LEGAL PARADIGM SHIFTS FOR A NEW ENVIRONMENTAL LAW

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May 2021

THE GREENS/EFA in the European Parliament

Report to the Greens/European Free Alliance

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Table of contents

Executive Summary

The sudden intrusion of COVID-19 into our lives has clearly revealed not only our extreme vulnerability, but also the interdependence of human beings within a globalised society. Finally, it has cruelly and painfully shown our interdependence with all living beings. Whether it arose directly from the destruction of living things, or indirectly through scientists playing God in their laboratories, this pandemic has shone a light on the highly topical and concrete threats of other global disasters triggered by the human race that are already hanging over us, including climate change, the sixth mass extinction of species and the overshooting of planetary boundaries. If we persist in destroying nature in this way, we condemn ourselves to self-destruction.

However, no political upheaval has ever taken place without a legal revolution. The law, which reflects the values, concerns and rules governing a society, has a symbolic force as well as a practical application. The transformation of European society, initiated by the EU with the Green Deal, must take place in tandem with a global reflection on our legislation, our treaties and our laws. The first challenge is to change ourselves: is Europe, the cradle of the Enlightenment and the Social Contract, able to move towards the Natural Contract as espoused by Michel Serres?

This is the thrust of this study, led by Véronique Jaworski and Marie-Pierre Camproux. Its aim is to mark out pathways of reform so that European Union law can stimulate and transcribe a new relationship between human societies and living beings. Our body of law, including environmental law, was indeed built on an anthropocentric view of the world, which disconnected humans from the non-human; its only aim was to protect human interests - and particularly economic interests - when they were at stake. This study puts forward a number of crucial instruments, based on the "natural commons approach", that will make it possible to legally reconnect and redraw the link between humans and the rest of the living world.

In this way, the "natural commons approach" could be an effective solution for protecting living beings, while our planet's safety and the planetary boundaries must ultimately be enshrined in our law.

Ecocide, which represents the most serious crime committed against the planet and natural commons, threatens our very survival and that of future generations. Recognising the crime of ecocide is also part of this legal revolution that we desire: Recognising ecocide in our law means placing the protection of both the planet, our common home, and the ecosystems on which we depend for survival, above economic interests, the race for profit and the monopolisation of resources. It also means eradicating a global form of law based on private interests and replacing it with a form of planetary law that protects natural commons. In so doing, this recognition will be part of a new conception of our relationships with living beings, based on "environmental solidarity" between non-humans and human beings, rather than the exploitation of one group by the other.

This paradigm shift is already starting to see the light of day in our legal systems. In France, the enshrinement in domestic law of the concept of "environmental damage", with the passing of the Biodiversity Law of 8 August 2016, is an important step towards this legal (r)evolution. This makes it possible to protect the environment per se by remedying the damage caused to the "elements or functions of ecosystems". Recognising the establishment of "environmental damage" in the Case of the Century, the administrative judge is also paving the way for its application in climate litigation. In Italy, Portugal and other EU member states, structural changes have also been made to environmental law, by bringing actio popularis to bear on environmental issues or by independently (as this is not yet required by European law) punishing damage caused to non-human living beings. The European Parliament, in turn, is addressing this paradigm shift by calling for ecocide to be included in the Rome Statute establishing the International Criminal Court, and for the intrinsic value of ecosystems to be recognised along with their right to be protected.

Europe can, and must, embark on this path. The environmental crisis no longer leaves us any choice. Four of the nine planetary boundaries have already been exceeded. More than ever, we must save what we can. It is a matter of survival – and of justice. Europe therefore must, , without delay, be part of this legal revolution and devise a body of law that is commensurate with the environmental and climate emergency. This law must ensure environmental and social justice, and efficiently protect nature, on which we and future generations depend. This study is not exhaustive, and others will have to continue working on this topic, while it will also be necessary to reform our EU Treaties and fundamental laws. Nevertheless, it outlines avenues that must be discussed by the whole of European society and lays an important stone on the path towards a much-needed change of legal models.

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Introduction

The current environmental and health situation is an existential wake-up call for humanity. It affirms the interdependence between human and non-human life, reminding us that the survival of humanity is inextricably linked to the protection of the planet, our mother home. This link, which crosses space, species and generations, calls for positive and reciprocal relationships between human and non-human life based on mutual respect; this will, in turn, lead to amicable cohabitation, planetary harmony, and in a word, balance.

But contemporary society, in its thirst for unbridled consumption and the search for short-term profit, has broken this age-old link. It has transformed it into the enslavement of nature and natural commons by man, the self-proclaimed master of the Earth and everything found within it. One might say that today this link is "denatured". The disappearance of tropical forests, impoverishment of soils, acidification of seas and oceans, increasing desertification, global warming etc are all phenomena that show us that this matrix link that binds human and non-human life together in the same common destiny, even if indissoluble, is nonetheless fragile. It also shows us that, as things stand, there is an urgent and imperative need to renew and consolidate this human-non human link in a last-ditch effort to ensure survival.

And while a public health emergency has been declared by numerous countries in order to stem the spread of Covid-19, it is the environmental emergency that the planet finds itself in that must now be declared. This emergency is recognised from all sides: the IPCC on biodiversity, COP25 on climate change, UN expert scientific reports and various public demonstrations on green issues. It calls for a radical change in current behaviour: we need nothing less than to recreate a strong link that rebalances the relationship between humankind and nature.

However, breaking this link requires a legal paradigm shift to accompany the transformation of behaviour and to put forward a coherent model. This is because, as Olivier Barrière asserts, "*the law fits squarely within the adaptation process of societies (....), its function being to regulate and normalise in order to ensure the continuation of the group*". From this perspective, "*the legal*

system, first and foremost, helps to ensure social resilience"[1]. We must not forget that the law is a social construct that reflects the values conveyed within a human society. Consequently, as, certain eminent authors such as Olivier Jouanjouan[2] and François Ost[3] point out, legal instruments or techniques are available to a philosophy or political project. This reminder can both alert us to the rationale of the current system, which is causing such damage to the planet and allow us to appeal to what Mireille Delmas-Marty calls the "*imagining forces of law*"[4] to envisage an ecological system and a social system in a relationship of coviability[5].

In the face of the environmental emergency and in the Anthropocene era[6], the law can provide some answers. It would therefore be helpful to broaden the scope of what is possible[7] to find some new ways of protecting the planet. The objective is, of course, to contribute to the environmental and social transformation of our society and "*to dare to break with* a*n organisational system of exponential satisfaction of our needs, based on a kind of endless race to plunder resources and to produce and consume goods, without a second thought about solidarity*"[8]. This perspective leads us to posit new conceptual foundations to provide strengthened and updated legal protection of the environment (Part 1), enabling us to reinvent the place of environmental criminal law, in particular by creating new offences that respond to current and future challenges (Part 2), as well as a full action for redress for environmental damage based on that recently introduced in French civil law (Part 3). Lastly, some recommendations are proposed (Part 4).

1 *Ibid*

2 O. Jouanjan, who wrote a book to show how the Nazis were able to justify the morally unjustifiable in law and invites us to think of the law as "normal" in Justifying the Unjustifiable. The Order of Nazi Legal Discourse (Justifier l'injustifiable L'ordre du discours juridique nazi), ed. PUF Léviathan 2017

3 F.Ost, What is the law for? Uses, functions and purposes (À quoi *sert le droit? Usages, fonctions, finalités*,), ed. Larcier 2016

4 M. Delmas-Marty, To the four winds: a short guide to sailing on the ocean of globalisation (*Aux quatre vents du monde, petit guide de navigation sur l'océan de la mondialisation)*, ed Seuil, 206 p.11

5 O. Barrière et al. Coviability of social and ecological systems: Reconnecting mankind to the biosphere in an era of global change. (*Coviabilité des systèmes sociaux et écologiques. Reconnecter l'Homme à la biosphère dans une ère de changement global)*, ed. *Matériologiques*, coll. *Essais*, 2019. According to these authors, the coviability of social and ecological systems is defined as: a property of interactive dependence between human and non-human systems establishing a link of viability that enables them to live together.

6 C. Bonneuil and J.-B. Fressoz, The Anthropocene Event; The Earth, history and us (*L'Evénement Anthropocèn; La Terre, l'histoire et nous)*, ed. du Seuil, 2013, 320 p.

7 M. Delmas-Marty, Rethinking law in the Anthropocene era (*Repenser le droit à l'heure de l'Anthropocène*), *AOC media*, 22 July 2019, https://aoc.media/analyse/2019/07/22/repenser-le-droit-a-lheure-de-lanthropocene/.

8 B. Drobenko, The Environment: a solidarity challenge (*Environnement: le défi solidaire*), in *Mélanges en l'honneur de Michel Prieur, Pour un droit commun de l'environnement*), Dalloz, 2007, p. 113.

Part 1

THE CONCEPTUAL FOUNDATIONS FOR STRENGTHENING AND UPDATING LEGAL PROTECTION FOR THE ENVIRONMENT

I. A theory of natural commons; the translation into law of a different representation of relationships between humankind and nature (humans and non-humans)

A. A CONCEPTUAL ANCHORS FOR THE THEORY OF NATURAL COMMONS

The theory of natural commons is part of a dynamic that is breaking with the (still) current philosophies, embodying individualism and individualisation, leading to the appropriation, monopolisation, commodification and financialisation of nature against a backdrop of scarce natural and living resources and the deterioration or dysfunctioning of ecosystems.

It is based on an acknowledgement of the disempowerment, disengagement or failure of the State in its role as guardian of the general interest (environmental protection is of general interest).

This theory accords with the thinking of E. Ostrom on commons as the third way between the market and the State[9] (by extension, as E. Ostrom is an economist and has only worked on local commons).

The aim of this theory is to improve environmental protection via the translation into law of another representation of human and non-human relationships.

The rights of nature movement is part of this same objective, but by highlighting the intrinsic value of nature via the subjectivisation of the non-human (transition from being the object of law to the subject with rights and a legal personality). The authors of this report do not associate themselves with this approach reflecting a subjectivisation of nature excluding humankind.

Admittedly, this subjectivisation is technically possible; it has strong symbolic weight and enables rights to be subsequently attributed to it, such as the right to exist and to live, and the general recognition that nature has intrinsic value[10].

However, several counter-arguments should be highlighted. We need to question the relevance of transplanting a conception of nature stemming from the spiritual relationship that indigenous populations have with their environment, or "biocultural rights"[11], which seek to translate the relationship of stewardship that a population has with its environment, without looking at their specific cosmologies[12], corresponding to practices, usages, perceptions and representations of different worlds. In

9 E. Ostrom, Governance of common goods (*Gouvernance des biens communs,*) LLN-Paris, ed. De Boeck, 2010 and A third way between the State and the market; conversations with Elionr Ostrom (*Une troisième voie entre l'État et le marché, échanges avec Elinor Ostrom*), Col. *Nature et société*, ed. Quae, 2017, 151 p.

10 C. Stone, Should trees be able to plead? (*Les arbres doivent-ils pouvoir plaider?*), ed. *Le passager clandestin*, 2017, 154 p.

11 F. Girard, Commons and fundamental rights: the emerging category of biocultural rights (*Communs et droits fondamentaux: la catégorie naissante des droits bioculturels*), RDLF 2019, chron.

12 P. Brunet, The ecology of judges and the legal personality of natural entities (New Zealand, India and Colombia) (*L'écologie des juges la personnalité juridique des entités naturelles (Nouvelle-Zélande, Inde et Colombie*)), in M.-A. Cohendet (ed.), *Constitution et écologie,* Paris, Mare & Martin, 2020, to be published

other words, residents living by the River Rhine cannot be similar to the Maori tribes living on the banks of a river in New Zealand.

We also need to evaluate potential ideological drifts stemming from the multiplication and ranking of legal topics, as there are no guaranteed concrete advantages of this.

Over and above these arguments, most importantly of all, we think this approach maintains the humankind-nature relationships in a divided, disassociated world that pits the interests of humankind against those of nature, as it exists in the West. By means of subjectivisation, the purely individualistic view is maintained. Only individuals are taken into account and the subjectivisation expounded in the rights of nature movement is based on the subjectivisation of nature that does not include humankind, and that opposes humankind and its capacity for destruction. Lastly, on the one hand, where there is opposition between legal persons and between human and non-human interests, humans will be favoured over non-humans. However, it should be clarified that nature is not at war with humankind[13] or vice versa[14]. The approach adopted should therefore correspond to a more complex reality in which humankind is a part of nature and, equally, all people do not destroy their environment. For these reasons, it should be highlighted that nature, of which humankind necessarily forms a part, must be effectively protected, but mainly from certain destructive human activities of production and consumption, with human beings, as members of the living community, not being stigmatised as a whole.

Experts who are convinced that a paradigm shift is vital propose to undermine this human/non-human opposition, by advocating a representation of non-human/human relationships based on companionship or a community of interests.

We must firstly be aware that environmental law is currently undergoing a strong regression and that proposals must in no way weaken the contributions of existing environmental law but, on the contrary, must strengthen its effectiveness.

The first priority must be to recognise the principle of non-regression of existing law. But to adapt this law to the environmental emergency and meet the needs of the living world we must set out in new directions.

Experts advocate an approach that does not focus on, or exclude, property or market forces, or the sole protection of the State; these are moved to the background for the benefit of this new representation of commons.

13 J.-C. Fritz Protection of the environment and market: coexistence or war of the worlds (*Protection de l'environnement et marché : coexistence ou guerre des mondes*), in *Marché et environnement* (ed. J Sohnle and M.-P. Camproux Duffrène), ed. Bruylant 2014, p. 17

14 A. Michelot poses the question of whether humanity is at war with nature in Towards a principle of environmental solidarity? From critique to proposal; from domestic law to international law" (*Pour un principe de solidarité écologique? De la critique à la proposition, du droit interne au droit international*), RJE, 04/2020, p.733.

The proposed approach goes beyond the purely utilitarian and/or individualistic view of nature; it conceives of a shared world, for both humans and non-humans, and the commons as a composite and systemic whole, based on relations of interdependence between the elements, regardless of their legal status.

The theory of natural commons enables us to plead for a change in the relationship between humankind and nature. Philippe Descola deconstructed the humankind-nature split in his work Beyond nature and culture (*Au-delà de nature et culture)*[15] and highlighted that non-humans may be considered as social partners[16]. It is possible to associate nature and culture, and to move from a view of a person dominating nature to one of a person who is not only a member of human society/the human race, but also has a common destiny with the living world and forms part of a complex environmental global system on which he depends.

Instead of focusing on the opposing interests of nature and culture, humans and non-humans, or object and subject, this view highlights a convergence of interests or a community of interests.

It proposes a different conception of law, a legal paradigm shift: a move away from a law based on the dichotomy between the subject and object of law, the separation between environmental law and the civil law of persons and goods, or a law of two opposing interests between a human being and a non-human, to one of relationships and solidarity, organised around the concept of living together and sharing in a common world.

