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# The environmental protection under the International Criminal Law: the new crime of Ecocide


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*A Beppe,*
*mi hai insegnato a guardare*
*un pò più in là*

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**List of abbreviations**

ECHR: European Court of Human Rights

EHP: Port Hope Environmental Group

EIA: Environmental Impact Assessment

FEEM: Fondazione Eni Enrico Mattei

ICJ: International Criminal Court

ICL: International Criminal Law

IEL: International Environmental Law

ILO: International Labour Organization

IPCC: Intergovernmental Panel on Climate Change

ITLOS: International Tribunal for the Law of the Sea

OECD: Organisation for Economic Co-operation and Development

SDGs: Sustainable Development Goals

TFEU: Treaty on the Functioning of the European Union

TUE: Treaty on European Union

UDHR: Universal Declaration of Human Rights

UNCED: United Nations Conference on Environment and Development

UNECE: United Nations Economic Commission for Europe

UNEP: UN Environment Programme

UNFCCC: United Nations Framework Convention on Climate Change

UNSC: United Nations Security Council

**Abstract**

Il presente elaborato affronta il tema della tutela dell'ambiente in ambito internazionale focalizzandosi, in particolare, sull'ideazione e sull'introduzione di un nuovo reato: il crimine di ecocidio.

Il concetto di giustizia ambientale ha iniziato ad assumere rilevanza negli anni settanta con la nascita dei primi movimenti per i diritti civili i cui cardini poggiavano sul concetto di equità ambientale e sull'idea, quindi, che la violazione del diritto delle persone a vivere in un ambiente sano corrispondesse alla conseguente lesione di altri diritti fondamentali come il diritto alla salute e alla dignità umana. La forte connotazione sociale che legò per la prima volta la tutela dell'ecosistema ai principi fondamentali di ogni società democratica, come l'uguaglianza, l'equità e la libertà, hanno aperto la strada a importanti prese di posizione e dichiarazioni.

Il tema della tutela ambientale e la sua intrinseca connessione alla salvaguardia dei diritti umani sono stati, infatti, oggetto dalla Dichiarazione di Stoccolma del 1972, in cui per la prima volta, venne evidenziato come l'uomo goda del*" diritto fondamentale alla libertà, all'uguaglianza e a condizioni di vita soddisfacenti, in un ambiente che gli consenta di vivere nella dignità e nel benessere. Egli ha il dovere solenne di proteggere e migliorare l'ambiente a favore delle generazioni presenti e future*".

La forte connotazione sociale espressa in questa e altre previsioni normative dell'epoca, come la Convenzione di Rio, implicava una visione antropocentrica ovvero una normativa il cui scopo era quello di proteggere gli esseri umani dai danni ecologici, non l'ambiente in sé.

Partendo da queste considerazioni, dopo aver analizzato a fondo l'inscindibile rapporto tra diritto all'ambiente e diritti umani e le principali tappe dell'evoluzione *dell'environmental protection*, il presente lavoro si occuperà di indagare gli strumenti di cui il diritto internazionale dispone.

Particolare attenzione sarà data al diritto internazionale dell'ambiente e al diritto penale internazionale. L'utilizzo di entrambe queste branche del diritto risulta essere fondamentale per affrontare sfide complesse come quelle dei reati ambientali che spesso hanno carattere transnazionale e che richiedono soluzioni capaci di coniugare i requisiti del diritto penale come la precisione e la prevedibilità con il diritto ambientale che comporta il bilanciamento tra interessi e principi diversi.

Per delineare le attività punibili a livello internazionale, il diritto penale richiede infatti definizioni precise, mentre il diritto internazionale ambientale comporta il bilanciamento e la ricerca di compromessi, con pochi divieti espressi in modo rigido e tassativo.

Sul versante del diritto penale internazionale, questo documento si focalizzerà sul tema del nuovo reato di ecocidio. Sempre negli anni settanta il biologo statunitense Arthur Galston coniò suddetto termine per descrivere i danni causati durante la guerra in Vietnam e, in particolare, per riferirsi alle conseguenze dell'utilizzo dell'"agente arancio" da parte dell'esercito statunitense. Solo qualche anno più tardi, nel 1973, Richard Falk, professore di diritto internazionale presso l'Università di Princeton fornì una prima analisi di questo termine sotto il profilo strettamente giuridico.

Nonostante ciò, da un punto di vista meramente legale, la condotta che presuppone la distruzione consapevolmente perpetrata di un ambiente naturale non ha mai avuto una definizione legale fino al 2021 quando la fondazione *Stop Ecocide*, un gruppo di lavoro composto da dodici esperti tra avvocati e giuristi provenienti da tutto il mondo, raggiunse un accordo sulla definizione giuridica di ecocidio. Secondo questo gruppo di esperti, l'ecocidio si sostanzia nella condotta di chi commette atti illeciti o sconsiderati con la consapevolezza che esista una sostanziale probabilità di causare danni gravi, diffusi o di lunga durata all'ambiente. Il gruppo di lavoro è stato convocato alla fine del 2020 in un momento storico particolarmente simbolico ossia dopo 75 anni dal primo utilizzo dei termini "genocidio" e "crimini contro l'umanità" avvenuto durante i processi di Norimberga.

Lo Statuto di Roma con il quale è stata istituita nel 1998 la Corte Penale Internazionale, prevede un insieme di disposizioni volte a perseguire le violazioni più gravi di diritti umani e, al suo interno, l'Articolo 8(2)(b)(iv) presenta una riferimento esplicito ai reati contro l'ambiente unicamente nell'ambito di crimini di guerra. Si tratta senz'altro di una disposizione fondamentale per la tutela ambientale in tempo di guerra in quanto esso punisce la condotta di chi causa danni ambientali indipendentemente dai danni provocati agli esseri umani in un'ottica prettamente ecocentrica.

Per proteggere l'ambiente, in situazioni di pace, questo non era sufficiente. E' stata, quindi, avanzata la proposta di introdurre il nuovo reato di ecocidio tra i crimini su cui estende la propria giurisdizione la Corte Penale Internazionale attraverso l'emendando dello Statuto di Roma. Qualsiasi Paese che abbia ratificato suddetto Statuto può, infatti, presentare proposte di emendamenti che devono essere votate a maggioranza semplice. Solo a questo punto viene avviata una fase di discussione e di possibili modifiche della proposta che si ritiene adottata solo se approvata dai due terzi degli Stati dell'Assemblea. L'iter si conclude con la ratifica da parte dei singoli Stati membri per far sì che la giurisdizione della Corte Penale Internazionale si estenda al crimine in questione.

Approfondendo le definizione di ecocidio, il terzo capitolo analizzerà nel dettaglio gli elementi che caratterizzano la condotta di reato. Come si vedrà, l'elemento materiale (*Actus reus*), si sostanzia nella causazione di danni diffusi, a lungo termine e gravi all'ambiente naturale. Per quanto attiene, invece, all'elemento soggettivo del reato (*Mens rea*) relativo al nuovo crimine di ecocidio, occorre tener conto dell'esistenza della presunzione secondo la quale si debbano ritenere intenzionali quelle condotte poste in essere dal soggetto che sapeva o avrebbe potuto prevedere, con un'elevata soglia di probabilità, che si verificasse l'evento dannoso. In tal modo, l'elemento soggettivo in capo al soggetto agente piò sostanziarsi sia nel dolo semplice, che nel dolo eventuale e nella colpa cosciente. Tra gli altri elementi si avrà modo di analizzare, nel dettaglio, anche il nesso causale ossia il legame eziologico tra l'evento e la condotta sia essa attiva o omissiva.

Sul piano della responsabilità, si vedrà come la Corte penale internazionale possa essere adita da diversi soggetti: da uno degli Stati che ha ratificato lo Statuto di Roma, dal Consiglio di sicurezza delle Nazioni Unite o dal procuratore della Corte. Sono state espressi numerosi e diversi pareri sulla possibilità di ampliare il numero di soggetti legittimati ad adire la Corte, dando la possibilità anche a singoli individui o a ricorrenti non governativi di presentare un reclamo. A questo proposito, alcuni studiosi hanno sostenuto che ogni individuo dovrebbe avere il diritto di ricorrere alla Corte, poiché il reato di ecocidio altro non è che un'aggressione dei diritti fondamentali di ogni essere umano sul pianeta.

Sebbene a livello teorico questa argomentazione possa sembrare corretta perché garantirebbe a ogni persona il diritto di chiedere la salvaguardia dell'intero ecosistema dinnanzi agli organi giudiziari, vedremo come, in realtà, si tratta di un suggerimento difficilmente applicabile sul piano pratico. Infine, si disquisirà sul tema del risarcimento del danno e della giustizia riparativa in materia.

Dopo aver analizzato la proposta del Centre for Criminal Justice and Human Rights dell'UCC University College Cork volta a far sì che l'introduzione di un quinto crimine sotto la giurisdizione della Corte Penale Internazionale si traduca in un'effettiva protezione dell'ambiente anche dal punto di vista strettamente procedurale, l'ultimo capitolo si occuperà della salvaguardia dell'ecosistema nell'attuale normativa europea che, come si avrà modo di vedere, presenta un quadro maggiormente definito rispetto al quanto previsto a livello internazionale. A livello europeo, infatti, il Parlamento ha dato un importante segnale sul riconoscimento del reato di ecocidio attraverso l'attivazione del processo di revisione della Direttiva 2008/99/CE. In seno a questo processo, il 21 marzo scorso, infatti, la Commissione giuridica del Parlamento europeo ha votato all'unanimità l'inclusione e la punibilità

dell'ecocidio assumendo una posizione poi approvata anche dal Parlamento europeo riunito in sessione plenaria. Nei prossimi mesi i rappresentanti del Parlamento, del Consiglio e della Commissione discuteranno nuovamente tale posizione all'interno del processo di negoziazione, prendendo una posizione storica perché nel caso in cui venisse accettata, tutti gli Stati membri dell'Unione Europea dovranno introdurre il reato di ecocidio nella loro legislazione nazionale. L'iter di modifica della Direttiva 2008/99/CE si è mostrato necessario anche in seguito alla valutazione finale pubblicata dalla Commissione in merito al recepimento di tale direttiva negli ordinamenti nazionali degli Stati membri che ha delineato un quadro scoraggiante rispetto al raggiungimento dell'obiettivo originario di una sufficiente armonizzazione delle legislazioni penali nazionali. Secondo tale valutazione, infatti, l'attuazione del testo è avvenuta in modo piuttosto eterogeneo a causa dell'ampio margine di discrezionalità con il quale gli Stati hanno potuto interpretare i termini vaghi e generici utilizzati dalla direttiva nel descrivere le condotte penalmente rilevanti. Questo, come si vedrà, ha portato ad approcci diversi nella ricezione della disposizione comunitaria da parte dei diversi ordinamenti nazionali.

Risultati altrettanto insoddisfacenti sono stati raggiunti sul versante dell'implementazione dei requisiti di offensività della condotta di reato per i quali si è registrata una forte disomogeneità nelle soluzioni adottate a livello nazionale dai diversi Stati membri. Nella maggior parte dei casi, gli Stati hanno scelto di ricorrere ad una trasposizione quasi pedissequa della nozione di "danno sostanziale". Questa decisione ha, di fatto, delegato ai legislatori nazionali il compito di definire i contorni dell'offesa. Al contrario, altri Stati hanno utilizzato definizioni più precise che hanno portato ad una maggiore frammentazione del quadro giuridico europeo. Ad esempio di ciò, come si vedrà, alcuni Stati hanno utilizzato il parametro dell'impatto economico prodotto dal danno generato per definire tale reato, quantificandolo in soli termini economici secondo criteri puramente civilistici. In altre giurisdizioni, invece, il danno rilevante si è fondato su criteri di durata, reversibilità e impatto sull'ambiente.

Ne è emerso un quadro frammentato e caratterizzato da una forte discontinuità di applicazione dei regimi, soprattutto sanzionatori, talmente variegata da rendere impossibile il confronto tra i rispettivi sistemi nazionali. A ciò si aggiunga l'adozione di una straordinaria molteplicità di sanzioni accessorie, di carattere sia amministrativo che civile, previste da ciascuna legislazione nazionale a integrazione della risposta penale e che sono soggette a discipline molto diverse da Stato a Stato.

**Introduction**

The Environmental protection has become a benchmark for the construction of an international order that is truly congenial to the full development of the individual and people, as well as for the affirmation of the role that civil society plays in international relations. In effect, the environment is defined as the space in which human beings live and on which the quality of their lives and health, including that of future generations, depends.

In order to understand the protection of the environment under international criminal law and its evolution up to the conception of a new international crime, the ecocide, it is necessary to preliminarily investigate the close relationship between the right to the environment and human rights by analysing the multiple instruments that international law uses to protect the ecosystem, from human rights treaties to customary law and multilateral treaties.

Since the creation of the United Nations, an increasing number of international human rights treaties have been promulgated and committees have been established to oversee the observance of the human rights guaranteed by each treaty. Most human rights treaties have introduced committees empowered to hear complaints of both individual and state human rights violations, where victims can seek redress. In addition to this, there is customary law, according to which a norm becomes part of international law once the existence of a state practice and *opinion*, on the basis of which states consider such conduct to be a legal norm, is proven. In environmental matters, the debate has been focused on the existence of customary law, and while it is true that the number of national constitutions that provide for environmental standards is very high, it is also true that these provisions differ significantly, creating a universal standard of environmental protection with considerable difficulties.

International law can then make use of multilateral agreements. The growing attention and sensitivity to environmental protection has led over the years to the conclusion of numerous multilateral environmental agreements between states that seek to regulate specific issues such as marine pollution, disposal of toxic substances and climate change.

These agreements primarily address states, providing rights and duties for them, but at the same time provide individuals with the right to access justice to enforce their rights and denounce specific violations.

The evolution of environmental protection goes through a series of important milestones such as the Rio Convention, which defines the rights and duties of nations and lays down the prerequisites for sustainable development, the fight against poverty, an appropriate population policy, the reduction of unsustainable modes of production and consumption, as well as extensive information and participation of the population in decision-making processes.

A key role was also played by the Stockholm Conference where attention was drawn for the first time to the fact that, in order to sustainably improve living conditions, natural resources must be safeguarded for the benefit of all, and that international cooperation is required to achieve this goal. In Stockholm, the focus was on solving environmental problems without forgetting the social, economic and development aspects.

The main instrument of international environmental protection is international environmental law, which is mostly relegated to interstate relations, giving individuals and other non-state actors an extremely modest and secondary position. Indeed, international environmental law focuses on establishing state responsibility rather than on the misconduct of the individual polluter, but while it is important to assess and determine the responsibility of states, it is equally necessary to recognise that non-state actors have a crucial role to play both as agents and as violators of environmental law. International environmental law is rooted in innumerable principles that will be analysed in detail in the course of the discussion: the precautionary principle, the prevention principle, the intra-generational equity principle, the polluter-pays principle and the participation principle.

Environmental protection involves not only international environmental law but also criminal law. This is why it becomes of paramount importance to understand which branch of law, between international criminal law or international environmental law, can play a leading role in environmental protection. Indeed, the combination of these two laws raises fascinating new challenges not always visible to a superficial analysis, which will be examined in detail.

From the point of view of international criminal law, one of the main current challenges is the definition of the crime of ecocide and its possible introduction as a fifth crime under the jurisdiction of the International Criminal Court, which already provides for the protection of the environment in Article 8(2)(b)(iv) of the Rome Statute. First used in 1970 in reference to the operations conducted by the United States during the Vietnam War, the neologism “ecocide” only found a definition in 2021 thanks to the Stop Ecocide Foundation, which define it as *'any illegal or arbitrary act perpetrated with the intent to cause, with substantial probability, serious and widespread or lasting damage to the environment*'. Finding a definition that is as inclusive as possible has taken years of study and analysis on the elements that characterise this crime: the material and psychological elements (*actus reus* and *mens rea*), the materialization of crime, the criminal liability and the remedies.

