it must be combined with common and harmonized elements regarding the definitions of offenses and the imposition of the applicable sanctions.

2. – *Harmonization of environmental criminal law*

Towards an international harmonization of the protection of the environment through criminal law– There exist no harmonized definitions or penalties for environmental offenses at international level, which incites criminals to go forum shopping[206]. In order to respond to the threats posed to the environmental and public health safety at the international level, an ordinary set of rules concerning the protection of the environment through criminal law is required.

A process in this respect has already been put in place at the European level with the passage of Directive 2008/99 on the protection of the environment through criminal law, in which a detailed list of behaviors that Member States should establish as criminal offenses is provided. Regarding the *quantum* of penalties, the directive urges States to take the necessary measures to ensure that the offenses are punishable by "effective, proportionate and dissuasive penalties", leaving thus a national margin of discretion to the States and limiting in this manner only partially the risk of environmental dumping. In the future and in view of an **amendment of the Directive 2008/99**, it could be possible to reinforce the harmonization level in the light of Article 83 of the Treaty on

[204] See « Environmental Compliance and Enforcement Committee: Meeting and Events – Final Report », February 2014, in particular p. 36, available at: www.interpol.int (last accessed November 2014).
[205] See "International Consortium on Combating Wildlife Crime", available at: http://www.cites.org/fra/prog/iccwc.php (last accessed November 2014).
[206] See "Environmental Compliance and Enforcement Committee: Meeting and Events – Final Report", February 2014, in particular, p. 36, available at: www.interpol.int (last accessed November 2014).

the Functioning of the European Union that "establishes minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offenses or from a special need to combat them on a common basis", especially on organized crime which has been shown to have pervaded, to a great extent, environmental crime. Moreover, it would be possible to consider an **expansion of the competence of the Union in the area of criminal environmental protection**, by adding environmental crime to the list of types of crime set forth in the Treaty as falling within an enhanced competence, which already includes, terrorism, computer crime and organized crime.

In any event, the harmonization efforts at European level should be backed at the international level, as environmental crime is a global issue and requires a reduction of gaps among the national legislation of the States concerned. As such, the 2014 Interpol report on environmental compliance urged States to move in this direction[207].

A convention against environmental crime (also known as Ecocrimes Convention) is required in order to strengthen the protection of the environment upon which human integrity depends. Such an international instrument could fill the different gaps of the existing norms. First, it would allow a determination of manner in which environmental damage would be punished as a means of protection of the environment, where current texts rarely refer to criminal law and where the systems of existing sanctions are not appropriate to reduce the growth of this type of crime. Then, an international treaty against environmental crime would consolidate, in a single instrument, the behaviors in respect of which States should provide a response based upon criminal law, where international law dealing with environmental damage is at present scattered throughout several instruments. Finally, a convention on the fight against environmental crime would provide the opportunity to establish a set of general norms on the protection of the environment, which will be graduated according to the common criteria of importance of the level of gravity of the value protected, the illegality of the conduct of the perpetrator of the offense concerned, or the gravity of the misconduct.

For the sake of legal and political realism and in order to secure the maximum number of States' accession to an international convention against environmental crime, it would be appropriate to accord States a minimal margin of discretion, a sort of right to establish different provisions[208] to take account of acceptable national specificities, and set in place a system of support for the most vulnerable States to be able to set up a legitimate and effective system of protection of the environment based upon criminal law.

While a number of occurrences of damage to the environment are deemed acceptable by the international community in light of tolerance criteria[209] of a political, socio-economic or cultural nature, others are, however, deemed unacceptable in that they

[207] *Ibid*., p. 7.
[208] M. DELMAS-MARTY, « À la recherche d'un langagecommun », *in* M. DELMAS-MARTY, G. GIUDICELLI-DELAGE and E. LAMBERT-ABDELGAWAD(dir.), *L'harmonisation des sanctions pénales en Europe*, coll. de l'UMR de droit comparé de Paris (colloquium of UMR on comparative law held in Paris), vol. 15, Paris, Société de legislation comparée, 2003, p. 375.
[209] M. DELMAS-MARTY, foreword *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. VII.

affect the essential interests of the planet and humanity. When damage to the environment reaches such a degree of gravity, international legal instruments of a specific and singular character are to be applied. This is the reason why efforts for the harmonization of environmental criminal law to fight common environmental crimes should be accompanied by a unification initiative that enables punishing extraordinary environmental crimes, which would amount, for instance, to the crime of ecocide.

3. – *The unification of sanctions for the crime of ecocide*

Towards an international treaty on the crime of ecocide – Extraordinary crimes require extraordinary legislation. The protection of a value such as the safety of the planet on the way to becoming a customary value implies the global disapproval of the most serious environmental crimes grouped under the single term of ecocide. In the same way that the international community has invented in the past an international legal instrument to prevent and punish the crime of genocide, **States are at present called upon to fight the crime of ecocide which is defined as any "intentional acts committed in the context of a widespread and systematic action that have an adverse impact on the safety of the planet**"[210]. From the 1980s onward, the preparatory work for the development of the Rome Statute establishing the International Criminal Court bears the trace of a proposal for the creation of a supranational crime against the environment falling within the most serious international crimes; this concept, however, has ultimately not been accepted at that time, which can be explained due to the insufficient normative force underlying the protection of the safety of the planet or the concern to prevent an excessive restriction of the development of the nuclear industry[211]. At present, things have changed, whether it is the reinforcement of the normative force of the "safety of the planet", the increased threats posed by environmental crimes of all kinds or the introduction of the crime of ecocide into national legislation of several jurisdiction, all these converging forces invite States to unite their efforts to give a universal criminal response to the most serious environmental crimes, which could take the form of an international convention against the crime of ecocide.

Proposal n° 3. Introducing two initiatives of environmental criminal policy:

3.1. **Simplifying environmental criminal law: the French example**

– Streamlining the statistical knowledge of environmental crime and the sanctions provided for by law

– Improving the assessment of environmental criminal law at later stages of the enactment process

– Decriminalization of environmental strict liability offenses and establishment

[210] See art. 2(2)(b) of the Draft Ecocide Convention .

[211] See Damien Short who has conducted research on the history of the crime of ecocide: D. SHORT available at: http://www.independent.co.uk/ (last accessed November 2014) ; M. CROOK and D. SHORT, « Marx, Lemkin and the Genocide-Ecocide Nexus », *The International Journal of Human Rights*, 2014, vol. 18, n° 3, p. 298.

of administrative sanctions – Creation of an autonomous High Environmental Authority – Making the *quantum* of penalties proportionate to the importance of the interest affected, the conduct in bad faith and the organized commission of offenses – Creation of a National Network for environmental security and strengthening of controls on the part of competent authorities – Coordination of civil, administrative and criminal sanctions in the environmental field 3.2. **Internationalization of the protection of the environment through criminal law** – Promoting international cooperation to fight environmental crime –Harmonization of criminal law concerning ecocrimes at the international level – Extension of the competence of the European Union in the field of protection of the environment through criminal law – Unification of sanctions for the crime of ecocide at the supranational level
Proposal n° 4. Proposal of two international conventions for the protection of the environment through criminal law: 4.1. A Convention against environmental crime (Ecocrimes Convention) 4.2. A Convention against the crime of Ecocide (Ecocide Convention)

Recognizing the gaps in the existing law, both at the national and international level, in order to tackle a heterogeneous environmental crime, which has become global and is continuously growing beyond the measures aimed at streamlining the system of protection of the environment through criminal law, recourse should be had to the aforementioned proposal to launch two initiatives of international criminal policy. These two initiatives, embodied by two draft international conventions, require an adaptation of criminal law to the specific features of both categories of international environmental crime upon which they are based.

TITLE 2

TOWARDS THE ADAPTATION OF THE CRIMINAL LAW TO THE SPECIFIC FEATURES OF ENVIRONMENTAL CRIME

The response to the increased need for protection of the environment requires the adaptation of the criminal law to the specific features of environmental crime. Such adaptation starts with the establishment of a more suitable definition of environmental offenses (Chapter 1), taking due account of the specificities of those involved in environmental crime (Chapter 2). It also involves an enhanced response of criminal law as far as its prevention component (Chapter 3) and its suppression component (Chapter 4) are concerned. Finally, it also requires laying down the foundation of a global justice system dealing with environment matters that combines national, regional and international levels (Chapter 5).

CHAPTER 1
A MORE SUITABLE DEFINITION OF ENVIRONMENTAL OFFENSES

A more suitable definition of environmental offenses involves above all drawing a distinction between ordinary offenses, described as ecocrimes, and extraordinary offenses, that is, the most serious offenses, described as crimes of ecocide. Regarding ecocrimes, even if they are already widely present in positive law, the fact that they are scattered throughout different sets of norms deprives them of their overall consistency and clarity, thus justifying a proposal for the simplification of rules concerning these environmental offenses (I). As for the crime of ecocide, even if such notion was forged at the international level, it now needs to be consolidated so that in the future it can be enshrined in international environmental law (II).

I. – SIMPLIFICATION OF RULES ON ECOCRIMES

Towards a description of criminal behavior– Simplification of the rules on ecocrimes certainly requires streamlining the criteria for the establishment of offenses, which are critical in environmental matters. This can be achieved by combining the importance of the protected value, the gravity of the damage, the illegality of behavior and the degree of severity of the misconduct of perpetrator of the offense[212]. Nevertheless, such a streamlining process is not enough in itself to render the rules on ecocrimes sufficiently clear and effective. It must also be supported by a suitable description of the behaviors that may give rise to the criminal responsibility of perpetrators. This the reason why the Draft Ecocrimes Convention, based upon the Convention of the Council of Europe of 1998 on the protection of the environment through criminal law and the European Directive of 2008 on the protection of the environment through criminal law, brings together in a single text all offenses related to the environment hitherto fragmented into a myriad of texts scattered throughout international instruments. The offenses are classified according to the protected value, namely, the protection of the environment itself[213] and the protection of human health[214].This type of classification of ecocrimes encompasses a range of different offenses, such as, the illegal disposal of waste, the illegal production of nuclear materials, the destruction of specimens of protected wild fauna or flora species, or the operation of a plant in which dangerous activities are carried out and which cause or are likely to cause death or serious injury to any person. It was decided that this **classification of environmental crimes does not constitute an exhaustive list**, but rather an **open one** that may also be applicable to new and hitherto unknown criminal conduct.

Towards a generalization of environmental offenses– Beyond a classification of ecocrimes, a decision was thus made to propose a broader definition of environmental

[212] Regarding these criteria, see Title 1, Chap. 2(I).
[213] See Art. 3 of the Draft Ecocrimes Convention.
[214] See Art. 4(2) of the Draft Ecocrimes Convention.

offenses that affect the environment or individuals in order to ensure overall consistency of multiple offenses, and especially to cover offenses similar to those described herein, which would not yet be known, but that might emerge in the future, given the evolution of human mastery over nature and public health. This would therefore be accomplished by the addition to list of existing offenses a general offense of endangerment of the environment (A) and a general offense of damage to the environment (B).

A. – *Creation of a general offense of endangerment of the environment*

Definition of the offense of endangerment of the environment –Beyond the description of a specific conduct constituting an endangerment of the environment, the draft Ecocrimes Convention contains a "catch-all provision" to cover "any other illegal act of a similar nature liable to put the environment at risk".215 Such a general offense of endangerment of the environment[216] leads to the expansion of the scope of application of criminal law by taking account of the future developments of environmental crime. Such a tool allows national court to raise the level of environmental safety according to the changing realities of crime against the environment, while ensuring observance of the principle of legality, due to the limitations posed by national rules relating to the endangerment offense when they exist and, in particular, because of the special definition of the endangerment of the environment that should have to be incorporated into national legal systems, namely **the act of creating a "risk of causing substantial damage to ecosystems by affecting their composition, structure and functioning**"[217].

B. – *Establishment of a general offense of damage to the environment*

Definition of the offense of damage to the environment– If a draft harmonization convention sets forth a general formal offense of endangerment, regardless of the occurrence of damage, then, a fortiori, such a draft convention should include a general strict liability offense, characterized by the occurrence of damage to the environment. In this respect, the Draft Ecocrimes Convention contains an article drafted in broad terms enabling the criminalization of the "**act of causing substantial damage to ecosystems by affecting their composition, structure and functioning**"[218]. Again, the purpose of such a provision is to ensure greater adaptability of criminal environmental law to the new developments of environmental crime. In France, several proposals have already been made in this respect, promoting the establishment of an autonomous specific offense of damage to the environment[219]. Thus, as early as 1978, a French senator had proposed to establish in the Criminal Code a new offense according to which, "any person who, by inattention, recklessness or negligence, directly or indirectly, caused harm to human,

[215] See Art. 3(1) of the Draft Ecocrimes Convention.
[216] L. NEYRET and N. REBOUL-MAUPIN (dir.), *Déclaration pour la protection juridique de l'environnement*, Paris, L'Harmattan, 2009, p. 8.
[217] See Art. 3(2) of the Draft Ecocrimes Convention.
[218] See Art. 3(3) of the Draft Ecocrimes Convention.
[219] Ministry of Ecology and Sustainable Development and Planning, *Rapport de la mission confiée à Corinne Lepage sur la gouvernance écologique*, Paris, La Documentation française, 2008, proposal n° 55. L. NEYRET and N. REBOUL-MAUPIN (dir.), *Déclaration pour la protection juridique de l'environnement*, Paris, L'Harmattan, 2009, p. 76.

animal or plant health by altering either the balance of the natural environment or the essential qualities of the soil, water or air, shall be held liable for the offense of pollution "[220]. To continue this line of thought, Mireille Delmas-Marty proposed, in turn, that "whoever, without justification based on a social interest, commits by negligence, or for the purpose of making profit, an action likely to either alter in a serious and irreversible manner the ecological balance or harm human health or animal life by causing a material alteration of the soil, water or the air" shall be held liable for the offense of pollution"[221].

In any event, the general offenses of endangerment of and damage to the environment would be provided for in the criminal codes of States rather than in *ad hoc* rules concerning the environment or environmental codes. This would give those offenses a higher symbolic force and contribute at the same time to improve accessibility to general environmental criminal law.

Proposal n° 5. Simplification of rules on ecocrimes :

5.1. **Creation of a general offense of endangerment of the environment**, which means "the act of creating a risk causing substantial damage to ecosystems by affecting their composition, structure and functioning"

5.2. **Creation of a general offense of damage to the environment**, which means the "act of causing substantial damage to ecosystems by affecting their composition, structure and functioning"

II. – ESTABLISHMENT OF THE CRIME OF ECOCIDE

As far as *extra*ordinary environmental crimes are concerned, from a theoretical perspective, specific rules that cannot be modeled on the ones concerning ecocrimes must be established. This is due to the fact that the above extraordinary crimesare fortunately rare and also exceptionally serious at the international level. Since the emergence of the term "ecocide" to describe this category of "extraordinary" crimes against the environment, there has been a tendency to equate them with the most serious international crimes - including war crimes and crimes against humanity - before making a case for establishing an autonomous crime of ecocide (A). It is difficult to affirm that a crime has become, from an international law perspective, an international crime of the most serious kind. This can be explained by the fact there exist no supranational authority to certify that situation, even though States are still reluctant to expand the category of the most serious international crimes, given the legal consequences of such crimes and the undermining impact on their sovereignty. A number of elements invite nowadays to wonder about the gradual recognition of a crime of ecocide, whose definition and the legal framework applicable to it could be drawn upon supranational crimes (B).

[220] Proposal made by M. Ciccolini in 1978 and cited by M. PRIEUR, *Droit de l'environnement*, 5e ed., Paris, Dalloz, 2004, n° 1139.
[221] Proposal by M. Delmas-Marty cited in the discussed in M. PRIEUR'S BOOK, *op. cit.*, n° 1139.

A. – *History of ecocide, from concept to the establishment of the crime*

Forging of the concept of ecocide– The term "ecocide", based upon the prefix "eco" – habitat, environment (oikos in Greek) – and the suffix "-cide" refers to the most serious damage caused to the environment, the purpose of which is to kill (caedo in Latin), or destroy in an irreversible manner222. It was as a result of the use of Agent Orange by the United States army in Vietnam that term emerged in the early 1970s: the use of such a powerful defoliant destroyed nearly 20 % of the Vietnamese forest. This has had disastrous health consequences for the population, such as cancer and serious birth defects, which are still present today. The term was used by the biologist Arthur W. Galston[223], being subsequently taken up - to describe the Vietnam war- in particular, by Swedish Prime Minister in his opening speech of the Stockholm Conference of 1972 and Professor R. A. Falk, who proposed, the following year, the adoption of an international convention on the crime of ecocide with a view to urging States to recognize that "human beings inflict irreparable damage on the environment"[224] and that the crime of ecocide may be classified as a war crime.

The ecocide as a war crime– States themselves have accepted to prohibit the use of the environment as an instrument of war. In 1976, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention) was adopted. The **Convention ENMOD** prohibits, in peacetime and in time of armed conflicts, the deliberate manipulation of natural processes having widespread, lasting or severe effects on the environment, as well as the alteration of the dynamics, composition or structure of the Earth. This include, in particular, deliberate acts intended to cause earthquakes or tidal waves, upset the ecological balance of a region, cause weather or climate change, or modify ocean current[225].

The following year, in 1977 **Protocol 1 Additional to the Geneva Conventions** of 12 August 1949[226], and relating to International Armed Conflicts, prohibits the use of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" (Art. 35(3)). Furthermore, it establishes that "[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage […] [that may] prejudice the health or survival of the population" (Art. 55(1)) and also prohibits attacks against the natural environment by way of reprisals (art. 55(2)). Serious environmental damage, such as sabotage of water tanks, nuclear facilities or oil wells, are therefore recognized by international law as constituting a war crime in international armed conflict.