THE THEORY OF NATURAL COMMONS IS BASED ON NOTIONS AND CONCEPTS THAT MUST BE DEFINED.

1. Environmental solidarity and interdependence

Solidarity is a testament to the mutual dependence of members of a society, but also to a sense of belonging to a community of interests and the obligation not to harm others. Solidarity implies a community or a set of elements with interdependent relationships.

Environmental solidarity is effectively a representation of interdependencies; it refers to an ecological system and the vital relationships between humans and non-humans. More specifically, it is a combined set of social and ecological systems, which overlap and intermingle to form a socio-ecosystem[17] or an ecosystem integrating living organisms, of which human beings are a part. Note that there is no interdependence in equal relationships in this socio-ecological system. On the one hand, while humankind vitally depends on the Earth and drags down much of the living world with it, the planet only depends on humankind in order to continue to be a possible habitat for it.

15 Ph. Descola, Beyond nature and culture (*Par-delà nature et culture*), Collection Bibliothèque des Sciences humaines, Gallimard, 2005, 640 p

16 Ph. Descola, The ecology of relationships (*Une écologie des relations*), CNRS editions, from Vive voix, Coll., *Les grandes voix de la découverte*, 2019 p.27

17 M. Prieur defines the ecosystem as "a topographical unit, regardless of the surface area, colonised by a certain number of living beings that have generally well-defined links between each other and the biotope in which they live".

On the other hand, only certain human activities destroy living conditions on Earth[18]. According to R. Mathevet, "*the use and development of the concept of environmental solidarity gets close to the view that asserts that as a human forms part of the community of living beings, he has a responsibility and a moral duty to feel bound to an understanding of, and beneficial actions towards, the ecosystems and the species which surround him*"[19]. Put another way, these dependency relationships are asymmetrical and unbalanced.

The principle of environmental solidarity, as it has been referred to in French law since the Law of 8 August 2016 on the restoration of biodiversity in the legal list of fundamental principles of environmental law contained in Article L.110-1 of the French Environmental Code, can be defined, according to the working group led by A. Michelot, as "*a principle, by which the interdependencies between ecosystems, living beings and natural and artificial habitats (regardless of their degree of artificialisation) are recognised, and guide all actions, practices and decisions.*"[20].

2. Sharing and pooling

The theory of natural commons is based on the concept of sharing. The sharing in question does not relate to the slicing up or distribution of pieces of cake, which would be the planet or its resources, since humans cannot allow the planet to disappear and the planetary system functions on a global scale. It corresponds to the sharing of one world, like the sharing of a bread oven in a village. A. Langlais understands the meaning of "sharing" as "*the possibility, for those recognised as members of a community, to use a resource established as a common good*"[21].

3. Commons and living together

According to F. Ost, the world of commons is **a relational world**; the focus is not on either the subject or the object of the law but on the relationship[22]. The world of natural commons is not underpinned by a rationale of elimination and replacement or the opposing interests of humans and non-humans, but on the concept of rebalancing the relationships between humankind and nature and the perception of a world in which humans are a part of nature[23] , and intellectually reinstates the fact that the planet is their environmental niche. It does not put at the forefront the

18 J.-B. Fressoz, Conference entitled "The Anthropocene: a man-made geological revolution", 20 June 2019, https://www.youtube.com/watch?v=pKOpZq4kkko.

19 R. Mathevet, Environmental solidarity, the link that binds us (*La solidarité écologique, ce lien qui nous oblige*), Actes Sud 2012, p. 88.

20 A. Michelot, Towards a principle of environmental solidarity? From critique to proposal; from domestic law to international law (*Pour un principe de solidarité écologique? De la critique à la proposition, du droit interne au droit international*), RJE, 4/2020, p.733

21 A. Langlais, Open concluding remarks on environmental debt, https://journals.openedition.org/vertigo/17500, consulted, 3 August 2020.

22 F. Ost, From commons to the legal personality accorded to nature (*Du commun à la personnalité juridique accordée à la nature*), in Seminar organised by D. Misonne entitled *Actualités des communs en droit de l'environnement et de la culture*, CEDRE, Université Saint-Louis, Brussels, 28 November 2017.

23 J.-C. Fritz Protection of the environment and market: coexistence or war of the worlds (*Protection de l'environnement et marché: coexistence ou guerre des mondes*), in *Marché et environnement* (ed. J Sohnle and M.-P. Camproux Duffrène), ed. Bruylant 2014, p.17

individual or exchange, but "sharing", in the sense of making resources available to everyone in a life community.

The common is therefore an "in common" as in "living together", according to the definition of P. Dardot and C. Laval[24].

Natural commons may also be thought of as an indivisible whole, a composite entity, a relational, dynamic system, a web of interdependent relationships between human and non-human natural entities. From a legal standpoint, natural commons illustrate this set of community values and sharing, and enable us to get out of the rut of our Western way of thinking, imbued in individualism and its counterpart – in terms of the legal relationship to things – exclusive ownership[25].

We must therefore clearly distinguish between commons and common goods[26]. The objects of commons are known in their entirety as *res communes* and cannot be appropriated. Goods are *res propriae* and hence things that can be appropriated. It is therefore somewhat paradoxical to combine the two terms "goods" and "common" when talking about "commons"[27]. Common goods are legally things that are collectively owned, which is not the case for *res communes*, which is not a legal concept but rather a moral or religious concept. Note also that the objects described by the term "commons" should no longer be thought of as *res nullius* i.e. goods that, of necessity, can be appropriated[28]. **We must therefore translate the French expression "communs naturels" as "natural commons" and never as "global goods", which relates to resources that are owned.** Note also that in the theory of natural commons, both ecosystems and the living community, which includes humans, go hand in hand. Human beings are therefore an integral part of the natural common. Thus, this theory of natural commons is very different from theories of common goods, which attribute such goods to humans/humanity.

24 P. Dardot and C. Laval, Commons, Essay on the 21st-century revolution (*Commun. Essai sur la révolution au xxi*e siècle), La découverte, 2014, p.283.

25 Some authors explain "*how the idea of `the commons' can work as a signifier - of resistance, community, collective action and common values", in* Holder, Jane B. and Tatiana Flessas. Emerging Commons, *Social & Legal Studies,* vol. 17, no. 3, September 2008, pp 299-310

26 The French term "communs naturels" must therefore be translated as "natural commons" and not as "common goods"!

27 Note also another Italian term, *beni comuni* from the Rodota Commission. Available at https://www.giustizia.it/giustizia/it/mg_1_12_1.wp?previsiousPage=mg_1_12_1&contentId=SPS47624 For the French proposition, see D. Mone, Rodota Commission (Italy) in M. Cornu, F. Orsi, J. Rochfeld, *Dictionnaire des biens communs,* Paris, 2017, pp. 196-199. Report that generated a draft law, according to which "[common goods are] *things that have functional uses for the exercise of fundamental rights and the free development of the person".* The draft contained a list including "rivers and their sources, lakes and other bodies of water, parks, as defined by the law, forests and wooded areas, high mountain areas, glaciers; rivers and coastlines designated as nature reserves, wildlife and protected flora, archaeological, cultural and environmental assets, and protected landscape areas. See the official website of the Italian Parliament: https://www.camera.it/leg18/126?leg=18&idDocumento=2237

28 Green Governance: Ecological Survival, Human Rights and the Law of the Commons, by Burns Weston and David Bollier, *Journal of Environmental Law*, Volume 27, Issue 2, July 2015, Pages 373–376

As a basis for this theory, we might call on the principle of inseparability between humans and non-humans, as developed by the philosopher F. Taylan on the *Te awa Tupua* law in New Zealand[29]. This natural common is also based on a view of a shared world[30], and thus goes beyond the nature-culture split described by Philippe Descola. In French law, support can be found in the second recital of the Introduction to the Environmental Charter, "The future and very existence of humanity are inseparable from its natural environment", the constitutional principle of fraternity (extended to all living things)[31], the principle of environmental solidarity mentioned in Article L110-1 C. of the Environmental Code, and the legal system of the unappropriated and inappropriable common thing.

B. THE STRUCTURE OF NATURAL COMMONS[32]

1. THE COMPOSITION OF A NATURAL COMMON

A natural common represents a **relational and functional unit**, a system or network made up of interdependent relationships between human and non-human living beings (the community of living beings) and with the ecosystem, the environment, the species etc (the natural object). It is also the legal translation of a world that we must share, i.e. make available to all and in which we must live together (humans and non-humans).

For a common to be created, there must be an object that is common to all, a community, rules of access and shared use.

A natural common is an indivisible **entity** comprising the following:

- **A composite natural object**

This may be an ecosystem (river, forest, wetland) or a matrix element (species, water, air, biosphere, etc) that has an environmental and social function and which therefore has many different uses, and

- **A community (or community dwellers).**

A definition of "community" in its broadest sense may be adopted. It may contain both current and future generations of human beings. Taking a holistic approach, the "community dwellers" in

29 F. Taylan, The strategy of the inseparability of human communities and natural environments. The *Te awa Tupua* law in New Zealand (*La stratégie d'inséparabilité des collectifs humains et des milieux naturels. La loi Te awa Tupua en Nouvelle-Zélande)*, in *L'alternative en commun*, ed. Hermann, *Les colloques Cérisy*, 2019, p. 165-178.

30 O. Barrière et al., Coviability of social systems and ecosystems: Reconnecting humankind to the biosphere in an era of global change (*Coviabilité des systèmes sociaux et écologiques. Reconnecter l'Homme à la biosphère dans une ère de changement global)*. ed. *Matériologiques*, coll. *Essais*, 2019

31 G. Canivet, Fraternity in French constitutional law (*La fraternité dans le droit constitutionnel français*), https://www.conseil-constitutionnel.fr/la-fraternite-dans-le-droit-constitutionnel-francais and see the thesis in preparation on The concept of fraternity (*La notion de fraternité*) by Pierre Coulaud

32 M.-P. Camproux Duffrène, Natural commons as an expression of environmental solidarity (*Les communs naturels comme expression de la solidarité écologique*), *RJE* 4/2020, p. 689-714. See also the work of GIP on The spectrum of communality (*Les* échelles *de la communalité*) (ed. J. Rochfeld), Report to the Law and Justice Mission 2020.

the natural common are a biotic community, attached to the same ecosystem and including both humans and non-human living organisms. In this sense, we are taking the "diplomatic" approach of Baptiste Morizot, who suggests that the commons of E. Ostrom should be expanded to include the entire biotic community, via the "allocation of rights of use to humans and non-humans in the same area[33]", and that of Aldo Leopold, according to which a common will then be considered as a "biotic community" encompassing humans and non-humans that are in a close interdependent relationship[34].

Thus, the community of a natural common involves one or more sets of people, regardless of size (humanity, indigenous population or citizens living in the same environment) and one or more sets of natural elements (species, populations or specimens) living in an environment.

• **Relationships between the community and the object and within the community**
What unites the members of the community is the link that connects them to the object of the common. It may be a use, access to and/or potentially competing and critical extractions from the object. Using less legal language, the members of this community are in dependent relationships with the object to ensure both their survival and their well-being. This dependent relationship is reciprocal and hence it is an interdependent relationship. Effectively, the object needs this living community to ensure its continuity. In terms of the deterioration of its condition, pollution of regions, and the overly rapid disappearance of species due to certain human activities, the object needs protection against overexploitation, disintegration or monopolisation. The human component of the community must therefore assert the existence of this interdependent relationship and protect it against humans, whether or not they are part of the community, who disrupt the functional equilibrium of the natural common as a whole.

2. TWO TYPES OF NATURAL COMMONS

In reality, the category of "natural commons" includes two types of commons: universal natural commons and territorial natural commons.

2.1 Universal natural commons

These comprise generic or matrix natural objects and the living community as a whole.

The objects of these commons are matrix or generic natural objects. These are water, air, the planet's ecosystem and biodiversity; abstract objects, universalities containing various other entities such as flora and fauna.

These objects are matrix or generic to the extent that they constitute the very essence of life on Earth, the origin and future functioning of what some call Mother Earth, *Pachamama* or the biosphere.

33 B. Morizot, The Diplomats. Living with wolves on a new map of the living world (*Les Diplomates. Cohabiter avec les loups sur une nouvelle carte du vivant*), Marseille, Wildproject, 2016, p. 289.

34 C. Larrère, The biotic community: Aldo Leopold's legacy (*La communauté biotique: l'héritage d'Aldo Léopold*) in *Les philosophies de l'environnement*, PUF, 1997.

They are necessary for the health of both humans and non-humans, and affect the survival of the present and future generations.

The community in question is the living community, that is, all humans and non-humans of both the present and future generations.

2.2 Territorial natural commons

These are lower down the scale and comprise a territorial ecosystem and a more localised community.

The object of a territorial natural common **is an ecosystem as a functional, localised unit** (the common is an environment, a forest, a river, etc).

The **community** of a territorial natural common is smaller and more localised. It **can be determinable, as there must be an identified connecting link** with the object, which may be an inhabitant, a nest, a local resident or an owner.

Note that these two categories may overlap.

The objects of spatial commons, the various ecosystems, of necessity, derive their ability to function and their sustainability from the matrix or generic objects of universal commons (species, water, air, etc), and can be considered as subsets (forest ecosystem/planetary ecosystem); the local community is part of the living community (population/species).

Spatial commons can be considered as a stratum, i.e. : "one of the layers of a whole, created by the overlap of objects and things that while fairly homogeneous, have a distinct character".

C. LEGAL RULES APPLICABLE TO NATURAL COMMONS

A number of legal contributions to this theory can be identified. It is thus possible to legally define the objects of commons as "common things", which has the legal effect of applying a protective legal system (1) to them. It is also possible to identify in the natural common a legal interest, which may be defended in a court of law (2).

1. LEGAL DEFINITION OF OBJECTS OF COMMONS AS COMMON THINGS[35]

1.1 Characteristics of the legal system

Legally, the object of a common may be defined as a natural common thing, within the meaning of Article 714 of both the Belgian and French Civil Codes. *"There are things that do not belong to anyone and they may therefore be used by everyone".* This definition is interesting in three ways.

35 M-P Camproux Duffrène, Rethinking Article 714 of the French Civil Code as a gateway to commons (*Repenser l'article 714 du Code civil français comme une porte d'entrée vers les communs*), in *Dossier: L'actualité des communs,* RIEJ, *(Revue Interdisciplinaire d'Etudes Juridiques*), 2018.81, pp. 297-331

It enables the object to be considered as **inappropriable**, which makes it impossible for the substance of the object to be monopolised, destroyed or damaged.

However, this object may be subject to **common usage by everyone**. Each person has less power over this thing, whether it is a use or a benefit (and not the abuse of the thing, or power to dispose of it). This use is communal, not exclusive, and must be shared, i.e. made available to other users.