The Centre for Criminal Justice and Human Rights at UCC University College Cork recently published a supplementary proposal that aims to strengthen the substantive reform put forward by the Stop Ecocide Foundation in seven macro-amendments. As will be seen,

according to this proposal, in order for the International Criminal Court to be able to exercise effective protection in environmental matters, it is necessary to limit the UN Security Council's power to renew the suspension of investigations or prosecutions, to change the evidentiary standard at the preliminary examination and investigation stages, to introduce the relative presumption of 'seriousness' and the satisfaction of the 'interests of justice', and to exclude the guilty plea from the abbreviated procedure.

If this is the picture we are facing at the international level, equally interesting is the European framework. Even at the European level, the protection of the environment is certainly one of the most relevant objectives, since the environment itself is a legal asset strongly threatened by the development of the modern economy. Indeed, environmental crime constitutes one of the largest criminal activities in the world, together with drug trafficking, human trafficking and counterfeiting. To cope with the exponential growth of the phenomenon, over the years the European Union devoted massive efforts to the creation of instruments that could effectively reverse the trend and preserve the environment as a supra-individual good functional to the life of every person.

Within this framework, studded with very important measures such as the European Green Deal, fits the latest draft reform of Directive 2008/99/CE presented in 2021 by the European Commission. The non-uniform application of the directive at state level, as we shall see, has led to a proposal for an amendment to make the response of member states to environmental crimes uniform. The process to include the crime of ecocide in this Directive is also underway in the Parliament, the Council and the Commission.

The Directive 2008/99/CE has a synergetic approach with other instruments provided for in European legislation and aimed at protecting the environment, fitting coherently into the framework already outlined by the Green Deal and the Biodiversity Strategy, the EU Action Plan against Wildlife Trafficking, the EU Serious and Organised Crime Threat Assessment 2021 and the new EU Organised Crime Strategy 2021-2025.

As we shall see, criminal law is actually only one of many possible tools to achieve comprehensive environmental protection, and above all it should always be considered as a last resort, operating when all other preventive and repressive tools have exhausted their effectiveness.

## 1.Environmental protection: international sources and instruments

"*The environment represents the space in which human beings live and on which their quality of life and health, including that of future generations, depends*". With this statement, the International Court of Justice highlights how crucial it is for international law to recognize and regulate the strict connection between human life on earth and the preservation of the different ecosystems that make living conditions possible.

In the process of developing international rules, environmental protection has gradually taken its place as one of the essential fields for creating an ordered co-existence in the international community. Indeed, environmental preservation has become a point of reference for the construction of an international order that is truly congenial to the full development of the individual and peoples, as well as to the affirmation of the role that civil society also plays in international relations.[1] Environmental problems do not only concern technical aspects, but are linked to political, economic and legal relations between members of the international community. The debate concerns above all the conduct of states, which are divided between the attitude of finding answers to environmental issues solely within their own domestic legal system and, on the other hand, the tendency to internationalize all types of protection. Around this duality, which is often conflicting, revolves the entire process of determining general principles, developing guidelines (soft-law) and particular regulations within the framework of the international legal system.

In the progressive development that international conventional law on the subject has experienced since 1972, following the conclusions of the United Nations Conference on the Human Environment, a dual path of normative production can be identified, which has been intensified in recent years. The first path is represented by the tendency to envisage and prepare a framework legislation with which to converge the will and conduct of states on this topic. The framework legislation aims to define objective criteria formulated on the basis of principles that are generally recognised by the actors of the international legal community or towards which at least an *opinio iuris* is considered to exist.[2]

The second is aimed at defining 'norms of conduct' for sectoral interventions that refer to individual aspects included in the broader scope of the environmental issue. In fact, norms of conduct are aimed at those particular areas in which the interests of states are directly affected, in other words, aspects that limited the possibility of an exclusive intervention of the

[1] Philippe Sands and Jacqueline Peel, Principles of International Environmental Law, 3rd ed. (Cambridge: Cambridge University Press, 2012)

[2] Patricia Birnie, Alan Boyle, and Catherine Redgwell, International Law and the Environment, 3rd ed. (Oxford: Oxford University Press, 2009)

domestic law of individual countries. This type of sectoral approach has the disadvantage of being fragmented and thus a source of norms and conduct that may differ between countries or between groups of countries, rather than envisaging common standards as is the case with framework norms. Moreover, in the case of environmental protection, the main problem of international law lies in the relationship between the sovereignty of states and the natural environment. International environmental protection presupposes, in fact, an awareness of the fact that the choices of states and peoples are increasingly conditioned by the factor of interdependence, which calls for solidarity measures to be translated at the legal level with uniform or similarly standards.

### 1.1 The indivisibility of environmental conservation and human rights protection: international recognition and instruments

This dissertation aims to examine whether the current international legal framework already provides adequate and effective protection to discourage and prosecute behaviors that constitute the crime of ecocide and protect both human rights and the environment.

Since the creation of the United Nations, an increasing number of international human rights treaties have been promulgated and committees have been instituted to supervise the observance of human rights guaranteed by each treaty. However, these follow-up processes suffer from restricted enforcement mechanisms and involve rather weak reporting requirements, whereby states must compile periodic reports outlining their compliance with the human rights enshrined in various treaties, as well as an equally weak system of optional interstate and individual complaints.

Nevertheless, international human rights law plays a key role in safeguarding individuals and communities by establishing universal standards and obliging states to abide by them.[3]

Regarding environmental protection, it seems important to remember that when human rights treaties were adopted by the international community, there was not the awareness and perception of environmental issues that exists today. Therefore, references to environmental issues in international instruments designed to protect human rights are very limited, unlike civil, political, economic and social rights. As evidence of this, the first internationally recognized human rights document, the Universal Declaration of Human Rights (UDHR) of 1948, contains no reference to environmental rights, and even today there is no binding international agreement recognizing an explicit right to live in a healthy environment.

[3] Rüdiger Wolfrum, 'Sources of International Law', in Rüdiger Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Oxford: Oxford University Press, 2011

Nevertheless, some experts argue that there are environmental rights within human rights instruments because there is an implicit link between some human rights and environmental issues.

For example, regarding the right to life, some researchers argue that this right not only includes the duty of states to prevent any deliberate deprivation of life, but also implies an obligation to take all practicable measures to prevent violations of the right to life by others.

The indivisibility of human rights and environmental preservation has arisen in several international conferences dealing with the environment. The United Nations Conference on the Human Environment, which was held in Stockholm in 1972, can be considered as the first international event that clearly established the indivisibility of human rights and environmental rights. As affirmed in the Stockholm Declaration, according to which human beings have the fundamental right to freedom, equality, and adequate living standards within an environment of such quality as to ensure a life of dignity and well-being. Through the Stockholm Declaration, an environmental approach to human rights was shaped, under which the preservation of the environment is a precondition for the complete fulfillment of human rights. More specifically, among the non-binding principles related to environment and development, we can highlight the Principle 21, which by balancing the principle of sovereignty and the necessity of coping with environmental issues worldwide, provides that states are entitled to exploit their own natural resources as they desire, but simultaneously they must guarantee that while doing so they do not damage the environment of other states. Through this disposition, the state's responsibility to avoid inflicting trans-boundary environmental damage was instituted.[4]

Since the 1970s there has been an increasing tendency to recognize the indivisibility of environmental protection and human rights. However, this inclination has been reflected purely in non-binding declarations that are part of the so-called soft law, demonstrating a reluctance among states to introduce binding obligations.

The Stockholm Declaration was the very first step toward the fulfillment of the human right to a high-quality environment, generating a domino effect leading to the recognition of an independent right to a healthy environment. In 1987, for instance, the Commission affirmed the right of all human beings to live in an appropriate environment for their own health and welfare. Only two years later, during the Hague Declaration on the Environment, States parties affirmed the duty to maintain the ecosystem and the right to live in decency in a

[4] Gaja G., General Principles, in Wolfrum, Max Planck Encyclopedia (2013)

sustainable global environment. Climate change impacts has undoubtedly turned the spotlight on the indissoluble connection between human rights and the natural world and the Paris Agreement on Climate Change in 2015 represented a landmark in the international community's recognition of the relevance of facing climate change to safeguard human rights.

The nexus between the right to life and the conservation of the environment has become increasingly evident over time. That is precisely the point of the new draft general commentary on the right to life published by the Human Rights Committee. This provision elucidates that states parties to the International Covenant on Civil and Political Rights must adopt appropriate actions to preserve the environment from life-threatening pollution and work to reduce other risks connected with natural catastrophes.

The draft additionally observes that states parties also should develop emergency response plans to reinforce resilience to both natural and anthropogenic hazards that may adversely affect the fulfillment of the right to life, such as industrial pollution.

The implicit relationship between human rights and environmental protection has also been widely accepted by international human rights bodies. The Committee on Economic, Social and Cultural Rights has clarified that the right to the highest level of health that can be achieved, according to Article 12 of the International Covenant on Economic, Social and Cultural Rights, includes a wide range of socio-economic determinants that enhance the conditions in which people can conduct a healthy life, and it also embraces the drivers of health, such as a healthy environment.[5]

Even though these statements of the Committee on Economic, Social and Cultural Rights are only declarations with non-binding strength, they may progressively develop a juridical corpus of human rights provisions on environmental defence that can highlight the relevance of ensuring appropriate and effective protection against ecocide. The ratification of international agreements presupposes that states adopt the domestic legislation and measures needed to ensure the fulfilment of what is stipulated in the treaties. Therefore, in this case, speaking of human rights and environment, it is evident that when environmental damage threatens to jeopardise or violate the observance of treaty rights, states have an obligation to implement determined actions to prevent such damage.[6]

According to the Convention on the Rights of the Child, states have a general obligation to observe and secure the rights contained in their respective treaties. On this point, the

[5] Dupuy P.M., *Formation of Customary International Law and General Principles*, in Bodansky et al., Oxford Handbook

[6] Handl G., *Territorial Sovereignty and the Problem of Transnational Pollution*, American Journal of International Law

Convention on the Rights of the Child, Article 24(2)(c), requires states parties to establish provisions to cope with dangers to children's health that result from local environmental pollution. With this provision, it also insists that states parties must not merely regulate but also track the ecological impact that certain commercial activities have on children's health. As stressed by Special Rapporteur John Knox, states are required to legislate at national level to provide environmental protection against damage that may violate the fulfilment of human rights and at the same time to provide a framework to regulate private actors to prevent and defend against these environmental harms. [7]

In addition to these substantive environmental protection obligations, international human rights agreements also recognize procedural rights, that play a significant part in environmental preservation.

Increasing importance is being accorded, with regard to the protection of human rights and the preservation of the environment, to groups of people who are considered to be more vulnerable, such as indigenous peoples. On this issue, Article 7 of ILO Convention establishes that governments should take measures, in cooperation with the populations affected, to safeguard and preserve the environment of the lands they inhabit. Similarly, United Nations has also recognized the crucial interrelation between the environment and indigenous people by establishing that indigenous populations have the right to the conservation and preservation of the environment. States must provide and support programmes for native populations for this preservation and conservation, with no discrimination.[8]

States are expected to cooperate with the indigenous peoples affected, by obtaining their free and informed consensus, before they allow the undertaking of any project that impacts their lands, territories or any other resource. This entails a duty to consult with the populations involved and, as stated in paragraph 3 of Article 32, states must ensure effective mechanisms for equitable and fair remedies in the event of environmental impacts.

### 1.1.1 Human rights treaties and International Humanitarian Law

The majority of human rights treaties have introduced committees empowered to hear both individual and state complaints of human rights abuses, in which victims can demand reparations.

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[7] Barrionuevo Arévalo L., *The Work of the International Law Commission in the Field of International Environmental Law*, Boston College Environmental Affairs Law Review 32 (2005)

[8] Dupuy P.M., *Soft Law and the International Law of the Environment*, Michigan Journal of International Law, 1991

A critical aspect is that these complaints can only be filed against states, not against individuals or non-state actors, such as corporations. Furthermore, these claims can only be submitted once the state ratified the treaty providing for the rights allegedly violated and when it has agreed to the committee's jurisdiction to uphold the complaint. It is only then that the Committee provides a non-binding recommendation to the state party in which it determines whether or not the state is accountable.

To guarantee that states respect these pronunciations, the only mechanisms available to these quasi-judicial bodies is a follow-up procedure.

In contrast to human rights treaties, environmental agreements typically do not provide for complaints procedures therefore the normative response to environmental damage is very limited. As evidence of this it should be emphasized that only a few cases involving an environmental dimension brought before the Human Rights Committee under Article 27 of the International Covenant on Civil and Political Rights have been successful.[9]

Among these, a few cases in particularly are worth mentioning. In the Ilmari Lansman case, the Committee argued, in line with a restrictive approach repeated in other cases, that provisions impacting on the lifestyle of people belonging to a given minority did not automatically constitute a deprivation of the right under Article 27. Such restrictive approach is confirmed in other cases.

There have, indeed, been bold cases in which the Committee also recognized the significance of the environmental aspects of human rights, as in EHP v. Canada, where, despite the fact that the case was declared to be inadmissible because of the non-exhaustion of internal remedies, the Committee admitted that the discharge of nuclear energy in the neighborhood of people's residences constituted a threat to life, in contrast to the right to life. This pro-environment perspective was also observed in Lubicon Lake Band v. Canada, in which the Committee identified a violation of Article 27 because of the detrimental environmental effects that specified oil and gas drilling activities had inflicted on the ancestral lands of an Indigenous community.

On the other side, International humanitarian law is the law governing armed conflicts and is provided for by a body of law consisting of the Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949 and their Additional Protocols.

These instruments require states to limit and calibrate the means used during an armed conflict and provide certain categories of persons and objects. Article 35(3) of Protocol I to

[9] Birnie P., Boyle A., Redgwell C., *International Law and the Environment*, 3rd ed. (Oxford: Oxford University Press, 2009)

the Geneva Conventions 208 prohibits States Parties from using methods that produce widespread, long-term and severe damage to the environment that could endanger the health or survival of the population. The Convention prohibits any technique of environmental modification that has widespread, long-lasting effects and may result in damage or injury to any other State Party.[10]

While these provisions are important when considering the protection of the environment and human beings in cases of ecocide during an armed conflict, they have some important shortcomings that make them ineffective. In detail, these rules set very high thresholds of harm. They speak of widespread, long-term and severe damage. In addition to the difficulty of proving this, it is noted that the definitions of 'environment' and 'high, uncertain and imprecise threshold' are missing.

Another problematic issue is that the Protocol refers to armed conflicts of an international character, overlooking the fact that most widespread, long-lasting and severe environmental damage has occurred during conflicts of a non-international nature.[11]

Finally, although the Protocol provides for important sanctions, there are, to date, no civil or criminal accountability mechanisms through which a complaint could be lodged with the United Nations Security Council (UNSC) in order to have an investigation initiated.

For all these reasons, the effectiveness of these provisions is highly questionable and although this instrument has played a key role in the recognition of wartime environmental protection, its relevance and effectiveness is very limited.

In analyzing the various instruments of international law that deal with environmental issues and considering that the majority of the cases of environmental destruction we have witnessed in recent decades have been caused by corporations, it is also necessary to investigate all those norms that regulate the conduct of corporations with regard to the environment and human rights. States, which are the traditional subjects of public international law, are entrusted with the role of regulating the harmful conduct of corporations and preventing the perpetration of human rights violations by non-state actors. For their part, corporations are obliged to respect Covenant rights regardless of the existence of domestic laws and their full practical application. However, when it comes to the protection of human rights and the

[10] White R., *Transnational Environmental Crime. Toward an eco-global criminology*, Routledge Taylor & Francis Group, 2011, p. 19 e ss.

[11] The Rwandan civil war is a clear example of this; in this case, the internal war had devastating environmental consequences due to, among other things, the poaching of endangered mountain gorillas and gorillas and the massive destruction of farmland and national parks caused by mining.214 Moreover, the Rwandan civil war is a clear example.

environment, there are no binding international obligations for companies but only soft law instruments. [12]

In 1999, in an effort to intensify cooperation between the private sector and the UN, the former UN Secretary General launched the UN Global Compact, a non-binding pact, established to stimulate businesses and corporations around the world to implement environmentally sustainable policies and abide by corporate social accountability. This is a voluntary initiative that is based on several principles, which states must adhere to, also related to human rights and the environment. The major concerns with this initiative have stemmed from its non-binding nature, lack of lack of an effective monitoring mechanism and specific sanctions for non-compliance.