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[222] For a historical and semantic approach of ecocide, see L. NEYRET, « Libre propos sur le crime d'écocide : un crime contre la sûreté de la planète », *in Pour un droit économique de l'environnement, Mélanges G. J. Martin*, Paris, ed. Frison-Roche, 2013, p. 411.

[223] Yale University Professor, who proposed a new international agreement to ban the ecocide, *cf.* D. ZIERLER, *The Invention of Ecocide*, Athens, The University of Georgia Press, 2011, p. 15.

[224] R. A. FALK, « Environmental warfare and ecocide », *Bulletin of Peace Proposals*, 1973, vol. 1.

[225] By end of 2014, seventy-six States had ratified the this Convention (including the United States, the United Kingdom, the Russian Federation, China and almost all EU members) and forty-eight States had signed it, see the information available at: http://disarmament.un.org/treaties/t/enmod.

[226] By the end of 2014, 174 States were parties to the Protocol I Additional to the Geneva Conventions and three States had signed it, see the information available at: https://www.icrc.org/applic/ihl/dih.nsf/INTRO/470.

Years later, in 1998, **Art. 8(2)(b)(iv) of the Rome Statute** establishing the International Criminal Court confirms that "the act of intentionally launching an attack in the knowledge that such attack will cause incidental [...] widespread, long-term and severe damage to the natural environment" constitutes a war crime. This provision, however, is far from encompassing all the ecocide cases, and covers only serious damage caused to the environment *provided that* such damage has been caused in times of international armed conflict, and thus, excluding, times of peace and internal armed conflicts *and* under more restrictive conditions that those provided for in the Protocol I Additional to the Geneva Conventions. The Rome Statute admits the possibility that damage caused to the environment, even severe damage, can be deemed lawful insofar that it "would [not] be clearly excessive in relation to the concrete and direct overall military advantage anticipated". In other words, as far war crimes are concerned, the acceptability of environmental damage is, in accordance with the principle of proportionality, measured in terms of military strategy.

It is worth adding that under the Rome Statute, causing damage to the environment can also constitute an act of genocide, by "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part » (art. 6, al. c). An example thereof is the second warrant of arrest issued by the ICC against Omar Al Bashir, President of Sudan, mentioning the contamination of wells and water pumps in towns and villages, as actions reflecting a genocidal policy implemented against certain ethnic groups in Darfur[227].

Thus, massive and serious violations against the environment have been recognized only through other international offenses under the Rome Statute. Nevertheless, the International Law Commission, which is responsible for the progressive development and codification of international law and scholarly writings have consistently demonstrated the need to recognize an autonomous crime of ecocide, applicable both in times of war and in times of peace.

The different stages of the establishment of an autonomous crime of ecocide– As early as 1947, the General Assembly of the United Nations[228] entrusted the formulation of a draft code of offenses against the peace and security of mankindto the International Law Commission. Although the environment is not mentioned as such in the 1954 draft code, in 1986, the Special Rapporteur proposed to complete the list of crime against humanity by including "any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment". In 1991, the proposed solution evolves to establish an autonomous international offence, which is independent of both war crimes and crimes against humanity. Thus, the draft articles provide for the international criminal responsibility of "an individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural

[227] ICC, *The Prosecutor v. Omar Al Bashir*, Pre-Trial Chamber 1, *Second Decision on the Prosecution's Application for a warrant of arrest against Omar Hassan Ahmad Al Bashir*, n° ICC-02/05-01/09, 12 July 2010, p. 7.
[228] Resolution 177 (II) of the General Assembly of 21 November 1947, which includes the development of a draft code of offenses against the peace and security of mankind.

environment"[229]. This text was clearly built upon Art. 55 of the Protocol I additional to the Geneva Conventions, albeit with a broader scope, as it also applies in times of peace. A number of States expressed full support for such a provision, also advocated by Christian Tomuschat who had been commissioned to study the issue concerning the incorporation of serious environmental damage in the final text[230]. However, the formal opposition of States such as the United States or the United Kingdom led the Special Rapporteur to state that "[i]t will be necessary to wait until developments in international law confirm or reverse the tendency to consider these acts as [international] crimes"[231]. Consequently, the draft Code adopted on second reading in 1996 does not provide for an autonomous international crime for causing serious damage to the environment and maintains any serious damage caused to the environment under the qualification of war crimes. This solution will be then taken up by the drafters of the Rome Statute. However, this draft has inspired national legislators who have introduced the crime of ecocide in their respective criminal legislation.

National definitions of the crime of ecocide – To date, ten States have explicitly established the ecocide as a crime under their criminal legislation[232]. The first of them, for the aforementioned historical reasons, was Vietnam. In 1990, this country established the definition of the crime of ecocide in its criminal code, according to which ecocide constitutes a crime against humanity when it results in the destruction of the natural environment, both in times of peace and in times of war[233]. This definition reflects the work of the International Law Commission on the draft code of crimes against peace and security carried out before 1991. Nevertheless, the national provisions enacted after the abandonment of the crime against the environment in the latest draft Code in 1996 reflect the will of States to enshrine an autonomous crime of ecocide. For example, the Russian Criminal Code defines the ecocide - immediately after dealing with the crime of genocide in the chapter dealing with "crimes against the peace and security of mankind" - as the "massive destruction of plant and animal life, the poisoning of the atmosphere or water resources, and the perpetration of any other actions that could cause an ecological disaster", this crime being punishable with prison from 12 to 20 years[234].

The States that have established an autonomous crime of ecocide are still few, and it is apparent that these provisions have not yet given rise to litigation before national courts, but the situation could change as a result of the influence of legal writers and civil society.

Proposals by legal writers and mobilization of civil society – The consideration of the

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[229] (Art. 26). For the text of the draft articles provisionally adopted by the Commission at its forty-third session, see *Yearbook of the International Law Commission*, vol. II (Part Two), UN, 1991, pp. 94-97.

[230] C. TOMUSCHAT, "Document on crimes against the environment", *inYearbook of the International Law Commission*, vol. II (1), ILC(XLVIII)/DC/CRD.3, UN, 1996, pp. 15-27, available at: http://legal.un.org/ilc/documentation/english/ilc%28XLVIII%29_dc_crd3.pdf.

[231] "Thirteenth report on the draft code of crimes against the peace and security of mankind", by Mr. Doudou THIAM, Special Rapporteur (A/CN.4/466), *in Yearbook of the International Law Commission*, vol. II (1), ONU, 1995, p. 37, §§ 8-10.

[232] Armenia (art. 394 of the crim. code of 2003), Belarus (art. 131 of the crim. code of 1999), Georgia (art. 409 of the crim. code of 1999), Kazakhstan (art. 161 of the crim. code of 1997), Kyrgyzstan (art. 374 of the crim. code of 1997), Moldova (art. 136 of the crim. code of 2002), Russian Federation (art. 358 of the crim. code of 1996), Tajikistan (art. 400 of the crim. code of 1998), Ukraine (art. 441 of the crim. code of 2001) and Vietnam (art. 278 of the crim. code of 1990). See, http://eradicatingecocide.com/overview/existing-ecocide-laws/ (last accessed in November 2014).

[233] L. NEYRET, « Libres propos sur le crime d'écocide : un crime contre la sûreté de la planète », *inPour un droit économique de l'environnement, Mélanges G. J. Martin*, Paris, ed. Frison-Roche, 2013, p. 417.

[234] *Ibid*.

issue by the International Law Commission resulted in proposals in support of the recognition of the establishment of an autonomous crime of ecocide[235], from both legal writers[236] and civil society. In 2010, the British lawyer Polly Higgins has launched a campaign aimed at "eradicating the ecocide" (Eradicating Ecocide Project)[237], that she considers as "a crime against present and future generations and life as a whole on Earth"[238]. She proposed an amendment to the Rome Statute and also to include ecocide under the fifth crime against peace, alongside genocide, crimes against humanity, war crimes and the crime of aggression. In 2013, the proposal was included in a European Citizens' Initiative to "end ecocide" in Europe and "to give the Earth Rights"[239] and by the end of 2014 was taken up by a new citizens' movement called End Ecocide on Earth. Moreover, a group of six organizations issued a global call entitled “Charter of Brussels”, requesting official recognition by the United Nations of ecocide as a crime against humanity and peace as well as the creation of a European and International Criminal Court for the Environment and Health[240].

Emergence of a crime of ecocide under customary international law ? – The recognition of the customary nature of an international law rule is always a delicate issue to address and has only rarely been unanimously supported. As a matter of fact, it implies "evidence of a general practice accepted as law"[241]. In other words, it presupposes the demonstration of two elements: a material element derived from State practice (that is, repetition of similar acts by a representative number of States) and a moral element, implying that by adopting such a behavior, States believe to be complying with international law. Thus, evidence of custom will be more or less easy to obtain, depending on the areas of regulation concerned and the degree of consensus that can be achieved among States. The environment is an area that crystallizes very divergent positions among the States. These positions are split, in particular, along a North-South line, with highly varying stances on how a balance can be achieved between the need for economic development and environmental protection. These divergences cannot be construed as a real disagreement on the need to protect the environment against serious damage. They are indeed differences concerning the ability of States to protect the environment while stimulating economic development. What is lacking in practice is thus not the agreement on principles of the fundamental nature of the protection of the environment, but an

[235] Or "geocide" according to the terminology chosen. See L. BERAT, « Defending the right to a healthy environment: toward a crime of geocide in international law », *Boston University International Law Journal*, 1993, pp. 327-348; see also, A. NIETO MARTÍN, « Éléments pour un droit international pénal de l’environnement », *RSC*,2012, p. 69.

[236] See M. A. DRUMBL, “Waging war against the world: the need to move from war crimes to environmental crimes”, *Fordham International Law Journal*, 1998, vol. 22, pp. 122 et seq.; M-A. GRAY, « The international crime of ecocide », *California Western International Law Journal*, 1995-1996, vol. 26, n° 2, pp. 215-271 ; L. NEYRET, « Libre propos sur le crime d’écocide : un crime contre la sûreté de la planète », *in Pour un droit économique de l’environnement*, Mélanges G. J. Martin, Paris, ed. Frison-Roche, 2013, p. 411. See Damien Short who conducted research on the history of the crime of ecocide, available at: http://www.independent.co.uk/ (last accessed November 2014); M. CROOKet D. SHORT, « Marx, Lemkin and the Genocide-Ecocide Nexus », *The International Journal of Human Rights*, 2014, vol. 18, n° 3, p. 298. See also, the contribution by E. FRONZA and N. GUILLOU, « Écocide: définir la qualification pénale internationale », footnote 1 ; B. Lay, L. Neyret, D. Short, M. Baumgartner, A. Oposa, Timely and necessary : Ecocide law as urgent and emerging, J. Juris 431, 2015, 431.

[237] P. HIGGINS, *Eradicating Ecocide*, London, Shepheard-Walwyn Publishers, September 2010.

[238] http://www.cites.org/fra/prog/iccwc.php/Wildlife-Crime (last accessed November 2014).

[239] http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2013/000002; https://www.endecocide.org/fr/ (last accessed November 2014).

[240] http://www.cites.org/fra/prog/iccwc.php/Wildlife-Crime (last accessed November 2014).

[241] Pursuant to Art. 38 of the Statute of the ICJ.

agreement on the conditions for its implementation. This is reflected, in particular, in the decision rendered by the International Court of Justice in the Gabčikovo-Nagymaros case, as the Court recalls "the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind"[242].

If all these elements are taken into account - treaty practice of State, the work carried out by the International Law Commission, proposals by legal writers, civil society initiatives, definitions of ecocide in national criminal legislation - all of them converge towards **the emergence of a common value at the international level - the "safety of the planet" - which, beyond the environment as such, aims at the sustainability of the Earth and the future of humankind as a whole**[243]**.** The proposed crime of ecocide would materialize the protection of that value through criminal law under international law against the most serious damage, which does not fall within the category of transnational crimes (ecocrimes) but within that of supranational crimes[244].

B. – *Ecocide, towards a supranational crime*

Elevating the crime of ecocide to the rank of most serious international crimes– Proposing the recognition of a crime of ecocide openly takes a forward-looking approach, although it is consistent with the process of criminalization at the international level. Before World War II, crimes against humanity did not exist under international law and war crimes constituted only national offenses that were provided for in the internal military, criminal and disciplinary legislation. It was through the Charter of the Nuremberg Tribunal and its Judgment that the aforementioned crimes were directly introduced in international law, accompanied by a specific legal regime based upon international criminal responsibility. The ecocide is considered as an international crime in the making, just like the aforementioned crimes before they had emerged as an obvious part of international law to punish the atrocities committed during the World War II and prevent the commission of such kind of acts again. The idea behind this proposal is to nurture a sense of anticipation for the establishment of the crime of ecocide before a major ecological disaster finally unites the States behind the need for its recognition.

The Draft of Ecocide Convention aims to promote the gradual acceptance of this crime by encouraging the discussion on the basis of concrete evidence. In this light, the proposal includes at the same time a definition of the crime of ecocide (1) and legal regime that would be applicable to it in the event that such a crime was recognized as falling within the category of the most serious international crimes (2).

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[242] CIJ, *Gabčikovo-Nagymaros, ICJ Reports of Judgments, 1997,* p. 41, para. 53. It should be noted that the contentious cases before the ICJ concerning environmental matters continues to grow following the advisory opinion rendered in the *Legality of the Threat or Use of Nuclear Weapons* case (1996), through, in particular, the cases concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (2010) and *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (2014). See the contribution by S. HENRY.

[243] See the contribution by H. HELLIO.

[244] See I. FOUCHARD, *Crimes internationaux*, Bruxelles, Bruylant, 2014 ; « De l'utilité de la distinction entre les crimes supranationaux et transnationaux », *RIEJ*, 2013/2, vol. 71, p. 49.

1. – *Elements of the definition of ecocide*

Definition of ecocide– The ecocide could be defined as any "intentional acts committed in the context of a widespread and systematic action that have an adverse impact on the safety of the planet"[245]. Despite a certain similarity with the definition of crimes against humanity, ecocide should be recognized as an autonomous crime, independent from war crimes and crimes against humanity, which were established for the protection of human dignity. The value protected by the crime of ecocide, that is ,the safety of the planet, is an integral part of its definition. This has a dual spatial dimension - the protection of the environment as such and the protection of affected populations through the environment where they live in and a dual temporal dimension - the protection of today and tomorrow's environment and population (see the "present and future generations" referred to in the preamble). The ecocide is defined on the basis of a "set of values, which are interdependent"[246] in space and time: the protection of ecological balance, the protection of animal and plant species and the protection of the health of human populations. The proposition of ecocide as falling within the category of the most serious international crimes would then be justified by the fact that it would be defined as serious damage caused to fundamental value of the international legal system. The supranational crimes, such as the crime of aggression, the genocide, crimes against humanity or war crimes are characterized, in fact, by two levels of gravity: a substantial gravity - since the incriminated behaviors violate the fundamental universal values, which are international peace and security, human dignity and, now, the safety of the planet; and circumstantial gravity - because only the most serious violations of those values deserve the qualification of supranational crime. This extreme gravity is reflected in the elements of the crime of ecocide, be they material or moral.

a) The material element of the crime of ecocide–The crime of ecocide would involve the commission of predicate offenses[247] causing an exceptionally serious damage, the aforementioned offenses being committed in the specific context of a "widespread or systematic action".

i) Firstly, as for the proposed **predicate offenses**, they cover a variety of behaviors, which cause damage to a number of elements of the environment – e.g. massive air, atmosphere, soil, water or aquatic environments pollution - its components– such as the destruction of wild fauna and flora specimens, whether protected or not[248], and their ecological functions. These are legal interests that have already been protected by criminal law under the Convention of the Council of Europe of 1998 on the protection of the environment through criminal law and the 2008/99 Directive on the protection of the environment through criminal law. The list of predicate offenses ends with "**catch-all**

[245] See Art. 2 of the Draft Ecocide Convention.
[246] See the contribution by E. FRONZA and N. GUILLOU, « Vers une définition du crime international d'écocide » *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 127.
[247] See Art. 2(1) of the Draft Ecocrimes Convention.
[248] Paragraph (e) ("the killing, destruction, possession or taking of specimens of wild fauna or flora species *whether protected or not*") goes beyond the existing law, but avoids excluding from the description of a crime of ecocide the massive destruction of specimens of fauna and flora that would have not been subject to special measures of protection. The proposed paragraph (e) requires the massive character of the damage causes that must necessarily affect the safety of the planet, which in turn limits the risk of non-compliance with the principle of legality.

provision" aimed at encompassing similar crimes not expressly provided for in the preceding paragraphs. This technique, which allows anticipating technological developments as well as new ways of committing a crime of ecocide, is known in the field of international criminal law. This is, particularly, reflected in Art. 7(1)(k) of the Rome Statute, which defines as crimes against humanity "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The margin of interpretation left to the (national and international) courts for the qualification of international crimes is defined by the limits set forth by the provision itself, namely, the requirement of a nature similar to that of the predicate offenses also listed in the draft Ecocide Convention . In other words, they must be of a comparable nature and gravity.