This common usage requires each and every one of us to **conserve the thing** so that others can use it[36]. Thus, access to, usage of, and drawing from it must not lead to damage to the substance of the thing (ecosystem) or its dynamic properties. Each user must limit their uses, and only carry them through insofar as they relate to portions or specimens and do not damage or degrade the substance of the thing (the proper functioning of ecosystems, the survival of species, etc). This conservation obligation – the reflection of a common usage right – must be particularly strengthened so that the object can benefit both present and future generations[37].

Common usage by everyone and the associated conservation obligation of co-users are the two main guiding principles of the legal system relating to the object of the common, the common thing that must not be exclusive. They must be understood as forming **the primary system applicable to natural commons.** These principles are primary in that they may also affect the legal system relating to spatial commons or to specimens of species, or pieces or portions of objects of commons. This system does not exclude the ownership of pieces or components of this object, but does, however, oblige this owner to take account of the fact that these pieces/components are parts of a whole (a common thing), which may reduce his right over the owned object.

Nuances may be applied to this system depending on the type of natural common concerned.

For universal commons, the objects are not controlled by any State or States. They are free from any limits imposed by political/legal boundaries as they are outside absolute and exclusive public or private ownership. They cannot be commoditised, either from a material point of view, or from the standpoint of ethics or social justice. Some portions, quotas or specimens contained within this object may be drawn (and hence appropriated) or used, provided they do not damage the functional dynamism of the object over the long term, for the needs of the living community and therefore for common use. According to P. Charbonnier and D. Festa, "*when the collective, and even social, dimension of the relationship to certain things* (here, the common thing) *is recognised, the objective of the law is to recognise and protect this collective characteristic against forms of exclusive appropriation*"[38].

36 Benoit Jadot, Article 714 of the Civil Code and environmental protection in F. Ost and S. Gutwirth, *Quel avenir pour le droit de l'environnement?*, Brussels, Pub., Faculty of the University of Saint Louis 1996, pp. 58-61

37 M-P Camproux Duffrène, Rethinking Article 714 of the French Civil Code as a gateway to commons (*Repenser l'article 714 du Code civil français comme une porte d'entrée vers les communs*), in *Dossier: L'actualité des communs,* RIEJ,, 2018.81, pp. 297-331

38 According to P. Charbonnier and D. Festa, "*when the collective, and even social, dimension of the relationship to certain things* (here, the common thing) *is recognised, the objective of the law is to recognise and protect this*

For territorial commons, the natural entity is spatial and therefore necessarily subject to one or several national jurisdictions and may be covered by public or private property law. Each of these natural entities may effectively be subject to a range of different uses (work, physical or spiritual needs). Of those who use them, one or more may be owners. In this case, both property rights and rights of use can be exercised simultaneously over this object or may overlap[39]. According to F. Ost, *"the owner retains most of his prerogatives but some of them are now subordinate to the conservation objective. As if his asset were managed externally, the owner no longer necessarily has the same level of control over each aspect of his asset"*[40]; the owner may have more rights than other users, but has a greater obligation of conservation and allocation[41] and must allow access to it by other users. He is therefore the custodian of the common thing. Sylvie Paquerot also notes that, within this framework, as explored by E. Ostrom, the common is not universal such that one community may have access to a territory to the exclusion of another[42].

1.2 Influence of the primary legal system on uses made or the appropriation of specimens or portions of the natural object

Two legal rules may apply: the fruit/product distinction and the accessory rule.

Fruit/product distinction

The legal system relating to common things allows everyone access to the vital elements, but prevents any damage being done to the substance of biodiversity and its proper functioning. Each user must limit the uses made (restraint) and only carry them through insofar as they relate to specimens that qualify as fruits, that is, where making use of it will not have any impact on the very substance of the thing or the proper functioning of the ecosystem. If drawing from it damages or degrades the substance of the thing, the element is not a fruit, but a product that the user may not take or appropriate.

This distinction between fruit and product, according to their nature, allows us to understand why some natural elements may be appropriated and others not. Specimens of protected species may

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collective characteristic against forms of exclusive appropriation", in *Biens communs, beni comuni*", *Tracés. Revue de Sciences humaines* [online], no.16 | 2016, published online 1 January 2017, consulted 26 February 2018. Link: http://journals.openedition.org/traces/6622.

39 According to F. Ost, *"the owner retains most of his prerogatives but some of them are now subordinate to the conservation objective. As if his asset were managed externally, the owner no longer necessarily has the same level of control over each aspect of his asset".* F.Ost, Responsibility: after us, the storm? (*Responsabilité, après nous le déluge?*), in *La nature hors la loi, l'écologie à l'épreuve du droit*, Paris, ed. *La découverte*, 1995, p.323

40 F.Ost, Responsibility: after us, the storm? *(Responsabilité, après nous le déluge?)*, in *La nature hors la loi, l'écologie à l'épreuve du droit*, Paris, ed. *La découverte*, 1995, p.323

41 A. Chaigneau, Ownership allocated to the community (*Une propriété affectée au commun*), *in* (ed. A. Chaigneau), *Fonctions de la propriété et commun, regards comparatistes*, ed. *Soc. de Leg. Comparée* 2017, Paris, LGDJ, p. 65

42 S. Paquerot, Commons and common goods (*Commun et bien commun*), in (ed. A. Chaigneau), *Fonctions de la propriété et commun, regards comparatistes,* ed. *Soc. de Leg. Comparée* 2017, Paris, LGDJ, p. 21

not be appropriated for the simple reason that drawing from them damages the substance of biodiversity and its proper functioning. For example, a group of specimens of a species may, by virtue of its rarity at species level (matrix common thing) or its role in the ecosystem (localised common thing) be classified as a fruit or product, and may or may not be appropriable depending on its classification. Specimens of protected species are not *rei nulli* (nobody's things) that can be appropriated by occupation, but products of the common thing and governed by the legal system relating thereto. Conversely, picking daisies in a meadow or slaughtering a wild boar or a sheep does not harm the environmental thing and stems from its use. Since they are neither rare nor essential to the proper functioning of the ecosystem in which they develop, these elements are fruits that the user of the common thing may appropriate[43].

This distinction between fruit and product for the detachable elements of the composite and functional object must act as a lever to limit the now virtually automatic appropriation of natural elements used, and should lead to a reduction in the number of specimens potentially belonging to the *res nullius* category. Moreover, it should be noted that the hunter or fisherman is now limited in the number of appropriations he makes[44].

Excessive usage, or put another way, excessive and unbridled consumption[45] (for example, in the case of overfishing leading to the disappearance of the species and the depletion of biodiversity) should lead to the element being reclassified from fruit to product. Its usage should therefore lead to a questioning of the partaker's responsibility for damaging the common thing itself, for exceeding his right, which is only of use, and harming the right of use of his co-users in the community of living organisms, via the mechanism of civil liability[46].

The rule whereby the accessory follows the principal

When the issue is specifically the **terrestrial ecosystem,** the question arises as to what ownership of the "land" means. It is often assumed that what is attached to or evolves on this appropriated

43 It is true that the use made of this animal, even if it corresponds to the right of use of each person (moderate use and for their needs) set out in Article 714 of the Civil Code, may, in the case of too many users, lead to damage of the substance of the thing. Regulation relating to access to the thing must therefore be established.

44 The legal distinction between environmental elements is based on two criteria. The first is the traditional criterion, based on whether or not use made of them alters the very substance of the thing from which they derive, with regard to their abundance or rarity. The second is more recent and relates to their importance for the proper functioning of the ecosystem, biological balances or the maintenance of biological diversity, and whether this usage harms the variability and adaptability of living organisms and therefore the maintenance of biological diversity.

45 V. S. Drapier, Which civil liability system should be used for damaged common things (*Quel régime de responsabilité civile pour les choses communes endommagées?*), RJE 4/2016 p. 691

46 M-P Camproux Duffrène, Towards a socio-ecosystemic approach to environmental debt: specific civil liability for damaging the environment (*Pour une approche socio-écosystémique de la dette écologique: une responsabilité civile spécifique en cas d'atteintes à l'environnement*), in *VertigO - la revue électronique en sciences de l'environnement* [online], Special issue 26 | September 2016, published on line 9 September 2016, consulted 1 March 2018. URL : http://journals.openedition.org/vertigo/17493 ; DOI : 10.4000/vertigo.17493

resource is, in legal terms, an accessory to it and can therefore be appropriated by incorporation or occupation or as forming part of the space above or below the appropriated resource.

With the theory of commons, the specimens of plant or animal species may not necessarily be seen as an accessory of the building on the land but as an accessory of a matrix common thing (biodiversity, a species) or a territorial common thing (a forest ecosystem, for example). In this case, they are considered as an accessory to the principal that is subject to the legal system relating to the common thing. It is already clear that specimens of a protected species (matrix common thing) living on appropriated land do not belong to the owner[47]. Depending on whether they are fruits or products, they may be drawn from[48] by humans, as users of biodiversity, and also potentially by the owner of the land.

As accessories to objects of natural commons, the legal system for these specimens may be adapted accordingly. A population consisting of a category of trees may, by virtue of its rarity or its importance for the proper functioning of the ecosystem with which it interacts, not be classified as a fruit and therefore as a good appropriated by the owner of the ground. It may be identified as a product of the common thing, the use of which damages the substance of the common thing and accessory to the common thing, and therefore follows the legal system for the common thing, i.e. it is unappropriated and inappropriable.

In this legal construction, it should be noted that the more the biodiversity is in danger, the more the specimens will fall under the category of product, as belonging to protected species (common thing). Therefore, the owner will have less right to the spontaneous productions of the biodiversity.

The issue of what is left for the owner of the ground might then arise. On the one hand, he has ownership of a base, the land and the productions related to his activity (plantations, constructions) and on the other, he may have the privilege of using what the soil produces or holds spontaneously (earthworms, bees) and which are not related to his production or construction activities. As the guardian user or custodian, the owner should therefore use these elements in moderation since his usage is shared with the living community[49]

47 A careful re-reading of Article 552 of the Civil Code in its entirety reveals that only the structure or the plantations (related to human activity and not to biological processes and ecosystems or interactions between living organisms) may be attached to ownership of the ground, including both the space above and below
Article 552 of the Civil Code states,
"Ownership of the ground implies ownership of the space above and below. The owner may create in the space above all the plantations and constructions he deems suitable, except for the exceptions stipulated under "Easements or land services".
"He may create in the space below all the constructions and excavations that he deems suitable and draw from these excavations all the products that they may yield, except for the modifications laid down by the laws and regulations relating to mines, and laws and police regulations."

48 And as goods, they may be traded.

49 Recently implemented techniques, such as the Real Environmental Obligation (a voluntary but legally-binding environmental protection measure) or environmental trusts, may enable this management for all.

Identifying the nature and subsequent legal systems relating to the natural elements enables us to understand the powers that the legal subject has over these elements and stop focusing on ownership.

Another interesting aspect of this theory is that it reveals an interest that is neither individual nor general, but an interest of the common as a whole, and reflects, via such interest, the interdependence between the members of a living community and the natural object.

2. IDENTIFYING AN INTEREST OF A COMMON[50]

Legally speaking, it is interesting to identify the interest of this community and of this common so that it can be defended in court (we will see in Part II that environmental damage is an illustration of the harm of this interest of a natural common).

The objective of this interest of a common is both the conservation and continuity of the natural object (the maintenance or restoration of the ecosystemic dynamic) and the protection of the relationships between this natural object and the community of human and non-human living organisms whose survival depends on it.

To pick up the theory of the common set out above, this interest of the natural common includes both human interests and those of non-human entities (environment, species), united in a relationship of interdependence and sharing, i.e. pooling resources and living together. It is therefore quite specific. It would not be reduced to an individual interest, i.e. that of a person (which would have to be proved in a typical action in French legal liability or before the European Court of Human Rights) or even by adding together individual interests (the possible subject of a class action). Nor would it be confused with a general interest, which in France is protected by the state and its representatives.

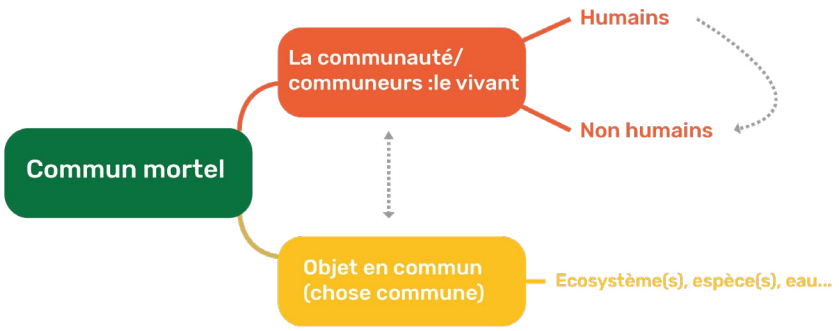
This common interest includes, on the one hand, a **community interest. This community may be human.** To this extent, this interest is multi-individual and transindividual, as it originates both in each individual in the community without exception, and in the existence of the group as a whole (e.g. breathing pure air). This interest is indivisible and non-apportionable; it is shared (made available to all) by a community. In this component. it is based on the concepts of collective interest (which is recognised and subject to legal action in France in areas such as consumer affairs or the defence of a profession) and diffuse interest, as exists in Portuguese law[51] or in Colombia.

However, within the framework of natural commons, this interest goes beyond the interest of the human community and encompasses all living organisms. It is also an interest of non-human living organisms, which have the same needs as the human species and the same essential dependence on their ecosystem. This is why this interest is, above all, a **cross-living-species** interest (containing

50 M.-P. Camproux Duffrène, Natural commons as an expression of environmental solidarity (*Les communs naturels comme expression de la solidarité écologique*), *RJE* 4/2020, p. 689-714.

51 A. Aragão and A. C. Carvalho, Taking access to justice seriously: diffuse interests and *actio popularis*. Why not? in: *ELNI Review, Environmental Law Network International*, no.2/2017, pp. 42-48 (http://elni.org/fileadmin/elni/dokumente/Archiv/2017/Heft_2/elni2017-2_Aragao_etal.pdf)

the interests of a **living community** that includes both humans and non-humans).



Unité relationnelle et fonctionnelle, dont l'essence est l'interdépendance des éléments qui la composent

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This component of the common interest may be classified as an **interest in common** (living together).

This interest of the common encompasses the **interest of the object** (e.g. the ecosystem) *per se*.

It is important to identify the components of this interest of the common to find out what it contains and then to better defend it from both a governance point of view and in court.

The recognition of this **singular interest** (which concerns both the object of the common (common thing) and the community concerned) **must be capable of being defended in court**; it is all the more conceivable that, in France, the recognition of an action for redress for environmental damage may be considered as a prime illustration of this.