In 2011, the Human Rights Council endorsed the Guiding Principles on Business and Human Rights within which it is stipulated that states are obliged to provide for responses to any human rights abuses occurring within their territory also carried out by businesses. Businesses do, in fact, have a duty to respect human rights, including environmental rights.

Furthermore, in 2015, the United Nations produced the Guiding Principles Reporting Framework, a tool dedicated to having companies monitor and evaluate their actions in relation to human rights compliance based on the UN Guiding Principles for Multinational Enterprises exhibited. This too, like those already mentioned, has no binding value, but is merely a reporting system whose results are not reviewed by any official body. The result produced by such an instrument is undoubtedly to provide greater transparency about the activities of corporations, but it cannot be denied that this, along with the others, are insufficient attempts to regulate corporate policies.

Overall, these international attempts to regulate the business sector can be considered soft mechanisms, which in practice have limited effect in preventing, stopping and remedying cases of environmental damage and cases that, a fortiori, integrate the crime of ecocide.

### 1.1.2 Customary International Law

A norm becomes part of customary international law once the existence of state practice and the *opinio* on the basis of which states consider such conduct to be a legal norm is proven.

In environmental matters, the question has been raised as to whether there is such a thing as customary law, and while it is true that the number of national constitutions that provide for

[12] Bjork T., *The Emergence of Popular Participation in World Politics: United Nations Conference on Human Environment 1972*, Department of Political Science, University of Stockholm, 1996, available at: http://www.folkrorelser.org/johannesburg/stockholm72.pdf.

norms relating to the environment is very high, it is also true that these provisions differ considerably from one another, hardly creating a universal standard in environmental protection.

What is less controversial, however, is the duty of states to prevent transboundary environmental damage. A duty, the latter, first recognised in the 1930s, in the Trail Smelter arbitration case (United States v. Canada). More than sixty years later, this obligation was also recognised by the International Court of Justice (ICJ) in its famous advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. Indeed, the Court enshrined the obligation of states to ensure that activities under their jurisdiction respect the environment of other states or territories that are beyond national control.[13]

This duty implies that the state must also undertake environmental impact assessments before embarking on a particular undertaking in order to prevent environmental damage, however, there are situations involving a multiplicity of states that make burden-sharing difficult.

The emblematic example of this is greenhouse gas emissions that have numerous effects, including rising sea levels. It is difficult, in situations with an extraterritorial character as in the present case, to understand who should be held responsible and who should guarantee just compensation to the inhabitants of the territories affected by this problem. It is easy to understand how, despite the growing establishment of a customary rule for dealing with such damage, the scope of these obligations is still very ambiguous.[14]

Customary rules include general principles applicable to international environmental protection, which will be analyzed in detail below.

The first rule responds to the Latin brocade "*sic utere tuo ut alienum non laedas*" which means "you may make use of it as long as you do not harm others" and which was applied to the Trail smelter case arbitration award in 1941. From this follows the prohibition of a state from being able to use or permit the use of territory, which by smoke emissions causes harm to the territory (or property and persons) of another state. The harm must be significant, proven, not merely a risk, and involve a transboundary incident.

Secondly, from custom derive obligations of due diligence i.e., diligent use of resources, a use in itself legitimate but under certain conditions. In addition, we also speak of the obligation to cooperate, which is embodied in the commitment to participate in global partnerships and the inclusion of internal rules defining liability and compensation for damages. Hence the

[13] Buergenthal T., Murphy S.D., *Public International Law* (3 Ed.), 2002

[14] Cherif Bassiouni M.., *International Crimes: Jus Cogens and Obligatio Erga Omnes*, *Law and Contemporary Problems* 63-74, 1996. Available at: https://scholarship.law.duke.edu/lcp/vol59/iss4/6

incorporation of environmental impact considerations, such as VAI (Environmental Impact Assessment), into business plans.[15]

Among the principles that derive from customary law we also find the principle of prevention, whereby the state must regulate, reduce, and prohibit activities that cause environmental damage by adopting appropriate rules and measures, supervising and controlling, and the precautionary principle that must be respected when there are threats of serious irreversible environmental damage, even in the absence of scientific certainty.

Finally, the "polluter pays" principle, whereby it is up to the polluter to prevent, reduce or cease the polluting activity and pay for any damage, and the principle of sustainability, whereby the ability of future generations to develop and meet their needs should not be compromised.

### 1.1.3 International treaty law : the indirect protection of human rights provided by multilateral environmental agreements

Increasing attention and sensitivity to the issue of environmental protection has led over the years to the conclusion of numerous multilateral environmental agreements (MEAs) between states seeking to regulate specific issues such as marine pollution, disposal of toxic substances, and climate change.

These agreements primarily target states, providing rights and duties for them, while at the same time providing individuals with the right to access justice to vindicate their rights and report specific violations. These procedural rights were enshrined in Principle 10 of the Rio Declaration, which states that individuals should be guaranteed three fundamental rights: the right to access information, to participate in decision-making processes, and to access justice. All of these three rights find expression in other environmental treaties.

Exactly like the Rio Convention, other environmental treaties require states to ensure public access to information, such as the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Article 15). Other environmental treaties, such as the Stockholm Convention on Persistent Organ Pollutants, provide for and allow for public participation, which is closely linked to the rights of freedom of expression (Article 12).

Finally, regarding the right to access legal remedies, we highlight the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters

[15] Boschiero N., Scovazzi T., Pitea C., Ragni C., *International Courts and the Development of International Law*: Essays in Honour of Tullio Treves, Asser Press/Springer, 2013

whose purpose is to ensure that individuals have a role in protecting the environment. To this end, States Parties are required to guarantee three procedural rights in their domestic jurisdictions, namely access to information about the environment, public participation in environmental decision-making, and access to justice in environmental matters.[16]

The Aarhus Convention has what is known as the Compliance Committee, a monitoring body tasked with verifying that these procedures are followed within the national laws of the signatory states. [17] Different environmental crimes, which involve activities that take place across national borders or have an impact on the entire world, have acquired the status of "international environmental crimes." These are, in particular, transnationally damaging crimes involving hazardous waste , ozone-depleting substances , illegal fishing and wildlife trade.[18]

It seems significant to point out that although these conventions do not expressly mention the concept of human rights, they do offer protection, albeit indirectly, to certain human rights.

As an example, the Basel Convention on the Control of Hazardous Wastes makes multiple references to "human health" affirming the need for all practicable measures to be taken to ensure the protection of human health and the environment.

The protection of the environment, in its various nuances, leads such conventions to offer indirect protection to human beings as well.[19]

What seems most interesting is the legally binding nature of these conventions that also provide enforcement mechanisms. Indeed, these conventions require states to criminalize specific environmental crimes at the national level and impose penalties ranging from imprisonment to simple payment of fines or restorative damages. In reality, however, it occurs that many environmental crimes occur in states with weak governments that lack effective institutions to prosecute these crimes. For this reason, in 2015, the United Nations General Assembly called on its member states to adopt more effective measures to prevent and combat environmental crimes.[20]

Even for international environmental protection, treaties, the covenantal norms, bind only ratifying states and indirectly private actors subordinate to their jurisdiction. There are, however, albeit few treaties that apply directly to private actors and cover highly hazardous activities with high risk of environmental impact, such as oil pollution, transportation of

[16] Klučka J., *Regionalism in International Law*, Routledge, 2018
[17] Conforti B., *Diritto internazionale*, Editoriale Scientifica, Napoli, 11 Ed., 2018
[18] Buergenthal T., Murphy S.D., *Public International Law*, 3 Ed., 2002
[19] Buergenthal T., Murphy S.D., *Public International Law*, 3 Ed., 2002
[20] Badiali G., *La Tutela Internazionale dell'Ambiente*, Edizioni Scientifiche Italiane, 1995

dangerous goods, transboundary transfer of hazardous wastes, and nuclear energy. Recall the 1992 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

No less important is the 1992 Convention on Biodiversity, which emphasizes the concepts of conservation of biological diversity, prevention of damage, sustainable use of resources, and sharing of information and innovations between industrialized and developing countries.

In the context of combating climate change, worth mentioning is the United Nations Framework Convention (UNFCCC) adopted at the Earth Summit in Rio in 1992, to which should be added the Kyoto Protocol (1997) for a 5 percent reduction in greenhouse gases compared to the year 1990. In addition, a non-binding instrument is proposed at that time, Agenda 2021. The Kyoto Protocol, for adhering countries, provides a flexible market mechanism for the purchase of pollutant emission allowances (Emission Trading), to allow those who reduce more than expected to surrender their surplus emissions to a less virtuous country. In addition, developed countries can invest in developing countries for the same gas reduction target (Clean Development Mechanism).[21]

During the various Conferences to follow there will be an evolution of international environmental commitment: development goals begin to intertwine with climate change goals. Hence the Seventh Millennium Development Goal for Sustainable Development (2015) and the 2030 Agenda with its Sustainable Development Goals (SDGs), of which the most inherent are: clean water and energy (SDG6 and 7), sustainable cities (SDG11), responsible production and consumption (SDG12), and protection of marine and terrestrial biodiversity (SDG14 and 15).

The 2016 Paris Agreement on Climate Change was the first binding universal agreement. Its Article 2 outlines its objectives: to "*strengthen the global response to the threat posed by climate change, in the context of sustainable development and poverty eradication efforts*" particularly by reducing greenhouse gases that affect global warming. All 195 states are signatories, but not all have ratified and are therefore bound by the agreement.

### 1.2 The Rio Convention and the relevance of international cooperation to eradicate and avoid environmental damage

The current body of international law finds its roots on the 27 principles of the 1992 Rio Declaration. These principles are dense in meaning, but in addition to not foreseeing onerous

[21] Kasperson, R. E., Kasperson, J. X., *Climate Change, Vulnerability and Social Justice*. Stockholm Environment Institute and SIDA, 2001

or immediately implementable commitments, they accentuate the tendency to consider environmental protection as the responsibility of each individual country, to be planned and addressed internally. According to the Declaration, states have the sovereign right to exploit their own resources according to their own environmental and development policies, and for this they must adopt effective environmental legislation.[22]

The highlights of this Declaration are the actions required of states. First, they must ensure that activities under their jurisdiction or control do not cause damage to the environment of other states or territories beyond the limits of national jurisdiction. Secondly, by action to promote the 'internationalisation' of environmental protection costs and, finally, by notification obligations in the event of natural disasters or emergency situations that are likely to produce sudden harmful effects on the environment or that may have serious adverse transboundary effects on the environment.

Inspiring this Declaration were some of the already mentioned basic principles of international environmental law that constitute a kind of *favour iuris* for the countries of the South. The principle according to which, for example, states have common but differentiated responsibilities emerged because of the different situations that individual states have in relation to environmental protection: economic situation, sources of pollution, exploitation of resources, ability to adapt international standards to domestic law. The principle of non-discrimination in trade matters, according to which trade policy measures for ecological purposes must not constitute a means of arbitrary or unjustified discrimination, is the basis for the avoidance of unilateral actions to solve major environmental problems outside the jurisdiction of the importing country. This is an area that directly touches on international trade issues and forms of regulation expressed in the multilateral context.[23]

Furthermore, the Declaration recalls the instruments offered by international cooperation which must be implemented to eliminate the causes of environmental damage, starting with the extreme forms of poverty. Therefore, it refers to the measures to be adopted in the international order and in the domestic order of individual states, especially those concerning the regulatory profile, environmental impact assessment, and the priority to be given to the actions of developing countries. The international legal system has come to recognise the existence of common rules, the so-called international standards, on the basis of which the

[22] Butos W. N., McQuade J. T., *Causes and Consequences of the Climate Science Boom*, The Independent Review, 2015 pp.165-196 available at https://www.jstor.org/stable/24562064

[23] Butos W. N., McQuade J. T., *Causes and Consequences of the Climate Science Boom*, The Independent Review, 2015 pp.165-196 available at https://www.jstor.org/stable/24562064

political and legislative conduct of individual states in environmental matters can be made to run.

From a strictly operational and institutional perspective, specific structures have been set up within the United Nations System. Firstly, the Commission on Sustainable Development, designed with three different levels of responsibility. It has the task of monitoring progress in the implementation of the conclusions and legislation adopted by UNCED, both at the international and regional levels and within individual states. Secondly, it is entrusted with the development of guidelines for follow-up actions to UNCED. It is also in charge of promoting dialogue and structuring a partnership between the various actors called upon to contribute to the implementation of the 2030 Agenda, starting with the countries that have the most responsibility for intergovernmental and non-governmental governance.[24]

As for the more strictly regulatory consequences, the conclusions of the Stockholm Conference envisaged a twofold approach for the subsequent drafting of international norms, favouring both the drafting of specific international agreements, preceded or followed by declarations of principle within international organisations, and the issuing of internal norms capable of taking into account the specific situation of each individual country. The reference to concepts such as environmental damage, specifically referring in that context to individual persons or state activities that are victims of pollution, and only indirectly to the damage committed against the environmental heritage considered as a whole, also gained in importance.

The multiplication of conventional standards in environmental matters, with a gradual definition of guidelines, is characterised by a number of factors. Firstly, we can see a shift from an exclusive focus on single sectors to the definition of norms that invest in global terms the dimension of the environmental problem, and therefore the protection of the different ecosystems, in relation to the different activities of states.

A second characteristic that marks the development of conventional legislation is the regionalisation which involves the conclusion of international agreements whose standards are designed and drawn up for restricted areas presenting similar problems and the possibility of homogeneous solutions. The advantage is a better enforceability of the norms themselves

[24] The Rio Declaration on Environment and Development, United Nations Conference of Environment and Development, Agenda Item 9, U.N. Doc. A/CONF.151/5/Rev.1 (1992)

and above all a full effectiveness of those criteria deriving from international standardisation in the field of environmental protection.[25]

A third element is the establishment of UNEP, as the UN body charged with promoting more effective international cooperation in environmental matters, also through legal regulation of the phenomenon. UNEP's policy guidelines, especially those that emerged in 1975 from the Third Session of its governing body, the Council of Governors, in addition to orienting its activities, indicated a number of objectives towards which international legal regulation on the environmental issue should converge: human health, the ecosystem, seas and oceans, management and conservation of natural resources, energy and energy sources.

UNEP also begins to identify the international conventions concluded on environmental matters that are the result of multilateral negotiations and that go to constitute in the international legal system a body of law, neither organic nor systematic, that acquires relevance due to the fact that it is oriented towards defining the simultaneous conduct of several states and thus providing for a general application of uniform standards to the benefit of the objective of protecting the ecosystem. Of course, in parallel, there is no shortage of the production of bilateral-type pactual norms aimed at ordering conduct and regulating any conflicts of interest arising between two countries with regard to environmental protection.[26]

The next moment in this evolution is given by the conventional acts adopted by UNCED in 1992, and in particular the Framework Convention on Climate Change and the Convention on Biological Diversity, whose developments in transposition and implementation by states open up new possibilities for regulation in particularly delicate areas of the whole environmental issue.