ii) Predicate offenses have, on the one hand, the capability of directly or indirectly affecting the environment, and on the other hand, they are of an extreme gravity, in that they affect the safety of the planet, not only the environment (heading of Art. 2 of the draft convention). The characterization of ecocide would thus require not only the occurrence of a damage - which excludes the notion of endangerment, reserved for ecocrimes - but more accurately also **serious damage that is characterized**, namely, by "(a) a widespread, constant and serious degradation of the quality of air or the atmosphere, the quality of soil or the quality of water, the fauna and flora or their ecological functions[249] ; or (b) death, permanent disabilities or other incurable serious illnesses [caused] to a population or [its permanent deprivation] of their lands, territories or resources"[250]. The requirement of the occurrence of exceptional damage that undermines the safety of the planet restricts the characterization of the crime of ecocide to the most serious environmental crimes, which is consistent with the logic underlying supranational crimes. To that purpose the cumulative criteria consisting of a "widespread, long-term and severe" damage would be included in the definition of ecocide, which have been drawn upon the Protocol I Additional to the Geneva Conventions of 1949 whose interpretation could serve as guidelines[251]. For example, the widespread destruction of the primary forest or the irreversible pollution of soil and water as a result of the discharge of highly toxic waste, as it happened in the *Chevron* case, or even the burning of vast areas of high ecological value in order to obtain pure economic benefits could be deemed to be a widespread, long-term and severe damage. Furthermore, the characterization of ecocide would require, as for the injuries caused to individuals, the "death, *permanent* disabilities or other *incurable serious* illnesses» or the permanent deprivation of a population of "their lands, territories or resources". The first element aims to cover those acts "which jeopardize the survival of the population, but also [...] those which could seriously prejudice health, such as congenital defects, degenerations

[249] The term "ecological functions" means the role played by an element of the environment (the soil, air, atmosphere, water or the aquatic environments and species) in ecosystems.
[250] See art. 2(2) of the Draft Ecocide Convention.
[251] According to the commentary by the ICRC regarding the Protocol I additional to the Geneva Conventions, the term "widespread" means an area on the scale of several hundred square kilometers, the term « long-term » means one or several decades, and the term "severe" means damage capable of endangering the long-term survival of the civilian population or that kind of damage that might create serious health problems to the civilian population concerned.

or deformities"[252]. The second element of the crime of ecocide, which consists of harm caused to individuals, tends to respond to acts against the environment that result in lasting or permanent deprivation of a population of its land or its resources. This is reflected in the growing practice of ***Land Grabbing***, which consists of agricultural land grabbing by transnational companies in developing countries in order to replacing them with large scale monocultures for the production of biofuels and palm oil. These practices, which are accompanied by a wide deforestation, bring about a major reduction of biodiversity. Courts having jurisdiction in these matters could base their decision upon the findings of the experts and, in particular, on those of the Group for Research and Enquiry on Environmental matters (GREEN)[253], in order to determine whether the damage caused has reached the level of severity required.

iii) Given the **specific context required**, the crime of ecocide should form part of a "**widespread or systematic action**". This criterion, which has been drawn upon the definition of crimes against humanity[254], allows for the restriction of the characterization of the ecocide to the most serious crimes and materializes the collective dimension required for the occurrence of any damage that affects the safety of the planet. The ecocide, however, would be presented as an autonomous crime, independent of the crimes against humanity, and any interpretation of the context required for the existence of an ecocide should be dynamic and adapted to the specific features of that crime. The term "action" reflects better its characteristics than the term "attack", which was taken from the context of armed conflict initially required to characterize crimes against humanity[255]. All the more so that, like the crimes against humanity and genocide, the commission of a crime of ecocide could take place both in times of peace and in times of armed conflict, without prejudice to the relevant provisions of international humanitarian law[256].

Another common characteristic both definitions have is that they also provide alternative criteria. Indeed, it suffices to prove that, the collective action in the framework of which the predicate offense is committed, is either widespread or systematic. In this regard, even if the definition developed by international criminal courts concerning the adjectives "widespread" (quantitative dimension: wide geographical scale, large number of victims, etc.) and "systematic" (qualitative dimension: the organized nature of crimes, the non-accidental repetition of similar criminal conduct on a regular basis)[257] is a useful source for the characterization of the crime of ecocide, it should only be considered as being of an indicative nature. For example, a widespread action could be defined as massive pollution produced by the discharge of toxic waste that caused a significant

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[252] To continue this line of thought regarding the Protocol I of 1977 Additional to the Geneva Conventions of 1949, according to the commentary issued by the International Committee of the Red Cross, para. 2135.

[253] As proposed in Art. 20 of the Draft Ecocide Convention (see *infra*).

[254] Neither the Rome Statute nor the crimes of elements pertaining thereto define a "widespread or systematic attack" characterizing the context of crimes against humanity. It is on the basis of case law – and, in particular, the case law of the *ad hoc* international criminal Tribunals for the former Yugoslavia and for Rwanda – that that notion has been defined.

[255] Art. 6(b) of the Charter of the Nuremberg Tribunal and Art. 5 of the ICTY Statute. See M. DELMAS-MARTY, I. FOUCHARD, E. FRONZA and L. NEYRET, *Le crime contre l'humanité*, coll. Que sais-je ?, Paris, PUF, 2009, p. 7.

[256] See Convention ENMOD of 1976 and the Protocol I Additional (1977) to the Geneva Conventions of 12 August 1949, supra; Art. 1 of the Draft Ecocide Convention.

[257] ICTY, *Prosecutor v. DragoljubKunarac, RadomirKovac and ZoranVuković*, IT-96-23-T& IT-96-23/1-T, Judgment, 22 February 2001, § 94.

number of victims (the Probo Koala case); systematic action could be inferred from severe damage caused by criminal trafficking through criminal networks (for instance, the trafficking of protected species such as rosewood from Madagascar) or caused by illegal deforestation organized by multinationals supported by their corporate structure and in particular a number of subsidiaries in order to dilute their responsibility.

The commission of a predicate offense as part of a widespread or systematic action, which has resulted in exceptionally severe damage, is thus necessary, but insufficient: "a person shall be criminally responsible and liable [...] only if the material elements are committed with intent and knowledge".

b) The mental element of the crime of ecocide–The mental element (or mensrea) means the psychological or intellectual attitude of the offender when he/she carries out the prohibited material conduct. A distinction is made between willful misconduct - which requires the knowledge of the prohibited act and the intent to challenge it - from non-intentional misconduct, - which can range from simple blunder (ordinary fault assessed under normal procedures) to a qualified negligent act (for instance, exposing another person to a particularly serious risk of which the agent must have been aware)[258]. Marine pollution, albeit tragic, caused by the gross negligence of an oil drilling company (by way of example, BP in the Gulf of Mexico)[259] is distinguished, based upon the aforementioned mental element, from the pollution caused as a result of the deliberate dumping of waste, which is known to be highly toxic and that causes serious damage to the environment and public health (for example, the Probo Koala case in Côte d'Ivoire). The exceptional nature of the crime of ecocide requires the intentional nature of the act concerned and the necessary knowledge by the offender that the act is carried out in the context of widespread or systematic actions[260].

The **intentional nature of the crime** is characterized both by intent and knowledge[261]. Strictly speaking, knowledge refers to the will of a person to carry out a conduct or cause a given consequence. Knowledge refers to the awareness that a circumstanceexists or a consequence will occur in the ordinary course of events. In the narrow sense, out of the aforementioned two examples concerning the oil spill in the Gulf of Mexico and the dumping of toxic waste from the Probo Koala off Abidjan, only the second one could fall within the realm of the crime of ecocide. Moreover, it turns out that a number of examples of acts causing serious and massive environmental damage do not result from a deliberate intention to cause that damage. That is why those intentional acts in respect of which the offender "knew or should have known that there was a high probability that they affect the safety of the planet" have been considered as falling within the category of "willful" misconduct. The wording echoes that of Art. 28 of the Rome Statute relating to the responsibility of commanders and other superiors and, above all, that of case law of the

[258] The concepts used here make reference to the categories established in the French Criminal Code.
[259] See, following a criminal conviction, the judgment against BP rendered by a civil court in the United States of America for "gross negligence" in managing its oil rig Deepwater Horizon in the Gulf of Mexico, whose explosion in April 2010 killed eleven persons and caused a major oil spill.
[260] See Art. 2(3) of the Draft Ecocide Convention.
[261] See art. 30 of the Rome Statute on the mental element.

international criminal courts[262] which, inspired by the Anglo-Saxon law, has in fact accepted a broad interpretation of the term "knowledge" so that, in the event of supranational crimes, gross negligence acts could be equated to willful conduct. For example, an individual who intentionally discharges toxic waste, in a massive way, near inhabited coasts cannot claim he/she did not know the result of his/her conduct would very likely cause widespread, long-term and severe pollution of marine and coastal water, as well as serious harm to the health of the population living there. This clarification allows to adjust the definition of ecocide to the reality of the most serious environmental crimes and to incorporate offenses resulting from deliberately taking an unreasonable risk, provided that such offenses cause damage affecting the safety of the planet.

Regarding the criterion of knowledge of the context of the offense, the wording here was drawn upon the definition of crimes against humanity (see heading of Art. 7 of the Rome Statute). In the case of ecocide would also be required **knowledge by the perpetrator that his/her conduct is part of a context of widespread or systematic actions** whose purpose is the commission of an ecocide. This does not require evidence of the fact that the perpetrator had knowledge of all the characteristics of the action or the particulars of its organization, but rather that the perpetrator was aware that in doing so, he was participating in such actions. In the example of illegal trafficking in waste, organized by a criminal group between an industrialized country and a developing country, the individual ensuring the receipt and subsequent dispersal of waste in the State of destination should know that he/she participates in a broader action, causing serious damage to the environment, if he/she is to be prosecuted for ecocide. Such a criterion excludes from the scope of application of the crime of ecocide those who intentionally participate in actions related to the discharge of waste with full knowledge of the unlawful nature of his/her actions (and therefore a potential perpetrator of a crime of ecocide), but unaware of the fact that his/her conduct was part of a widespread or systematic action. **The mental element would thus allow, in line with the exceptional character of the crime of ecocide, for the characterization of ecocide to be reserved for the most serious acts, most often committed by instigators, organizers and those giving the orders to commit crimes rather than by the mere executors**.

2. – *Application to the ecocide of the specific regime applicable to supranational crimes*

Expanding scope of application of the rules concerning supranational crimes to govern the crime ecocide– If the crime of ecocide should be recognized by States as falling within the category of the most serious international crimes, it would be logical that the specific regime applicable to supranational crimes as established under international criminal law were also applicable to ecocide. It is of course obvious that States, given the legal consequences associated with the characterization of a crime as one of a supranational nature, will hardly admit ecocide as falling within the latter category of crimes, even if the Draft Ecocide Convention explicitly recalls the principles

[262] ICTY, *Prosecutor v. DragomirMilošević*, judgment rendered on 12 December 2007, para. 951: "As confirmed by the Galić Appeals Chamber, the notion of "willfully" incorporates the concept of recklessness, whilst mere negligence is excluded".

of sovereign equality, territorial integrity of States and that of non-intervention in the domestic affairs of other States[263].

Non-Applicability of the Statute of Limitations to the crime of ecocide– Under international criminal law supranational crimes are not subject to any the statute of limitations. In addition to being set forth in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) and its European counterpart (1974), this rule has also been enshrined in Art. 29 of the Rome Statute. Therefore, it would be logical that no statutory limitations apply to the crime of ecocide, both regarding the institution of proceedings and the imposition of sentences. There is no doubt that States will raise objections to this issue, as has been the case during the negotiations on the Rome Statute, but the non-applicability of statutes of limitations would be an excellent way to enhance the effectiveness of the punishment of the crime of ecocide[264]. In this regard, States now recognize, especially in matters of corruption[265], that international criminal law conventions provide for longer statutes of limitations to promote effective prosecution of transnational crimes. This is the minimum solution that could be considered alternatively in a draft Ecocide Convention, namely, that States would commit themselves to set forth in relation to issues concerning the aforementioned matters the longest limitations periods allowed by their domestic legislation in connection the most serious crimes. This would be all the more justified as the damage to the environment or human health caused by environmental crime, especially, as far as water or soil pollution is concerned, may occur or be measured a long after the commission of act that caused the pollution.

Limitation of amnesties for crimes of ecocide – International law does not prohibit amnesty measures that constitute a critical element of the process of reconciliation of a population after a period of violence or armed conflict. States thus maintain a very large margin of freedom in that regard. Only general amnesties concerning the most serious international crimes are subject to limitation. Under international law, such general amnesty measures are deemed to have no effect outside the State that delivered, rather than being banned. In other words, it would be coherent to accept that an amnesty enacted by the State of nationality of a perpetrator of a crime of ecocide cannot prevent the offender from being prosecuted on that ground by a foreign or international tribunal, having jurisdiction on the matter concerned.

Recognition of a universal jurisdiction– One of the characteristics of the most serious international crimes is that international law recognizes the so-called "universal" criminal jurisdiction in this field. This allows any State to prosecute and try an individual who perpetrates such a crime, regardless of their nationality, the nationality of the victims and the place of commission of the crime, provided that the perpetrator is present in its territory. The expansion of the scope of application of this criminal jurisdiction to the crime of ecocide would amount to recognizing that any State could try a foreigner, who

[263] See Art. 19 of the Draft Ecocrimes Convention and Art. 21 of the Draft Ecocide Convention.
[264] See Art. 4(2)(b) of the Draft Ecocide Convention.
[265] See Art. 29 of the United Nations Convention against Corruption of 2003.

has committed abroad a crime of ecocide against foreign persons as long as the alleged perpetrator is present in its territory. It should be noted that universal jurisdiction as recognized for the most serious international crimes is deemed to be **optional** (States, except as otherwise specified, are not obliged to prosecute and try the person concerned) and **subsidiary** (such jurisdiction should be exercised only if the States directly concerned cannot or do not want to try the perpetrator and no international court has jurisdiction over the matter)[266].

Expanding the scope of application of the responsibility to protect – The responsibility to protect ("R2P"), established in the 2005 World Summit Outcome[267], corresponds to the modern version of the "right to intervene" and is aimed at striking a balance between two fundamental principles of international law: the sovereignty of States, which advocates the non-intervention and the protection of fundamental rights, requiring that actions be taken in a given scenario. More specifically, this is basically a preventive doctrine based upon the principle that all States are under the obligation to protect their population against mass crimes, namely, the genocide, crimes against humanity, ethnic cleansing and war crimes, and that in the event that the State fails to do so, such a responsibility lies with international community, without being hindered by national sovereignty. The responsibility to protect thus postulates a "responsible sovereignty", which is similar to the principle of "common but differentiated responsibilities of States"[268]– advocating the right of a State to intervene despite the sovereignty of the other State, under conditions that, in principle, must be strictly enumerated in a limitative way. The responsibility to protect is based upon three pillars[269] that are indicative of the graduation of the reaction: firstly, the main responsibility of the State to ensure the protection of civilians in its territory, whether they are its nationals or not; then, the responsibility of the international community to help States to protect populations against those crimes and to strengthen their national capacity; finally, the possibility for the Security Council to take action, if need be, in a “timely and decisive manner” in accordance with Charter VII of the Charter of the United Nations. At that point, the "prevention" component would be replaced with the "reaction" component. The modalities for implementation of the responsibility to protect are in this way identified; they are also limited to acts of genocide, war crimes, ethnic cleansing or crimes against humanity. Examples of implementation of the responsibility to protect include Libya[270] and Côte d’Ivoire[271]. In these cases the Security Council referred the situations in those countries to the International Criminal Court, which shows the relationship between the responsibility to protect and the international criminal justice as a means of preventing the most serious international crimes. Therefore, in view of the establishment of a crime of ecocide in the category of the most serious crimes, it would be coherent to consider

[266] See Resolution of the Institute of International Law, *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*, Krakow Session, 2005, Rapporteur : M. Christian Tomuschat, adopted on 26 August 2005.
[267] 2005 World Summit Outcome, paras. 138 and 139.
[268] See Principle 7 of the Rio Declaration on Environment and Development, 12 August 1992. See reference to that principle made in Art. 20 of the Draft Ecocrimes Convention and Art. 22 of the Draft Ecocide Convention.
[269] See the Report of the Secretary-General: Implementing the responsibility to protect, 12 January 2009.
[270] See Security Council resolutions 1970 (2011) and 1973 (2011) concerning the situation in Libya.
[271] See the Security Council resolutions 1975 (2011) and 2062 (2012) concerning the situation in Côte d’Ivoire.

expanding the circumstances giving rise to the responsibility to protect to situations where there is a risk that a crime of ecocide be committed or is being committed. The idea of expanding the responsibility to protect to cover natural disasters was supported by a number of States, but was ultimately not adopted because it was considered too broad. Circumscribing the extension of the responsibility to protect to the crime of ecocide rather than to any natural disaster could be an acceptable solution. It would undoubtedly be an additional prevention tool, even if, in matters related to the crime of ecocide more so than for other supranational crimes, the need for a resolution of the Security Council necessarily implies the selection of situations and the possible fear by developing States that such a situation gives rise to an additional basis for interfering with their internal affairs.

Proposal n° 6. Establishment of the crime of ecocide:

6.1. **Ecocide could be defined** as any "intentional acts committed in the context of widespread and systematic actions that have an adverse impact on the safety of the planet"

6.2. **Expanding the scope of application of the rules concerning the most serious international crimes to govern the crime of ecocide** : non-applicability of the statute of limitations, limitation of amnesties, universal jurisdiction

6.3. **Applying the notion of responsibility to protect to the crime of ecocide**

CHAPTER 2
ADAPTING CRIMINAL LAW TO THE SPECIFICITY OF STAKEHOLDERS INVOLVED

The adaptation of criminal law to environmental crime also involves taking into account the specificity of the persons directly involved, whether they are the offenders, starting with transnational corporations (I) or the victims such as associations for the protection of the environment (II).

I. – CONSIDERATIONS ABOUT THE PERPETRATORS OF OFFENSES

International environmental crime has a collective dimension that most often involves companies whose setting-up and the main activities they carried out are lawful (A), and that may also involve mafia-type criminal organizations (B).In both cases, the criminal response is nowadays inadequate and insufficient to address the organizational aspect of environmental crime, which requires expanding the traditional modalities of participation in the commission of offenses (C). In any event, those prosecuted should always be able to avail themselves of the highest standards of guarantees in terms of respect for human rights (D).