Once the structure of a common has been identified and this interest of the common broken down, it is easy to imagine the attribution of a legal personality to a natural common as a mixed legal entity (including both humans and non-humans). This attribution is not impossible but it must in no way be confused with the attribution of a personality to a natural element (excluding humans). If necessary, it must fall within a very specific framework of governance and protection, notably regarding legal action.

The important thing about a natural common is not its identification as a legal entity with a legal personality but what it brings as an approach to the relationships between humankind and nature, and the repercussions it may have in this regard, especially in terms of legal action for redress in the event of damage to this interest of the common. It can be seen how compensation for damage to an interest of a natural common has been implemented in the civil courts via the action for redress for environmental damage introduced into the French Civil Code by the Law of 8 August 2016; we will speak more about this action in Part 3.

II. The expressive function of criminal law: a legal paradigm shift to protect the safety of the planet

The special report Climate, health: better prevention, better healing (*Climat, santé: mieux prévenir, mieux guérir*) issued by the High Council on Climate (HCC) in France in response to the coronavirus crisis has a revealing subtitle which summarises the issues of the current situation: "*accelerating a just transition to strengthen our resilience against climate and health risks*"[52]. The behavioural change that such a transition entails must be accompanied by a change in the legal framework that will lay the foundations for future actions. In the early stages of reasoning, it is the *raison d'être* of criminal law, its *ratio legis*, which must be questioned and confirmed in the face of the environmental emergency.

An intellectual conduit, which leads to the drafting of a legal definition for an offence, it reveals the legal aim, intention and underlying reason of its creator, the legislator, and of its creation, the offence. From a conceptual point of view, it contains the issues to be addressed and protected, which need to be translated into law and included in the text of the criminal offence in order to specify and delineate the scope of application. Thus, criminal law is the guarantor of the social values deemed essential in the name of a higher interest, called the "*general interest*". In its voluntarist conception, which is that adopted in French law, this is the expression of the general will, namely the will of the whole community, going beyond the specific interests of each individual. An intentionally vague and open concept, it follows changes in society, encompassing the social needs of the time and reflecting new challenges. The latter include the inescapable emergence of the issue of the environment, which is becoming more urgent by the day in the context of the global emergency.

The general interest related to the protection of the environment has been readily recognised in both supranational and national law[53]. Supported by public pressure, as evidenced by mounting demands since the 1970s in the face of the proliferation of environmental disasters, protecting our environment would appear to be gradually becoming a common interest recognised by all – both States and individuals. In France, for example, the Criminal Code that entered into force on 1 March 1994 places "*the integrity [....] of the equilibrium of its natural setting and environment*" among the the fundamental interests of the Nation[54]. Ten years later, the Constitutional Charter for the Environment reaffirms, in its recitals "*that the preservation of the environment must be sought in the same way as the other fundamental interests of the Nation*"[55]. But, paradoxically, the protection afforded it by law, including criminal law, has been limited right from the start, and is restricted to a purely utilitarian view – and hence purpose – of its object. Most of the declarations

52 https://www.hautconseilclimat.fr/actualites/le-hcc-presente-son-rapport-climat-sante-mieux-prevenir-mieux-guerir/

53 For example, in French law, Article L. 110-1 of the Environmental Code lists all the following as of "general interest": the awareness, protection, development, restoration, remediation and management of spaces, resources and natural land and marine environments, sites, daytime and night-time landscapes, air quality, living organisms and biodiversity, as well as the preservation of their capacity to evolve and the protection of the services they provide.

54 Article 410-1 of the French Criminal Code.

55 Article 2 of Constitutional Law 2005-205 of 1 March 2005 on the Environmental Charter.

and legal texts converge in that they do not see the environment as an entity unto itself, but only in terms of its functions that are useful to humankind. Consequently, the protection afforded by law is indirect, incomplete and insufficient to halt the well-advanced process of destruction.

The legal framework, which is incomplete in its most essential part, i.e. the matrix link at the source of everything on Earth, needs to break out of the tight straitjacket imposed by current law (A) and redefine – and enshrine in law – the real fundamental values that will underpin a more appropriate penal response (B).

A. CASTING OFF ANTHROPOCENTRISM TO ADOPT AN ECOCENTRIC VIEW

For a long time, man – at least in the West – has believed himself to be master and owner of an infinite natural world with inexhaustible resources. Recently, however, he has realised that his natural environment is potentially finite and that, as a result, the human race could die out. This finite nature of the Earth and its resources – and hence of humanity itself – is the issue that is now mobilising young people in different countries and motivating people to march for the climate and the planet, because it is the future of the generations to come that is at stake, and for which present generations must take responsibility. Because he feels personally threatened in his very existence, man realises that he is not "outside nature" or above nature, but that his survival depends on the planet's equilibrium and the sustainability of non-human living organisms. This radical change in perspective means he is no longer placed at the centre of everything but alongside the rest – "de-centred" – within a global system of interrelationships and interdependence that fuel the processes of life. It is no longer a question of living at the expense of others but living *with* others.

Anthropocentrism, which currently governs the adoption of legal texts and underlies political rhetoric is therefore no longer appropriate, because it does not in any way reflect this universal reality, but on the contrary, dangerously obscures it. While the International Court of Justice (ICJ) recognised, in its advisory opinion of 8 July 1996, that *"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"*[56], the form of words is very vague and abstract, but, most of all, still focuses on a purely utilitarian view of this "*space*", which is entirely devoted to humankind and its well-being. A quarter of a century later, there is an urgent need to erase this perception of things and replace it with one that should be obvious: to combat damage to the environment is to fight to protect the human race, both present and future, but also to protect the current and future equilibrium of the planet and of *everything* on it.

The first challenge of environmental law is therefore to bring about this transition from anthropocentrism, which only takes account of the interests of man, established as the "master and possessor of nature", in the words of Descartes, to an ecocentric view based, on a planetary level, on the systems of relationships and interrelationships geared towards a common global objective: the viability of the planet, the balance of the biosphere and the survival of the human race. It is

56 ICJ, advisory opinion of 8 July 1996, Legality of the threat or use of nuclear weapons, ICJ Compendium, 1996, pp. 241-242, §29.

these links within life systems that we need to consolidate to pursue an objective of common protection. The challenge is therefore to develop new values based on a universal, systemic approach and thence to enshrine new legal concepts that represent them and ensure they are protected in a lasting manner.

B. ENSHRINING NEW FUNDAMENTAL VALUES IN LAW

The matrix link, which unites humankind and nature, recognised as the key point of any legal action, whether public, private, individual or collective, needs to be consolidated in a new system of values, centred on the key issue of the protection of the environment per se; this should be understood in its global, universal dimension as the safety of the planet, the balance of the biosphere and the survival of humanity and species, all of which are intrinsically linked. "*Whereas the Earth, home to humanity, constitutes a whole marked by interdependence and reaffirming that the existence and the future of humanity are inseparable from its natural environment*"[57], the "rights of humankind", as proclaimed in the Universal Declaration of 2015 serve both the present and future generations as well as nature and the living world in general. Moreover, it would be more accurate to talk about the rights of "*the living world*" or "*living beings*" (humans and non-humans), the legal translation of this new universal view based on an ecocentric approach. Based on this approach, new values, which would be officially and institutionally protected by criminal law, must be defined and enshrined in law via their inclusion in new criminal offences.

1. THE "COMMON HERITAGE OF THE LIVING WORLD"

If we focus on the space/time dimension of current and future issues, the environment to be preserved can be considered a *common heritage*, uniting all the objects of natural commons that we have inherited from our ancestors and which it is our responsibility to protect, to ensure their transmission to future generations. In its opinion issued on 18 March 2003, the French Economic, Social and Environmental Council stresses that the finite dimension of the Earth and its natural resources and the non-renewable or exhaustible nature of many of its resources confers on them a dimension that could be described as "heritage that must be preserved". For this type of "*capital*" consisting of natural resources, we should only consume "*dividends*", that is, the portion that is renewable and not the "*capital*" itself, if we want to ensure "*sustainable development*" on our Earth[58]. The things or resources classified as natural commons thus form part of a whole called "common heritage"; by including them in this heritage they can be collectively managed with the purpose, guaranteed by criminal sanctions, of preserving them.

Historically, this concept of a common heritage, which, in etymological terms, means "that which comes from our fathers", and hence this heritage to be bequeathed, is not new and has been broken

57 Universal Declaration of Humankind Rights 2015 (http://droitshumanite.fr/declaration/), which reproduces the wording already used in the Rio Declaration on Environment and Development of 13 June 1992.

58 Environment and sustainable development – The indispensable mobilisation of economic and social players (*L'indispensable mobilisation des acteurs* économiques *et sociaux*), Opinion of the Economic and Social and Environmental Council, presented by MARTINAND, 18 March 2003, 8.

down at various levels over time: firstly at the level of *humanity* in international law[59], then the *nation* in the French environmental and town planning codes[60] and, more recently, *human beings* in the third recital of the 2004 French Constitutional Charter for the Environment. It is interesting to note that, in 1945, the concept of humanity, connected with common heritage, was to take on a truly legal dimension in criminal law via the criminalisation of the offence called "crime against humanity", enshrined in the Charter of the International Military Tribunal (IMT) at Nuremberg[61]. Humanity, thus targeted as a civilian population group, became a new legal subject of international law, whose existence and protection constitute the very object of contemporary international law. But looking through the prism of ecology, humanity, that is all peoples of the world included in one community – no more than the "*human beings*" included in the common heritage described in the 2004 Charter – are not enough today to establish the protection by criminal law of our environment. Going beyond the anthropocentric view they convey, these terms must be replaced by a more encompassing formula that will allow all living organisms on the same level, whether human, animal or plant, to be gathered together in a single community, and in view of the interdependent relationships that bind them, this will be for a common purpose: the protection of this ultimate value that is life.

Thus, one might say that "the whole marked by interdependence", which characterises Earth, the home of humanity, as stated in the 2015 Universal Declaration and before it, the 1992 Rio Declaration, unites humans (living humans), animals and plants (living non-humans), and is the owner of a heritage which, in its entirety, going beyond humanity, can only be that of all living organisms. On this basis, it would be better to talk of a "common heritage of living beings". Such a definition would be widely used to show the ethical dimension of environmental protection, that is the existence of a common interest corresponding to universal values and addressing issues for the entire planet and the whole of humanity, both current and future.

2. THE "SAFETY OF THE PLANET"

The definition of "common heritage of living organisms" has repercussions in terms of the "*safety of the planet*", a new common value emerging at international level, which targets the viability of

59 This first appeared in general international law, expressed as the "common heritage of humanity" in 1958 when the president of the first Geneva conference on the Law of the Sea, Prince Wan Waithayakorn of Thailand, noted that "*the sea constitutes the common heritage of all mankind, and it is therefore in the general interest to clearly determine the law of the sea and to ensure that it equitably governs the various interests and guarantees the conservation of this heritage for the good of all*". Along the same lines, the permanent representative of Malta to the United Nations, Ambassador Arvid Pardo, proposed, a decade later in the first Committee of the General Assembly in New York in 1967, that the use of mineral resources from the seabed beyond the limits of the national jurisdiction of States, be regulated by the United Nations, while asserting that these resources constituted the common heritage of humankind. Today, in accordance with international conventions, the common heritage of humanity includes the moon, its resources and the other celestial bodies, as well as the seabed (called "the Zone").

60 Articles L. 110-1 of the Environmental Code and L. 101-10 of the Town Planning Code.

61 Article 6 c) of the Charter of the IMT, Nuremberg, attached to the London Agreement of 8 August 1945 on the prosecution and punishment of major war criminals of the European Axis Powers.

the Earth, and with it, the future of humanity[62]. In point of fact, "*behind the safety of the planet, we can see a new alliance between the protection of the environment and the protection of humanity, where the two entities would not so much be dissociated as associated*"[63]. The advantage of this expression lies in its all-encompassing dimension, which refers to the balance of the biosphere and the integrity of ecosystems in their composition, structure and functioning. It contains the various components of the environment: water, air, soil, subsoil, biodiversity (fauna, flora, ecosystems), as well as their environmental functions and all vital processes. This new concept therefore seems fundamental in criminal law, since, on the one hand, it can be used to embody "*a higher environmental value that can even form the basis of stronger and more extensive protection of the biosphere (…)*"[64] and, on the other, corresponds to the recognition of a common heritage enshrined as a strictly legal concept, endowed with an appropriate legal protection system. Protecting the safety of the planet is meant to constitute the *ratio legis* of new universal offences resulting from the desired legal paradigm shift.

In the context of an environmental emergency, there is a particular interest in recognising "*the legal existence of a common environment*"[65]*,* specifically from a criminal law standpoint. The definitions of "natural commons" and the "common heritage of living organisms" assume a particular connotation. Effectively, it is no longer a common thing because it is plentiful and freely accessible to all, but because it is rare and/or threatened with extinction. There is, for example, a right to water or to clean air only because both are becoming scarce. On this basis, the common heritage requires a specific focus by the community in terms of its management and conservation. It underpins a responsibility towards the environment, as set out back in 1972 in principle 4 of the Stockholm Declaration[66]: *"Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors".* This responsibility will be reflected in and accomplished by means of appropriate criminal sanctions that guarantee the new universal values of the common heritage of living organisms. Unanimously recognised and enshrined in law, these fundamental values will make it possible to specify and legitimise the place of criminal law in the process of protection.

62 NEYRET L., Ecocide, in Dictionary of Common Goods, edited by M. CORNU M, ORSI F. and ROCHFELD J., *Dictionnaires Quadrige*, 2017, 477-484.

63 FRONZA E. and GUILLOU N., Towards a definition of the international crime of ecocide (*Vers une définition du crime international d'écocide*), in *Des* écocrimes à l'écocide – Le droit pénal au secours de l'environnement, edited by NEYRET, Bruylant, 2015, Chapter 7, 135.

64 HELLIO H., From the shared value of safety of the planet to the international repression of ecocide. A new quest (*De la valeur partagée de la sûreté de la planète à la répression internationale de l'écocide. Une nouvelle quête*), in *Des* écocrimes à l'écocide – Le droit pénal au secours de l'environnement op. *cit.,* Chapter 6, 111.

65 WEISS L., The globalisation of the concept of environmental rights and its repercussions in French law. Search for a legal singularity (*La mondialisation du concept de droits environnementaux et ses retombées en droit français. Recherche d'une singularité juridique*), in *Mondialisation et globalisation des concepts juridiques: l'exemple du droit de l'environnement,* IRJS editions, 2010, Sorbonne Legal Research Institute Library – André Tunc, Vol. 22, 39.