There are currently more than five hundred bilateral and multilateral conventions, the result of the will of states, albeit with varying degrees of effectiveness. The multitude of such conventions has led to an attempt at classification for those of a multilateral nature, using the ordinary criteria of legal systematics: source of production, formal aspects, object, spatial and subjective scope of effectiveness, legal effects. As far as legal effects are concerned, for conventions, the formal degree of compulsoriness, proper to international treaties, which falls on the parties to them, remains firm. It is precisely this latter type of legislation that has shown a clear development in recent years, especially with agreements between neighbouring

[25] Palmer G., *The Earth Summit: what went wrong at Rio?* Washington University Law Quarterly, 1992 available at https://journals.library.wustl.edu/lawreview/article/5181/galley/22014/view/

[26] Preston J., Robinson E. *National Interests preside at Rio*, Washington Post, June 7, 1992 available at https://www.washingtonpost.com/archive/politics/1992/06/07/national-interests-preside-at-rio/e1ea4e6d-18e4-47f3-b423-30de3ac97e02/

and bordering states, i.e. those that share the management and conservation of watercourses, lakes, mountain ranges. Gradually, however, the content of these agreements has tended to include other areas of environmental issues as well, as shown, for example, by the Convention on Air Quality concluded in 1991 between Canada and the United States.[27]

Some of the conventions also provide for the establishment of special bodies with powers, generally of an administrative nature, to oversee their implementation. In the case of conventions issued by intergovernmental organisations, it is instead the organisation itself that exercises periodic control over the degree of implementation: such are, for example, the ILO Conventions that contain a control mechanism activated annually by the Conference of the Organisation.

With regard to the legal effects produced vis-à-vis the states party to them, it is possible to divide the existing multilateral convention norms into three categories. Firstly, there are norms that create obligations of conduct, such as the 1960 Convention for the Protection of Workers against Ionising Radiation, the 1963 Convention on Third Party Liability in the Field of Nuclear Energy, or the 1969 Convention on Civil Liability for Nuclear Damage.

Then there are norms that create a ban as is the case with the 1963 Treaty on the Prohibition of Nuclear Tests in the Atmosphere, Outer Space and Underwater or the 1969 Convention on the Prohibition of Bottom Trawling in the South Pacific.

Finally, the third category are the programmatic regulations such as the 1974 Agreement for an International Energy Programme, the 1985 Convention for the Protection of the Marine Environment of the North-East Atlantic or the set of regulations that concluded the 1992 Conference on the Protection of the Black Sea against Pollution. It must be considered, however, that very often, in spite of formal acceptance, the conduct of states does not seem to transpose the dictates of the conventional standards, preferring behaviour that is not only detrimental to the standards themselves but above all to the environmental situation: : this cannot lead to consider as ineffective the slow but progressive progress of the international order towards full respect for the ecosystem and its protection.

### 1.3 From the Stockholm Declaration to the Nagoya-Kuala Lumpur Protocol: the evolution of international law on accountability for environmental damage

International environmental protection law revolves around the concept of liability for environmental damage. The question of damage and consequent liability is both a function of

[27] Butos W. N., McQuade J. T., *Causes and Consequences of the Climate Science Boom*, The Independent Review, 2015 pp.165-196 available at https://www.jstor.org/stable/24562064

resolving the effects of active or omissive behaviour that harms the environment, and of preventing possible damage. But above all, it has gradually taken shape as a way of taking into direct consideration those who are victims of damage to the ecosystem, both in the patrimonial aspect and directly in living conditions.

The Stockholm Declaration called on states to progressively commit themselves to the further development of international law on liability and compensation for victims of pollution and other environmental damage.[28]

However, the real problem arises in the relationship between States, i.e. in defining strict liability when the environmental damage caused causes effects in other States: what is technically called transboundary pollution. In this sense, the Declaration to Principle 21, referring to the principles of general international law and the UN Charter, upholds the sovereign right of states to use natural resources on the basis of their environmental policies[29]. This right, however, is coupled with a limitation, expressed through an *erga omnes* obligation that falls on states, which have the responsibility to ensure that activities carried out within their jurisdiction and under their control do not cause damage to the environment of other states, or in regions that are not under national jurisdiction.[30]

A provision, the latter, also echoed in the Charter of Economic Rights and Duties of States, which states in Article 30 the responsibility of all states to ensure that activities within their jurisdiction or under their control do not cause damage to the environment in other states or in areas not under any international jurisdiction.

The Rio Declaration, again addressed to States, poses the question of liability for environmental damage in a twofold perspective, that relating to damage caused within a State and therefore pertaining to domestic legal systems that will develop national law on liability for damage caused, and that relating to the development of international law on liability and compensation for the harmful effects of environmental damage caused by activities within their jurisdiction.

Furthermore, the Declaration suggests, with regard to liability for environmental damage, the objective of 'internationalisation' of costs, assuming that it is in principle the polluter who has to bear the cost of pollution. In the current configuration of the international legal system, therefore, it is clear that one of the key concepts around which international environmental

[28] Young D.E., *The decline of the sovereign state* in Carl Schmitt's International Thought: Order and Orientation by William Hooker, 2011, pp.497-499 available at https://www.jstor.org/stable/23016521

[29] Desai B.H., *Envisioning Our Environmental Future, Stockholm+50 and Beyond*, IOS Press, 2022

[30] Dodds F., Strong M. and Strauss M., *Only One Earth: The Long Road via Rio to Sustainable Development*, Earthscan, 2012

law revolves is that of the responsibility of actors: states and non-state actors such as industries and individuals operating within them. In terms of responsibility, several principles emerge above all, that of the 'polluter pays', that of the obligation of vigilance and precaution, that of risk prediction, and that of the pre-eminence of the collective interest over individual countries. From these general principles it is possible to derive certain criteria inspiring rules of conduct that would seem to be configurable as obligations for states. [31]

First of all, the preliminary assessment of the consequences of an activity that may affect the environment becomes essential because it is projected in an international or transboundary dimension. This aspect, initially made part of the more general 'precautionary principle', has subsequently become the obligation of risk assessment based on scientific evidence and the consequent obligation of risk management linked to the function of special mechanisms and strategies set up following the identification of risks made in the assessment procedures.[32]

Another awareness that has inspired the rules of conduct is the need to activate contacts with neighbouring states that may have relations with the activity being undertaken, in order to prevent damage and ensure adequate information.[33] The possibility, also for those directly harmed, to access information and administrative and judicial procedures in the State where the damage originated is, in fact, essential.

Finally important is the obligation to avoid a double standard in the legal regulation of damage by a State, proceeding with greater care towards border areas. In this line, it is interesting to point out the regulatory activity of the Organisation for Economic Co-operation and Development (OECD), which becomes illustrative even though it directly concerns only its member states, since it is the organisation that groups together all the highly industrialised countries with activities at high environmental risk.

In 1975, it was established for the first time that the polluting state, in addition to being held liable for damage it has committed, must be required to pay compensation for damage to the transboundary environment. This principle was taken up in the subsequent Recommendation on the Application of the Polluter-Pays Principle in Accidental Pollution, adopted by the

[31] Chasek P., *Stockolm and the Birth of Environmental Diplomacy* in IISD, Still only one earth, lessons from 50 years of UN sustainable development policy, 2020 available at https://www.iisd.org/system/files/2020-09/still-one-earth-stockholm-diplomacy_0.pdf

[32] Wirth D., *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?* 29 Georgia Law Review, 1995

[33] Chasek P., *Stockolm and the Birth of Environmental Diplomacy* in IISD, Still only one earth, lessons from 50 years of UN sustainable development policy, 2020 available at https://www.iisd.org/system/files/2020-09/still-one-earth-stockholm-diplomacy_0.pdf

OECD Council in 1989, which adopted guiding principles for classifying accidental pollution and applying the polluter-pays principle.

The reference was primarily to hazardous industrial and technical installations that should be reported by individual states. On this aspect, the OECD Council had intervened a year earlier with a mandatory decision concerning persons directly exposed to the risks created by hazardous installations, recognising that individuals likely to be affected have the right to be informed.

This act was complemented by the Concluding Declaration of the OECD Conference on Hazardous Substances Accidents of 1988 and the Decision of the Council of the Organisation on the Exchange of Information Concerning Accidents Causing Transboundary Damage. This OECD activity was particularly important because it broadened the application of the 'polluter pays' principle and affirmed the 'right to information' on hazardous facilities. The affirmation of the latter right pertaining to people's interests had a broader scope than that contained in other international provisions, such as the Seveso Directive, which operated within the scope of EU law. [34]

In the broader international context, the issue of polluter's liability was the subject of attention in the process of codification of international law initiated within the United Nations Commission on International Law, which in the Draft Articles on the International Responsibility of States stated that the protection and preservation of the environment is a fundamental interest of the international community and therefore the violation of essential obligations for the protection and preservation of this interest is an international crime. This provision allowed the International Law Commission, to draw up a draft Code of Crimes against the Peace and Security of Mankind, inserting the theme of environmental protection which, constituting a fundamental interest of mankind in the event of damage, entailed the inclusion of the responsibility of its perpetrators, not only with respect to domestic but also international law.

In this sense, Article 26 of the draft Code, on 'Deliberate and Serious Damage to the Environment', provided for the conviction of any person who deliberately causes extensive, lasting and serious damage to the natural environment. It is interesting to note that this draft article is included in its contents in the Statute of the International Criminal Court and

[34] Ivanova, M. *Designing the United Nations Environment Programme: a story of compromise and confrontation*. International Environmental Agreements, 2007, pp. 337–361 available at https://doi.org/10.1007/s10784- 007-9052-4

considered in the category of 'war crimes' over which the Court can exercise jurisdiction and which will be discussed below.[35]

If one examines the elements it contains, the application seems to be subordinate to the fact that the damage must be to the natural environment, i.e. to what surrounds the human species as well as its preservation: thus the territory, seas, atmosphere, fauna, flora, biological diversity are covered. Furthermore, the damage must be 'extensive, lasting and serious' and at the same time caused 'deliberately'. This last point would seem to exclude damage caused by negligence, but also damage caused by an intentional violation of limits or regulations on the use of dangerous techniques and substances provided that the lack of specific intent to cause environmental damage is proven. The more recent development of the problem of environmental damage has seen a gradual extension to the consideration of civil liability that may affect a State, its organs or persons in the objects covered by international law, as in the case of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, adopted by the Council of Europe in 1993.

Within the broader issue of environmental damage, the issue of transboundary movements of toxic and hazardous waste should certainly be included. This is an issue that points directly to a view of environmental damage set in the context of North-South relations. For while it is clear that waste is essentially produced in developed countries, its disposal directly involves the countries of the South.[36]

In this perspective, a number of substantive elements are affirmed at the legal level to determine: the type of transport, whether it is deemed hazardous or not; the control and prevention of accidents; the possible insufficiency of the technology used; the type of information required. A recent orientation can also be found in Agenda 2030, which refers to the illicit trafficking of hazardous waste and its prevention, especially when such trafficking is carried out in violation of national legislation and relevant international instruments. In this slow but steady evolution, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters should be included.[37]

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[35] Ivanova, M. *Designing the United Nations Environment Programme: a story of compromise and confrontation*. International Environmental Agreements, 2007, pp. 337–361 available at https://doi.org/10.1007/s10784- 007-9052-4

[36] Ivanova, M. *Designing the United Nations Environment Programme: a story of compromise and confrontation*. International Environmental Agreements, 2007, pp. 337–361 available at https://doi.org/10.1007/s10784- 007-9052-4

[37] 2030 Agenda for Sustainable Development, United Nations Sustainable Development Summit, 2015 available at https://sdgs.un.org/2030agenda

This is the first multilateral normative act to impose obligations on the contracting parties regarding the possibility of being informed, participatory responsibility in decision-making processes and the effects of legal action taken in relation to damage related to or suffered by them.[38]

Still on the subject of damage resulting from transboundary movements, mention should also be made of the Nagoya-Kuala Lumpur Additional Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, adopted in 2010 at the Conference of the Parties to the Biodiversity Convention in conjunction with the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation.[39] The issue of defining civil liability for damage resulting from the transboundary movement of living modified organisms had already come to the attention of states at the Cartagena Conference in 2000, where, however, the proposal of some countries to start negotiations for regulatory purposes was met with fierce opposition from those who had a direct economic interest in the production and export of living modified organisms.

In the impossibility of reaching an immediate compromise on the issue, the Cartagena Protocol stipulated that the Conference of the Parties should initiate a process to develop appropriate international rules and procedures on liability and compensation for damages, expanding the institution of civil liability also in this area. It took almost ten years of negotiations and annual meetings for the Nagoya-Kuala Lumpur Protocol on Civil Liability for Damage Caused by Transboundary Movement of Living Organisms to finally be approved and for a mechanism of checks and sanctions to be put in place that would operate at the substantive and procedural levels.

The Protocol's scope is limited to damage caused by living modified organisms that have their origin in a transboundary movement, where living modified organisms are understood to be those intended for human or animal consumption or processing, intended for contained use or intended for intentional introduction into the environment, as well as illegal and accidental introduction.

The great novelty introduced with the Protocol lies in the regime of civil liability on operators who cause damage and in the obligation on States to adopt all response measures deemed necessary to prevent, minimise, contain, limit or otherwise avoid damage and to restore

[38] Sohn L.B., *The Stockholm Declaration on the Human Environment* in Harvard Journal of International Law, 1973, pp. 513-515

[39] Sohn L.B., *The Stockholm Declaration on the Human Environment* in Harvard Journal of International Law, 1973, pp. 513-515

biological diversity that has been damaged or lost through the transboundary movement that caused the damage.

As for the legal regime of the civil liability of operators, it must be said that this issue represented the real regulatory crux on which the various international players had to confront themselves, and on which a compromise solution may have prevailed, contained in a sort of safeguard clause, which recognised that States, in the event of damage falling within the cases described by the Protocol, could continue to apply their domestic regulations on civil liability, where existing, or draw up ad hoc regulations on the subject, or even adopt a 'combined' solution of the two systems. [40]

As regards the different hypothesis of damage caused to property and persons by the transboundary movement of living modified organisms, on the other hand, the problem has arisen in quite different terms, the damage caused by the transboundary movement being inherent in the person. The Protocol, in providing nothing on this particular question, introduced a real obligation for States to refer to domestic legislation on civil liability, where such legislation already existed or, in the absence of regulatory references, to draw up ad hoc legislation. States were also given the power to adopt a 'combined' solution of the two systems, imposing on them in each case a real obligation to take legislative action. The overall analysis of the legislation drafted through the Additional Protocol allows us to recognise that this act has the merit of having introduced, at the international level, a minimum standard in matters of civil liability. However, it represents only the first step in the development of a truly comprehensive legislation, which will have to see the involvement of States both in the drafting of national legislation and in the participation in the periodic Conference of the Parties that will be called upon to implement the document once it enters into force.

### 1.4 The relationship between environment and human rights

In the attempt to understand the gradual evolution of the international legal system with regard to problems related to the protection of the ecosystem, it appears interesting to analyse the relationship between the environment and human rights. That is, how we move from a right of the environment to a right to the environment, referring to the international legislation

[40] Sohn L.B., *The Stockholm Declaration on the Human Environment* in Harvard Journal of International Law, 1973, pp. 513-515

and action to protect the human person, his rights and freedoms, which opens up to a particular connection with environmental protection.[41]

The Stockholm Declaration indicates that the fundamental rights of the individual are to be recognised and implemented in a quality environment in which a dignified existence is permitted, and in which the responsibility of each individual to protect and preserve the environment for present and future generations remains paramount.

It should be borne in mind that the general human rights legislation developed at the UN lacks a direct provision for the right to the environment, although it is possible to grasp the existence of such a right at least indirectly. Article 3 of the Universal Declaration of Human Rights and Article 6 of the International Covenant on Civil and Political Rights affirm the 'right to life' for every person. Clearly, aspects such as health, living conditions and the working environment contribute to making such a right a reality. There is therefore a profound correlation between the right to life and the right to live in a healthy and protected natural environment. Such an extensive interpretation could certainly be proposed by analogy for the provision of Article 25 of the Universal Declaration, which affirms the right of everyone to a standard of living adequate for the health and well-being of oneself and one's family.[42]

Regarding the definition of a human right to the environment, the Rio Declaration recognises that human beings have the right to a healthy and productive life in harmony with nature. The Declaration does not directly mention the human right to the environment, which is essentially made part of the broader right to development, the full realisation of which must be achieved in such a way as to meet the environmental and developmental needs of present and future generations in an equitable manner.[43] However, it is possible to extract from the text some specifications directly referring to the conduct of states that give concreteness to the ascertainment of a human right to the environment, even without a formal enunciation of the same right. Such are, for example, the right of every person to a quality life as set forth in Principle 8, the right to endogenous resources as set forth in Principle 9, the right to participation in dealing with environmental issues, and the right to judicial and administrative action in the event of environmental damage as set forth in Principle 10.