A. – - *Expanding criminal liability of legal entities at the international level*

Reducing impunity of transnational corporations – The most significant environmental cases in recent times show the involvement of major company groups such as the American company Chevron in Ecuador[272], the Dutch company Trafigura in Côte d'Ivoire or the British company BP in the Gulf of Mexico, etc. The issue of the responsibility of transnational corporations is becoming increasingly apparent as a result of the internationalization of trade exchanges and its counterpart, the internationalization of crime, in particular, environmental crime[273]. It should be noted that challenges in terms of responsibility for the environmental crimes committed by these companies or their employees are numerous[274]. These challenges stem, firstly, from the fact that transnational corporations are composed of a myriad of subsidiaries under the aegis of their respective parent companies and from a legal viewpoint they are not moral persons to which legal responsibility can be attributed. Moreover, the above challenges also result from the difficulties in disentangling the complex legal links interwoven among the commercial entities incorporated under different domestic legal systems and, therefore, different applicable laws. This complex situation gives rise to the so-called "organized

[272] See the contribution by K. MARTIN-CHENUT and C. PERRUSO, "L'affaire *Chevron-Texaco* et l'apport des projets de Conventions *Écocrimes* et *Écocide* à la responsabilisation pénale des entreprises transnationales" *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 67.
[273] This is reflected, especially, in the resolution of 26 June 2014 of the Human Rights Council aimed at the "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights" (A/HRC/26/L.22/Rev.1).
[274] See the contribution by J. TRICOT *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 141.

irresponsibility[275]. Finally, an additional difficulty lies in the fact that the recognition of the criminal liability of legal persons depends on domestic legislation and the diverse notions thereof existing in each country. However, the States have so far not admitted that international criminal courts have jurisdiction to try legal persons for the international crimes in respect of which they could be held responsible. In other words, only national courts can try legal persons, including the crime of ecocide.

Expanding the conditions under which legal persons can be held responsible – In the framework of recently adopted international criminal law conventions, which also faced with similar problems in terms of corruption or, in particular, transnational organized crime, attempts have been made to expand the conditions under which legal persons can be held criminal liability. Nevertheless, the above conventions provided for extremely narrow definitions of, especially, legal personality, the nature of the responsibility that can be attributed to legal entities, that is, criminal, administrative or civil responsibility – as well as the different modalities of attribution of such responsibility, which however they do not specify. In this regard, States parties thus have a very broad margin of appreciation at the national level, which respects their sovereignty, but does not contribute enough to the process of harmonization of domestic rules. In order to strengthen the effectiveness of the prevention and prosecution of environmental crime, Art. 6 of the Draft Ecocrimes Convention and Art. 5 of the Draft Ecocide Convention propose ways that foster the possibility of holding legal persons liable, while respecting the sovereignty of States. First, they do that by establishing a **definition of "legal person"**, drawn upon European texts, in the following terms: "any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organizations"[276]. The definition here has been designed to cover commercial corporations, with the responsibility of States and public entities being governed by a special regime of responsibility not falling with the scope of application of conventions. Then, the specification of the **modalities of attribution of liability to legal persons** also represents an achievement that has been proposed in both draft conventions. These combine, on the basis of the current developments in economic and financial crime and as means of furthering the consolidation of the aforementioned achievements, the *identifying* model and the *organizational* model, which are two models of attribution of liability aimed at recognizing the responsibility inherent to legal persons[277]. Thus, it is proposed that legal persons can be held responsible for crimes against the environment, where such crimes have been "committed for their benefit, by any person who has a leading position within the legal person concerned, acting either individually or as part of the organ of the legal person" (identifying model)[278]. Legal persons could also be held responsible "where their

[275] M. DELMAS-MARTY, *Les forces imaginantes du droit (IV) – Vers une communauté de valeurs ?*, Paris, ed. du Seuil, 2011, p. 99.
[276] Definition built upon Art. 2(d) of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law. See Art. 1(3) of the Draft Ecocrimes Convention and Art. 5(4), of the Draft Ecocide Convention.
[277] See the contribution by J. TRICOT *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 141.
[278] See art. 6(1) of the Draft Ecocrimes Convention and Art. (5)(1) of the Draft Ecocide Convention.

lack of supervision or control has made possible the commission for their benefit" of a crime of ecocide or an ecocrime (organizational model). Finally, both drafts conventions specify that responsibility of legal persons shall not exclude criminal prosecution against natural persons who have participated in the commission of the crime concerned.

Encouraging the adoption of measures aimed at holding legal persons responsible for ecocrimes – Even though "group" crime continues to grow, legal persons are still not being held criminal responsible for the commission of international crimes, be they of a supranational or of a transnational nature [279]. International conventions regulating cooperation on criminal procedures providing for the liability of legal persons leave a large amount of discretion to States by not specifying the nature of such responsibility - be they administrative, civil or criminal. That is the approach adopted by the Draft Ecocrimes Convention, which is on this matter in line with the existing international law, especially, in terms of corruption and transnational organized crime. It goes without saying that it would be desirable, where possible, for States to foster the criminal responsibility of legal persons convicted of the commission of ecocrimes. Such extension of criminal responsibility on to legal persons would be in line with the recognition that transnational corporations should be under a general obligation to exercise a duty of care in respect of their dispersed activities.

Recognize the criminal responsibility of legal persons in cases of ecocide – As far as cases of ecocide are concerned, the draft convention differs from the existing international conventions in that it requires that States parties should establish, without prejudice to other forms of responsibility, the criminal responsibility of legal persons. This would be imply both showing the range of possibilities available to States to tackle impunity of legal persons and underscoring the difference concerning the nature and severity of ecocrimes and the crime of ecocide. Furthermore, this will also provide matter for current discussions on the recognition of criminal responsibility of legal persons for international crimes. This choice also reflected the criminal policy underlying the two categories of environmental crimes: the policy fostering harmonization of domestic criminal legislation on ecocrimes (that is, encouraging harmonization while respecting the margin of appreciation of States) and the policy promoting unification of the legal regime applicable to the crime of ecocide.

Proposition n° 7. Holding transnational corporations responsible:

7.1. Encouraging the adoption of measures aimed at holding legal persons responsible for ecocrimes

7.2. Recognizing the criminal responsibility of legal persons for crimes of ecocide

[279] See the contribution by J. TRICOT *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 141.

B. – *Strengthening the fight against ecomafias*

Becoming aware of the importance of ecomafias worldwide and coordination of an appropriate response to this type of crime – International reports consistently highlight the links between environmental crime and organized crime. Thus, as recalled by the report published in 2013 by the International Fund for Animal Welfare on the global security implications of the illegal wildlife trade, the United Nations considered the illicit trade in wildlife species and woods as a "serious form of organized crime". 280 Specifically, it can be argued that there are obvious similarities between groups or individuals taking part in organized crime and in the trafficking in wildlife, natural resources or waste. Al these activities involve detailed planning, significant financial support, use or threat of violence, international management of shipments, sophisticated forgery and alteration of permits and certifications, well-armed participants with the latest weapons, opportunity for massive profits and capacity to launder enormous amounts of cash281. Organized criminal groups are attracted to trafficking in protected species, natural resources, or waste, to the extent that, compared to other transnational criminal activities, **environmental crime has a small risk of detection and relatively light fines and jail sentences** : in other words « high benefits, low risks ». For all these reasons, the establishment of a harmonized system of environmental protection through criminal law requires specific consideration of the environmental crimes committed by mafia organizations through the expansion of the scope of application of the international rules dealing with **organized crime**[282]**.** This requires, inter alia, the recognition of criminal liability on the sole ground of participation in an organized criminal group, the implementation of proactive investigative techniques and investigation and prosecution, such as surveillance and undercover operations, controlled deliveries, generalized wiretapping or electronic surveillance, as well mechanism of international cooperation in police and judicial investigations[283].

Proposal n° 8. Applying rules concerning organized crime to ecomafias (tools specific to transnational organized crime: specific investigative techniques and investigation and prosecution, undercover operations, wiretapping, electronic surveillance)

C. – *Expanding forms of participation in environmental offenses*

Adapting the forms of participation in environmental offenses– In the draft conventions against environmental crime and against ecocide, the provisions concerning

[280] "Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade", available at: http://www.ifaw.org, last accessed November 2014.
[281] *Ibid*.
[282] United Nations Convention against Transnational Organized Crime of 15 November 2000 ("Palermo Convention").
[283] See contribution by I. RODOPOULOS *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 165.

participation in offenses [284] are patterned after traditional methods of attribution of criminal responsibility - commission, complicity, organization or giving the order to commit the offense. These classic provisions are additional to elements aimed at broadening the scope of participation in environmental crimes according to their specificities, and especially, taking into account the organized nature of many of those offenses that are committed in connection with other transnational crimes (illegal trafficking, corruption, etc.) and also to the ensuing difficulty to determine the individual behaviors within the organization.

In terms of ecocrimes, the traditional forms of attribution of criminal responsibility are patterned after the model of the United Nations Convention against Corruption. In addition to the commission of a given offense, "participation in any capacity such as an accomplice, assistant or instigator" is also included in the above provisions, leaving then a considerable margin of discretion to States Parties[285]. Furthermore, in order to address the organized nature of these crimes, a broader notion of participation in the crime concerned is proposed where this is committed by a group of persons acting with a common purpose[286]. The idea here is to innovate by reference to the United Nations Convention against Transnational Organized Crime (the "Palermo Convention"), widely ratified[287], in order to tackle environmental crime arising from activities carried out by an organized criminal group. Nevertheless, it is proposed not to follow the threshold of four years for a crime to be qualified as a serious crime within the meaning of Article 2 of the Palermo Convention, because of the traditionally mild punishment provided for environmental offenses.

Regarding participation in the crime of ecocide, it should be noted that this wasadmitted by international criminal case law concerning international criminal responsibility for supranational crimes. Moreover, the conditions giving rise to such responsibility, which have been developed by international criminal tribunals, introduce,in particular, a broader conception of complicity, have been enshrined in Art. 25 of the Rome Statute, upon which Art. 3 of the Draft Ecocide Convention has been heavily drawn. This article first provides for traditional assumptions in criminal law concerning the commission of a given offense (para. (a)) and the attempt to commit a crime (para. (e)). It then covers those assumptions that are common for the most serious international crimes, in which the perpetrator has not himself/herself physically committed the crime concerned but he/she ordered, solicited or induced its commission (para. (b), facilitated the commission of such a crime, by aiding, abetting or otherwise assisting in the perpetration of the crime, including providing the means for its commission (para. (c)), contributed in any other way to the commission of such a crime by a group of persons acting with a common purpose (para. (d)), which does not refer to the notion of transnational organized crime as defined in the United Nations Convention,

[284] See Art. 5 of the Draft Ecocrimes Convention and Art. 3 of the Draft Ecocide Convention.
[285] See Art. 5(1) of the Draft Ecocrimes Convention .
[286] See Art. 5(3) of the Draft Ecocrimes Convention and Art. 3 of the Draft Ecocide Convention .
[287] By the end of 2014, 183 States were a party to the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, Doc. A/55/383.

but rather to the concept of joint criminal enterprise developed by international criminal tribunals case law and subsequently applied by the International Criminal Court. Furthermore, it might also be interesting to draw upon Art. 28 of the Rome Statute, although this assumption was provided for in the Draft Ecocide Convention, concerning the responsibility of other superiors to hold business leaders responsible for crimes committed by their subordinates, where business leaders "knew or should have known" that their employees were committing or about to commit crimes and they failed to take all necessary measures to prevent their commission or to submit the matter to the competent authorities[288].

In both scenarios, it is all about expanding the forms of participation in the commission of crimes to adapt them to the specificity of environmental crimes in order to ensure their widest possible repression, while maintaining the principle of individual criminal responsibility.

Proposal n° 9. Harmonizing the forms of participation in environmental crimes:

9.1. Applying to ecocrimes the forms of participation in organized crime

9.2. Applying to the crime of ecocide the forms of participation in the most serious international crimes (extended complicity, joint action, etc.)

D. – *Ensuring respect for the rights of prosecuted persons*

Adoption of measures aimed at repressing environmental crime in compliance with international law on human rights– Since the 1970s, international criminal law conventions have gradually provided for the rights of prosecuted persons for offenses defined therein. International law on human rights has thus been taken into account by draft conventions to ensure that States Parties shall grant prosecuted persons a number of guarantees, beginning with "fair treatment at all stages of the proceedings"[289], that is, from arrest until trial. This is reinforced by the requirement that any person prosecuted for ecocrimes or the crime of ecocide shall be guaranteed the "enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present. This provision does not address the differences among national criminal legislation in terms of human rights, but is line with the idea of harmonizing the treatment of this type of crimes based upon the standards applicable to other international crimes according to the criminal codes and the criminal procedural codes of the States Parties. Finally, it is also envisaged that any foreign person arrested and detained for a crime defined by the draft conventions should be able to "communicat[e] immediately with the nearest [...] representative of the State of which he/she is a national"[290], which is an additional guarantee of respect for the rights of the person prosecuted by the

[288] Such a provision is also encouraged, in particular, by the organization *End Ecocide*, see http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2013/000002%20;%20https://www.endecocide.org/fr/.
[289] See Art. 13 of the Draft Ecocrimes Convention and Art. 11 of the Draft Ecocide Convention.
[290] See Art. 13(3) of the Draft Ecocrimes Convention and Art. 11(3) of the Draft Ecocide Convention.

custodial State.

Moreover, in the specific framework of extradition, the above draft conventions provide for an exception to the obligation to extradite of the requested State "if [the latter] has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons"[291].

All these matters are in line with existing conventions and could not certainly give rise to opposition from States.

II. I. – CONSIDERATIONS ABOUT THE VICTIMS OF CRIMES

Strengthening the position of victims in the process of punishing environmental crimes– Transnational environmental offenses are often committed in vulnerable countries, where governments' actions are aimed at fostering the development of their countries or sometimes at settling domestic or international conflicts rather than protecting the environment and victims of pollution. As way of example, in the *Probo Koala* case, compensation for victims suffering from health problems as a result of the dumping of toxic waste around the city of Abidjan has for the most part been handled by the Ivorian State. Most of the victims did not participate in the proceedings instituted before national courts. Regarding the trafficking of rosewood in Madagascar, local environmental organizations are fully aware of the identity of perpetrators of that traffic, although to date, Malagasy civil society has not been authorized to be a party to civil proceedings, even if certain provisions of national criminal law prohibit the trafficking of precious wood. Under these conditions, the effectiveness of the common system of protection of the environment through criminal law requires an enhanced participation of civil society in criminal proceedings concerning environmental matters. Such an evolution is based, among others, upon the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (the "Aarhus Convention"). This would imply **the expansion of the right of civil society to become a party in civil proceedings**, including associations for the protection of the environment, victims' associations, traditional clans – fo roffenses against the environment[292] Furthermore, it would also be advisable **to give victims of environmental and health damage an eminent position in the determination and implementation of agreements concerning restorative justice**. Finally, it would also be appropriate, to the extent that international environmental criminal law would also aim to protect such vital interests as the protection of the environment, public health and, more broadly, the planet, **to grant civil society the right to issue a warning**, coupled with the resulting protection. This explains why the draft Ecocide Convention provides that citizens as well as the Group for Research and Enquiry on Environmental matters

[291] See Art. 16(7) of the Draft Ecocrimes Convention and Art. 14(7) of the Draft Ecocide Convention, which have been drawn upon Art. 44 of the United Nations Convention against Corruption.
[292] See Art. 14 of the Draft Ecocrimes Convention and Art. 12 of the Draft Ecocide Convention.

(GREEN) [293] can refer matters to the International Prosecutor for the Environment[294]concerning actions causing intentional, serious and systematic damage to environment.

Proposal n°10. Facilitating victims' access to justice

10.1. Expanding the right of civil society to institute criminal proceedings

10.2. Involving civil society in restorative agreements

Proposal n° 11. Granting civil society the right to issue awarning, in particular, by referring matters to the International Prosecutor for the Environment or to the Group for Research and Enquiry on Environmental matters (GREEN)

[293] See art. 17(2) of the Draft Ecocide Convention.
[294] See art. 20(2) of the Draft Ecocide Convention.

CHAPTER 3
STRENGTHENING PREVENTION OF ENVIRONMENTAL CRIMES

The Importance of prevention in the framework of environmental law – In the environmental and health areas, the adage that "prevention is better than cure" is crucial, given the importance of the interests involved. This explains why the prevention principle is a fundamental principle of environmental law that pervades all the fields concerned. In international environmental law, this idea was clearly expressed in the decision rendered by the International Court of Justice in the Gabčíkovo-*Nagymaros* case in 1997, according to which the Court affirmed that "in the field of environmental protection, vigilance and protection are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage". 295 In the same direction, the International Labour Organization Convention concerning the Prevention of Major Industrial Accidents requires State parties to « implement […] a coherent national policy concerning the protection of […] the public and the environment against the risk of major accidents"[296]. Under European law, the Directive 2004/35/EC on environmental liability expressly addresses "prevention and remedying" of environmental damage, which in addition is part of its title. As for French law, the prevention principle is given priority, being enshrined in Art. 3 of the Charter for the Environment, according to which "[e]veryone shall […] avoid the occurrence of any damage which he or she may cause to the environment". Even more broadly, the French Constitutional Council stated in 2011 that everyone is to comply with a duty of care concerning the occurrence of damage that could result from their own actions".297 Consequently, it is apparent that, at international, European and French law level, an obligation of prevention and vigilance exists concerning the occurrence of damage to the environment, which is to be enforced by States. This obligation finds a natural extension in the field of criminal law.

Imposing an obligation on States to ensure prevention and vigilance concerning environmental crime– The general obligation to ensure prevention of environmental violations that is apparently imposed on States applies to environmental crime. This is expressly stated in the Convention on the Protection of the Environment through Criminal Law, which specifies in its preamble that "imposing criminal […] sanctions on legal persons can play an effective role in the prevention of environmental violations". However, despite this provision, the Convention of the Council of Europe, like any other international text, does not contain any specific article dealing with the prevention of environmental crime. Under these conditions, in order to meet the urgent requirement of prevention in environmental matters, and taking into account the recent international texts[298], it would be appropriate that prevention plays a specific role in future conventions,

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[295] ICJ, *Case concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, judgment of 25 September 1997, *ICJ Reports 1997*, p. 78, para.140.