66 Declaration of the United Nations Conference on the Environment, 16 June 1972.

Part 2

THE NORMATIVE FUNCTION OF CRIMINAL LAW: NEW OFFENCES OF ENDANGERING THE ENVIRONMENT

The *ratio legis* of environmental criminal law, supplemented by these new fundamental values that reflect current and future challenges, will enable us to define the place of this really special law (I), in order to strengthen its legitimacy and its relevance to the goals set. These will in particular lead to the creation of new offences in order to incorporate the most serious situations threatening the safety of the planet and the survival of humankind (II) into criminal law.

I. The need to redefine the place of environmental criminal law

The place of criminal law is a key question. It points to the precise and specific framework of this very special law in its relationship with the common heritage of living beings, the object of its protection. From the outset, we need to make a distinction, taking into account that the preservation of the environment involves numerous specific factors stemming from the polysemic and multifaceted nature of its very object. In cases of environmental damage, there is the common – in the sense of "current", "habitual" – and the exceptional; the ordinary and the extraordinary, or even "*the banal and the tragic"* to use the expression of French jurist Jean Carbonnier. The "*banal*" relates to anything that does not constitute large-scale environmental damage threatening the safety of the planet, the balance of the biosphere or the survival of humankind, in other words, the universal values stemming from the new legal paradigm. Thus, it could be, for example, visual or aesthetic pollution through flyposting, which has nothing in common, in terms of seriousness and the challenge to the planet, with deforestation of the Amazon or the global loss of diversity.

Consequently, the new criminal law must be positioned in relation to the nature of the violation, the disturbance caused or the damage done. At the same time, the form of response by criminal law, required by certain circumstances, must also be specified and circumscribed. As the ultimate sanction called on in situations of vital environmental emergency for humankind and the whole planet, the innovative criminal law can logically only have a restricted field of application. It is the "*tragic"* in all its forms that must be combated and expunged (A). And within this defined framework, priority must be given to the non-acceptance of irreversibility, implying action at the risks stage, i.e. *before* the damage is done (B).

A. THE CRIMINAL LAW RESPONSE TO THE "TRAGIC"

In environmental terms, the "tragic" relates to all environmental, and by association, humanitarian disasters. It is, for example, Texaco's oil pollution in Ecuador or that of Shell in the Niger Delta, the Monsanto affair or the Probo Koala, etc… it is also organised environmental crime, generated by illicit trafficking of any kind – trafficking in endangered species, toxic waste, illegal trade in precious metals or other natural resources, such as Madagascar rosewood – which is fourth in the world illicit trade rankings, after drug trafficking, counterfeiting and human trafficking[67]. The repercussions of these activities go way beyond the deterioration of a geographically defined area, of a forest, a park or a river, or the destruction of a particular species of wildlife. The negative impact

67 NEYRET L., Ecocide (Point of view 2), https://lapenseeecologiques.com/ecocide-point-de-vue-2/

is both cross-border and transgenerational, upsetting the processes of life and natural development in their entirety and over decades. The challenge is therefore inter-spatial, at planetary level and inter-temporal all at once, and for current and future generations.

A change in perspective is thus inescapable. At present, it is about combating large-scale/substantial/long-term damage to vital natural commons, because they are essential to the safety of the planet and the balance of the biosphere, and therefore the survival of humankind. We cannot be content with a sectoral approach – which past and current experience has shown to be ineffective – or a small-steps strategy. The "tragic" at issue here unquestionably comes under pure criminal law, whose power to condemn, punish and deter would seem to be a categorical imperative[68]. This imperative implies a refocusing of criminal action on the most serious forms of damage to ecosystems. Such is the specific scope that would have to be assigned to it within the framework of a global[69] and sustainable policy. With regard to the hierarchy of social values to be protected, the need to punish the most serious environmental damage seems all the more indisputable given that these destructive actions have a severity level comparable to those of crimes judged the most tragic in terms of dehumanisation, namely international crimes falling under humanitarian law, which are war crimes, crimes against humanity, or even "*the crime of crimes*"[70]: genocide. Acts that threaten the planet's viability likewise carry the germs of widespread destruction that characterise such crimes.

But refocusing environmental criminal law on the most serious damage is not sufficient. To ensure criminal protection is effective, the criterion of temporality is equally decisive. It implies that timely intervention is possible, and we can prevent, as far as possible, the "tragic" from occurring. Insofar as this designates the degradation of ecosystems to the point others, i.e. humankind, are exposed to a risk of damage to their physical well-being or even their lives, we have to redefine the essential notion of "risk" and its understanding by criminal law.

B. THE THREAT OF CRIMINAL PROSECUTION FOR SERIOUS AND SYSTEMIC RISKS

Defining risk is not easy, as the notion seems subtle insofar as it "*aggregates two dimensions, which are themselves difficult to assess: the seriousness of the consequences and the probability of a feared event occurring*"[71]. In all its complexity, risk relates to a particular danger marked by

68 GIUDICELLI-DELAGE G., Concluding remarks, RJE, 2014, Environmental criminal law special edition (*numéro spécial Droit répressif de l'environnement*), 245.

69 SIZAIRE V., Can there be an environmental criminal law? (*Peut-il exister un droit pénal de l'environnement?*) *La Découverte*, Discussed, *op. cit.,* 42-49.

70 The expression used by Judge KAMA when sentencing Jean-Paul AKAYESU in the ICC for Rwanda on 2 October 1998.

71 BOUZON A., Ulrich Beck, Risk society. Towards a new modernity, translated from German by L. Bernardi, Questions of communication, 2/2002, published online on 30 July 2012, http://journals.openedition.org/questionsdecommunication/7281

uncertainty with regard to its occurrence or the time of its occurrence[72]. From a legal standpoint, its more or less high probability of occurrence leads to a distinction between known and proven risks falling within the scope of prevention or simply potential or uncertain risks, covered by the precautionary principle, because with the current state of knowledge, they are the subject of scientific controversy. Within its current meaning, the word "risk" combines the probability that harm will occur, i.e. the possibility that a negative event will occur, and the seriousness of this potential harm[73]. Henceforth risk will only really be taken into account if the danger (its first component) is likely to damage fundamental issues, both human and environmental, if it occurs (the second component), as a result of their exposure. The risk is therefore only criminalised if it involves endangerment, that is exposure to a harmful situation with a potential impact. Thus defined, it has a very wide scope of application, potentially covering all domains, public and private, of human activity and both natural and artificial phenomena. Consequently, it is understandably applicable in situations likely to have an adverse impact on the environment, and, by extension, man's health and safety, whether in cases of exposure to lead, dioxin, asbestos, pesticides or hazardous waste, etc.

Applied to the environment, if it transpires that zero risk does not exist and will never be achievable; its manifestations present issues that must be tackled and countered in their most serious forms. Consequently, it is preventive action, the anticipation of harm, that is to be developed as a priority, and that numerous national and international general provisions have for a long time been calling for. Thus, to mention just the main ones, preventive action established in principle at European level in Article 130 R §2 of the Maastricht Treaty[74] received statutory recognition in French law in article L. 110-1-II, 2° of the Environmental Code[75], before receiving the ultimate accolade of being incorporated into article 3 of the Constitutional Charter for the Environment, where it takes the form of an instructive duty[76] of collective responsibility.

But while risks, in their great variety, may carry varying degrees of severity, ranging from intolerable risk to simply negligible and therefore acceptable risk, criminal law comes into play *before* the actual occurrence of damage, and would not therefore be able to stop them all from occurring.

72 According to Cornu, risk is understood as "*a harmful event whose occurrence and date of occurrence are uncertain*".

73 This is the definition adopted by the European Commission, which takes two factors into account: the probability that a dangerous scenario will arise and the severity of its consequences.

74 "*Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and that of preventive action, the principle of corrective action, primarily at source, of environmental damage and the principle that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies* (…)".

75 "*The principle of preventive and corrective action, primarily at source, of environmental damage, using the best techniques available at an economically acceptable cost. This principle means avoiding damage to biodiversity and the services it provides; failing that, to limit its extent; finally, to offset damage that cannot be avoided or limited, taking into account the species, natural habitats and ecological functions affected*".

76 "*All persons must, under the conditions defined by the law, prevent damage that could be caused to the environment, or failing that, limit its* extent".

The appropriateness of an anticipatory approach to sanctions, i.e. placed ahead of the *iter criminis* (the path of the crime), implies excluding low risks in terms of seriousness and challenges from the scope of criminal law, in order to retain and counter only the most serious, those that fall under the "tragic", and which are consequently unacceptable. Anticipatory action places a limit on the social acceptability of the sanction, which we need to ensure is not crossed. In its role of protector of social values deemed to be essential, criminal law only gains its legitimacy in situations in which there are warning signs of exposure to environmental disaster or health scandals, and in which we know that the consequences, if they occurred, would be very serious or even irreparable.

Within this precise framework, we must therefore lay the solid groundwork for anticipatory criminal liability, focused on highly probable harmful conduct, and punishing strict situations that pose a threat and in which risk is the central conduit. The latter, because it falls within the framework of prevention policies, is at the same time related to the rights of future generations, in both its temporal and spatial dimensions[77]. Indeed, its intrinsic uncertainty leads us to envisage and dread its possible consequences, both for the present and for the current generations, and for the more or less distant future and hence the next generations.

At present, various cases escape criminal punishment and therefore require legislative intervention. The place of criminal law in the "tragic" is thus to be created, whether it intervenes *upstream* from systemic risks or *downstream* from the feared damage, because the common characteristic of all tragic cases is the impunity of those who caused them. This impunity is all the more unacceptable because it jeopardises the very existence of humankind and the planet, which are linked by the same destiny.

II. The legal recognition of the new offences of endangering the environment

Environmental law is deficient in several EU member states, including France, which is all the more surprising and unsatisfactory as it clearly falls short of the requirements of the 2008 European directive on the protection of the environment through criminal law[78]. This directive contains the terms of a Council of Europe Convention adopted ten years previously, and which, even though it never came into force as it did not achieve the required threshold of ratifications, served as a model to the Council of the European Union. European texts are unequivocal on the criminal policy to be implemented by the States concerned. Starting from the clearly defined objective of "*a high level of protection*" for the environment, they decree 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 air quality, including the stratosphere, to soil and water, and to flora and fauna, including in terms of the conservation of species*"[79].

77 Law specifically recognised in France in the Constitutional Charter for the Environment.

78 Directive no. 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law.

79 Considering (5) of the directive, *op. cit.*

The appearance and development of mass, global crimes today require a response by criminal law on the same scale, i.e. a systemic approach in the protection that criminal law can offer. The division of current offences into sectors does not in any way reflect the complexity of relationships and interrelationships of the elements that make up the environment, their relationships and the links that unite them, as well as all the environmental implications that ensue. Hence, the bulk of environmental issues is hidden, when, by its nature, it requires a global approach that takes into account this complex system and the interdependence of every action carried out on it. It is therefore imperative that we abandon the system of sectors and limits that it conceals so that we can propose inclusive offences that severely punish behaviour affecting the safety of the planet, thereby guaranteeing the rights of future generations.

Then, on the structural level, experience shows us that serious environmental crime is mainly collective[80], whether it relates to actions committed by criminal groups known as "ecomafia"[81], or legal trading companies that are not related to organised crime and whose main purpose is legitimate, which is called "corporate delinquency". It is thus estimated that around one hundred transnational corporations (TNCs) are responsible for 60% of global pollution[82]. In this regard, we can speak of a real "culture of impunity", which the current criminal legal system seems unable to touch. The principle of individual responsibility, central in criminal law, stands as an *a priori* pitfall that is insuperable in the face of an intrinsically collective criminal behaviour. To suppress this behaviour, we need to think of criminal liability in a global manner, and no longer purely in individual terms.

Consequently, we need to incorporate this systemic dimension into environmental criminal law; this dimension, which does not yet exist, relates to an intergenerational responsibility, with the protection of present and future generations, and therefore spatio-temporal criteria that simple offences or sector offences do not contain. The new offences that typify this view should be subject to a two-stage enforcement process in order to be more effective. Upstream, situations creating a serious risk of environmental disaster require a special offence of "risk caused to the safety of the planet" (A), which at the moment is sorely lacking in the criminal law of several States. The purpose of this formal offence is to prevent the committing of more serious offences downstream

80 See on this question: TRICOT J., Ecocrimes and Ecocide: who is liable? (*Ecocrimes et écocide: quels responsables?*), *in* From Ecocrimes to Ecocide. Protecting the environment through criminal law (*Des* écocrimes à l'écocide. Le droit pénal au secours de l'environnement), *op. cit.,* chapter 8, 141-163.

81 See on this question: RODOPOULOS I., Organised environmental criminal activities: a few thoughts for an international response by criminal law (*Les activités criminelles organisées en matière environnementale: quelques réflexions en vue d'une réponse pénale internationale*), *in* From Ecocrimes to Ecocide. Protecting the environment through criminal law (*Des* écocrimes à l'écocide. Le droit pénal au secours de l'environnement), *op. cit.,* chapter 9, 165-182.

82 "*While all the Earth's ecological systems are more vulnerable than ever, we are also seeing a surge of environmental crime that prospers around the world and benefits from excessive impunity. Disregard for rules of prudence, the duty of vigilance and the precautionary principle enable some to extract considerable economic benefit at the expense of the ecosystems*": Forum: Recognising ecocide on the same level as crimes against humanity (*Tribune Reconnaître l'écocide au même rang que les crimes contre l'humanité*), published in *Libération*, 10 December 2019, https://www.liberation.fr/auteur/20326-un-collectif-de-responsables-politiques-et-d-intellectuels

that would result from it. The latter, committed in the event that the prevention and dissuasion policy has failed, would constitute the second stage in the enforcement process, of which one of the transpositions into criminal law, the most tragic, would be the crime of ecocide, to be enshrined at European level (B).

A. A DEALING WITH UNREALISED RISK: THE OFFENCE OF "RISK CAUSED TO THE SAFETY OF THE PLANET"

Starting with the example of France, it should be noted that when the Criminal Code was redrafted in 1992, the legislator, mindful of developing a policy to prevent dangerous behaviour, established the notion of risk and devoted an autonomous offence of "risks caused to others" to it, under Article 223-1[83]. A striking innovation of the "new" criminal code that came into force on 1 March 1994, this offence, without being specific to environmental law, could have *a priori* served as a basis for criminal prosecution in this area. However, the plethora of conditions characterising the constituent parts of the offence, supported by case law that formally respects the strict interpretation of criminal law, is very often subject to out-of-court settlements or acquittals, revealing the serious inadequacy of common law to the specific issue of environmental litigation. The offence in the French Criminal Code has until now only had relatively few applications in this regard. It is regularly set aside by judges, notably because this term of *"others"* that it is intended to protect does not mean the environment *per se* taken as a whole, but solely the human person taken individually[84].