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[41] International Conference on Human Rights, Apr. 22-May 13, 1968, Teheran, Iran, Proclamation of Teheran, pmbl., U.N. Doc. A/CONF. 32/41

[42] .Rinceanu J., *Enforcement Mechanisms in International Environmental Law*, J. Envt'l L. & Litig, 2000 pp. 147-149

[43] Kiss A., *An introductory note on a human right to environment*, in Environmental Change and International Law: new challenges and dimensions, Brown Weiss ed., 1992

Alongside the indirect identification of a protection of the right to the environment within the framework of international human rights law, one can see the affirmation of provisions that further link this right to the more general right to development, as well as the emergence of norms that directly protect it, expanding the very protection of fundamental rights within the framework of international law, both at the universal and regional levels. The conclusions of the 1993 World Conference on Human Rights in Vienna, which in its Final Declaration established the principle that the right to development should be realised in such a way that the development and environmental needs of present and future generations are met in an equitable manner, are also part of this perspective.[44]

Despite the absence of a specific legal provision in relation to a right to the environment, it should be noted that there has been no lack of tendency in the United Nations framework to contextualise environmental protection among human rights, albeit with results that are not immediately perceived. As early as 1992, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities undertook a study on the relationship between human rights and environmental protection, better known as the Ksentini Report, named after the Special Rapporteur in charge of the research at the UN. This Report did not limit itself to statements of principle on the need to elaborate a notion of a human right to the environment, but identified in detail the instruments deemed necessary for the realisation of this objective, translating this into a draft Declaration of Principles on Human Rights and the Environment. These included the contents of the Aarhus Convention and those that had already emerged in the interpretations of the aforementioned articles of the Universal Declaration and the Covenants, in various domestic legal systems or in jurisprudential pronouncements also by regional human rights courts.

It was subsequently the UN Human Rights Council that took up the topic, raising the issue in connection with the topic of climate change. In 2011, the UN High Commissioner for Human Rights in drafting a study on the environment-human rights relationship for the Council proceeded to note what had already emerged and to some extent consolidated in the form of opinio juris on the subject. A work that, while recognising the difficulty of defining a new right, envisaged its formalisation through the path of judicial protection. An attitude that drew inspiration from the work of bodies such as the European Court of Human Rights which, faced with the silence of the European Convention on Human Rights (ECHR), proceeded to identify and protect the right to the environment through the provisions of other rights

[44] Kiss A., *An introductory note on a human right to environment*, in Environmental Change and International Law: new challenges and dimensions, Brown Weiss ed., 1992

contained in the ECHR. These include the right to life enshrined in Art. 2 or the right to the protection of private and family life enshrined in Art. 8 within which the protection of the environment is identified in situations of environmental degradation not autonomously, but with respect to the effects they produce on the lives of individuals, families, and communities.[45]

By contrast, the right to the environment finds a place in other normative acts for the supranational protection of human rights. This is evidenced by Article 24 of the African Charter on Human and Peoples' Rights, the final wording of which dates back to 1981, and which proclaims: "All peoples have the right to a generally satisfactory environment, favourable to their development". What is evident here is the enlargement of the subjective sphere of applicability of a fundamental right to the environment. The African Commission on Human and Peoples' Rights has intervened to protect this right with a number of decisions addressed to states.

Similarly, the Additional Protocol to the 1969 Inter-American Convention on Human Rights in Article 11 provides for the right of every person to live in a healthy environment, with the corresponding obligation of States to promote the protection, preservation and improvement of the environment. There is thus an interpretation of the right to the environment as a fundamental right to which corresponds the obligation for States to behave not just by omission, but actively.

The profile of human rights, too, highlights how the environmental issue is linked to the new challenges on the path of the human family and the need for governance capable of regulating and managing the new goals that individual countries achieve on a daily basis, also in terms of environmental protection.

[45] Weber S., *Environmental Information and the European Convention on Human Rights* in Human Rights Law Journal, 1991 available at https://weber.co.at/wp-content/uploads/2019/02/Weber-Environmental-Information.pdf

## 2. The protection offered by instruments of International Environmental Law (IEL)

Although individuals are allowed to file human rights litigation, these cases have to be connected to an established human right. In the current situation, however, this becomes complex since there is no general right to a healthy environment.

As already underlined, the topic of environmental protection has not been a prominent issue of international legal interest in the past years, nevertheless innumerable cases of environmental damage around the world have increased the attention on this subject and have led international law to develop in this direction. Differently to human rights, international environmental law (IEL) is mostly relegated to inter-state relations, attributing to individuals and other non-state actors an extremely modest and secondary position.[1]

Actually, IEL is focused on establishing the liability of the state, instead of the individual polluter's misconduct, but while it is important to evaluate and determine the states' responsibility, it is equally necessary to recognise that today non-state actors have a very important role to play both as agents and offenders of environmental law.

This aspect will be addressed more accurately in the chapter related to criminal liability, with a distinction between crimes perpetrated by individuals, states and corporations.

Among the other weaknesses of the IEL there is the circumstance that it relies, largely, on voluntary mechanisms. In particular, states mainly adopt the so-called 'soft-law' approach, under which the majority of the provided instruments are non-binding. These instruments do not even possess effective enforcement mechanisms to guarantee states' observation.

From this perspective, and in consideration of these evident limitations in the field of IEL, it is obvious that international environmental law is not enough to ensure adequate protection for the environment in cases of ecocide.

The dramatic changes in the environment and the multiple phenomena of environmental damage caused by human activities have led many scholars to conclude that multiple legal instruments must be used to address what many call the 'Anthropocene', a geological era characterised by human impact on the biosphere. Among the various instruments at our disposal is international environmental law. Recourse to an instrument of an international nature is necessary when the environmental impact is transboundary or global, as the effects of climate change are considered to be. Environmental impacts requiring the application of instruments of international law may also result from activities that contribute to environmental damage such as the international trade in elephant ivory or the deforestation of protected areas. In these circumstances, international

[1] Bulkeley H. et al., *Transnational Climate Change Governance,* Cambridge University Press, 2014

cooperation is the only instrument for an effective response and this can be through the signing of binding 'hard low' treaties or a non-binding 'soft law' inter-state agreement.[2]

For most of the last century, international environmental law has mainly reflected bilateral or regional disputes over shared resources, such as rivers or lakes that cross national borders. These disputes led to diplomatic tensions that escalated into international lawsuits and were resolved through relatively narrow regional or bilateral treaties.[3]

International environmental law initially developed with reference to 'neighbourly relations' between countries where polluting activities and gas emissions took place close to borders. Nowadays, on the other hand, particularly dangerous activities, such as those of nuclear power plants, which are capable of causing damage even to territories far away from those where the damage has occurred, are the object of concern. Observing the practice of recent years, it is consistent to affirm the existence of a principle of international law imposing a ban on transboundary pollution. This principle states that no state has the right to use its territory or allow its territory to be used in such a way as to cause damage to the territory of another state.[4]

This means that international law has been concerned to protect two opposing requirements: on the one hand, to maintain the sovereignty of the State over its own territory intact, leaving it free to dispose of its natural resources, and, at the same time, to prevent damage to the environment with possible consequences on the territories of other States in the course of such activities. An early affirmation of this principle was in the famous 1941 arbitration award, Trail Foundry.

### 2.1 The principle of International Environmental Law

The increasing pollution and frequent ecological disasters affecting the planet over the last thirty years have shaken public opinion to such an extent that environmental protection has become an increasingly felt need of the international community, which has progressively recognised the value of the environment and the importance of stemming all those phenomena that contribute to its deterioration.[5]

The birth of international environmental law is considered to date back to the United Nations Conference on the Human Environment, held in Stockholm between 5 and 16 June 1972 . The Conference, attended mainly by industrialised countries (Western Europe, Canada, the United

[2] Bulkeley H. et al., *Transnational Climate Change Governance,* Cambridge University Press, 2014

[3] Rajamani L., *The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations* in Journal of Environmental Law, 2016

[4] Rajamani L., *The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations* in Journal of Environmental Law, 2016

[5] Beyerlin U., *Different Types of Norms in International Environmental Law*, in Bodansky D, Brunnée J, Hey E., The Oxford Handbook of International Environmental Law, Oxford University Press, 2007

States and Japan), was convened by the United Nations General Assembly following strong pressure from public opinion, due to the excessive industrialisation of previous centuries that had led to a lack of respect for the balance and protection of the environment. The main aim of the states was to make care and protection of the environment a priority and a commitment for the entire international community. In fact, in previous years, due to the profound differences and above all the different economic objectives between industrialised states on the one hand, committed to increasing their industrial development, and less developed states on the other, where environmental protection was considered a secondary goal compared to overcoming social and economic inequalities, the environmental problem had never been effectively and efficiently addressed by the international community.

Although these premises, the United Nations Conference on the Human Environment is considered a milestone in the development of environmental protection policies, as it achieved important goals, such as the adoption of the Stockholm Declaration of Principles, the establishment of an Environmental Action Plan for the achievement of objectives through three different policies and the creation of a body competent in environmental matters, the United Nations Environment Programme (UNEP). In particular, the Article 2 of the Declaration of Principles establishes for the first time the concept of natural resources, stating that these "including air, water, land, flora and fauna, and particularly representative samples of natural ecosystems, must be preserved in the interest of present and future generations through appropriate planning and management. The principle examined constitutes the first, timid, attempt to define the concept of 'environment', which to this day still lacks a precise definition and which tends to invest approximately every aspect of each individual's life.[6] Subsequently, the jurisprudence of the International Court of Justice also recognised the existence of a specific area of international law of recent formation, defining the environment as 'the space where human beings live and on which the quality of their life and health, including that of future generations, depends. The most significant features of this specific area of international law are, firstly, the rapid evolution of legislation and, secondly, the need to rapidly adapt environmental norms to all the advances in science and technology.[7]

In the two decades since the Stockholm Declaration, the approach to environmental protection has been achieved mainly through mainly sectoral treaties and conventions that have brought little result. Even the policies adopted within UNEP had not produced the desired outcome, as this institution had not received any support from states. Moreover, public opinion was increasingly

[6] Viñuales E., *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment* in Fordham International Law Journal, 2008

[7] Beyerlin U., *Different Types of Norms in International Environmental Law*, in Bodansky D, Brunnée J, Hey E., The Oxford Handbook of International Environmental Law, Oxford University Press, 2007

alarmed by the numerous environmental disasters that were occurring in different parts of the world, reinforcing the idea that any measures taken to protect the environment could only be positive if they were taken at an international level. Driven by these motivations, the UN General Assembly convened the United Nations Conference on Environment and Development (UNCED) in Rio in 1992. The Rio Conference began to adopt a different approach, no longer aimed at repairing damage but at prevention, with the provision of additional tools for environmental protection, including the initiation of a sustainable development process, i.e. taking into account the close interconnection between environment and development . The great novelty was to make states aware of the serious environmental damage that their behaviour was producing and of the need for cooperation between great powers and developing countries in environmental matters more than in other areas, since, as the environment is a global problem, there is a need to solve it with the commitment of all states in the world community.

In spite of these important evolutions, to date there is still no globally applicable international instrument that concretely defines obligations and duties in environmental matters and that succeeds in regulating the phenomena of environmental pollution of various kinds in a more effective and comprehensive manner. Even Agenda 21, the action plan stemming from UNCED to be implemented in every area where human presence affects the environment, was not as successful as hoped. Subsequently, the adoption of the Kyoto Protocol, approved by the Conference of the Parties from 1 to 10 December 1997, constituted the first example of a legally binding global treaty by which certain targets were set in terms of reducing gas emissions for which mainly developed countries are responsible: it was envisaged to reduce pollutant gas emissions by 5.2 % overall compared to previous years' levels. However, the countries that have ratified the Protocol only account for 44.5 % of global emissions to date, with the heavy absence of the signature of the United States, which contributes more than 36 % of emissions and without whose signature it has been difficult to ensure that the planned targets are achieved.[8]

In September 2002, the World Summit on Sustainable Development was convened in Johannesburg, during which it was noted that, although the Rio Conference was fundamental to the recognition and affirmation of the concept of sustainable development, it failed to produce tangible results. At the Johannesburg Summit, the signatory states sought to strike a balance between the economy, the environment and society, committing to economic growth that was respectful of environmental protection and the future of humankind. Despite this halting phase in the development of international environmental law at the conventional level, there are numerous

[8] Beyerlin U., *Different Types of Norms in International Environmental Law*, in Bodansky D, Brunnée J, Hey E., The Oxford Handbook of International Environmental Law, Oxford University Press, 2007

principles of international law that do not allow states to conduct activities that result in a failure to protect the global environment either in their territories or in those belonging to the common heritage of mankind. Indeed, since 1949, with the Corfu Straits case brought before the International Court of Justice, so-called 'fundamental principles' in environmental matters have found their way into international law, which, as stated in the Iron Rhine arbitration award, are potentially applicable to all members of the international community and have contributed to the development of international environmental law.

The rise of these new principles has intensely influenced the development of the subject, despite the difficulty of giving a general definition of the nature, status and role of the different principles. Some of these are of a customary nature, such as the prohibition of transboundary pollution and the principle of cooperation, others are principles that have only recently emerged, such as the principle of sustainable development, some imply rules of conduct, and others can be regarded as principles of an interpretative nature or guiding principles that suggest the conduct to be adopted in order to concretely protect the environment 15. There are a number of reasons that have led to the proliferation of these principles: firstly, because international environmental law is aimed at regulating not only the environmental field but also the economic and social fields, which are closely intertwined. This cannot be done through the provision of precise and general rules applicable in all circumstances, but through the affirmation of principles that can serve as the basis for further and subsequent specific rules governing specific areas of law. Secondly, the urgency of finding a solution to the environmental crisis made it necessary to avoid the adoption of international treaties that were difficult for states to ratify: the flexibility and adaptability of the principles, on the other hand, helped facilitate the acceptance of environmental rules by states. Finally, a further reason why there has been a strong development of these principles is to be found in their particular ability to regulate environmental situations characterised by scientific uncertainty.[9]

As regards the function of the principles, they are primarily intended to set the parameters for subsequent obligations and to facilitate negotiations between the parties. In addition, they serve as a guide for Courts and Tribunals in the interpretation of treaty obligations: numerous references to the principles of international environmental law have been made in a large number of cases dealt with by the ICJ. Very often, in fact, the ICJ has invoked these principles and stressed their importance in the interpretation and formation of international environmental law. In the following paragraphs, given the fundamental importance of these principles (the prohibition of transboundary pollution,

[9] Viñuales E., *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment* in Fordham International Law Journal, 2008

the precautionary principle, the principle of prevention, the principle of cooperation, sustainable development, the principle of common but differentiated responsibilities, the polluter pays principle and the principle of public participation), which are indispensable for the formation of international environmental law, their purpose will be illustrated, focusing in particular on the affirmation of these in international conferences and the recognition of them in ICJ judgments.

### 2.1.1 The Precautionary Principle

A second fundamental step in the development of international environmental law occurred when the international community realised the irreversibility of much of the environmental damage caused by human activities. This realisation led to the affirmation of one of the most controversial and interesting developments in international environmental law: the precautionary principle. The distinguishing feature of this principle is that it gives legal relevance to situations marked by scientific uncertainty. It can be invoked when the potentially dangerous effects of a phenomenon, product or process have been identified through scientific and objective assessment, but this assessment does not allow the risk to be determined with sufficient certainty.