[296] See Art. 4(1) of the ILO Convention n° 174, adopted in 1993, which entered into force on 3 January 1997.

[297] Cons. const., 8 April 2011, n° 2011-116, QPC, *Rev. dr. immob.*, 2011, p. 369, note by F.-G. TRÉBULLE.

[298] See, in particular: Art. 18 of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims; chap. III of the Council of Europe Convention on preventing and combating violence against women and

regardless of whether they deal with ecocrimes in general terms or specifically with ecocide. As regards, more specifically, the issue of determining whether it is advisable to underline the significance of the obligation of States to prevent the crime of ecocide, reference is made to the stance taken by the International Court of Justice in a case concerning the application of the convention on the prevention and punishmentof the crime of genocide in which the Court specified that States parties are under the positive obligation "to take such action as they can to prevent genocide fromoccurring"[299]. Consequently, failure to take all the possible measures aimed at preventing the occurrence of genocide will give rise to the violation of the obligation to prevent a genocide, as the State's duty to act "arises at the instant that theState learns of, or should normally have learned of, the existence of aserious risk that genocide will be committed"[300]. Given that the obligation in question is thus "one of conductand not one of result"[301], the Court specifies that "for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them"[302]. Although it should be borne in mind that the Court, in that decision, explicitly reserved this interpretation to the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide[303], this analysis can be useful in the field of ecocide, which as in the case of genocide, falls within the category of the most serious international crimes.

Modalities of prevention of environmental crimes – Both, the draft ecocrimes and ecocide conventions contain [304] a specific chapter on preventive measures. More specifically, States are invited to **cooperate**, particularly, through the exchange of information, to counter preparations in their respective territories for the commission of crimes against the environment within or outside their territories. Moreover, the prevention of ecocrimes and the crime of ecocide could require **adequate training for the relevant professionals or increased public awareness** of the existence, the causes and the gravity of environmental crime. Moreover, for the purposes of deterrence, it would be appropriate to strengthen control by the competent authorities in the fight against environmental crime. Furthermore, States could encourage good practices to prevent environmental crime. This could simply take the form of measures aimed at fighting corruption or a duty of care on financial professionals for them to detect suspicious transactions that might finance environmental crime. On this basis, it would be possible to create a list of non-cooperative countries, as is the case in the field of anti-money laundering, coupled with a list of virtuous countries[305], as suggested by the

domestic violence of 7 April 2011, which entered into force on 1 August 2014.

[299] CIJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide(Bosnia and Herzegovina v. Serbia and Montenegro)*,Preliminary Objection, Merits, Judgment of 26 February 2007, *ICJ Reports 2007*, p. 43 (para.427).

[300] *Ibid*.(431) and (432).

[301] *Ibid*.(430).

[302] *Ibid*.(438).

[303] *Ibid*.(429).

[304] See Art. 4 of the Draft Ecocrimes Convention and Art. 2 of the Draft Ecocide Convention.

[305] See the contribution by C. ROBACZEWSKI *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 223.

European Commission in relation to the fight against endangered species[306]. More specifically, when dealing with the prevention of the crime of ecocide, it is advocated that a **Group for Research and Enquiry on Environmental matters** (GREEN)[307] be created. This group would play a monitoring role concerning the general situation of environmental crime and an investigative role in certain cases of particularly serious damage caused to the environment.

Proposal n° 12. Requiring States to take appropriate steps to prevent the commission of environmental crimes (information and awareness campaigns, research and education programs)

Proposal n° 13. Promoting good practices to prevent environmental crime and adopting measures to fight corruption (creation of a list of virtuous countries and a list of non-cooperative countries)

Proposal n° 14. Improving the exchange of information among States and relevant regional and international institutions in the field environmental crime

Proposal n° 15. Improving training of professionals involved in the fight against environmental crime (judiciary, customs, police, etc.)

Proposal n° 16. Strengthening controls by the competent authorities in the fight against environmental crime, be they administrative, police or customs authorities

Proposal n° 17. Imposing on financial professionals an obligation of vigilance to detect suspicious transactions that might finance environmental crime

[306] See Communication from the Commission to the Council and the European Parliament of 7 February 2014 on the EU Approach against Wildlife Trafficking, COM(2014) 64.
[307] See Art. 20 of the Draft Ecocide Convention.

CHAPTER 4
TIGHTENING SANCTIONS AGAINST ENVIRONMENTAL CRIMES

Towards a flexible harmonization of sanctions against environmental crimes– Harmonization of criminal law, in general, and that of environmental criminal law, in particular, have not resulted in the creation of a list of the sanctions to be imposed[308], although it is well known that the existing disparity among countries in the level of sanctions against environmental crimes incites the perpetrators of environmental damage to go *forum shopping*. To address this situation, the question arises as to whether the solution would be to extend the harmonization of environmental offenses to cover the harmonization of the corresponding sanctions. One thing is certain: the task is challenging, given the diversity of sentencing ranges within States. That is why, it is not appropriate to move towards a stronger harmonization, since the objective is to avoid affecting the internal consistency of the sanctions systems applicable to environmental offenses. The resolution of the tension between homogeneity, the respect for sovereignty and State identities would rather urge States to identify and group "sanctions" in the broadest sense possible, based upon common goals[309], which may be associated either with a punitive justice (I) or a restorative justice (II).

I. – ADAPTING PUNITIVE JUSTICE

Adapting sanctions to the gravity of the crimes **–**In the *Probo Koala* case, the multinational corporation Trafigura was ordered to pay a EUR 1 million fine while its annual turnover amounted to nearly USD 73 billion. This is just one example, among many others, **of the often derisory nature of sanctions imposed against environmental crimes**, which are thus not a good deterrent. To end the profitability of environmental crime and enhance the effectiveness of the criminal justice response in this field, it is necessary to adapt the sanctions to the severity of environmental crimes. This was the case, for example, in France with maritime pollution offenses in the framework of the *Erika* proceedings, where the maximum fine, which amounted to EUR 375,000, was deemed to be very low taking into consideration the gravity of the misconduct by those primarily involved in the case and the scale of the disaster, which led to an increase of the fine likely to reach EUR 10.5 million now. Traditionally, the proposed conventions require States Parties to "take such measures as may be necessary to impose effective, proportionate and dissuasive" sanctions on those persons convicted for crimes against the environment, regardless of whether the these constitute an ecocide or an ecocrime or have been perpetrated by a natural person or a legal entity.

The question of sanctions has raised a number of issues depending on the category of the crime concerned. Regarding ecocrimes, the finding that they are not adequately punished in domestic law prompted the group to propose a *quantum of sanction* that

[308] See contribution by A. NIETO MARTÍN *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 183.
[309] *Ibid*.

should reach a minimum threshold of four years' imprisonment. Based upon the United Nations Convention against Transnational Organized Crime, that threshold would have allowed both to restrict the application of the Convention to relatively serious offenses and required States to impose effective sanctions. However, since that proposition was not very much rooted in conventional practice, it was rejected on grounds of pragmatism. As for ecocide, it was envisaged some time ago that the *nature of sanctions* were specified and that additional wording were added based upon Article 77 of the Rome Statute, in the following terms: "Such sanctions may include imprisonment, the imposition of a monetary fine, a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties." This solution, which is more consistent with the logic underlying the unification of the law applicable to supranational crimes, was abandoned in favor of an approach that was more respectful of national sovereignty and the diversity of domestic legislation concerning criminal sanctions.

Ultimately, the proposed draft conventions are based upon the guidelines on criminal policy of the Council of Europe that is the only international organization which has held an in depth discussion on the issue of sanctions[310]. Neither a precise scale of penalties is provided nor the type of punishment (i.e. custodial sentences or fines) for individuals is specified in keeping with the national margin of appreciation. The harmonizing effect stems implicitly from the requirement that the gravity of the crime should be taken into account and that equivalent sanctions should be established as provided for in internal criminal legislation for similar offenses. In addition, non-restrictive criteria to guide the choice and determination of the degree of severity of the sanction - the economic benefit from the infringement, the level of responsibility of the offender, the organized nature of the crime, etc. - are likely to further promote the harmonization of sanctions, depending on the severity of the offenses under the criminal legislation of the States Parties.

Adapting sanctions to the status of perpetrators of the offenses – Effective criminal sanctions must be adapted to the status of the perpetrators and their specificities. Consequently, the draft conventions deal with sanctions in separate provisions, depending on whether they concern natural[311] or legal persons[312]. This choice also reflects the priority given to the purpose of punishment. Thus, in the case of sanctions concerning individuals priority is given to prevention, and in the case of legal persons, priority is given to compensation[313]. As for the former, the above drafts are in line with international conventions regulating cooperation on criminal procedures by providing a large margin of appreciation to States in conformity with the scale of values of their respective criminal systems. However, the provisions on sanctions against legal persons are of a more innovative character.

Establishing specified graduated sanctions for transnational corporations – While

[310] *Ibid*.
[311] See Art. 7 of the Draft Ecocrimes Convention and Art. 6 of the Draft Ecocide Convention.
[312] See Arts. 8-11 of the Draft Ecocrimes Convention and Arts. 7-9 of the Draft Ecocide Convention.
[313] See the contribution by A. NIETO MARTÍN *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 183.

transnational corporations bear a major responsibility for the commission of environmental crimes, the most common sanction (if not the only one) provided for by domestic law against them is the imposition of fines. However, this sanction has a double restriction: where the sanction concerned is too low, there is a "tendency to consider it as an additional production cost that could be passed on to consumers" and, where it is too heavy, it can cause excessive collateral damage on workers or to the creditors of the entity in question[314]. Therefore, the proposed provisions are of relatively low degree of detail as to the range of sanctions that States could introduce into their criminal legislation, so that the diversity of criminal law traditions can be respected, enabling States to determine the administrative or criminal nature of the sanction envisaged.

The proposed draft conventions also provide **a table of a non-exhaustive nature of different types of sanctions that may be imposed against legal persons** (fines, prohibitions, including gaining access to a regulated profession related to the environment or concluding public procurement contracts[315], confiscation and seizure, etc.). The various sanctions envisaged reflect the **graduation necessary to address the different categories of companies** : companies whose criminal activity is sporadic or isolated (fines with restorative and preventive purposes); recidivist companies (sanctions with a corrective purpose, namely, those of a structural character such as the appointment of a judicial representative), hazardous companies (prohibitions, such as the temporary closure of establishment until the danger has been eliminated) and, finally, companies linked to organized crime (dissolution and final closure of facilities for neutralization purposes). The proposed criteria that serve as a basis for choosing and determining the sanction to be imposed in a given case facilitate the distinction between these different categories of companies: the economic benefit from the violation, including savings that may have resulted from the failure to adopt measures to protect the environment; the repeated offenses against the environment within or by the corporation; the organized nature of the crime, etc.[316] In the future, it would be conceivable to improve clarity and grant sentencing authorities the power to increase the fines of companies having perpetrated environmental offenses that result in high profitability rates to 10% of average annual turnover of the company concerned.

To ensure **individualization of the sanction concerned**, the above draft conventions provide for the conditions under which States Parties could decide not to prosecute, punish or execute a given sanction against a legal entity, especially in cases where the company in question would have properly complied with its internal measures of organization and would have warned, voluntarily and immediately, the relevant authorities against the commission of the offense or have compensated the damage caused to the victims[317]. Finally, an article contained in both draft conventions, which is modeled on Article 12 of the United Nations Convention against Transnational Organized Crime,

[314] *Ibid.*
[315] See, in this regard, theDirective 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.
[316] See Art. 9(3) of the Draft Ecocrimes Convention and Art. 8(3) of the Draft Ecocide Convention.
[317] See Art. 10 of the Draft Ecocrimes Convention.

specifically deals with confiscation and seizure of proceeds of crime or property and the equipment destined for use in the commission of the offense[318].

Proposal n° 18. Individualizing sanctions by establishing severity criteria : economic profit from the crime, according to the perpetrator of the offense (including public officers), prompt compensation of damage, organized nature of the crime, severity of the damage

Proposal n° 19. Enabling courts to increase the fines imposed oncompanies with high rates of return, which intentionally perpetrate environmental offenses, to 10% of their annual turnover

Proposal n° 20. Adapting sanctions to the status of the perpetrators and defining specific sanctions for legal persons, including:

– **Fines** ;

– **Prohibitions** : dissolution of the legal person; temporary or permanent closure of premises or establishments of the legal entity concerned; temporary or permanent suspension of all or part of the activities carried out by the legal person in the course of which the offense was committed, incited or covered up; withdrawal of licenses, authorizations or concessions; prohibition against receiving public subsidies and financing and entering into contracts with public administrations;

– **Publication of the conviction**. Where there are a number of unidentified victims, such publication shall ensure that the victims become aware of their right to claim compensation;

– **Appointment of a judicial officer** to ensure that the legal person concerned takes the organizational measures aimed at preventing additional crimes against the environment or that it diligently implements restoration or compensation measures

The issue of adaptation of sanctions to the *nature* of the environmental crimes is not reflected in the punitive component. Rather, it concerns the restorative justice model.

II. – ADOPTING THE RESTORATIVE JUSTICE MODEL

Convenience of introducing a restorative justice model into the field of environmental crime–The establishment of an international environmental criminal law requires taking into account the specificity of crime it addresses, given the offenders and the main purpose of the imposition of sanctions. As such, the environmental crimes that cause damage to the environment, the persons or the safety of the planet fall basically within corporate crime. Now **the main purpose of the imposition of sanctions against legal persons is the restoration of the damage caused**[319]**.** Under these conditions, harmonization of criminal sanctions concerning environmental matters involves

[318] See Art. 11 of the Draft Ecocrimes Convention and Art. 9 of the Draft Ecocide Convention.

[319] See the contribution by A. NIETO MARTÍN *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 183.

underlining the significance of the restoration of the interests adversely affected by the conduct of the offender. This search for restoration of damage, which is provided for in Article 8 of the Convention of the Council of Europe of 1998 on the protection of the environment through criminal law and also established in the French Ordinance of 11 January 2012 on simplification, reform and harmonization of the set of provisions concerning administrative and judicial enforcement powers[320] is one of the goals pursued by restorative justice, which deserves further elaboration in the framework of the future international instruments that will deal with protection of the environment through criminal law.

According to the Economic and Social Council of the United Nations, "restorative justice means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator"[321]. The draft Ecocrimes and Ecocide Conventions aim at expanding the scope of application of restorative justice to cover environmental crime[322], so that criminal sanctions become corrective sanctions to repair the interest affected in the past and protect the interest concerned for the future. As such, those States that would be a party to this kind of conventions should "take such measures as may be necessary to […] ensure restoration of damage to the environment and compensation for victims"[323].

Guidelines for restorative justice in connection with environmental crime– Restorative justice applied to environmental crimes have several characteristic features[324].

Firstly, restorative justice applied to environmental crime is **a justice that provides reparation**. Reparation here is to be understood broadly, since it is not only about repairing ordinary damage caused to individuals through the environment, but also the damage affecting the environment as such. Furthermore, repairing the damage caused as a result of the commission of environmental offenses requires taking into account all the adverse effects that the conduct in question has had on the community or social group concerned. This paves the way for symbolic reparation to compensate for the social and cultural damage that environmental violations could have caused. For illustration purposes, the unlawful destruction of a sacred land to aboriginal people could be repaired by issuing a public apology or by means of an assistance program providing aid to the affected population. From a formal point of view, the repair procedures for an environmental offense should be stipulated in a "**restorative agreement**" with the participation of all those parties having been affected by the wrongful conduct.

Secondly, restorative justice applied to environmental crime is **a justice of a deliberative and participative nature**. This paves the way for the community adversely

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[320] Ordinance n° 2012-34 of 11 January 2012, *published in the Official Gazette* on 12 January 2012. This text contributes to the widespread adoption of measures aimed at the restoration of damage that are applicable to all of the offenses provided for in the Environmental Code (art. L. 173-5, in particular, para.2).

[321] "La justice restaurative, Rapport du Conseil national d'aide aux victimes", May 2007, available at: http://www.justice.gouv.fr (last accessed November 2014).

[322] See, to that effect, R. WHITE, *Transnational Environmental Crime*, Routledge, 2011, p. 131.

[323] See art. 8(1) of the Draft Ecocrimes Convention and Art. (7)(1) of the Draft Ecocide Convention.

[324] For further exploration of the issue, see the contribution by A. NIETO MARTÍN *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 183.

affected by the environmental offense to participate in the debate on the determination of the sanction to be imposed. In France, it is regrettable that the generalization of the plea bargaining agreement[325] in the environmental field introduced by the Ordinance of January 2012 was not accompanied by a right of monitoring and involvement for the benefit of the associations for the protection of the environment and competent public institutions, concerning the appropriateness and proportionality of the measures aimed at ensuring the reinstatement of the environment that may be imposed on the operator. In the future, it would be appropriate to foster participation of the parties concerned in the adoption of the adequate remedial measures.

Thirdly and lastly, restorative justice in the field of environmental means **a consensual justice**, that is to say, justice is only possible with the consent of the perpetrator of the offense. This implies that the company that caused a serious damage to the environment voluntarily accepts to pay compensation for that damage. From the companies' perspective, participation in this type of procedure is a way to protect their reputation and, in the best-case scenario, become a leader in the field of compliance with environmental legislation.