The absence of a special offence, adapted purely to situations of environmental endangerment, leads in practice to the creation of an unacceptable legal vacuum in terms of punishment and deterrent. What then of instances of pollution whose effect is delayed, in the absence of a formal summons and damage at moment T, but whose environmental and/or health degeneration in the near or long term are inevitable? Chronic pollution, which is lawful because it is emitted in low quantities, but which in the long term or over its geographical reach is likely to cause serious damage to the environment? Or cases of exposure to pollutants that carry serious risks for the natural environment and human health, but which do not result in criminal convictions due to insufficient proof of the causal link between the pollutant and the damage? What if a minor common law offence hides a more serious situation of environmental endangerment that is not taken into account as such by environmental criminal law and consequently hinders a sanction that is appropriate for what is at stake and the offence committed[85]? What of collective pollution situations - for example,

83 *"The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year's imprisonment and a fine of €15,000".*

84 In the "Stocamine" case, the Criminal Chamber of the Court of Cassation was thus led to clarify the value protected by Article 223-1 of the Criminal Code, noting "*that the offence of 'risks caused to others' falls within the category of 'endangerment of persons', the sanction of which is exclusively intended to protect the 'human person'":* Cass. Crim., 5 April 2011, appeal no. 09-83277, Unpublished, M. VERON, Offence exclusively ensuring the protection of the human person, Criminal law, July 2011, commentary 88.

85 Such is the case, for example, of a lorry driver, who, knowing the risk he is taking, drives with a load of highly toxic material over a bridge limited to 19 tonnes with a trailer of 38 tonnes, and only incurs a fine for committing a road

successive additions to a waste deposit - which are the sum of individual and combined activities, but which taken on their own do not constitute criminal offences, because they comply with the standards and thresholds set by the authorities, but which together contribute to the conscious taking of serious risk?

Conversely, other countries, such as Germany, Austria, Croatia, Spain, Finland, Italy, Portugal and Poland, punish risk caused to the environment in their penal or criminal codes. But an analysis of the texts defining the offence shows numerous disparities as to the precise definition of protected social values, the constituent parts of the offence (material and moral) and the different penalties applied by nature and amount (with Austria and Finland only setting terms of imprisonment, and Germany, Spain and Italy combining these with fines). This lack of harmonisation at European level is inevitably reflected in these States' case law, which does not seem extensive in this area, directly posing the question of the effectiveness of these heterogeneous legislations.

The recognition of a special offence dedicated to the environment as a whole is therefore desirable at European level, if we want a legal tool that can respond to current challenges. The existence of dangers likely to impact the safety of the planet mainly calls for the criminalisation of particularly dangerous behaviours, the use of certain techniques, destructive processes *per se*, without waiting for the damage that could result over the longer term and prove irreversible. The offence that combines all these elements is intended to be formal in that it does not require a material result or damage, for it to be committed. On the contrary, through its "offence-obstruction" function, it seeks, through the threat of punishment it carries, to prevent – obstruct – the committing of other even more serious offences in terms of material result.

In its wording, the criminalisation of risk caused to the safety of the planet requires that we combine under the scope of criminal law both the special hypotheses of breaching specific obligations of prudence and safety provided for by the law or regulations (which is the case in most of the States mentioned above that already recognise an offence of risk caused to the environment) and, when these can be characterised, situations of non-adherence to a general duty of environmental vigilance, separate from pre-existing written standards and aimed at fostering behaviour that is normally described as prudent and diligent. For example, if we consider specifically the parent companies and principal contractors as well as their subsidiaries and trade partners (subcontractors and suppliers), the sanction of such a general obligation of prudence and safety could correspond to a transposition into criminal law of the duty of vigilance, introduced into French law by Law no. 2017-399 of 27 March 2017[86] to identify the risks and prevent serious damage to, in particular, the health and safety of people and the environment.

Having thus defined the material act, the particular criminalised behaviour calls for criminal

traffic offence. Or of the captain of a cargo ship transporting dangerous materials who enters a marine protected area, in contravention of the rules on marine navigation.

86 Law 2017-399 of 27 March 2017 on the duty of vigilance for parent companies and principal contractors (JORF no. 0074 of 28 March 2017), as amended by Decree no. 2017-1162 of 12 July 2017 introducing various measures to simplify and clarify disclosure obligations borne by companies.

punishment to the extent that it creates an immediate risk of damage, that is a proven risk based on current scientific knowledge and hence certain, but not a risk of immediate damage. Thus, it does not matter if the damage is produced years later (as in the cases of exposure to asbestos, which only causes lesions 30 or 40 years later), or even never. Uncertainty over the realisation of the risk is offset by the certainty of the seriousness and irreversibility of the same in the event of its realisation, which would have to be confirmed by scientific experts. It is the change from uncertainty to probability that paves the way to anticipation once there is a serious and plausible risk based on available knowledge[87]. What is important is that a particular serious risk is the result of immediate exposure, a contemporary situation of endangerment and reflects present harmful potential[88]. The causal link that operates at the junction between the two objective components, the behaviour at the source of the risk (the material act) and the occurrence of the risk (the legal result), must be direct and certain, without being necessarily exclusive, otherwise the hypotheses of multiple and simultaneous exposures, of cumulative and combined sources of pollution – numerous in practice –, would not be able to be fulfilled. And if the causal link is direct, the exposure to risk might very well only be indirect, the essential factor being in the *immediate* nature of the risk related *directly* to the specific criminalised behaviour.

The moral element of the risk offence remains to be clarified, as it is the seriousness of the misconduct that justifies the upstream intervention of criminal law, in situations when material damage has not yet occurred. Consequently, misconduct must necessarily be of a certain intensity, of a minimum degree, which the European directive of 2008 on the protection of the environment by criminal law described as *"at least serious negligence"*[89]. It will therefore be important to find the precise legal transposition in domestic law of this misconduct characteristic of serious endangerment that could cause potentially irreversible damage. Its definition it all the more important in that the misconduct contains within it details on the individual offender, the target of the punishment. Various categories of potential responsible parties will stem from the nature of the misconduct. In reality, it is possible to distinguish between two types of environmental crime.

On the one hand, there is what we could call *objective* endangerment, infrequent, which stems from conscious dereliction and which applies to "casual crimes". Characterised by gross negligence, this relates to the state of mind of those who, in full knowledge that their behaviour is dangerous, nevertheless engage in it and, do so without intending in any way the harmful result. The person deliberately takes a risk, intentionally violating the obligation of prudence and safety. He does not necessarily want the risk to cause damage but foresees– or should have foreseen– that it as possible and accepts it. In its criminal transposition into French law, the wilful misconduct of endangerment remains in the category of negligence, but one of its most serious forms. It is a manifestation of *indifference* to the protected social values, where the agent wants the act, but not the result. And there is, on the other hand, *subjective* endangerment, decided knowingly, which stems from a recurring and planned corporate strategy or one from a criminal organisation ("ecomafia"). Wilful

87 LASSERE V., Risk (*Le risque*), Dalloz 2011, *Chronique* 1632.

88 MAYAUD Y., in Cass. crim. 19 April 2017, appeal no. 16-80.695, published in the Bulletin, confirming the conviction for endangerment of others handed down by CA Bastia, ch. correct., 6 January 2015.

89 Directive no. 2008/99/EC of 19 November 2008, *op. cit.*

misconduct would concern this second case that relates either to white-collar crime committed within the framework of legal activities, or behaviour carried out within the framework of illegal activities relating to organised crime. It thus justifies an increase in applicable penalties, the intention constituting an aggravating circumstance of the exposure to risk since it is a manifestation of *hostility* to protected social values, where the agent wants not only the act but even, whether only partially, the harmful result.

Given the diversity of environmental crimes creating situations of serious endangerment, the punishment must cover all acts, committed intentionally or through gross negligence (wilful misconduct of endangerment), of a kind that directly or indirectly exposes the environment in its various components to an immediate risk of substantial degeneration, endangering the safety of the planet and the survival of humankind. The risk offence would thus punish the act of directly or indirectly exposing the environment in its various components: water, air, soil, subsoil, fauna, flora, ecosystems, intentionally or through gross negligence, to an immediate risk of substantial or long-term deterioration that threatens the safety of the planet or the health and safety of people. Gross negligence is understood to mean either the deliberate breach of a particular obligation of prudence or safety set out by the law or regulations, or the committing of a misdeed that exposes the environment to a particularly serious risk that the person in question cannot fail to be aware of; when the offence is committed intentionally, tougher penalties are applied.

The issues are such in this case that we can talk about "mass risks" for the environment and human health. The severity of the risk taken into account is in relation to the irreversibility of the potential damage, which, in the event of a failure to prevent its occurrence, calls for an additional level in the enforcement process, with the ultimate recourse to the crime of ecocide.

B. DEALING WITH REALISED RISK: LEGAL RECOGNITION OF THE CRIME OF ECOCIDE

The tragedy of today's world has a name: "ecocide". From the Greek prefix *"oikos",* meaning house, and the Latin suffix *"cide"* for *caedere*, i.e. to kill, ecocide is the act of destroying our home, understood as Planet Earth. This is not a new term. It was democratised following the ravages of Agent Orange used by the Americans in the Vietnam War to destroy forests and prevent the Vietnamese rebels from taking refuge there. The large-scale use of this defoliant is said to have caused the destruction of 20% of Vietnam's forests, with catastrophic health consequences, chiefly cancer and serious deformities among the people exposed. Its inventor, the botanist Arthur Galston, who coined the term "ecocide", defined it as "*devastation and destruction aimed at damaging or destroying the ecology of geographic areas to the detriment of all forms of life, whether human, animal or plant.*[90]. Given the specific situation that caused this concept to emerge, it was considered a war crime at the time.

90 This definition was then repeated a number of times, notably by the Swedish Prime Minister Olof PALME in his opening speech at the Stockholm Conference on the environment in 1972.

Ecocide therefore corresponds to serious and widespread damage to one or several ecosystems or their destruction, which may have consequences over several generations. Removed from its original context, it today reflects a worrying reality, as a number of serious instances of pollution and environmental deterioration caused by economic activity; notably, transnational corporations that relocate their activities in developing countries, may be described in this way. If this behaviour is not rapidly criminalised at international and national level and if these companies continue to be allowed to pursue their destructive activities with complete impunity, massive destruction of the environment will result on a global scale. Conditions for life on Earth will no longer be tolerable for millions of individuals, starting with the most vulnerable, such as the inhabitants of small islands or countries such as Bangladesh, who will find themselves caught between rising sea levels and melting glaciers. Millions of lives are at stake, and the global balance of the Earth could in time be broken.

In its legal conception, ecocide designates the most serious crimes committed against the environment, which, at all times, that is in peace time as well as during periods of armed conflict, damage the safety of the planet. It qualifies as damage to the fundamental right to life, to the human right to a healthy environment, to the rights of indigenous people to live according to their ancestral traditions, and to the rights of future generations. But existing environmental legislation, whether national or supranational, is insufficient to respond to this damage. The current environmental emergency requires the recognition of the autonomous crime of ecocide for the most serious intentional damage, the "exceptional" damage that relates to the "tragic". The term "ecocide" must therefore be reserved for the most serious damage, i.e. to environmental disasters. It contains an expressive and symbolic value that places it on the same level as international crimes that threaten the whole international community, notably genocide. The designation therefore refers necessarily to a criminal classification.

Its relation to the most serious crime of genocide has also not been contested. In the 1970s, during debates on the effectiveness of the United Nations Convention of 1948 on the prevention and punishment of the crime of genocide, the idea of adding new elements in order to prevent genocide was discussed. One of the issues discussed was precisely the inclusion of a crime for environmental damage. The idea was however quickly abandoned, with States considering that ecocide must be treated separately from genocide. We could have then reasonably expected that the way was clear for ecocide to be made an autonomous crime. In this regard, the following two decades offered hope in terms of reflection and proposals. In 1986, the special rapporteur of the International Law Commission instructed by the United Nations General Assembly to produce a code of crimes against peace and the security of mankind – the forerunner of the Rome Statute of the ICC – had thus recommended supplementing the list of crimes against humanity by including "*any serious breach of an international obligation of vital importance for the safeguarding and preservation of the environment*". In 1991, the text evolved to enshrine an autonomous international crime, which would be separate from crimes against humanity and war crimes. The draft code then set out the international criminal liability of *"an individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment*".

While a certain number of States spoke in favour of such a provision, the opposition of others such as the US and the UK led the Special Rapporteur to conclude that*: "we shall have to wait until*

developments in international law confirm or reverse the tendency to consider these acts as international crimes"[91]. Finally, the draft code adopted in 1996 did not consider severe damage caused to the environment to be an international crime[92]. The development of international law called for by the special rapporteur is unfortunately still awaited while the emergency environmental situation hardly gives us time to do this. The Rome Statute leading to the creation of the International Criminal Court (ICC) in 1998 did not include ecocide in the material jurisdiction of the latter alongside the four most serious crimes, which are crimes against humanity, genocide, war crimes and the crime of aggression. Nevertheless, in 2016, hope as engendered on the back of statements made by the ICC's Chief Prosecutor, Fatou Bensouda, who, in her policy paper[93], stated that henceforth, particular consideration would be given to crimes involving *"the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land*". In doing so, the prosecutor explicitly declared that damage to the environment and the rights of peoples may constitute crimes against humanity that international law, through the ICC, could no longer allow to go unpunished. A strong message was thus sent to multinationals and investors, who to this day have never been concerned by the Court, whose new policy could extend, for example, to prosecutions in the area of climate liability. Be that as it may, four years have passed since that declaration of intent, without any concrete effect on the ICC's activities, despite several charges such as those covering the dispossession of land in Cambodia…

Thus, while it has repeatedly been debated and continues to be to the present day, whether within the framework of the United Nations, at European level (Council of Europe and European Union) or even in France, ecocide has never managed to be incorporated under international criminal law. Faced with this, there has been increasingly strong social pressure to make this an autonomous crime. Civilian society has been mobilising to this end for several years, supported in law by a part of the legal doctrine. Petitions, marches, waves of legal challenges aimed at forcing States and companies to acknowledge their environmental responsibilities are growing in number. Recently in France, the Citizens' Convention for Climate included in its proposals the criminalisation of the crime of ecocide, voicing a collective awareness and a strong call from citizens to the public authorities.

It is therefore time to take the leap and recognise and officially name this crime committed against the living world by a part of humankind so that we can understand all its consequences in terms of criminal proceedings. This can only be done by making ecocide an autonomous crime. The ones we have at the moment, i.e. war crimes, crimes against humanity and genocide in the ICC's Statute of Rome, have proven insufficient. These provisions of international humanitarian law are rarely used to protect the environment, or it is difficult to do so, because they contain too many limits in their respective scopes of application. In general terms, and this is the main obstacle, the protection

91 M. Doudou Thiam, 13th report on the draft code of crimes against the peace and security of mankind, Yearbook of the International Law Commission, vol. II (1), United Nations, 1995, 37, §§ 8-10.