Actual recognition came with Principle 15 of the Rio Declaration according to which in order to protect the environment, the precautionary approach shall be widely applied by States according to thei capabilies. The main purpose of the formula is to emphasise how scientific uncertainty regarding possible negative consequences of certain activities or behaviour cannot serve as an excuse for not taking preventive measures with the aim of protecting the environment . It is a guiding principle intended to guide the activities and decisions of international courts and tribunals, indicating the attitude to adopt in situations of uncertainty.[10]

Subsequently, the precautionary principle found further affirmation in the World Charter for Nature, adopted by Resolution No. 37/7 of the United Nations General Assembly, which translates the principle in question into procedural and substantive rules, stipulating: Activities that may have an impact on nature must be controlled and the best available technologies that minimise significant risks to nature or other adverse effects must be used. In particular, activities that may cause irreversible damage to nature must be avoided and that may pose a significant risk to nature must be preceded by an exhaustive examination. Their proponents must then demonstrate that the expected benefits outweigh the potential damage to nature. Environmental impact studies of development

[10] Freestone D., Hey E., *The Precautionary Principle and International Law*. Boston Kluwer Law International, 1996

projects are also important and must be conducted sufficiently in advance. They must be planned and implemented in such a way as to minimise potential negative effects. [11]

The Precautionary Principle, from the perspective of the World Charter for Nature, departs from what the Rio Convention states, in that actual prohibitions are envisaged that require the avoidance of both activities that may cause irreversible damage to nature and those whose potential harmful effects are not known with certainty. Furthermore, understood in this sense, the principle allows only those activities in which it can be demonstrated that no damage to the environment can result. These two different interpretations of the principle under consideration, one stricter given by the Nature Charter, the other less strict with the 35 World Charter for Nature, resolution of 28 October 1982.[12]

Thereafter, the principle was incorporated into the Johannesburg Plan of Implementation and the Treaty establishing the European Community, but despite this strong development, its establishment as a customary norm is controversial. One of the main reasons is its multifaceted nature, due to the lack of a homogenous content, which leads to different development in different contexts. Secondly, the principle has not been homogeneously invoked as a customary norm: while the International Court of Justice in the Nuclear Tests II case supported New Zealand's assertion of its customary nature (without, however, entering into the merits of the issue), the Appellate Body of the World Trade Organisation has been sceptical about the nature of the principle under consideration. The only court to have made even an implicit reference to the precautionary principle was the International Tribunal for the Law of the Sea (ITLOS) which, in the bluefin tuna case, stated that parties should act prudently to ensure that effective conservation measures are taken to prevent serious damage to the southern bluefin tuna stock. Despite its uneven nature and application, the principle has become widespread and increasingly important in international environmental law and is likely to acquire the status of a customary norm.[13]

### 2.1.2 The Principle of Prevention

From its definition, it is evident that the principle of prevention is a fundamental principle in environmental law which has developed alongside the precautionary principle described above. The ratio of this principle can be identified in the necessity to intervene before environmental damage is inflicted, attempting to remove or reduce the risk of such damage occurring and controlling as far as

[11] Bishop, W. *Risk Assessment vs. the Precautionary Principle: Is it Really Either/Or?* Risk Policy Report, March 20, Washington Publishers, 2000, pp 35-38

[12] . Ashford N., *A Conceptual Framework for the Use of the Precautionary Principle in Law* in Protecting Public Health and the Environment: Implementing the Precautionary Principle, Island Press, 1999

[13] See ITLOS, Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), Order of August 27, 1999

possible the dangerous activities carried out by the State and private individuals. Failure to comply with this principle results in the commission of an international offence, even if only by failing to behave in accordance with international obligations and subjecting the environment to an unjustified risk.[14] The precautionary principle differs from the precautionary principle in that, the former acts in cases where the feared damage is certain, while the latter operates in the presence of feared damage or risks, therefore, only potential. Clear manifestations of the principle in question are all those disciplines that provide for special controls and authorisations for the performance of activities that are potentially harmful to the environment, inasmuch as there is a preference for monitoring harmful activities and attempting to avoid the production of detrimental effects, rather than exercising compensatory protection that often proves to be more burdensome in economic terms and often does not allow for the total repair of damage and the restoration of the situation ex quo ante. The principle has also found confirmation in international jurisprudence, such as in the Corfu Straits case where the International Court of Justice observed that every State has an obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States, and in the Gabcikovo-Nagymaros case, where the Court ruled that in the field of environmental protection, vigilance, and prevention are required on account of the often irreversible character of damage to the environment.[15]

### 2.1.3 The Principle of Cooperation

Closely related to the principles examined in the previous paragraphs, the obligation of international cooperation in environmental matters is the subject of a norm that, according to a large part of the doctrine, should undoubtedly be attributed a customary nature. The principle in question was first affirmed in Article 74 of the United Nations Charter which, by affirming the principle of 'good-neighbourliness', led to the development and application of norms on environmental cooperation that refer to the maxim *'sic utere tuo et alienum non laedas'*. The first real enunciation of the principle of cooperation was in the Stockholm Declaration.

The obligation to cooperate can be summarised as a duty to act in good faith. It is a duty that is the result of the historical evolution of international environmental law, which has resulted in a no longer unilateral but collective approach to solving environmental problems. In Principle 19 of the

[14] Marchant G.E., Mossman K.L., *Arbitrary and Capricious: The Precautionary Principle in the European Union Courts*, AEI Press, 2004

[15] Hey E., *The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution*, Georgetown International Environmental Law Review, 1992

Rio Declaration, a particular duty of cooperation is laid down, namely that of timely notification of activities that may adversely affect the environment of other states.[16]

In particular, there is an obligation on states to notify in environmental emergencies so that other states can provide assistance, as stipulated in Principle 18 of the Rio Declaration. This obligation arises as soon as a state becomes aware of an environmental emergency and must be fulfilled before any activity is authorised. Notification is necessary to enable the commencement of consultations in order to reach an agreement between the states involved that respects the opposing interests and needs. The obligation to consult does not imply the reaching of an agreement, otherwise it would impose on states a surrender of their sovereign prerogatives, but in the course of negotiations, states must behave in good faith, striving for a compromise.

For this reason, specific procedures are foreseen to facilitate agreement between the parties, but if the consultations are not successful, the state of origin may implement its plan, always respecting the principle of good faith. The general duty to cooperate is broken down into a series of specific duties designed to prevent a state from resolving a particular environmental issue or initiating a project without involving the states potentially affected. A first specification of the principle under consideration is the equitable management of natural resources shared among several states. This implies that states, before undertaking any environmentally harmful activity, must conduct an environmental impact assessment (EIA) of that project or activity. The EIA, which represents a further application of the obligation to cooperate, recognised in numerous international instruments, has multiple functions: it provides a set of technical-scientific data necessary to make the most correct environmental decisions; it guarantees public participation in environmental decisions through the provision of a legal, procedural framework of reference; it entails the obligation to inform and notify other States of the commencement of an activity that has an environmental impact, so as to allow for the start of negotiations and consultations between the interested parties.[17]

Moreover, this principle was recognised in the Gabcikovo-Nagymaros judgment where the ICJ stated: 'Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby deprinving Hungary of its rights to an equitable and reasonable share of the natural resources of the Danube failed to respect the proportionality which is required by international law.[18] These

[16] Nouzha C., *Réflexion sur la contribution de la Cour Internationale de justice à la protection des ressources naturelles*, Revue juridique de l'Environnement, 2000, pp. 391-420 available at https://www.persee.fr/doc/rjenv_0397-0299_2000_num_25_3_3804

[17] Galambos J., *An International Environmental Conflict on the Danube: the Gabcikovo-Nagymaros*" in Environment and Democratic Transition in Central and Eastern Europe: Policy and Politics in Central and Eastern Europe, 1993. pp. 186 - 191

[18] Nouzha C., *Réflexion sur la contribution de la Cour Internationale de justice à la protection des ressources naturelles*, Revue juridique de l'Environnement, 2000, pp. 391-420 available at https://www.persee.fr/doc/rjenv_0397-0299_2000_num_25_3_3804

obligations do not require a specific result and do not impose a right of veto on the harmful activity of the proposing state, but rather imply a duty to seek agreement with the rules of good. A further obligation envisaged is that of prompt notification in the event of an environmental disaster, which has found recognition especially in cases submitted to the International Tribunal of the Sea (ITLOS), such as in the MOX Plant case, a dispute between Ireland and the United Kingdom, where the former claimed a breach of the duty to cooperate on the part of the United Kingdom, guilty of failing to carry out an environmental impact assessment. ITLOS ruled not only confirming the Irish argument, but also declaring the customary nature of the principle of cooperation and related obligations.[19] A particular type of obligation related to that of cooperation is that of the management of common resources and heritages of mankind or 'common heritage', i.e. those areas and resources common to all states that are worthy of protection even if they are not under the control of any specific state. In the past, no state could claim exclusive control over such resources, as these were far from its jurisdiction and thus exploitable by all. In light, however, of the over-exploitation of these resources, it appeared necessary to regulate these activities around the principle of cooperation. To date, after a process that began with the arbitration ruling on the Bering Sea Foche case, common resources can be exploited non-exclusively by each state, subject to the relevant rules of cooperation.

The concepts of 'common interest' and 'common heritage' of humanity also derive from the obligation to cooperate. Common interest means all those issues that are to be excluded from the exclusive management of individual states because they are considered to be of interest to the entire international community. An example might be climate change or the preservation of biodiversity. The concept of common interest results in the exclusion of certain issues from the purely internal sphere of competence of states. By 'common heritage of mankind' is meant all areas or resources that are removed from the sovereignty and use of individual states and are, therefore, administered by the international community.

### 2.1.4 The principle of common but differentiated responsibilities: the Principle of Intra-generational Equity

The principle of common but differentiated responsibilities consists of two elements: the common responsibility of states to protect the global environment and the differentiated contribution of states to climate change with reference to their ability to cope with environmental crises. The application of this principle has two consequences: it requires states to cooperate in the approval of measures

[19]Judgment of the Court (Grand Chamber) of 30 May 2006. Commission of the European Communities v Ireland. https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A62003CJ0459

that are useful for the resolution of environmental problems, and it entails obligations that burden states differently.[20] With regard to the second point, industrialised states bear the heaviest burdens as they are primarily responsible for the environmental degradation of our planet, but they have the opportunity to address the problem more effectively, thanks to the means at their disposal. This does not totally exempt developing countries from their environmental obligations, but allows them, in some cases, to receive favourable treatment. In particular, this can be seen in the flexibility of obligations contained in various environmental conventions that take into account the technical, scientific and economic capacities of the Parties. In extreme cases, developing countries are exempted from certain obligations: a striking example is the case of climate change, which entails an obligation to reduce greenhouse gases only for industrialised countries, leaving developing countries free of any obligation. In other cases, however, there are instruments that ensure the effective participation of developing countries in the formation of an environmental treaty in order to allow the interests of all states to participate.

However, it must be considered that, to date, many of the countries that were considered developing have reached a level of wealth that can be compared to industrialised countries. Applying this principle too rigidly could lead to results that are fundamentally at odds with the objective of the principle of common but differentiated responsibilities, and there are currently many who question the application of this principle in certain areas. As for the first application of the principle of common but differentiated responsibilities, i.e. the need for states to work together to solve environmental problems, it finds its antecedents in the concept of the common heritage of mankind. In areas such as marine soil and subsoil, space and Antarctica, states in the international community have a duty to work together to protect the environment and common natural resources. Countries must therefore cooperate, in accordance with the principle of cooperation, and reach an agreement on how to behave in order to prevent any kind of pollution and damage to the environment. This concept emerged in particular in the 1992 Convention on Climate Change, which states that the climate crisis must be considered a common concern of humankind.[21]

The diffusion of the principle of common but differentiated responsibilities is to be regarded as a general principle of international law even if its full affirmation as a customary norm is being held back by continuing political tensions. The legal consequences of the application of this principle are also doubtful: many believe that it could be invoked by developing countries as a guiding principle,

[20]Frakes, J. *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise*? in Wisconsin International Law Journal, 2003

[21] Frakes, J. *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise*? in Wisconsin International Law Journal, 2003

when conducting negotiations, to claim differential and more favourable treatment. Of course, differential treatment will only be acceptable if the type of obligation justifies it and only if there is a real difference in conditions between the states involved. Furthermore, it can be inferred from the practice of states and international case law that this principle cannot be invoked in relation to activities with a high environmental risk and that the differential treatment provided for by the principle is of a temporary nature and could change as the objective starting situations change substantially.

### 2.1.5 The Polluter Pays Principle

In the event that the application and observance of the principles examined in the preceding paragraphs do not take place, it is necessary to establish who is to be considered at fault for the damage committed and the sum to be imposed by way of compensation. In such cases, the 'polluter pays' principle intervenes, which states that compensation for the damage caused by a given harmful conduct must be borne by the person responsible for the activity that caused the pollution. This principle was developed within the Organisation for Economic Co-operation and Development (OECD) in the 1970s but, although it emerged not so recently, it has not received universal recognition. The first universally applicable instrument that addressed the polluter-pays principle was the Rio Declaration, which translated it in Principle 16 as: National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instrument, taking into account the approach that polluters should, in principle, bear the costs of pollution, with due regard to the public interests and without distorting international trade and investment . States must, therefore, commit themselves to adopting measures (prevention and remediation of damage) that only burden the potential polluter and not the entire community.[22]

However, the precise content of this principle and its application remain open to interpretation, as its exact definition is a matter of dispute. One part of the doctrine likens it to a principle of preventive ecological policy through which the social cost of pollution must be borne by the operators of polluting activities. For others, on the other hand, it allows private individuals to have a genuine right to fair compensation for the damage suffered. The lack of a homogeneous definition means that the solutions adopted by states in applying this principle vary. While, on the one hand, industrialised countries have long been committed to the adoption of economic instruments in their legislation, developing countries have only recently begun to make use of instruments such as sanctions, reparations and environmentally sound management systems. A further consequence of

[22]Bugge, H.C. *The Principles of 'Polluter-Pays' in Economics and Law* in E. Eide and R. Van den Bergh, eds. Law & Economics of the Environment, Juridisk Forlag, 1996

this uneven definition is the controversial determination of the costs to be imposed on the polluter. Many believe that it is up to national governments to determine the different penalties through the adoption of specific instruments, others argue that it is up to the courts to determine the different penalties on a case-by-case basis.[23]

Despite a not very strong presence of the principle under consideration in international environmental treaties, international courts have often referred to the polluter pays principle, especially in relation to the precautionary principle. However, the lack of a universally accepted definition of this principle implies a limitation to its development and recognition as a fundamental principle of international environmental law. It therefore needs more attention and it is hoped that it will have a more incisive and well-defined presence in treaties in the future.[24]

### 2.1.6 The Principle of Public Participation

Connected to the principle of cooperation, which entails the obligation to inform other states and enter into consultation with them, a further principle is gaining ground in international law, which envisages the obligation to also inform subjects other than states (individuals, non-governmental organisations, citizens' groups) of environmental activities involving them, to enable them to participate in decisions on the matter. Indeed, it is commonly believed that decisions taken with the involvement of those who might be affected by them lead to more stable measures in the long term. The principle of public participation is based on three fundamental pillars: the right to information, the right to participate in the decision-making process and the right to justice.

This principle implies the possibility for each individual to have access to environmental information held by public authorities, the possibility of participation in decision-making processes, and the onus on states to make it easier for the public to participate by making information available and ensuring effective access to judicial and administrative proceedings. Despite the many criticisms received due to its content being considered vague, this principle is important in many respects: not only does it require states to facilitate public participation, but also to encourage such participation by ensuring that information is accessible to all, in a language that can be understood by all citizens and with content that is not strictly technical. The Plan of Implementation envisaged by the 2002 Johannesburg Conference reaffirmed the need to ensure national access to environmental information and judicial and administrative proceedings. However, the instrument

[23] Aldy, J.E., S. Barrett, Stavins R.N. *Thirteen Plus One: A Comparison of Global Climate Policy Architectures*, Fondazione Eni Enrico Mattei (FEEM), 2003

[24] Faure M., Gupta J.,. Nentjes A.. *Key Instrumental and Institutional Design Issues in Climate Change Policy* in Climate Change and the Kyoto Protocol: The Role of Institutions and Instruments to Control Global Change. Cheltenham: Edward Elgar, 2003

that has most helped the development of the principle of public participation is a treaty adopted within the framework of the United Nations Economic Commission for Europe (UNECE): the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters or Aarhus Convention of 25 June 1998.