Forms of restorative justice in the field of environmental crime– In practice, the companies involved in the commission of environmental offenses could conclude restorative agreements with the parties concerned (public environmental agencies, local and regional authorities, associations for the protection of the environment, residents, indigenous peoples, etc.), for example, through the mediation of an independent environmental administrative authority. The content of such an agreement would vary depending on the circumstances and could encompass **measures for remedying the damage** caused to the environment and individuals, a commitment by the company, which could take the form of a **compliance program** conceived to improve its environmental policy, the **issuing of public apologies** to the local communities affected by the damage caused or the **organization of a meetingwith the victims** and a **visit of the site that was affected by the damage**, the funding of **measures aimed at fostering local development**, the **appointment of a judicial officer** to ensure the proper performance of the agreement, or **establishment of a trust fund for the prevention of any** future occurrence of damage.

Towards the establishment of an international compensation fund for the environment and public health– Given the global nature of the environmental crime, which can have transnational implications that transcend the boundaries of time, it would be appropriate to consider the establishment of an international compensation fund for the environment and public health. At present, such a fund would be financed by monetary fines imposed in cases of ecocrimes and ecocide, monies paid by companies in compensation for any irreversible damage caused to the environment, as well as the additional funding granted by developed countries or by companiesdepending on the risks they create. In the future, the fund may finance projects for the protection of the

[325] Art. L. 173-12, I of the Environmental Code.

environment, human health and more broadly, the safety of the planet. In any case, such a body would not be intended to replace organizations of a similar character established at the national or regional level. Indeed, harmonization of the protection of the environment through criminal law should be primarily supported by States in order to be effective and efficient. This feature is one of the essential aspects of a global environmental criminal justice.

Proposal n° 21. Establishing guidelines for restorative justice in the field of environmental crime, including: measures aimed at ensuring the reinstatement of the environment; compensation for damages; compliance programs; financing of the compensation fund for the environment and public health; local development measures; and, as appropriate, symbolic reparation measures adapted to the cultural dimension of the environmental damage, which may take the form of apologies to the affected communities

Proposal n° 22. Establishment of an international compensation fund for the environment and public health

CHAPTER 5
LAYINGTHE FOUNDATIONS OF A GLOBAL ENVIRONMENTAL CRIMINAL JUSTICE

The term "global criminal justice"[326] is to be interpreted as a criminal justice system to be built around the national criminal justice (I) and the international criminal justice (II) based upon the vertical and horizontal complementary relationships linking up those two systems.

I. – STRENGTHENING THE CAPACITIES OF NATIONAL CRIMINAL SYSTEMS

Strengthening the capacities of national criminal systems is the traditional objective of international conventions on criminal matters. This objective can be achieved in several ways: increasing the number of States having jurisdiction to prosecute and try the offenses concerned (A), expanding the terms of international legal assistance (B) and, more generally, developing cooperation among countries (C)

A. – *Urging States to establish and exercise their criminal jurisdiction*

Moving from a sovereignty approach to a rationale of cooperation– Criminal matters are at the heart of sovereignty of States and have historically remained within their discretion: States are, in principle, free to establish that certain acts constitute an offense and punish more or less severely certain acts committed in their territory. However, given that crimes transcend their national borders, they also exceed the capacity of States to individually repress them. Indeed, the question arises as to how to effectively ensure the prosecution of an offense committed by a national of State A in the territory of State B causing victims of the nationality of State C ? *A fortiori*, the perpetrator of such a crime will seek refuge in a State D, whose criminal law does not criminalize the conduct in question. Consequently, State D will be neither able to arrest nor to prosecute nor to extradite the person concerned. Depending on the circumstances, the repression of the crime, which, however, would have affected several States proves to be complex, and in the worst-case scenario, impossible. Thus, in response to the internationalization of crime, States have concluded international conventions on criminal cooperation under which they are required to define the offenses covered by the conventions concerned in their domestic criminal legislation and establish courts having jurisdiction to prosecute and try those offenses. The Draft Ecocide and Ecocrimes Conventions follow that rationale.

Urging States to define environmental offenses in the framework of their criminal legislation –For a national court to exercise its jurisdiction, it is first necessary that the conduct in question is defined as an offense by its national criminal law. That is why international conventions on criminal cooperation urge States Parties to take all measures as may be necessary at the national level to criminalize the conduct covered by their provisions. This approach was adopted by the draft conventions in that they provide that

[326] See M. DELMAS-MARTY, « À crime global, justice globale », *Le Monde*, 30 January 2002.

"[e]ach State Party shall adopt such legislative and other measures as may be necessary to ensure that [the conduct defined in their provisions] constitute a criminal offense". States are thus required to criminalize in their domestic legislation the environmental damage falling within the scope of application of the conventions and, according to the streamlining approach as set out in the draft conventions, are also invited - albeit indirectly - to decriminalize the least serious offenses to the environment that are not covered by the draft conventions[327]. Nevertheless, on this matter, States have been left with the largest degree of flexibility, insofar that the draft conventions, confirming the accepted conventional practice, provide that States Parties "may adopt more strict or severe measures than those provided for in this Convention"[328]. This applies to the definition criteria for establishing both, offenses and fines.

Urging States to establish and exercise their jurisdiction in criminal matters –The traditional basis for criminal jurisdiction lies in a connecting factor between the offense and the State establishing and exercising its jurisdiction to prosecute and try the offense concerned. Consequently, the connecting factor confers jurisdiction on the State in whose territory the offense was committed, regardless of the nationality of the perpetrator or of that the victim of the offense (territorial jurisdiction). The State may also establish its jurisdiction on the basis of the nationality that links the former with the perpetrator (active personality jurisdiction) or with the victim of the offense concerned (passive personality jurisdiction), including when the offense was committed abroad[329]. The same solution applies to environmental crimes dealt with in the draft conventions[330]. It should first be noted that, States would in fact accept to be bound by the obligation, rather than a simple option, to criminalize in their domestic legislation the conduct defined in the draft conventions and to establish the jurisdiction of their courts to try those offenses, if committed in their territory (territorial jurisdiction) or by their nationals (active personality jurisdiction)[331]. This ensures that States primarily and directly concerned may, in any event, punish the offense. A simple *option* is maintained in the event that the only connecting factor between the State and the offense would be that one of the victims at least is a national of the State concerned (passive personality jurisdiction). The objective is to ensure that all States directly or indirectly concerned by the offense can, according to their domestic legislation, arrest, prosecute and try the alleged perpetrator of an ecocrime or an ecocide.

In any event, it would be appropriate, to ensure developing States full exercise of their jurisdiction, to encourage developed States to provide technical and financial assistance tailored to the needs of the former, such as training for professionals orthe provision of techniques for the adaptation of their respective domestic legislation. Finally, in addition

[327] See Art. 2 of the Draft Ecocrimes Convention that excludes from the scope of application of the Convention both, the most serious offenses (ecocide) and the least serious offenses, which are in turn considered to be falling within the scope of application of administrative law.
[328] See Art. 20 of the Draft Ecocrimes Convention and Art. 22 of the Draft Ecocide Convention.
[329] A so-called "real" or "protection" jurisdiction is also allowed where the interests of a given State may be at stake beyond its national boundaries.
[330] See the contribution by C. SOTIS *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 203.
[331] See Art. 12 of the Draft Ecocrimes Convention and Art. 10 of the Draft Ecocide Convention.

to strengthening the criminal jurisdiction of the judges, it would be important that each State establishes an autonomous High Environmental Authority that can control, and if necessary, sanction non-compliance with environmental regulations.

Establishing the obligation to prosecute or extradite– Also in a traditional manner, the draft conventions provide for the obligation of States Parties to establish their jurisdiction in cases where the perpetrator of an ecocrime or an ecocide would be present in their territory and where the perpetrator of such offenses would not be extradited to a State that has a more direct interest in the case[332]. These provisions are designed to prevent the alleged perpetrator of a ecocrime or an ecocide from finding refuge in the territory of another State Party: the latter, upon becoming aware of the presence of the alleged offender in its territory must arrest and detain the person concerned. The aforementioned obligation of the State Parties to establish their jurisdiction in the above cases is supplemented by an obligation to exercise that jurisdiction in an alternative manner, that is, either the State prosecutes or extradites (*aut dedere aut judicare*[333] clause) the person concerned, in the understanding that the obligation to "submit the case to its competent authorities for the purpose of prosecution" is imposed on the State Party "regardless of whether a prior request for extradition concerning the alleged offender was submitted"[334]. Therefore, "extradition is an option offered by the Convention to the State, while prosecution is an international obligation under the Convention, the breach of which gives rise to the responsibility of the State for the commission of an illicit act"[335]. Thus, the custodial State, which may have no interest in prosecution itself, can extradite the alleged perpetrator to another State Party directly affected, that so requests because the offense was committed or damage was caused in its territory, or to another State Party of which the offender is a national. Nevertheless, in the event that no State would be interested in prosecuting the offender, the State that arrested the perpetrator is under the obligation to prosecute and try the alleged offender. This is a standard provision in international conventions on criminal cooperation, often likened to a form of universal jurisdiction.

Coordinating the exercise of concurring jurisdictions– One feature that is worth noting, which is rather unusual in international conventions on criminal cooperation, is derived from the efforts made to streamline the exercise of jurisdictions. In the above example, assuming that all States concerned are parties to the ecocrimes and ecocide Conventions, each of them will (theoretically) have established as offenses the ecocrimes and the ecocide, and granted their respective national courts the authority to prosecute these offenses. However, the question arises as to how to coordinate the exercise of these concurrent jurisdictions? Should State D have a de facto priority even if it has no connection factor with the offense committed, except for the presence of the alleged perpetrator in its territory? If State D decides to extradite the alleged perpetrator, should

[332] See Art. 12(2) of the Draft Ecocrimes Convention and Art. 10 of the Draft Ecocide Convention.
[333] See Art. 15 of the Draft Ecocrimes Convention and Art. 13 of the Draft Ecocide Convention.
[334] See ICJ, *Questions relation to the Obligation to Prosecute or Extradite* (*Belgium v.Senegal*), Judgment rendered on 20 July 2012, para. 94.
[335] *Ibid*.(97).

it extradite the person concerned to State B (in whose territory the crime was committed) or to State A (which is the State of the nationality of the perpetrator of the offense)? So far, States have never established a hierarchical framework of criminal jurisdiction in international conventions on criminal cooperation. It seems unlikely, albeit regrettable, that States agree to establish an explicit hierarchy concerning criminal jurisdictions, which greatly undermines their sovereign discretion. However, it seems essential at least in cases of concurrent jurisdictions concerning the same offense, the States concerned are required to coordinate their actions,[336] starting with the exchange of information upon arrest of the alleged offender and throughout all the phases of the prosecution proceedings[337], with the International Prosecutor for the Environment playing a key role in matters related to ecocide.

Proposal n° 23. Urging States to establish an autonomous High Environmental Authority, which will have jurisdiction to control and, if applicable, sanction non-compliance with environmental regulations

Proposal n° 24. Urging States to establish their own jurisdiction over environmental offenses (territorial and personal jurisdictions and *aut dedere, aut judicare*– prosecute or extradite)

Proposal n° 25. Supporting the strengthening of capacity-building activities of judicial authorities of developing States (training for professionals, assistance in adapting domestic law, etc.) according to their specific needs

Proposal n° 26. Coordinate concurrent criminal jurisdictions by requiring States to cooperate and promote the most effective judicial system on a case-by-case basis

B. – *Strengthening modalities of mutual legal assistance*

Strengthening mutual legal assistance– The taking of evidence of the commission of an offense of an international character, and all the more so in the environmental field, may require the involvement of police, administrative and judicial authorities in several countries, namely, the country where the offense was committed, or perhaps the country (or countries) in whose territory the damage was caused, and potentially that of which the perpetrator is a national. Sometimes if a single country refuses to cooperate the whole investigation and prosecution may be doomed to failure. Therefore, it is critical that States Parties undertake the obligation to provide mutual legal assistance in conducting investigations and prosecuting ecocrimes and the crime of ecocide. This is the purpose of international mutual legal assistance in criminal matters, which encompasses all measures taken by a State (the requested State) upon request of another State (the requesting State) to encourage the prosecution and punishment of an offense in the requesting State.

[336] See Art. 12(3) of the Draft Ecocrimes Convention and Art. 10 of the Draft Ecocide Convention.
[337] See Art. 11 of the Draft Ecocrimes Convention and Art. 13 of the Draft Ecocide Convention.

This component has been increasingly specified in the various international conventions on criminal law, and the identical provisions set forth in the Draft Ecocrimes Convention and in the Draft Ecocide Convention[338] accurately reflect the accepted practice in this field: States Parties afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the crimes covered by the conventions concerned. In the field of environmental crime, the issue of mutual legal assistance is even more critical[339]. Permissive legislation of developing States attracts foreign companies whose respective national laws are more restrictive, and to name just one example, the Bhopal case shows the difficulties that can be encountered in prosecuting foreign investors before local courts. The modalities of mutual legal assistance, including the conditions under which that assistance may require specific procedures are specified in the draft conventions in order to strengthen its effective implementation.

Admitting mutual recognition of judicial decisions – In the *Chevron* case, a United States court refused to enforce a judgment issued by an Ecuadorian court ordering the American company to pay a USD 9.5 billion fine for causing pollution in Ecuador, dismissing the claims of the victims. To address the impunity that can result from this type of situation, the Draft Ecocrimes Convention and the Draft Ecocide Convention specify that mutual legal assistance shall be based on the principle of mutual recognition of judgments and judicial decisions of States Parties. This would ensure the implementation, in a State Party, of sanctions, fines or custodial sentences handed down by the courts of another State Party. This provision would not solve by itself the question of the independence of judges or differentiated capabilities of national judicial systems - in the *Chevron* case, the American court based its refusal to enforce the decision rendered by an Ecuadorian judge on the grounds that latter was corrupted. However, if such a provision is combined with the different enforcement mechanisms established in the conventions, it would have a marked impact on the effectiveness of the system.

Promoting extradition – Given the importance of *aut dedere aut judicare* (extradite or prosecute) clause, extradition is dealt with in the Draft Ecocrimes Convention and the Draft Ecocide Convention[340] in a detailed specific provision, like in the recently adopted conventions on criminal cooperation. The aim of that provision is to make extradition possible, whatever the requirements of national laws on the matter. For those States making extradition conditional on the existence of a treaty, ecocrimes as well as the crimes of ecocide would by the mere operation of law be included as extraditable offenses in any extradition treaty concluded or to be concluded between the Contracting States, and in the absence of such a treaty, the Convention may be deemed to constitute the legal basis for extradition; for those States not making extradition procedures conditional on

[338] See Art. 17 of the Draft Ecocrimes Convention and Art. 15 of the Draft Ecocide Convention.
[339] See contribution by C. ROBACZEWSKI *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 223.
[340] See Art. 16 of the Draft Ecocrimes Convention and Art. 14 of the Draft Ecocide Convention.

the existence of a treaty, they would be required to recognize ecocrimes and the crime of ecocide as extraditable offenses between them. Furthermore, in order to bypass traditional barriers relating to extradition, such offenses would be regarded as having been committed in the place where they actually occurred as well as in the territory of the States required to establish jurisdiction to prosecute those offenses; moreover, these offenses could not be deemed to be offenses policies.

C. – *Developing international cooperation*

Developing international cooperation on environmental violations –International cooperation is the key to the effectiveness of the system established in the framework of several conventions to fight environmental crime, including measures aimed both at punishing and preventing the above offenses. Therefore, it can be legitimately expected that States Parties agree on the broadest possible range of measures of cooperation, including, but not limited to, mutual legal assistance and extradition - their two main components. International cooperation in criminal matters also encompasses other forms of cooperation such as the transfer of criminal proceedings, enforcement of foreign judgments, confiscation of proceeds of crime or the collection and exchange of information among intelligence, detection and law enforcement services[341].

As far as the preventive component is concerned, it may have seemed necessary to clarify the specific forms of international cooperation in environmental matters[342], particularly in terms of adoption of national measures likely to prevent the preparation or commission of environmental crimes in territory of States Parties, exchange of information and training of the parties concerned[343].

International cooperation is traditionally considered as being of an intergovernmental nature, but it must also be reflected in cooperation among States based upon the existing mechanisms - such as Interpol[344] or Eurojust[345],with these organizations being increasingly actively involved in the field of environmental crime - or also based upon additional mechanisms to be established in the future at the international level. Therefore States parties would be under the obligation to cooperate actively, in the framework of investigations and prosecution proceedings against the crime of ecocide, with the International Prosecutor for the Environment[346]. Horizontal cooperation should thus be additional to vertical cooperation to generate the momentum necessary to the effectiveness of a global criminal justice.

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[341] See R. ZIMMERMANN, *La coopération judiciaire internationale en matière pénale*, 3rd ed, Bruxelles/Berne, Bruylant/Stämpfli, 2009.

[342] See Art. 18 of the Draft Ecocrimes Convention and Art. 19 of the Draft Ecocide Convention.

[343] See the treatment of this issue on the prevention of environmental offenses.

[344] Operation Infra (International Fugitive Round Up and Arrest) Terra was launched by INTERPOL on 6th October 2014, focusing on 139 fugitives wanted by 36 member countries for crimes including, among others, illegal fishing, wildlife trafficking, illegal trade and disposal of waste, illegal logging and trading in illicit ivory. It is the first INTERPOL fugitive operation targeting individuals specifically wanted for crimes concerning the environment.

[345] See EUROJUST, « Stategic Project on Environmental Crime, Report », November 2014, 102 p., available at: http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Strategic%20project%20on%20environmental%20crime%20%28October%202014%29/environmental-crime-report_2014-11-21-EN.pdf.

[346] See art. 16(2)(b) and Art. 17 of the Draft Ecocide Convention.