92 On the contrary, this project inspired dozens of national legislators that have incorporated the crime of ecocide in their criminal codes: Armenia (2003), Belarus (1999), Georgia (1999), Kazakhstan (1997), Kyrgyzstan (1997), Moldavia (2002), Russia (1996), Tajikistan (1998), Ukraine (2001) and Vietnam (1990).

93 https//:www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection-Fra.pdf.

of the environment is not the main object of these offences. Through anthropocentric conventions on the protection of the rights of humankind, international criminal law chiefly aims to reduce the suffering of human beings in times of war and/or to guarantee human dignity at all times. The environment, the common heritage of living beings, does not have its own place as such. Based on an anthropocentric view, these offences only ensure the protection of the environment when it is immediately and directly of service to people and not *per se,* which is much too reductive given the current challenges.

Existing law is therefore not sufficient. Innovation is required in the form of new criminal offences. We have seen this for *potential* damage to the environment, where dangerous situations create serious and systemic risks. This holds true even more for *actual* damage, when, following the failure of prevention, the damage has been done. The environmental emergency requires the recognition of a special crime against the environment, for the most serious intentional damage done to ecosystems. And starting from the model proposed for the offence of creating risk, because it is a direct extension of this when this risk could not be avoided, while taking into account its relationship with the crime of genocide, ecocide would, in its legal definition, cover intentional acts, committed at any time, within the framework of a generalised or systematic action, that threaten the safety of the planet. For the sake of accuracy and completeness, it is important to specify that these acts pose a threat when they cause either substantial, widespread or long-term deterioration of the air or the atmosphere, the soil, subsoil, water, aquatic habitats, fauna and flora, ecosystems, or death, permanent disability or serious incurable disease to a human population, or when they dispossess these populations on a long-term basis from their land, territory or resources. The extreme seriousness of the crime implies that these acts are committed intentionally and in the knowledge of the general and systematic nature of the action of which they are a part. But in order to take into account the particular psychology of certain responsible parties, particularly the TNCs whose immediate objective is to generate as much profit as possible and not to threaten the safety of the planet, which is then only an indirect consequence of their activities, these acts will also be defined as intentional when their perpetrator knew or should have known that there was a strong possibility they would threaten the safety of the planet (without requiring an intention to harm, which is too difficult to prove).

Part 3

REDRESS FOR ENVIRONMENTAL DAMAGE IN FRANCE VIA THE ACTION FOR REDRESS FOR ENVIRONMENTAL DAMAGE[94]

A MODEL TO BE FOLLOWED WHILE PERFECTING IT

94 The articles of the French Civil Code on action for redress for environmental damage are reproduced in the Annex at the end of the document.

In French law, Law no. 2016-1087 of 8 August 2016 for the restoration of biodiversity, nature and landscapes[95] enshrined an action for redress for environmental damage. This action may be considered a realisation of the commons approach, aimed at not bringing man and nature, human and non-human into conflict, and recognising and preserving their interdependence.

The legal innovations it contains may symbolise the beginnings of a transformation from a law centred on the individual, his/her person and property, to a law that admits man depends on nature, which our way of producing and consuming is now destroying. In order to protect the rights of man (individuals), we therefore need to protect not only human rights (collective), but also the rights of living things (human and non-human) as a whole with respect for their ecological niche, Planet Earth.

The introduction into French law of legal redress for environmental damage, as defined by the law, may be a concrete illustration of the theory of natural commons. The extension to European Union level of civil liability in the event of damage caused to the environment, as the basis is laid down in French law, could make a significant contribution to environmental protection.

French law is interesting in that it identifies what environmental damage is, the legal transposition of damage to the environment, and gives it an original definition (I). Consequently, it adapts the action for redress to environmental damage (II).

I. The unique definition of environmental damage

Environmental damage is defined according to Article 1247 of the French Civil Code as "*not insignificant damage to the elements or functions of ecosystems or to the collective benefits derived by humankind from the environment*".

A. THE CONTENT OF THE DEFINITION

The central element of the definition is the ecosystem, which may be defined according to Article 2 of the Rio Convention of 5 June 1992 on biological diversity as "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit".

The damage may be to the elements comprising the ecosystems, that is fauna, flora, water, air and soil.

It may also focus on the functions of ecosystems, that is the physical, chemical and biological processes associated with the functional unit (ecosystem), but also the interrelationships of elements between each other and the contributions made by each element to the functioning of the others and the whole. These functions are the very expression of the interdependence of the elements making up these ecological systems, and ensure their sustainability and resilience.

95 Law no. 2016-1087 of 8 August 2016 for the restoration of biodiversity, nature and landscapes, JORF no. 0184 of 9 August 2016

The damage may also be to the "collective benefits derived by humankind from the environment". These are the benefits and uses for humankind produced by the natural environment. Note that the notion of ecosystemic services has not been used, rejecting the anthropocentric and utilitarian perception of the environment in favour of terminology expressing the idea that humankind needs its environment.

B. ELEMENTS FOR ANALYSIS

This legal definition lists three distinct elements (elements, functions, benefits derived by humankind), which are closely related and sometimes difficult to separate. This definition nevertheless allows each of the elements to be perceived independently, but also as a continuum and a system consisting of processes and feedback.

By identifying the first two (ecosystem elements and functions), we can attribute an intrinsic value to ecosystems. This directly takes into account the natural environment *per se* (regardless of its legal status). The wording of Article 1247 of the Civil Code is evidence of this: *"environmental damage consists*" not "*result*s". Damage is not the consequence on a person (the victim) of harm to a factual element or a relationships, but harm to these elements or functions themselves, regardless of the repercussions on the person. It is the damage to non-human interests, those of ecosystems directly in their components and their functioning, that is taken into account.

The third element (collective human benefits) refers to humankind, and therefore to the environment's instrumental and utilitarian value (the protection of the environment is not completely unselfish, but how could a social construct such as law escape from it, particularly if its primary objective is to protect humankind?). The collective utilities of the environment or the uses shared with the human community are therefore taken into account. It is not about individual harm caused by damage to the environment, which is the object of classic redress proceedings, but the damage to the interests of human society related to the environment, to the multipartner and transindividual interests of a human community. It is about having access to water or food, breathing clean air or enjoying a beautiful landscape (whether the needs are physically, psychologically or culturally vital).

This third component confirms the conception of natural commons in that it is difficult to disassociate damage to ecosystems from damage to man in the case of environmental damage. And in the Anthropocene era, this definition of environmental damage merely acknowledges, in the political-legal arena, humankind's dependence on nature and its involvement in how the planet (mal) functions.

Environmental damage is not envisaged as harm to an interest or a right within an individualistic and exclusive framework, but in a characteristic dimension of commons and the principle of environmental solidarity, combining transversal human interests and the interests of non-human entities. Through this approach focused on the trio of elements-functions-benefits, it transcends interests and rules out discussions on ecocentric or anthropocentric approaches and enables us to consider the interactions and interdependencies that constitute natural commons, linking the interests of humans and non-humans. It is not about damage exclusively to humans or damage exclusively to non-humans (damage purely to the environment), but damage to both.

Ultimately, by building on the theory of natural commons, this environmental damage enshrines as legally redressable harm to non-human interests, those of ecosystems directly (in their components and their functioning) as well as harm to human interests, solely as a collective, relative to the uses that humankind may draw from the environment (interests described as collective or diffuse depending on the community adversely affected)[96]. To take into account the totality of the interests covered and their possible aggregation in environmental damage, we believe it is possible to describe this environmental damage as damage to natural commons. It will thus correspond to harm to an interest of natural commons (universal or territorial) as a whole, that is concerning both the/a living community and the natural object (matrix/generic elements or ecosystems). Environmental damage will be described as damage to the common interest when the harm focuses in particular on the interests of the community concerned by the natural common, thus expressing the grouping of interests that are not exclusive but inclusive of human and non-human entities (avoiding in this precise framework the personification of non-human entities to the possible benefit of the mixed human/non-human entity of the common).

It should be pointed out that this definition does not correspond to the definition given by the Directive on Environmental Responsibility (DER)[97],which opted for a functional definition, and one that is restrictive as regards the natural elements taken into account, excluding air, and soil when the damage does not pose a risk for human health, as well as damage to ordinary biodiversity and waters not protected by European law.

The specific nature of environmental damage as introduced in French civil liability law requires adjustments to be made to action to defend this damaged interest, some of which are set out in the French Civil Code, although improvements are possible.

II. Adapting the claim for redress to the unique nature of environmental damage and possible improvements

As the interest harmed within the framework of a claim for redress for environmental damage exceeds the individual interest traditionally provided for in France in terms of civil liability, exemption rules are provided for to take this into account. Two of these adjustments are analysed and concern the claimants (A) and the forms of redress (B).

96 M.-P. Camproux Duffrène, Special report on Biodiversity as a common thing (*La biodiversité comme chose commune*), *in Échelle de communalité – Propositions de réforme pour intégrer les biens communs en droit*, Title 1, Part 2 on Descriptions of communality (*Les qualifications de la communalité*), Report for the Law and Justice Mission, 2020, ed. J. Rochfeld.

97 The definition of the DER is transposed in Article L. 162-1 I. of the French Environmental Code (see Annex).

A. THE CLAIMANTS

1. MULTIPLE CLAIMANTS

Article 1248 of the French Civil Code concerns the claimants seeking redress for environmental damage.

The text includes a list of claimants entitled to take action, which are *de facto* presumed to have an interest in taking action. Multiple claimants of various statuses may choose to take action. These are private legal entities (approved associations or created at least five years before the date on which proceedings began, whose aim is to protect nature and defend the environment) or public entities (the State, the French Agency for biodiversity, regional authorities, public bodies that aim to protect nature and safeguard the environment), which are specialised or have specialist missions relating to the environment, and they may act cumulatively.

This list is preceded by general wording, which states that "the claim for redress for environmental damage is open to anyone entitled to take action and is interested in doing so". It can potentially allow a class action. That is to say the possibility for everyone to bring an action before the court, not owing to personal interest (which may be compensated through conventional damage claims), but to defend this common interest in accordance with Article 1 of the French Constitutional Charter for the Environment of 2005: "each has a right to a balanced environment that does not endanger health" and Decision 2011-116 QPC of the French Constitutional Council of 8 April 2011[98].

2. POTENTIAL TO EXPLORE: FROM AN ACTION TO DEFEND AN ENVIRONMENTAL INTEREST TO A CLASS ACTION

In view of what is covered by environmental damage, this action for redress, which is currently an action to defend an environmental interest open to certain legally entitled persons, should be turned into a class action, i.e. one that should be able to be brought both by entitled representatives such as associations (as individuals do not always have the resources to do so), but also more broadly by each individual concerned or a member of the community in connection with the damage caused to the environment.

Each party should be able to represent the interest of the community (of which their own interest is part, in that it converges with the interests of other users and is incorporated into the interest of the community, and that of the object of the common (ecosystem, for example) to which this community is attached. The class action recognised in Portugal and Italy has not yet been accepted in France, but the wording of Article 1248 of the French Civil Code opens the door to this through a simple interpretation by a judge. Within the framework of environmental damage, this class action should enable the largest number of representatives of interests concerning ecosystems to

98 Decision no. 2011-116 QPC of 8 April 2011 | Constitutional Council, M. Michel Z. and others [Neighbourhood Nuisance and Environment], https://www.conseil-constitutionnel.fr/decision/2011/2011116QPC.htm, F.-G. Trébulle, The Constitutional Council, the environment and liability: between environmental vigilance and concern: Real estate press review (*Le Conseil constitutionnel, l'environnement et la responsabilité: entre vigilance environnementale et préoccupation, RD immobilier*), 2011, p. 369.

act for themselves and those of the various users in terms of collective benefits. A study of comparative law shows that this plural representation seems to guarantee better protection of the natural common's interest.

Adopting the theory of natural commons (see part 1 of this report), the action must be open to all if the environmental damage falls within the framework of a universal natural common. In connection with a territorial common, the claimants in the action could be limited as in Italy to those presenting evidence of their connection to the damaged ecosystem (inhabitants, local residents, leisure, statutory purpose of the association).

B. COMPENSATION IN KIND AND BY EQUIVALENCE

In traditional French civil liability law, the choice of compensation arrangements are left, under the judge's control, to the injured party, in accordance with the principle of full reparration and the appropriateness of the compensation for the damage, to the extent that the injured party benefits from the compensation. In relation to environmental damage, the French Civil Code derogates from this rule and requires compensation in kind and by equivalence. Having said that, the choice of compensation arrangements is restricted by the judge in order to best ensure compliance with the principle of full reparation and the appropriateness of the compensation to the damage.

Thus, French law provides that in the case of environmental damage, the judge may order compensation in kind or by equivalence. According to Article 1249 of the French Civil Code[99], the sole objective of the action for redress for environmental damage is to repair the natural environment, i.e. restoration of ecosystems and their dynamism.

Compensation in kind arrangements are thus prioritised and may be envisaged on the model of compensation measures set out by Directive 2004/35 on environmental liability[100]. This compensation in kind enables the ecological restoration of the environment and avoids any confusion with the (monetary) compensation for individual damages of the claimants. It expunges the potentially perverse effect of cumulative claims and avoids the monetary evaluation of the environmental damage (non-commercial character of nature), but not that of restoration measures, as although nature does not have a price, its restoration has a cost.

However (and unlike the DER), the award of compensation by monetary equivalence or damages is provided for, but only in a subsidiary manner, and in this case, the amounts received must exclusively be allocated to remedying the damage.

99 See Annex.

100 Marie-Pierre Camproux Duffrène, Environmental damage (*Le préjudice écologique*), Dossier Colloque Toulon, La Revue Maritime, no 516, p. 90, or Methods of reparation of the damage: the contributions of environmental liability (*Les modalités de réparation du dommage; les apports de la responsabilité environnementale*), *in La responsabilité environnementale: prévention, imputation, réparation,* Dalloz, Actes, 2009, Scientific Director, C. Cans, p. 113

It should be noted that in the case of damages, this may not be received by the claimant, if he does not have the expertise or the resources necessary to repair the damage. There is therefore a possible dissociation between the claimant and the beneficiary, as the beneficiary of the damages may be either the claimant or the State, with the obligation to repair the damage caused to the environment.

This understanding of compensation arrangements corresponds to the fact that the damaged interests are indivisible and transindividual interests affecting human and non-human life and reflect the interdependence of relationships within ecosystems and between human and non-human life.

Consequently, it is logical that:

- The benefits of the action may not be divisible among individuals, and therefore if there are multiple claimants, the compensation may not be divided between each claimant, as this would be in total contradiction to the general principle of full restoration and the specific allocation of targeted resources to repair the environmental damage.

- During the procedure, the persons authorised to act in the interests of the community and the object of the commonality may not be those that will implement the measures ordered by the judge with regard to their expertise and/or their specialisation centred on the protection of the damaged interest, in order to ensure the effectiveness of the legal decision and the final object of the measures relating to the repair of damage to the natural environment.