The Convention emphasized that the obligation to inform the public about environmental risks is not only a principle in environmental matters, but is also part of the protection of fundamental human rights. The fundamental objective of the Convention is made clear in Article 1 that in order to contribute to the protection of the right of every person to live in an environment adequate to his or her health and well-being, states must guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters. This Convention is considered to be of fundamental importance for having succeeded in creating not only a close link between human rights and environmental rights, affirming the existence of a duty to future generations, but also between government responsibility, transparency and environmental protection. Indeed, since sustainable development requires a balancing of opposing interests, it is imperative that individuals have the opportunity to express their views on certain issues that could impact their lives. The principle of public participation responds to fundamental demands for more democratic decision-making processes, which are finding increasing recognition both nationally and internationally. It is a principle that is increasingly emerging as an emerging norm of international environmental law, but because of its recent emergence and evolution in the international arena, its customary nature is controversial.

### 2.2 The ban on transboundary pollution: the Trail Smelter Arbitration

International environmental law developed, at first, with reference to the "neighborly relations" that existed between countries in which polluting activities and gas emissions were exercised close to borders. Nowadays, however, the object of concern is mainly particularly dangerous activities, such as those of nuclear power plants, which are capable of causing damage even to territories far away from those where the damage occurred. Looking at the practice of recent years, it is consistent to affirm the existence of a principle of international law that imposes a ban on transboundary pollution. The principle under consideration states that no state has the right to use its territory or to permit its use in such a way as to cause harm to the territory of another state.[25]

This means that international law has been concerned to protect two opposing needs: on the one hand, to keep intact the sovereignty of the state over its own territory, leaving it free to dispose of

[25] UN, Trail smelter case (United States, Canada) in Report of International Arbitral Awards available at https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf

its natural resources, and, at the same time, to prevent that, in the exercise of such activities, the environment is damaged with possible consequences even in the territories of other states. An early affirmation of this principle occurred in the famous 1941 arbitration award, Trail Foundry, a dispute concerning damage caused to grain fields located in the territory of the United States by noxious fumes containing sulfur dioxide emitted by a smelter based in the neighboring Canadian territory due to adverse weather conditions.[26]

In the arbitration, the tribunal condemned Canada for the immissions produced and admitted that the case had no similar precedent in international law. Therefore, the court chose to enunciate from scratch the appropriate rule to govern the case in question by stating that according to the principles of international law no state has the right to use or permit the use of its territory by causing harm in the territory of another state. It follows that it is the duty of every state to take all necessary measures to avoid or reduce the risk of transboundary harm resulting from the exercise of dangerous activities. The state thus has a duty of conduct of a preventive nature, as the principle will be deemed violated by the very fact that the state has not put in place sufficiently adequate control measures to prevent the harm.

A few years later, the concept was reiterated in the Lake Lanoux case, concerning a dispute between France and Spain over potential damage on Spanish territory due to the detour of the Carol River into French territory. The Court in this case expounded the prohibition for an upstream state to alter the waters of a river in such a way as to cause serious harm to the downstream state.[27] The principle of prohibiting transboundary pollution then finds definitive affirmation in Principle 21 of the Stockholm Declaration that states have the sovereign right to exploit their own environmental resources and policies, but they also have a responsibility to ensure that activities within their jurisdiction do not cause harm to the environment of other states.

With this provision, the responsibility of states is no longer limited only to harmful activities carried out on their own territory, but also to all those carried out under their control. The principle qualifies as a duty of care incumbent on the state and must be complied with in a particularly scrupulous manner, including through the provision of an administrative apparatus that ensures effective control over public and private activities, since environmental damage may entail irreversible effects and traditional mechanisms for repairing the damage may be inadequate. Part of the doctrine, also considers a duty of care to be part of the duty of prevention, that is, an obligation

[26] Prunella C., An international environmental law case study: the trail smelter arbitration in International Pollution Issues, 2014 available at *https://intlpollution.commons.gc.cuny.edu/an-international-environmental-law-case-study-the-trail-smelter-arbitration/.*

[27] Lake Lanoux Arbitratione (France v. Spain), 1957 availabe at http://www.cawater-info.net/bk/water_law/pdf/france_v_spain.pdf

to take all necessary measures to prevent the exercise activities from causing serious harm to the environment. While the Stockholm and Rio Declarations do not contain precise indications as to the extent of the harm to be prevented, case law and some subsequent international treaties have used expressions such as "serious" or "significant," intending to indicate that the existence of the harm is sufficient and that it can be proved.

The International Court of Justice, taking up the well-established principle summarized in the Latin brocardo onus probandi incumbit actori, has also ruled that the onus is on the plaintiff to prove the actual existence of the tort and that, in doing so, he must support his case with adequate evidence. In light of this, it seems clear that the prohibition against transboundary pollution is a true general principle of international law.

Further confirming this is the Advisory Opinion on the Lawfulness of the Use and Threat of Nuclear Weapons of the International Court of Justice of July 8, 1996, in which the Court for the first time defined the norm as customary. To the contrary, it is worth noting the opinion of B. Conforti, [28]who believes that the prohibition of transboundary pollution cannot yet be defined as a principle of customary law due to the insufficient jurisprudential practice in this regard and the continued refusal of states to recognize their liability for damage resulting from activities carried out in their territory.

### 2.3 The role of the International Court of Justice in developing international environmental law

Although, in recent years, the role of the ICJ in the development of international environmental law has expanded and there are numerous cases dealt with or still pending on environmental matters, the environment remains a niche issue, compared to the Court's other areas of jurisdiction. There are a number of reasons that serve as impediments to the development of the International Court of Justice as an environmental dispute resolution body.

First, the reluctance of states to submit to decisive and binding third-party judgments that, in seeking solutions to disputes, do not take into account the positions of the parties, but clearly, decisively and bindingly determine who is the winner and the loser.[29]

Second, international law's relatively recent approach to the discipline in that, until a few years ago, the environment was not considered a problem with a global dimension, but falling within the reserved domain of each state. The Court's intervention in environmental matters is also severely limited by the fact that the multilateral agreements that govern the field, rarely provide for the use

[28] Conforti B., *Diritto internazionale*, Editoriale Scientifica, Napoli, 11 Ed., 2018
[29] Conforti B., *Diritto internazionale*, Editoriale Scientifica, Napoli, 11 Ed., 2018

of the ICJ as an instrument for dispute resolution, preferring the use of typically non-binding instruments. [30]

Finally, with regard to litigation procedures, access to the Court is limited to states and only certain entities including the UN General Assembly, the Security Council, and specialized UN organs and institutes, which have the option of requesting advisory opinions. Despite the limitations described, the decisions and opinions of the International Court of Justice have contributed over time to the formation and recognition of the status of the fundamental principles of international environmental law.

The first to emphasise the importance of the International Court of Justice in the formation and development of international environmental law was Judge Sir Robert Jennings, President of the ICJ, in his statement read during the UNCED plenary session in Rio de Janeiro. The judge first emphasised the close link between the environment and the fight against poverty, the equitable distribution of materials and other resources, and the development of technology. He then shifted the focus to the need to elaborate and develop specific principles and rules to protect the environment, highlighting the importance of the International Court of Justice, as the principal judicial organ of the United Nations, to serve as an important resource of international law. In a recent pronouncement, Judge Owada, former President of the International Court of Justice, also recognised the important contribution of the ICJ in shaping international environmental law. Indeed, through the resolution of bilateral disputes between states and the adoption of advisory opinions, the Court contributes to making the environment a fundamental element of international public policy and to the consolidation of the basic principles of international environmental law.It is believed that environmental problems are worthy of protection for a number of reasons: first of all, referring to future generations, efforts must be made to combat climate change so that the next generations will not be prejudiced by the behaviors of the current society. In addition, environmental justice also means respect for all other living creatures that often suffer prejudice from unruly human activities. Finally, environmental justice is critical to compensating and rewarding those who have suffered harm as a result of environmental degradation. It is important to emphasize, however, that not purely environmental disputes have been brought to the International Court of Justice, but that each case dealt with is a combination of various kinds of international law legal issues that are impossible to separate. However, considering the rapid development of the subject matter, it is believed that cases with purely environmental issues brought before the Court will be increasing in

[30] Condorelli L., *L'imputation a l'etat d'un fait internationalement illicite: ' solutions classiques et nouvelles tendences*, in *Collected Courses of the Hague Academy of International Law*. Vol. 189 available at <http://dx.doi.org/10.1163/1875-8096_pplrdc_A9780792300571_01>

the coming years, also taking into account the ever-increasing relevance of the International Court of Justice in the international arena.[31]

In order to better understand this topic, however, some brief mention of the purely formal aspects concerning the composition and functioning of the ICJ is necessary. The Statute of the International Court of Justice provides that it is composed of 15 judges representing the world's major legal systems elected by the United Nations General Assembly and the Security Council. Judges serve for nine years, are eligible for re-election, and although they are appointed on the basis of nationality, they sit in their personal capacity, unable to be influenced by the authorities of their home states. The basic principle with regard to dispute resolution is that there must be consent of the parties, but as has already been pointed out, only states can request the Court's intervention. The ICJ can decide either according to law or equity (ex equo et bono) but only if expressly requested by the parties.

The proceedings are divided into two stages, one written and one oral. The first includes the submission of written briefs by the Court or the President without any time limit. The submission of cross-applications is also permitted, although this possibility is not very common. The Statute of the Court also provides for the possibility of intervention by a third state but only if that state has a legal interest that could be prejudiced by the decision on the case. At the end of the written phase, we move to the oral phase, where the Court determines the order of hearings, which are usually public. During the hearings, the parties present their arguments, and the Court may provide for or allow at the request of a party for the intervention of experts and witnesses. After the oral proceedings, the Court deliberates in chambers and its decisions are binding on the parties.

### 2.4 The intersection of International Environmental Law and International Criminal Law

As seen, the need to provide international protection to the environment raises numerous issues and challenges.

Of paramount importance is to understand which law, among International Criminal Law (ICL) or International Environmental Law (IEL), can play a prominent role in environmental protection. The combination, in fact between these two rights raises fascinating new challenges not always visible to a superficial analysis.

Regarding, for example, the crime of ecocide multiple discussions have arisen about the very definition of this crime. Experts, in order to find an appropriate definition for this new crime have started by using the same method used in drafting the crimes enshrined in the Rome Statute and for which the International Criminal Court has jurisdiction. For war crimes and crimes against

[31] Condorelli L., *L'imputation a l'etat d'un fait internationalement illicite: ' solutions classiques et nouvelles tendences,* in *Collected Courses of the Hague Academy of International Law*. Vol. 189 Available at <http://dx.doi.org/10.1163/1875-8096_pplrdc_A9780792300571_01>

humanity, logic dictated that reference be made to international humanitarian law and international human rights law by drawing, in particular, on concrete prohibitions applicable to individual actors and for which there was a broad moral consensus that the acts were worthy of criminalization. For the crime of aggression, similarly, experts used the same method by drawing on the prohibition in public international law. [32]

When finding a definition of ecocide by looking to international environmental law, the experts immediately realized that this method could in no way be used.

IEL does not, in fact, have concrete and absolute prohibitions on conduct in the same way that, for example, international humanitarian law does. This law, on the contrary, requires states to consider particular situations and conduct, establishes principles for sharing common resources, and seeks to balance economic development and environmental damage. In sum, IEL unlike IHL largely leaves it to national systems to balance economic needs and environmental damage. Even the most impactful prohibitions, such as the one on chlorofluorocarbon emissions, have been moderated in different ways allowing, as pointed out earlier, developing countries to meet basic needs.

This means that there are no clear prohibitions outside of illegal trafficking in hazardous waste and that, in the area of environmental law, reference is made to domestic law, as opposed to international criminal law, which transcends domestic law. Thus, it is interesting to understand the relationship between IEL and ICL in finding a definition of ecocide that should include three main elements: an impact threshold, a standard of error, and a way to align ecocide with environmental law. [33]

First, it seems relevant to understand whether ICL can be the appropriate tool to protect the environment because criminal law is a blunt instrument, to be used in moderation and with awareness of its side effects. Halting or curbing, in fact, the continued destruction of the natural environment requires systemic social reforms that are beyond the scope of criminal law, which can only be one of the tools brought to bear.

There are, undoubtedly, great benefits to be had from the introduction of an international crime of ecocide. Indeed, if one thinks about the phenomenon of pollution, it becomes evident how this issue is addressed at the national level by fragmented and often poorly enforced laws. For this reason, the crime of ecocide would, even more, turn the spotlight on staggering environmental damage that is often transnational in nature and involves several countries and geographic areas. One of the greatest benefits of introducing this crime is, undoubtedly, the expressive function through which it

[32]Robinson D. *Your guide to Ecocide – Part 2: the hard part* in Opinio Iuris, 2021 available at http://opiniojuris.org/2021/07/16/your-guide-to-ecocide-part-2-the-hard-part/

[33]Peterson I., *The Natural Environment in Times of Armed Conflict: A Concern for International War Crimes Law?'* Leiden Journal of International Law, 2009

emphasizes that massive environmental damage is not just a regulatory issue. Destruction of the shared habitat on which life on earth depends is one of the most serious threats to humanity and deserves a place alongside crimes of greater gravity.

It cannot be denied that the criminal law has often tended to underestimate white collar crimes within which environmental crimes are often included. Ecocides are commonly committed by companies from the Global North acting and having an impact in the Global South.

The introduction of an ecocide crime can help reduce such structural injustices by reframing the most serious acts as criminal and not commercial. Thus even though it is believed that there should be much less use of criminal law, ecocide is among the most serious harms that deserve to be criminalized.[34]

As we shall see in the next chapter, at present, the political focus is on amending the Statute of the International Criminal Court to add ecocide among the crimes already within its jurisdiction as a fifth crime. An alternative to such an amendment is to enter into a simple convention by which each state party commits itself and incorporate said crime into domestic law. In this case a convention could encourage states to adopt offenses for environmental damage less serious than ecocide. Such a second proposal would, surely, allow progress to be made even without the need to amend a treaty, and it would be a declaration containing a sufficiently accepted definition to provide states with the convenience of incorporating it into domestic laws with extraterritorial jurisdiction.

As for the actual definition, then, ecocide could be drafted as a general formula or with a "chapeau" and a list of acts assessed as crimes against humanity. The peremptory provision of prohibited conduct is certainly desirable for specificity and predictability. However, the main problem is that, unlike international humanitarian law, IEL does not specify prohibited conduct. For example, the Biodiversity Convention, in Article 1, requires states to consider significant adverse impacts on biodiversity and to assess projects to avoid or minimize harm.

As for the first aspect to be taken into account in defining the crime of ecocide, an impact threshold will distinguish "simple" crimes whose adjudicative forum will be domestic from those that warrant international criminalization. This is the "widespread, long-term and serious" threshold that will be better addressed later, by Additional Protocol I and the ILC's draft Crimes Code. This implies that setting and maintaining a threshold that justifies international criminalization will have the effect of creating a critical mass of support among states that will retain the stigma of crimes. This means that, for example, the intended impact will always have to be "severe" to justify the label of "ecocide."

[34] Hulme K., *Environmental Security: Implications for International Law* in Yearbook of International Environmental Law, 2009

Another major point of contention will be the appropriate standard of error. It is pointed out that even though "ecocide" sounds like "genocide," the Panel's recent proposed definition, which we will see next, does not include the requirement of "specific intent" like that of genocide. Contrary to this an earlier proposal made by Richard Falk in 1973 spoke of "specific intent." This requirement is no longer taken into consideration today since people rarely commit such a crime with the purpose of harming the environment as such. The suffix "*cide"* (from the Latin *caedere*) means "to kill" or "to bring down" and does not imply that there must be intent.