Proposal n° 27. Expanding the scope of cooperation and mutual legal assistance mechanisms applicable to corruption and transnational organized crime to cover environmental crime (international warrant of arrest, assets freeze, surveillance and undercover operations in foreign countries, international investigation structure (Interpol, Eurojust), regional and international *Task Force*)

Proposition n° 28. Promoting the mutual recognition of foreign judgments

II. – DEVELOPING COMPLEMENTARY MECHANISMS AT THE INTERNATIONAL LEVEL

Complementarity must be regarded not only as *vertical*, built around the primacy of national courts over international institutions, but also as *horizontal*, that is, both among national authorities and among international mechanisms intended to reinforce oneanother in pursuit of the same goal of fighting international environmental crime. This is about "mechanisms" because it does not concern only judicial bodies such as the International Prosecutor for the Environment (A) or, eventually, an International Criminal Court for the Environment (B), but also an investigative and fact-finding body (C) and measures aimed at strengthening mechanisms for the effective implementation of conventions (D).

A. – *Establishment of the International Prosecutor's Office for the Environment*

An International Prosecutor for the crime of ecocide –In the framework of the prosecution of a crime of ecocide, which requires the occurrence of exceptionally severe damage ("a violation affecting the safety of the planet"), the event giving rise to the damage may take place in one country, but the damage may occur and its consequences affect victims across a great number of countries. The idea behind the establishment of an International Prosecutor's Office for the Environment arose from the observation that, depending on the cases, no prosecution proceedings may be instituted before national courts or, on the contrary, several proceedings may be initiated simultaneously in the different States concerned. In either case, the effectiveness of the fight against ecocide will be badly affected and consequently impunity will prevail. The establishment of an International Prosecutor's Office for the Environment thus fulfills the need to combine the acceptability and the effectiveness of the proposed system for the repression of the crime of ecocide and ultimately, if appropriate, for the repression of serious ecocrimes as well.

An independent body– Given that there is no international organization for the protection of the environment under the aegis of which the proposed International Prosecutor's Office for the Environment could be established[347], it would thus be created as an independent body. Furthermore, it would not be appropriate to establish it under the aegis of the International Criminal Court, since the latter has no jurisdiction over the

[347] See art. 17 of the Draft Ecocide Convention.

crime of ecocide and also because it already has its own international prosecutor's office. The International Prosecutor for the Environment would then be elected by the Assembly of States Parties to the Ecocide Convention, with his/her Office being endowed with its own budget and personnel that will be independent from States Parties. The International Prosecutor for the Environment would the Head of an efficient and flexible organization, composed of prosecutors, lawyers and investigators who may be seconded to national agencies, at their request.

An additional function of coordination of prosecution proceedings at national level – The International Prosecutor for the Environment would coordinate the exchange of information and the investigations conducted by national authorities concerning certain acts that could allegedly constitute an ecocide. The Prosecutor could not thus conduct, on her/his own, prosecution proceedings that fall within the jurisdiction of national prosecutors, but could act in support of a national prosecutor to investigate and gather evidence by filing requests for action with the authorities of the other States concerned. Therefore, the International Prosecutor would play a complementary role to that of the national prosecuting authorities and ensure coordination of those prosecution proceedings in a way more similar to the manner the European Union's Judicial Cooperation Unit (Eurojust) operates than to that of the proposed European Public Prosecutor's Office whose centralized nature faces resistance from States. The main interest of this International Prosecutor's Office thus lies in its role in the cross-fertilization of experiences and coordination of investigations and prosecutions. Moreover, it would promote the carrying out of a coordinated expert appraisal in cooperation with the different States concerned. In that way, victims could be identified and also informed about the remedies available to them. This solution would also avoid the phenomenon of *forum shopping* : if companies can choose the place where they can establish their place of business and carry out their activities, the system would also enable national prosecutors, who would be put in contact with one another through the International Prosecutor for the Environment, to choose the most appropriate judicial system for each prosecution proceeding. The competition between jurisdictions could thus lead to a virtuous logic directing the prosecution of crimes of ecocide to the most efficient jurisdiction.

In view of the establishment of a global judicial system, the International Prosecutor for the Environment should be able to request the assistance of the Group for Research and Enquiry on Environmental matters (GREEN) whose expertise could be useful for investigations of alleged acts of ecocide.

Proposal n° 29. Establishment of the International Prosecutor's Office for the Environment: This is an independent body responsible for coordinating the exchange of information and the investigations conducted by national authorities concerning certain acts that could allegedly constitute an ecocide

B. – *Considering the establishment of an International Criminal Court for the Environment*

Current proposals for the establishment of an international criminal jurisdiction for the environment– At present, a number of proposals put forward by civil society, including organizations such as End Ecocide on Earth and Eradicating Ecocide, consider the establishment of an international criminal court specialized in environmental crime as the key to the effective repression of that kind of crime. A consortium of organizations launched the "Charter of Brussels", which promotes the creation of a European and International Criminal Court for the Environment and Health and requests the official recognition by the United Nations of ecocide as a crime against humanity and peace. The Charter, which is opened for signature by citizens and was designed to be submitted to the United Nations Secretary-General and the presidents of the European Commission and of the Council of the European Union, proposes a three-phase incremental approach: the setting-up of a permanent moral court for the empowerment of civil society and the prosecution and trial of those responsible for environmental crimes; the creation of a European Criminal Court for the Environment and Health and the creation of an International Criminal Court for the Environment and Health[348].

Some favor adding the crime of ecocide in the existing list of crimes for which the International Criminal Court has jurisdiction, either by adding the intentional environmental disaster as constituting a crime against humanity (Art. 7 of the Rome Statute establishing the International Criminal Court) or by setting forth the ecocide as a fifth autonomous crime (with the subsequent amendment of Art. 5 of the Rome Statute). At first sight, this option has the advantage of simplicity, since it is based on a court already established and operating. However, it seems that such an option is not the one that should be preferred as it presents a number of practical, legal and above all policy difficulties, particularly in terms of funding, amendment of the Rome Statute, capacity of the International Criminal Court to deal with the contentious activity related to an additional crime, and especially because of the probable reluctance of both States Parties and non-States Parties to the Rome Statute.

Others are considering the establishment of a new international or regional criminal court, specializing in ecocide and independent from the International Criminal Court. An intermediate option was also proposed, namely the exercise by the judges of the International Criminal Court - who would be then vested with a dual mission - of an additional jurisdiction over the most serious environmental crimes on the basis of specific provisions that are not contained in the Rome Statute[349].

The option for a pragmatic approach– All these different approaches have the advantage of supplementing the global criminal justice for the most serious environmental crimes which, for one reason or another, would fall outside the jurisdiction of national criminal courts. Therefore, these approaches reflect the common need to

[348] http://iecc-tpie.org/?lang=fr.

[349] See the contribution by C. SOTIS *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 203.

include the fight against impunity, as far as supranational crimes are concerned, in a jurisdictional system composed of a combination of national and international jurisdictions. Nevertheless, the decision made between these approaches is based upon political considerations rather than legal ones. Accordingly, Article 18 of the Draft Ecocide Convention materializes **the agreement in principle on the establishment of an International Criminal Court for the Environment and reserves for a later stage the forms in which such a criminal jurisdiction for environmental crime could be established**. This reflects the approach taken under the Genocide Convention (Art. VI) and the Apartheid Convention (art. V) at the time of their conclusion. Indeed, due to lack of agreement at the time of their adoption on the creation an international criminal court, these conventions established the potential jurisdiction of a future international criminal court. A priori, of little use, these provisions became then significant precedents concerning the acceptance in principle of such a jurisdiction and ultimatelycontributed to the adoption of the Rome Statute.

In line with the above Statute, **the jurisdiction of such an international court should be complementary and subsidiary to that of national courts when the latter have the will and the capability to prosecute and try themselves the crime of ecocide**. Moreover, it would be desirable, that a future international criminal court may go beyond the scope of application of the Rome Statute by providing for the possibility to prosecute and hold legal persons responsible at the international level, in case of ecocide. This is especially important in view of the fact that in the environmental field, a great number of the most serious crimes occurs in the territory of developing States, where the need for foreign investment is as important as environmental legislation is lax, and quite often those countries lack the will or ability to prosecute foreign companies causing offenses against the environmental. Therefore, up to the moment in which an International Criminal Court for the Environment will be established, only States will be able and must seek to establish the liability of legal persons in the field.

Proposal n° 30. Considering the establishment of an International Criminal Court for the Environment

C. – *Creation of a Group for Research and Enquiry on Environmental matters (GREEN)*

Alongside the international mechanisms of a judicial nature –the International Prosecutor for the Environment and a future specialized international criminal court – a **Group for Research and Enquiry on Environmental matters** (GREEN)[350] could also promote the prevention of the crime of ecocide, and contribute, as appropriate, to establish facts related to environmental crime. Like the Intergovernmental Panel on Climate Change (IPCC)[351] or the forum recently advocated by Interpol in the fight

[350] As proposed in Art. 20 of the Draft Ecocide Convention.
[351] Created in 1988, its function is to provide detailed assessments of the state of scientific, technical and socio-economic knowledge on climate change, its causes, potential impacts and response strategies.

against environmental crime[352], GREEN would allow "the intergovernmental community to consider its responses to environmental security threats"[353].

An international independent authority to be endowed with powers of conducting investigation and making recommendations– GREEN would be a permanent institution and its intervention will be mandatory in matters related to the crime of ecocide. To ensure the independence and impartiality of its members, who cannot be dismissed, they would be elected by the Assembly of States Parties and shall serve in their personal capacities as experts in environmental matters, while respecting the diversity of States Parties. GREEN, **albeit of a non-judicial nature**, would be a competent body to make **findings on material facts** that could fall under the definition of the crime of ecocide and to provide advice on international environmental crime. Given that GREEN will exercise a **monitoring role**, a large variety of issues could be submitted to it by one or more States Parties, the Secretariat of the Convention, the International Prosecutor for the Environment or the civil society, regardless of any pending legal proceedings. Once a matter has been brought before it, to ensure the effective accomplishment of its mission, GREEN should be able to request the States Parties, relevant national, regional and international institutions to provide all the information and the assistance that GREEN shall deem to be necessary to fulfill its tasks. GREEN would report annually the results of its investigations and, if necessary, issue non-binding public opinions.

GREEN's functions would thus be independent but supplementary to those of national criminal jurisdictions and international mechanisms; GREEN could also facilitate the tasks of these jurisdictions and mechanisms by establishing in an impartial manner the circumstances in which a serious environmental violation was committed and the nature and extent of the ensuing damage (especially the relevant information to determine whether the damage caused is of a "widespread, constant and serious" nature). However, to overcome the challenge of proliferation of relevant mechanisms and to counter the risk of conflicting decisions, it would be important to establish that GREEN cannot make a determination on a case that would have been examined by the Compliance Committee of the Convention (see *infra*) or by a national or international criminal jurisdiction, unless GREEN justifies its intervention on the ground that new facts have been brought to its attention.

Proposal n° 31. Creation of a Group for Research and Enquiry on Environmental matters (GREEN) : group of independent international experts empowered to make findings and recommendations as to serious damage to the environment

[352] Interpol, Resolution n° 3, AG-2014-RES-03.
[353] *Ibid*., p. 2.

D. – *Strengthening the implementation of the Convention and enhancing the effectiveness of the settlement of disputes procedures*

Where international environmental law texts exist, their implementation by States typically does not meet appropriate standards. Therefore, to ensure the effective implementation of international conventions to fight environmental crime and ecocide, it was proposed to combine various texts that exist separately in various international instruments. The approach in this regard is threefold.

Establishment of a Conventions Compliance Committee– Firstly, the establishment of a "non-compliance procedure"[354] of the Convention is proposed. Beyond the classical rationale of reaction to the violation by States of their obligations, this procedure is conducted prior to any violation and is thus similar to a mechanism to provide assistance to States, in particular, developing States, to comply with the obligations under the convention concerned. Patterned after the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (the "Aarhus Convention"), the proposed model is built around several internal bodies to the conventional system, created by consensus by the Assembly of State Parties upon the basis "of arrangements a non-confrontational, non-judicial and consultative nature"[355]. The key element is a Compliance Committee of the provisions of the conventions, composed of independent experts called upon to make determinations on the compliance or non-compliance by a State Party with the obligations under the conventions. These experts would issue, in this regard, opinions and make non-binding recommendations, including proposals for "reaction", which shall be submitted to the Assembly of States Parties that would decide on further action.

Graduation of response to non-compliance– The objective is to promote compliance with the Convention by States Parties that sometimes lack the required capabilities. Furthermore, the Committee would aim at promoting mutual consultation among States Parties on the challenges posed by implementation of the conventions and lessons learned from the experience by other countries (dissemination of "best practices"). Furthermore, the measures that the Committee may recommend would be as far as possible opinions, advice, measures of financial, technical, scientific or legal assistance to restore compliance with the Convention. It is only then that the Committee could recommend warnings or publicity measures and, as a last resort, the suspension of certain rights or privileges under the Convention.

A possible additional opportunity to promote compliance by States Parties with the proposed conventions would be to establish that States Parties are required to issue on a regular basis a report to the Secretary of the Convention to give account of the national measures aimed at implementing the Convention, modeled on Article 12 of the Convention on Combating Bribery of Foreign Public Officials in International Business

[354] See Art. 21 of the Draft Ecocrimes Conventionand 23 of the Draft Ecocide Convention.
[355] See para. (1) of Art. 21 of the Draft Ecocrimes Convention and Art. 23 of the Draft Ecocide Convention; see also Art. 15 of the Aarhus Convention.

Transactions (OECD) (in particular, see Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), which provides for a "a system of self-evaluation and a system of mutual evaluation".

Encourage public participation in the procedure to foster compliance with the Conventions– The other fundamental aspect of this procedure is the place that should be given to the public whose participation can take the form of communications to the Committee on matters related the Convention.356 In other words, in this procedure, the public, natural or legal persons, as well as associations, organizations or groups composed of such entities357– could warn the Committee against potential breaches by a State Party of the Convention and trigger the review of the matter concerned. The referral conditions could be complemented with the fulfillment of certain requirements, such as the exhaustion of domestic remedies, to limit the flow of communications from individuals. The possibility should also be explored that in addition to States Parties and the public at large, GREEN can also refer matters concerning alleged cases of ecocide to the Compliance Committee.

Proposal n° 32. Create a Compliance Committee of the provisions of the draft conventions

Proposal n° 33. Establishing a non-compliance procedure to help States comply with their environmental international obligations, which may take the form of the following graduated measures:

– opinions, advice, recommendations, measures of financial, technical, scientific or legal assistance to restore compliance with the Convention;

– *failing these* : warnings or publicity measures ;

– and *as a last resort measure* : suspension of certain rights or privileges under the Convention

Coordination between non-compliance procedures and settlement of disputes procedures –In case of failure of the above procedures, which are given priority where they are feasible and deemed to be preferable, resort could be had to a more classic and strict international jurisdictional mechanism[358]. The second important feature of the measures aimed at enhancing the effectiveness of draft conventions involves the insertion of an arbitration clause which provides for referral of the matter in question to the International Court of Justice or to an arbitral tribunal. Pragmatism has led to set forth an optional clause as States are still reluctant to accept the jurisdiction of an international court to settle their disputes concerning environment matters. Such an optional clause can be established either by means of reservations to environmental treaties or by excluding these matters from their declaration of acceptance of the compulsory

[356] Regarding the key role played by non-State parties in this context and the forms their participation may take, see contribution by S. HENRY *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 241.
[357] See Art. 4, (2) of the Aarhus Convention.
[358] See Art. 22 of the Draft Ecocrimes Convention and Art. 24 of the Draft Ecocide Convention.

jurisdiction of the International Court of Justice[359].

Provisional measures– Provisional measures are mandatory interim measures that, as their name suggests, are intended to prevent the worsening of the situation or dispute between two parties pending a final decision. They constitute a classic judicial function and are especially important when dealing with the protection of the environment. Both draft conventions[360] allow a court or the body responsible for the review of compliance with the Convention, before which a dispute or a situation was submitted, to issue provisional measures if the court or the body concerned considers that it has prima facie jurisdiction to hear the dispute. Consequently, the court or the body concerned could order "any provisional measures that it considers appropriate under the circumstances to prevent serious damage to the environment or preserve the respective rights of the parties to the dispute pending the final decision". These provisional measures would be ordered taking into account the circumstances and, therefore, they may be modified or revoked depending on the evolution of the situation.

An important aspect that should be kept in mind is that the above measures could be requested, in the framework of the Compliance Committee, not only by a party to the dispute, but also by any member of the public interested and entitled to submit communications to the aforementioned Committee. Such a possibility, including a procedure ensuring that information will be provided to the parties involved and offering them the opportunity to express themselves, would guarantee an optimal mechanism to ensure the protection of the environment as well as a reinforced prevention that should start at the earliest possible stage of any situation likely to cause environmental damage.

Furthermore, to prevent emergency situations where an arbitral tribunal has not yet been constituted by the parties, the above draft conventions establish that any court designated by common agreement between the parties or, failing that, the International Court of Justice, may issue provisional measures if it considers that the urgency of the situation so requires, with the court concerned being entitled, once the dispute matter has been definitively referred to it, to modify, revoke or affirm those provisional measures.

Complementarity between the non-compliance procedure and the settlement of disputes procedure– The general system established under the two draft conventions was designed to enable an optimal coordination of the existing mechanisms to avoid that they become mutually excluding and that a hierarchy between them be established. The idea behind this is to allow the parties to seek the best solution to safeguard the environment. This complementary relationship was preferred so that the mechanism that is considered the most appropriate at a given time can be triggered immediately. Thus, if a party considers that preserving the environment requires the intervention of a judicial mechanism, there is no prior requirement to resort to a non-compliance procedure.

[359] See contribution by S. HENRY *in* Des écocrimes à l'écocide – Le droit pénal au secours de l'environnement, Bruylant, 2015, p. 241.
[360] See Art. 23 of the Draft Ecocrimes Convention and Art. 25 of the Draft Ecocide Convention.