Lastly, note that the French law of 8 August 2016 provides for the coordination of restoration measures within the framework of the transposed Directive on Environmental Liability (Article L. 164-2 of the Environmental Code[101]) and the restoration arrangements made on the basis of Article 1249, paragraph 3 of the Civil Code[102].

Improvements to be made

- Monitoring and control activities relating to the repair of the damage not expressly provided for in the French Civil Code should be provided for within the framework of legal reparation measures (the judge may provide for them, but this is only at his/her discretion).

- In the case of environmental damage, a plan/programme for a "restoration" project should be

101 Article L. 164-2 of the French Environmental Code: "*Restoration measures implemented in application of this title take into account those implemented, where appropriate, in application of Title IV-ter of Book III of the Civil Code.*"

102 101 Art. 1249 para. 3 of the French Civil Code: "*The assessment of damages shall take into account, where appropriate, restoration measures already taken, particularly within the framework of the implementation of Title V1 of Book I of the Environment Code*"

able to be proposed and approved by the judge, according to L. Neyret[103].

- In the case of multiple claims, the measures taken by way of sanctions should be part of the overall project to "repair" damage to the natural environment and in no circumstances be divided among each claimant.

- The safeguard of only considering the State as a third-party beneficiary of the action and not other competent structures or associations should be removed, as certain associations or other structures are entitled to "repair the environment" with authorisation from the judge.

103 L. Neyret, Repairing environmental damage *(La réparation du préjudice écologique*), Environmental damage, commission report of the *Association des Professionnels du Contentieux Économique et Financier*, December 2016, www.apcef.com/652_p_39272/commission-prejudice-ecologique.html.

Part 4

Recommendations

Recommendation no. 1: Advocate a conceptual change

1. ANOTHER APPROACH FOR THE RELATIONSHIP BETWEEN MAN AND NATURE BASED ON ENVIRONMENTAL SOLIDARITY, INTERDEPENDENT RELATIONSHIPS AND THE SHARING OF A COMMON INTEREST

The legal construction of natural commons does not pit nature against man, but proposes an alliance or companionship between them in the shared destiny of the living world and the interdependence of the good health of humans and ecosystems. This natural commons approach based on environmental solidarity enables a convergence of interests in the conservation of ecosystems, their proper functioning and the preservation of uses and ties of dependence in respect of the environment. We must protect a common interest from certain predatory human activities and against our production and consumption patterns.

This construction provides the foundations for and legitimises the implementation of special protection for the environment through an appropriate legal system, notably by recognising a legal action defending this common interest by an individual or multiple authorised individuals. The recognition of this environmental solidarity and therefore of these interdependent relationships and these shared interests also strengthens arguments calling for the establishment of civil liability in cases of environmental damage (see Recommendation 3).

2. THE LEGAL RECOGNITION OF THE NOTION OF "THE COMMON HERITAGE OF LIVING BEINGS" AND AN OPEN UNIVERSAL DEFINITION

- We must reclaim the concept of "common heritage", which will be the element to identify the natural commons to be protected; a global and unifying element.
- The term "humanity" could be replaced by "living beings" to give the common heritage to be protected a broader and more comprehensive scope.
- The common heritage of living beings would be constituted by all objects of natural commons, which, in an interdependent relationship, ensure the balance of the biosphere and the perpe-

tuation of human and non-human life. The following would thus be included on the (open) list: the air or atmosphere, the soil and subsoil, waters and aquatic habitats, species of fauna and flora, as well as the environmental functions of all these elements, that is their role within ecosystems.

The legal concept of the "common heritage of living beings" would lay the foundations for and legitimise the establishment of special protection through a legal system appropriate for the concept thus enshrined, and in particular the definition of new criminal offences.

Recommendation no. 2: Legally enshrine new criminal offences

1. **The criminalisation of risk caused to the safety of the planet**, an offence that prevents ecocide, which punishes behaviour posing serious risks for the environment, the safety of the planet or the integrity of the common heritage of living beings.

   "The offence of risk caused to the safety of the planet is constituted by the act of directly or indirectly exposing the environment in its various components: water, air, soil, subsoil, fauna, flora, ecosystems, intentionally or through gross negligence, to an immediate risk of substantial or long-term deterioration that threatens the safety of the planet or the health and safety of people.

   Gross negligence is understood to mean either the deliberate breach of a particular obligation of prudence or safety set out by the law or the regulations, or the committing of a misdeed that exposes the environment to a particularly serious risk that the person in question cannot fail to be aware of.

   Committing these acts as part of an organised group is an aggravating factor".

2. **The crime of ecocide**, the ultimate sanction, the criminal transposition of the duty of environmental vigilance and aimed at any intentional act resulting in the most serious damage to the common heritage of living beings, which endangers the safety of the planet.

   "Ecocide is constituted by intentional acts, committed at any time, within the framework of a generalised or systematic action, threatening the safety of the planet.

   The acts referred to in the first paragraph pose a threat when they cause either substantial, widespread or long-term deterioration of the air or the atmosphere, the soil, subsoil, water, aquatic habitats, fauna and flora, ecosystems, or death, permanent disability or serious incurable disease to a human population, or when they dispossess these populations on a long-term basis from their land, territory or resources.

The acts referred to in the first paragraph must be committed intentionally and in the knowledge of the general and systematic nature of the action of which they are a part. These acts will also be defined as intentional when their perpetrator knew or should have known that there as a strong possibility they would threaten the safety of the planet.

Committing these acts as part of a organised group is an aggravating factor.

The crime of ecocide is imprescriptible".

+ **Recommendation common to both offences**: the act of inciting to commit intentionally one of these two offences or being an accomplice thereto should be punishable under criminal law.

Recommendation no. 3: Establishing environmental civil liability at European level

Liability actions enabling the restoration of environmental damage in France could be used to support a proposed inclusion of environmental civil liability within a European text, particularly a European directive. It should be noted that this environmental civil liability has already been, previously, the subject of discussions within the Union as part of the adoption of Directive 2004/35 of 21 April 2004 with regard to the prevention and restoration of environmental damage (DER) and a White Paper on environmental liability104, dated 9 February 2000. The proposal should be updated and formulated within the DER.

1. **The objective is the recognition and defence of specific damage that does not harm an individual right or damage goods, but causes damage to a common (socio-)ecological interest, combining non-human and human interests with a view to safeguarding the sustainability of ecosystems. This may be harm to non-human interests, those of ecosystems directly (in their components and their functioning) as well as harm to human interests, solely as a collective, relating to the uses that man may draw from the environment.**

2. **The measures ordered by the judge must be intended to prevent or repair the natural object damaged by:**
   - prioritising the prevention of damage via the cessation of the unlawful activity
   - prioritising compensation in kind in relation to the damages awarded, based on the model of compensation measures set out by the Directive on environmental liability
   - allowing damages to be awarded by way of compensation, provided that the amounts are allocated to repairing the damage
   - developing a "restoration" plan or programme approved by the judge for which the claimant or a qualified third party is responsible or by allocating an amount to a restoration fund.

104 White Paper on Environmental Liability, COM(2000) 66 final, 9 February 2000

3. The representatives of the damaged interest, as promoters of the action, must be able to represent environmental interests without confusing them with their personal interests. This may be a representative such as a defender of the natural common, an ombudsman, an environmental protection association, or an independent authority or agency. The action of multiple claimants is to be encouraged in order to promote the action without this causing problems in terms of compensation, with this being allocated to the restoration of the damaged environment regardless of the claimant; this avoids the risks of cumulative compensation and the confusion of interests (between that of the acting representative and that of the damaged environment).

4. It would be a good idea to advocate for the engagement of civil (or administrative) liability in cases of environmental damage:
   - class action enabling everyone to act not only in the name of their personal interest but also in the interest of all members of a community or a common;
   - or at least an action to defend the (socio-)ecological interest with various claimants designated as representative of this interest (NGOs, communities, individuals, ombudsmen, etc.).

5. **Additionally, as part of the revision of the Aarhus Convention onaccess to information, the partic**ipation of the public in the decision-making process and access to justice in environment-related issues, of 25 June 1998 **and its Article 9 on access to justice** in environment-related issues, **it is recommended to broaden the scope to act to include NGOs,** thereby taking up the European Commission's proposal on the revision of the Aarhus Convention (October 2020)[105] and recognising this possibility to take action not only in administrative courts but also **in judicial jurisdictions (particularly within the framework of the future direct application to corporate environmental civil liability).**

Recommendation no. 4: Provide for the formulation of new criminal law proposals and with regard to civil liability within the texts of the European Union

1. **Provide for the formulation of new criminal law proposals within Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law. Which regulatory framework should we choose?**

Negotiations on the 2008 Directive began well before the Treaty of Lisbon, which validated the possibility of the Union legislating in criminal matters. As a consequence, its content is tenta-

105 "*The proposal broadens the possibilities currently available to NGOs to seek administrative review. Whereas currently an administrative review can only be requested for acts of 'individual scope' (acts which are directly addressed to a person or where the person affected can be distinguished individually), in the future NGOs will also be able to request review of administrative acts of 'general scope'.*" see the Commission legislative proposal amending the Aarhus Regulation 1367/2006 (COM(2020) 642 final).

tive and lightweight. Specifically, the offences recognised in this document are limited to adding criminal sanctions to administrative offences, and do not concern autonomous crimes or offences related to the environment. Furthermore, the difficulties relating to the greater involvement of organised criminal groups and the need to further encourage cross-border cooperation have not seen sufficiently addressed. On 10 September 2020, after arranging for an assessment of this directive as regards its transposition and effective implementation, the Commission issued a statement to the effect that the scope of criminalisation of offences should be broadened at European level. There are two ways in which this statement can be put into effect:

- Partially amend the current directive, supplementing and updating it by inserting the new concepts and offences proposed in numbers 1 and 2.
- Propose a new text, which could be a new directive on protecting the safety of the planet, enshrining environmental damage as an autonomous offence and establishing scales of criminal sanctions to produce a modern environmental criminal law that is harmonised at European level.

2. Provide for **the formulation of environmental civil liability within Directive 2004/35** of 21 April 2004 on environmental liability as regards the prevention and remedying of environmental damage (DER)

The DER has enabled certain forms of damage to the environment to be recognised and the prevention of damage and its compensation exclusively in kind to be considered. For these reasons, it is progress to be welcomed. However, it is regrettable that this text, which was at the outset a draft aimed at establishing the civil liability of human activities causing damage to the environment, has led in France at least to the creation of an additional administrative policy, making the State the arbiter of this prevention or restoration, since it is only the State that has the ability to impose these measures on companies. In addition, it should be noted that to date, it has not been transposed into French law despite disasters such as Lubrizol. It seems appropriate to revive this proposal of corporate civil liability at European level, taking into account the legal progress made, notably in France, and see how it can be formulated within this directive.

Could we propose to:

- amend the DER and add a chapter to it, with the title of the Directive finally taking on a legal significance (with companies being able to be held legally liable for damage through civil liability)?
- draw up a new directive covering the civil liability of companies in the event of environmental damage (in a broader sense than the definition of damage caused to the environment provided within the framework of the DER) and to partially amend the DER by simply adding an article referring to this future directive?

3. **Propose a new text combining the criminal and civil sanctions for environmental damage**

Recommendation no. 5: Ask the Commission to conduct comparative law studies:

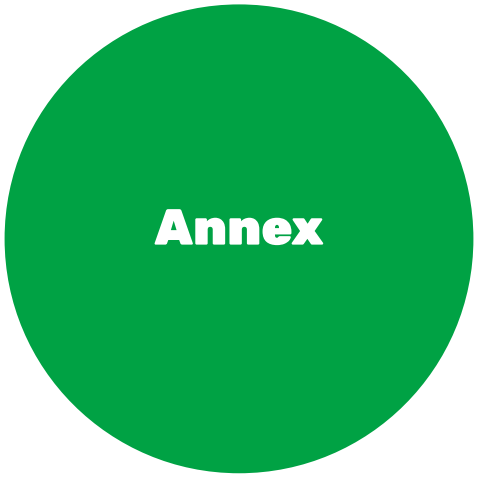
1. **To work towards a satisfactory definition of the criminal offences proposed, studies focusing on:**

    - the state of legislation and case law of the various EU Member States concerning the offence of environmental endangerment (risk offence)
    - the crime of ecocide (text and case law) enshrined by 10 States worldwide, namely Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldavia, Russia, Tajikistan, Ukraine and Vietnam.

2. **To improve the application of the DER and effectively establish environmental liability, studies focusing on:**

    - the state of legislation and case law of the various EU Member States on the representation of nature in court and the various legal techniques used (personification, diffuse interest, individual human interest)106
    - The state of legislation and case law of the various European Union Member States on measures of prevention and restoration of environmental damage and on the existence of specialist entities (agencies, funds).

106 See *Representation of nature in court; comparative approach and outlook (La représentation de la nature devant le juge; approches comparative et prospective)*, Co-Scientific Director, M.-P. Camproux Duffrène and J. Sohnle, ed. Vertigo, HS no. 22, September 2015 (digital version https://vertigo.revues.org/16159 and paper version, 370 pages).



Articles 1246 to 1252 of the French **Civil Code** introduced by the Law of 8 August 2016 on the restoration of biodiversity, nature and landscapes

“Art. 1246. - Any person who causes environmental damage is required to repair it.

Art. 1247. - Under the conditions set out in this title, environmental damage consisting of non-negligible damage to the elements or functions of ecosystems or to the collective benefits derived by humankind from the environment is repairable.

Art. 1248. - The action to repair environmental damage is open to anyone with the capacity and interest to act, such as the State, the French Biodiversity Agency, local authorities and their associations whose territories are impacted, public institutions and associations approved or created at least five years before the commencement of the proceedings and whose purpose is the protection of nature and the preservation of the environment.

Art. 1249. - The restoration of environmental damage will, as a priority, consist of compensation in kind.
If restoration is in fact or in law impossible or insufficient, the judge may order the responsible party to pay damages and interest to the claimant, who may take the necessary measures to restore the environment, or if the claimant is unable to do this, to the State.
The assessment of damage shall take into account, where appropriate, restoration measures already carried out, particularly within the framework of the implementation of Title V1 of Book I of the Environmental Code.

Art. 1250. - In the event of a fine, this is paid out by the judge to the claimant, who shall restore the environment, or, if the claimant is unable to take appropriate measures in this regard, to the State, which shall allocate it for this purpose.
The judge retains the authority to pay it out.

Art. 1251. - Expenditure incurred to prevent the imminent occurrence of damage, to prevent it getting worse or to lessen its consequences constitutes repairable damage.

Art. 1252. - Regardless of the repair of the environmental damage, the judge, having received an application in this regard from a person mentioned in Article 1248, may prescribe reasonable measures to prevent or end the damage”.

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