Proposal n° 34. Promoting the issuance of provisional measures to prevent the aggravation of the situation or dispute

Proposal n° 35. Settling of disputes by seeking the best solution for the state of the environment

CONCLUSION

Taking on the challenge of environmental crime – To meet the challenge posed by the fight against environmental crime, jurists should be creative and take duly into account the specificities of this form of crime.

Consequently, in view of its object, environmental crime concerns at the same time the environment and human life, with a variable level of severity which leads to draw a distinction between ordinary crimes grouped under the concept of ecocrimes and extraordinary crimes such as the crime of ecocide.

In view of the matters concerned, environmental crime is related not so much to physical persons, but rather to companies, and in particular, transnational companies that go, according to some authors, *forum shopping,* given the disparity in the sanctions from one State to another. Organized criminal groups have fully understood this, taking advantage of such disparity in the legislation of different countries to make huge profits without risking significant sanctions in areas as diverse as the trafficking of waste, protected species, natural resources or rare metals. As for the States, the diversity of internal contexts and, in particular, the different levels of development among them make it difficult to ensure a harmonized protection of the environment through criminal law. From the perspective of the victims, environmental crime affects the environment itself. Nevertheless, domestic jurisdictions do not always establish a defender of the environment. Moreover, environmental crime also affects vulnerable populations in comparison to the economic and political power of the perpetrators of those acts.

Against this background, a proposal for the protection of the environment through criminal law involves considering a graduated response, where criminal law would be the ultimate solution commensurate with the importance of the interests involved, the severity of the damage or the misconduct of the perpetrators of the crime. From the perspective of the criminal policies to be implemented in order to achieve this goal, the intention is to move towards a streamlining process of national legislation and an internationalization process of the protection of the environment through criminal law. In this regard, the number of international initiatives for the purpose of strengthening the fight against environmental crime is on the rise. The United Nations General Assembly adopted on 30 July 2015 a resolution on "Tackling illicit trafficking in wildlife "[361] which "encourages Member States to adopt effective measures to prevent and counter the serious problem of crimes that have an impact on the environment". Despite its non-binding nature, this resolution takes on a historic dimension reflecting the political commitment to the fight environmental crime. In the future, the Secretary-General of the United Nations may even appoint a special envoy who would be responsible for drawing the interest of and mobilize public opinion in favor of the fight against this scourge. The European Commission launched on 26 February 2016 an "Action plan against wildlife

[361] A/69/L. 80.

trafficking"[362] containing a number of measures aimed at "preventing wildlife trafficking and addressing its root causes", "implementing and enforcing rules and combating organized wildlife crime more effectively" and "strengthening the global partnership of source, consumer and transit countries against wildlife trafficking".

Therefore, the process of strengthening of the protection of the environment against attacks by offenders has begun. It remains much to be done in order to consolidate this process, bearing in mind that law is a powerful weapon against the crimes that threaten the planet and therefore a path of hope for the preservation of the basic interests of humanity.

[362] COM(2016) 38 final.

SUMARY OF PROPOSALS

Becoming aware of the reach of the environmental crime and the adaptation of the measures aimed at its protection
Proposal n° 1. Development of tools adapted to measure environmental crime, at the national, regional and international level in order to compare the systems of protection in terms of effectiveness and identify good practices.

Streamlining the protection of the environment through criminal law
Proposal n° 2. Proposal for a classification of environmental offenses (see Comparative Table of environmental offenses, *infra*, p. 452) 2.1. Distinguishing between administrative offenses, ecocrimes and ecocide 2.2. Distinguishing, within the notion of ecocrimes, damage to the environment and injuries caused to individuals 2.3. Elevating ecocide to the rank of the most serious international crimes **Proposal n° 3. Introducing two initiatives of environmental criminal policy:** 3.1. **3.1.** **A. – Simplifying environmental criminal law: the French example** – Streamlining the statistical knowledge of environmental crime and the sanctions provided for by law –Improving the assessment of environmental criminal law at later stages of the enactment process –Decriminalization of environmental strict liability offenses and establishment of administrative sanctions –Creation of an autonomous High Environmental Authority –Making the *quantum* of penalties proportionate to the importance of the interest affected, the conduct in bad faith and the organized commission of offenses –Creation of a National Network for the environmental security and reinforcement of controls on the part of competent authorities
–Coordination of civil, administrative and criminal sanctions in the environmental field 3.2. **Internationalization of the protection of the environment through criminal law** –Promoting international cooperation to fight environmental crime –Harmonization of criminal law concerning ecocrimes at the international level

–Extension of the competence of the European Union in the field of protection of the environment through criminal law

–Unification of sanctions for the crime of ecocide at the supranational level

Proposal n° 4. Proposal of two international conventions for the protection of the environment through criminal law:

4.1. A Convention against environmental crime (Ecocrimes Convention)

4.2. A Convention against the crime of Ecocide (Ecocide Convention)

A more suitable definition of environmental offenses

Proposal n° 5. I. – Simplification of rules on ecocrimes

5.1. **Creation of a general offense of endangerment of the environment**, which means "the act of creating a risk causing substantial damage to ecosystems by affecting their composition, structure and functioning"

5.2. **Creation of a general offense of damage to the environment**, which means "act of causing substantial damage to ecosystems by affecting their composition, structure and functioning"

Proposal n° 6. II. – Establishment of the crime of ecocide

6.1. **Ecocide could be defined** as any "intentional acts committed in the context of a widespread and systematic action that have an adverse impact on the safety of the planet"

6.2. **Expanding the scope of application of the rules concerning the most serious international crimes to govern the crime of ecocide** : non-applicability of the statute of limitations, limitation of amnesties, universal jurisdiction

6.3. **Applying the notion of responsibility to protect to the crime of ecocide**

Adapting criminal law to the specificity of perpetrators of environmental crimes

Proposal n° 7. Holding transnational corporations responsible:

7.1. Encouraging the adoption of measures aimed at holding legal persons responsible for ecocrimes

7.2. Recognizing the criminal responsibility of legal persons for crimes of ecocide

Proposal n° 8. Applying rules concerning organized crime to ecomafias (tools specific to transnational organized crime: specific investigative and prosecution techniques, undercover operations, wiretapping, electronic surveillance)

Proposal n° 9. Harmonizing the forms of participation in environmental crimes:

9.1. Applying to ecocrimes the forms of participation in organized crime

9.2. Applying to the crime of ecocide the forms of participation in the most serious international crimes (extended complicity, joint action, etc.)

Adapting criminal law to the specificity of victims of environmental crimes
Proposal n° 10. Facilitating victims' access to justice 10.1. Expanding the right of civil society to institute criminal proceedings 10.2. Involving civil society in restorative agreements **Proposal n° 11. Granting civil society the right to issue awarning**, in particular, by referring matters to the International Prosecutor for the Group for Research and Enquiry on Environmental matters (GREEN)

Strengthening prevention of environmental crimes
Proposal n° 12. Requiring States to take appropriate steps to prevent the commission of environmental crimes (information and awareness campaigns, research and education programs) **Proposal n° 13. Promoting good practices to prevent environmental crime and the adoption of measures to fight corruption** (creation of a list of virtuous countries and a list of non-cooperative countries) **Proposal n° 14. Improving the exchange of information** among States and relevant regional and international institutions in the field environmental crime **Proposal n° 15. Improving training of professionals involved in the fight against environmental crime** (judiciary, customs, police, etc.) **Proposal n° 16. Strengthening controls by the relevant authorities** in the fight against environmental crime, be they administrative, police or customs authorities **Proposal n° 17. Imposing on financial professionals an obligation of vigilance** to detect suspicious transactions that might finance environmental crime

Tightening sanctions against environmental crimes
Proposal n° 18. Individualizing sanctions by establishing severity criteria : economic profit from the crime, role of the perpetrator of the offense (including public officers), prompt compensation of damage, organized nature of the crime, severity of the damage **Proposal n° 19. Enabling courts to increase the fines imposed on corporations with**

high rates of return, which intentionally perpetrate environmental offenses, up to 10% of their annual turnover

Proposal n° 20. Adapting sanctions to the status of perpetrators and defining specific sanctions for legal persons, including:

– **Fines** ;

– **Prohibitions** :dissolution of the legal person; temporary or permanent closure of premises or establishments of the legal entity concerned; temporary or permanent suspension of all or part of the activities carried out by the legal person in the course of which the offense was committed, incited or covered up; withdrawal of licenses, authorizations or concessions; prohibition against receiving public subsidies and financing and entering into contracts with public administrations;

– **Publication of the conviction.** Where there are a number of unidentified victims, such publication shall ensure that the victims become aware of their right to claim compensation;

- Appointment of a judicial officer to ensure that the legal person concerned takes the organizational measures aimed at preventing additional crimes against the environment or that it diligently implements restoration or compensation measures

Tightening sanctions against environmental crimes

Proposal n° 21. Establishing guidelines for restorative justice in the field of environmental crime, including: measures aimed at ensuring the reinstatement of the environment; compensation for damages; compliance programs; financing the compensation fund for the environment and public health; local development measures; and, as appropriate, symbolic reparation measures adapted to the cultural dimension of the environmental damage, which may take the form of apologies to the affected communities

Proposal n° 22. Establishment of an international compensation fund for the environment and public health

I. – Strengthening the capacities of national criminal systems

Proposal n° 23. Urging States to establish an autonomous High Environmental Authority competent to control and, if applicable, sanction non-compliance with environmental regulations

Proposal n° 24. Urging States to establish their own jurisdiction over environmental offenses (territorial and personal jurisdictions and *aut dedere, aut judicare* clause –

prosecute or extradite)

Proposal n° 25. Supporting the strengthening of capacity-building activities of judicial authorities of developing States (training for professionals, assistance in adapting domestic law, etc.) according to their specific needs

Proposal n° 26. Coordinating concurrent criminal jurisdictions by requiring States to cooperate and promote the most effective judicial system on a case-by-case basis

Strengthening international cooperation and mutual legal assistance
Proposal n° 27. Expanding the scope of cooperation and mutual legal assistance mechanisms applicable to corruption and transnational organized crime to cover environmental crime (international warrant of arrest, assets freeze, surveillance and undercover operations in foreign countries, international investigation structure (Interpol, Eurojust), regional and international *Task Force*) **Proposal n° 28. Promoting the mutual recognition of foreign judgments**

Developing complementary mechanisms at the international level in the field of ecocide
Proposal n° 29. Establishment of the International Prosecutor's Office for the Environment: : this is an independent body responsible for coordinating the exchange of information and the investigations conducted by national authorities concerning certain acts that could allegedly constitute an ecocide **Proposal n° 30. Considering the establishment of an International Criminal Court for the Environment**
Proposal n° 31. Group for Research and Enquiry on Environmental matters (GREEN): group of independent international experts empowered to make findings and recommendations as to serious damage to the environment

Strengthening the procedures relating to compliance with treaties on environmental protection
Proposal n° 32. Create a Compliance Committee of the provisions of the draft conventions **Proposal n° 33. Establishing a non-compliance procedure to help States comply with their environmental international obligations**, which may take the form of the following graduated measures: – opinions, advice, recommendations, measures of financial, technical, scientific or

legal assistance to restore compliance with the Convention;

– *failing these* : warnings or publicity measures;

– and *as a last resort measure* : suspension of certain rights or privileges under the Convention

Strengthening the dispute settlement procedures related to the implementation of the convention on environmental protection
Proposal n° 34. Promoting the issuance of provisional measures to prevent the aggravation of the situation or dispute **Proposal n° 35. Settling of disputes by seeking the best solution for the state of the environment**

COMPARATIVE TABLE OF ENVIRONMENTAL OFFENSES*

	ADMINISTRATIVE OFFENSES	ECOCRIMES		ECOCIDE
		Damage to the environment	**Harm caused to individuals**	
Definitions	Administrative environmental offenses are offenses punishing the mere breach of administrative rules of a preventive nature, regardless of whether a risk or damage to the environment can be proved	**Predicate offense:** endangerment of the environment means criminalized unlawful acts committed intentionally or by negligence or at least serious negligence, which create a risk of causing substantial damage to ecosystems by affecting their composition, structure and functioning **Aggravating factor:** endangerment of the environment means criminalized unlawful acts committed intentionally or by negligence or at least serious negligence, which entail a risk of causing substantial damage to ecosystems by affecting their composition, structure and functioning	**Predicate offense:** the endangerment of the life of individuals as a result of damage caused to the environment means any criminalized unlawful acts committed intentionally or by negligence or at least serious negligence, which entail a risk of causing death or serious injury to any individuals **Aggravating factor:** harm caused to individuals as a result of damage to the environment means any acts that cause death or serious injury to any individuals	Ecocide could be defined as any criminalized unlawful acts committed intentionally in the context of widespread and systematic actions that have an adverse impact on the safety of the planet
Criminalized acts	Criminalized acts can be defined as any violation of administrative rules of a preventive nature concerning the protection of the environment:	The following acts can fall within the notion of criminalized acts: (a) the discharge, emission or introduction of a quantity of substances or ionising radiation into the air or the atmosphere, soil, water or the aquatic environments; b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker in the framework of any activity related to waste management;	The following acts can fall within the notion of criminalized acts: (a) the discharge, emission or introduction of a quantity of substances or ionising radiation into the air or the atmosphere, soil, water or the aquatic environments; b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker in the framework of any activity related to waste management;	The following acts can fall within the notion of criminalized acts: a) the discharge, emission or introduction of a quantity of substances or ionising radiation into the air or the atmosphere, soil, water or the aquatic environments; b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including action taken as a dealer or a broker in the framework of any activity related to waste management;

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		(c) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used; (d) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances; (e) the production, import, export, placing on the market or use of ozone-depleting substances; (f) the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; (g) trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, except for cases where the acts concern a negligible quantity of such specimens and have a negligible impact on the conservation status of the species; (h) any other acts of a similar nature liable to put the environment at risk.	(c) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used; (d) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances; (e) any other acts of a similar nature liable to cause the death or serious injuries to individuals.	(c) the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used; (d) the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances; e) the killing, destruction, possession or taking of specimens of wild fauna or flora species whether protected or not; f) anyother acts of a similar character committed intentionally that adversely affect the safety of the planet.
Protected values	**Compliance with administrative regulations**	**Environment**	**Human health**	**Safety of the planet**
Severity	**Irrelevant criterion**	**— Substantial damage to ecosystems** by affecting their composition, structure and functioning **— Risk of causing a substantial damage to**	**— Risk of causing death or serious injury to individuals** **— Death or serious injury caused to any individuals**	**Double severity criterion:** — *intrinsic criterion* : ecocide has an adverse impact on an universal value — the safety of the planet; — *extrinsic criterion* : ecocide — involves

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		ecosystems by affecting their composition, structure and functioning		extraordinary damage, including: a) a widespread, constant and serious degradation of the quality of air or the atmosphere, the quality of soil or the quality of water, the fauna and flora or their ecological functions; or b) death, permanent disabilities or other incurable serious illnesses [caused] to a population or [its permanent deprivation] of their lands, territories or resources
Condition of illegality	**Yes**	**Yes**	**No**	**No**
Misconduct	**Petty offense**	**Willful misconduct and non-intentional misconduct**		**Willful misconduct** Intention and knowledge
Damage	**Irrelevance of any risk of causing damage or proven damage**	— **Irrelevance of the occurrence of a damage** : characterization of the offense of endangerment as a result of the commission of an act entailing a risk of damage — **Occurrence of damage** : aggravating factor		**Requirement of occurrence of exceptional damage**(damage affecting the safety of the planet)
Nature of the individual responsibility	**Civil or administrative responsibility**	Responsabilité **pénale** des individus définie et mise en œuvre en droit pénal interne		Responsabilité **pénale** des individus directement en droit international
Nature of the responsibility of legal persons	**Civil or administrative responsibility**	**Criminal, civil or administrative responsibility**		**Criminal responsibility**
Specific consequences	**No**	1. **Exclusive competence of domestic courts**, without order of priority and establishment of a law enforcement mechanism modeled on the *aut dedere aut judicare*clause(prosecute or extradite) 2. Application of general law in matters of amnesty, statutes of limitations and immunities		1. Two-tiered law enforcement mechanism: — implemented by **domestic criminal courts** (including, action taken on the basis of the **universal jurisdiction**), coordinated by the International Prosecutor for the Environment and — by an **international** criminal jurisdiction (draft agreement on the establishment of an International Criminal Court for the Environment)

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				2. non-applicability of the statutes of limitations, restriction of the powers of the State in matters related to amnesties and extension of the responsibility to protect to cover the crime of ecocide
Criminal policy	**Decriminalization**	**Harmonization** Source according to which an offense is deemed to be committed = national legal systems, even if the offense concerned is internationalized as a result of the conclusion of a convention to establish the scope of application of the extension of criminal jurisdictions to which ecocrimes give rise Internationalization process of the national criminal law systems Right to *utilitarian* cooperation (defense of identical individual interests of States) = harmonization of national laws		**Unification** Source according to which an offense is deemed to be committed = international law, even if the offense has been now established by a national legal system so that it can be effectively prosecuted and tried by national courts Criminalization process of international law Right to *solidarity* cooperation (defense of shared values) = globalization of repression
Category of offense	**Administrative offense** = Violation of administrative regulations	**Transnational crime** = an offense under domestic law, which becomes transnational most of the time by means of its establishment in an international convention, as it has an international element giving rise to enhanced intergovernmental cooperation in the field of prevention and repression of crime Especially: pollution, trafficking in protected species,waste trafficking, etc. In line with other transnational crimes recognized as such under international criminal law, including corruption, transnational organized crime, taking of hostages, illicit drug trafficking, trafficking in persons, etc.		**Supranational Crime** = A crime under an international norm accepted and recognized by the international community as a whole as being of such a fundamental nature that its serious violation gives rise to the criminal liability of individuals directly under international law In line with other supranational crimes recognized as such under international criminal law: genocide, crime against humanity, war crimes, crime of aggression