Besides these first two issues, by far the most difficult question is how to align the crime of ecocide with environmental law-that is, how to combine the requirements of criminal law (precision, predictability) with environmental law, which operates by balancing different interests and principles. There are activities that, by their nature, can foreseeably cause widespread, long-term and serious harm and yet can be socially valuable. So while these are environmentally responsible actions, they are legal and ethically appropriate . Indeed, criminalizing widespread, long-term, and serious harm simpliciter would create a strange incentive: companies could avoid reaching the intended harm threshold by dividing themselves into a myriad of smaller companies, each of which conducts smaller-scale operations. Thus, the goal should not be to punish actors for their size but to target those who cause serious and irresponsible harm consistent with environmental law. A crime of ecocide aligned with IEL can strengthen moral and social censure against the worst polluters, thus contributing to the necessary change in consciousness.[35]

The main problem lies in sampling how internationally punishable activities are delineated. Criminal law requires fairly precise definitions and predictability, while IEL involves balancing and compromise, with few rigid and clear prohibitions. In domestic law, the dilemma is usually resolved in this way through an initial environmental regulatory process that assesses benefits, harms, and grants or denies permission to operate. Second, harmful activities carried out without a permit are assessed and the species offense is defined. This process creates the clarity needed for the criminal law to intervene only if there is no permit, while the balancing occurs in the antecedent stage of licensing and setting conditions. The challenge for ecocide is that there is no similar international environmental regulator, so this process cannot take place.

A first option for identifying punishable conduct may be to criminalize widespread, severe, and longstanding harm without warning. As seen earlier, this would create an incentive to fragment and duplicate operations, which would increase pollution contrary to the IEL approach, which, by

[35]Bjork T., *The Emergence of Popular Participation in World Politics: United Nations Conference on Human Environment 1972*, Department of Political Science, University of Stockholm, 1996, available at: http://www.folkrorelser.org/johannesburg/stockholm72.pdf.

examining the adequacy of impact reduction measures, seeks to incentivize better practices. Because of these problems, it seems unlikely that this option will be adopted. Banning harm completely is extremely attractive and probably necessary, but this should be pursued in IEL, which has better tools for thinking about how to reform and reconfigure human society to achieve it, unlike criminal law, which is inappropriate for complex societal reforms.

Another option is to adopt a threshold so high that "balancing" is no longer necessary. This conception, however, breaks down against the fact that there is no quantum of harm that states have agreed to prohibit. Perhaps states would accept a new crime without balancing if the threshold were very high, so high as to make, however, the crime much less valuable: smaller harms occur, but still committed on a daily basis are severely destructive.

Another cue for defining this new crime comes from the concept of illegitimacy in the IEL. Since, in fact, criminal law generally draws on international law, a definition could refer, for example, to "serious violations of international environmental law" to which the impact threshold and standard of wrongdoing should be added. This approach clearly aligns ecocide with IEL. However, the problem is that there are very few concrete prohibitions in IEL that could apply to conduct, and so this approach would refer to very little conduct at least until customary IEL and case law are enriched with more robust prohibitions.

Another approach might involve illegitimacy in domestic law. International criminal law establishes rules that transcend domestic law, but since IEL relies heavily on domestic systems, it may be appropriate to refer to domestic illegality . According to this option, domestic law does not condone internationally illegal conduct; rather, it creates an alternative path that goes beyond international illegality. Many of the worst environmental harms are already illegal under domestic law so this option would encompass much of the prohibited conduct. This option would, no doubt, find favor with states because it does not interfere with their sovereignty while also satisfying the principle of legality. However, a concern with this approach is that national laws have widely varying standards.[36]

[36] Bjork T., *The Emergence of Popular Participation in World Politics: United Nations Conference on Human Environment 1972*, Department of Political Science, University of Stockholm, 1996 available at: http://www.folkrorelser.org/johannesburg/stockholm72.pdf.

### 3. The concept of Ecocide: its genesis and historical evolution

The neologism 'Ecocide' derives from two ancient words, from the greek οἶκος (*oikos*) which means house and from the latin *caedĕre* in its meaning of 'to destroy', and with it we refer, essentially, to the destruction of the environment or an ecosystem.[1]

At present, this semantic core is not matched by a normative definition core, but it is essential to define conduct that, even if lawful, has an impact on the environment, damaging and depleting available resources. The necessity of introducing a new international crime requires not only to determine which conducts are punishable under criminal law, but which of them are serious enough to reach the appropriate threshold of criminality for this type of offence.

In this context, it is worth noting that the inclusion of autonomous offences to safeguard the environment is not a new issue in international criminal law, neither is the provision of a specific offence by extending a category of already existing crimes. The question arose, for instance, in relation to the 1948 Convention, subsequently taken up by the Rome Statute, which included neither cultural genocide, ethnocide, or ecocide. However, both at the time of the *Travaux préparatoires*, and in the proposals to amend the Convention, the issue of whether to extend the issue of whether to broaden the definition of genocide.

The creation of the expression, inspired by the neologism of 'genocide', can be attributed to the scientist Arthur W. Galston, an American botanist and bioethicist, who adopted it for the first time in 1969 during a hearing before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affair of the US government. On that occasion, he complained about the use of the defoliant 'Agent Orange' and the devastating collateral damage to the environment that had occurred during the Vietnam War operations.[2] This denunciation led the President Richard Nixon to demand an end to its use. Subsequently, in 1970, at the 'Conference on War and National Responsibility' held in Washington, Galston proposed an appeal to prohibit ecocide, highlighting three main detrimental effects of ecocide, namely ecological, agricultural, and crop damage and harm to people.[3]

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[1] White R., *Transnational Environmental Crime. Toward an eco-global criminology*, Routledge Taylor & Francis Group, 2011, p. 19 e ss.

[2] Arthur W. Galston estimated that American troops released approximately 20 million gallons of chemical herbicide to destroy crops and expose the defensive positions of the National Liberation Front of South Vietnam, as well as to expose their movements in the vast forests and territories of Vietnam and Cambodia. He also noted that around 4 million acres of Vietnam, an area the size of the state of Massachusetts, had been sprayed with over 100 million pounds of various herbicides, including other chemical agents such as 'Agent White' and 'Agent Blue'.

[3] Zierler D., *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment*, Georgia 2011

Galston's pioneering vision represented a turning point in the affirmation of the concept of ecocide, and in the following years, several scientists and jurists conducted investigations in this field until they attracted the interest of the political community.

In 1972, indeed, Swedish Prime Minister Olof Palme, during the UN Stockholm Conference on the Human Environment, spoke openly about ecocide and made the Stockholm conference the genesis of the 'green generation' as well as the first occasion at which the issue of global pollution was discussed.[4] Other state leaders, including Indira Gandhi from India, the head of the Chinese delegation Tang Ke, and delegates from Iceland, Tanzania, Romania, Algeria and Libya also condemned the Vietnam War for the human losses and environmental damage caused.

As effectively argued by the jurisprudence of the time, the challenge was not only to determine whether environmentally destructive conduct could be considered forbidden under international criminal law using the expression 'ecocide', but also to wonder about the cogence of this term which, due to the magnitude and novelty of the underlying phenomenon, was not yet included in the legal vocabulary.[5]

In 1973, reflecting on the environmental damage in Indochina, Richard A. Falk, professor at Princeton University, encouraged the political and legal community to designate as an ad hoc crime whatever, as a side effect of war, had substantially and irreversibly destroyed a specific ecosystem.[6] According to Falk, the variety of weapons - including bombs, napalm, herbicides and poison gas - mainly and extensively used by the United States during the Vietnam War, would have caused substantial ecological and long-term damage. For this purpose, Falk proposed an 'International Convention on the Crime of Ecocide', including a 'Draft Protocol on Environmental Warfare' and a 'Draft People's Petition against Ecocide and Environmental Warfare', addressed to the United Nations and its member states. The Convention is certainly the most interesting and complete from

[4] *"The air we breathe is not the property of any nation, we share it. The great oceans are not divided by national borders: they are our common property [...]. Our future is common. We must share it together. [...] The immense destruction wrought by indiscriminate bombing and the large-scale use of pesticides is an outrage - sometimes described as ecocide - that urgently requires international attention. It is shocking that so far only preliminary discussions on this subject have been possible at the United Nations and International Committee of the Red Cross conferences [...]. We fear that the active use of these methods is accompanied by a passive resistance to discussing them."* in E. Paglia, *The Swedish initiative and the 1972 Stockholm Conference: the decisive role of science diplomacy in the emergence of global environmental governance, Humanities and Social Sciences Communications*, 2021, p. 1-10.

[5] UN, Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14/Rev. 1, June 16 (1972), New York, https://www.un.org/en/conferences/environment/stockholm1972

[6] Falk Richard A., *Environmental Warfare and Ecocide—Facts, Appraisal and Proposals* in Bulletin of Peace Proposals, 1973.

a legal point of view, and there are numerous aspects, both substantial and procedural, worthy of further study.[7]

From a substantive point of view, Article 2 proposed the definition of 'ecocide' as any of the following acts committed with the intent to destroy, in whole or in part, a human ecosystem: the use of weapons of mass destruction, whether nuclear, bacteriological, chemical or any other type; the use of chemical herbicides to defoliate and deforest natural woodlands for military purposes; the use of bombs and artillery in such quantity, density or size as to compromise soil quality or increase the prospect of dangerous diseases to people, animals or cultures; the use of demolition equipment to demolish large areas of forest or cropland for military goals; the use of technology to increase or decrease rainfall or otherwise modify the climate as a weapon of war; the forcible displacement of humans or animals from their habitats to facilitate the achievement of military or industrial aims.

Article 3 provided for the punishment of both attempt and instigation to commit ecocide, as well as complicity - including moral participation - of perpetrators. As regards the punishment treatment then, Article 4 included an accessory sanction: anyone who committed ecocide would be suspended for a certain (even undefined) period from any command position or the exercise of public duties. Moreover, it was specifically established that no immunity could be provided for governors, public officials and military commanders. Of equal and perhaps greater interest are the procedural aspects of this Convention.

Article 5 proposed the establishment by the United Nations of a special Commission for the Investigation of Ecocide, which would consist of fifteen experts in international law supported by specialists in environmental sciences, to investigate allegations of ecocide, thereby highlighting, in effect, a necessary (and far-sighted) mixing of science and law.

Article 8 then provided that ecocide could not be considered a political offense for extradition proceedings, forcing states to allow extradition in accordance with their existing laws and treaties. Regarding jurisdiction, Falk left two different options open. Article 7 sanctioned the jurisdiction of a competent court of the state where the ecocide would be committed, but at the same time provided for the creation of an ad hoc international criminal tribunal for the crime of ecocide (obviously only for those Contracting Parties that accepted its jurisdiction).

Article 10, on the other hand, provided for the special jurisdiction of the International Court of Justice, at the request of either party, in a dispute concerning the interpretation, application or fulfilment of the provisions contained in the treaty. Finally, in part (b) of the Convention ("*Resolution relating to the study by the International Law Commission of the question of an*

[7] Falk Richard A., *Environmental Warfare and Ecocide—Facts, Appraisal and Proposals* in Bulletin of Peace Proposals, 1973, p. 80-96, cfr. p. 91: "to designate as a distinct crime those cumulative war effects that do not merely disrupt, but substantially and irreversibly destroy a distinct ecosystem".

*international criminal jurisdiction*"), the United Nations General Assembly was invited to mandate the International Law Commission to study the advisability and possibility of establishing an international judicial body for the trial of persons accused of ecocide, or of establishing a special chamber within the International Court of Justice.

The main purpose of the Convention, as articulated by Falk himself, was to recognise that the world was experiencing a period of increasing danger of environmental and ecological collapse and to acknowledge that human beings had the power to consciously or unknowingly inflict irreparable damage on the environment, whether in times of war or peace. The development of procedural issues could be relegated to later stages. As expressly stated in the Preamble, the pursuit of the protection of environmental quality would in any case also have required the development of subsequent international guidelines and procedures to foster the cooperation between states that was necessary for the enforcement of the Convention itself. With these premises, the Convention should have represented more of a starting point than a point of arrival, but the proposed Convention was never adopted.

In 1978, five years after Richard Falk's draft Convention, the United Nations Special Rapporteur on the Prevention and Punishment of the Crime of Genocide, Nicodème Ruhashyankiko, concluded his study on the issue of the prevention and punishment of the crime of genocide, which was then submitted to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. In this report, the crime of ecocide was defined as "an international crime similar to genocide."[8]

However, there were numerous oppositions raised by states and divergent viewpoints on the topic. For instance, in 1972 the Holy See stated that serious consideration should be given to the question of whether those acts could be qualified as "cultural genocide" or "ethnocide" or "ecocide".

At the opposite end of the spectrum, in 1973 Romania made a proposal to provide for the revision of the 1948 Genocide Convention, without feeling the need for a new treaty . Poland, on the other hand, argued that the international measures taken up to that time on the prevention and punishment of the crime of genocide had not proved effective and, therefore, aimed at the creation of an ad hoc convention. Then there were those who advocated-such as the Subcommittee itself-to broaden the concept of ecocide, proposing that any interference with the natural environment or the environment in which specific ethnic groups lived should be considered as a form of "ethnic genocide," in that it would alter or prevent them from living according to their own customs and habits.

[8] Ruhashyankiko N., UN Special Rapporteur on Prevention and Punishment of the Crime of Genocide, Study of the question of the prevention and punishment of the crime of genocide, (1978) E/CN.4/Sub.2/416, available at: https://digitallibrary.un.org/record/663583

Other governments, such as the USSR, observed more generally that the 1948 Convention should not be touched and, at the same time, rejected the need for a new convention. For the USSR, since only 1/3 of the UN Member States were parties to the 1948 Convention, the focus should have been primarily on measures directed at encouraging more states to join the existing genocide convention. Similar views were expressed by the satellite governments of Ukraine and Belarus. For Italy, too, the existing international measures on genocide already seemed to be sufficiently effective, provided, however, that all member states adhered to them and complied with their provisions. In contrast, for Austria the effectiveness of existing international measures on genocide and the provisions of the 1948 Convention were to be considered rather limited, considering that various types of genocidal acts continued to be perpetrated in various parts of the world, and therefore the priority had to be to strengthen at least the then existing legislation.

The limited effectiveness of previous legislation was also emphasized by other states such as Rwanda, Congo and Oman, which among other issues raised the fact that until an International Criminal Court was established the 1948 Convention would always be limited in scope. From a strictly legal standpoint, the most critical views were those of Finland and the United Kingdom. The Finnish government emphasized critical theoretical issues in the field of criminal law, pointing out that the concepts hitherto suggested were too vague and fragmentary to be taken into account, and that this would also lead to problems at the definitional level, thus calling for "combating by other means" the criminal conduct of ecocide.

Even harsher was the British government's view that the possibility of undertaking further international covenant initiatives should not even be considered, since the effectiveness of existing international mechanisms had not yet been tested in practice. Therefore, until then, the question of further international action should have remained "merely academic." Again, the UK explicitly pointed out that the term ecocide was being used primarily for political propaganda purposes and it would be inappropriate to attempt to introduce such normative provisions into an international convention.

In part (b) of his study Nicodème Ruhashyankiko proposed the inclusion of ecocide as a war crime, but even this idea had no follow-up. A further step is to be found in the 1985 report compiled by the next UN Special Rapporteur, Benjamin Whitaker who in 29(3) of that report, entitled "*Cultural Genocide, Ethnocide and Ecocide*" it was pointed out that the negative alterations, often irreparable, of the environment (caused, for example, by nuclear explosions, chemical weapons, severe pollution and acid rain, or rainforest destruction ) that threaten the existence of entire populations,

deliberately or through negligence, should have been criminalized.[9] Whitaker also observed that the main victims of such actions were indigenous peoples. None of the proposals, however, were further developed by the United Nations Subcommittee on the Prevention of Discrimination and Protection of Minorities. In fact, in the subsequent report (38th session held in 1985), ecocide appears mentioned only a few times, without a dedicated chapter. Space was found for ecocide exclusively in the chapters devoted to *'other Issues'*.

As has already been noted, the most important period, as far as ecocide and its history are concerned, is to be found between 1984 and 1996, years characterized by extensive efforts by the ILC for the inclusion in the Code of a law relating to "*extensive environmental damage*"[10]. And indeed, in 1984, the ILC considered including in the "*list of acts to be qualified as crimes against the peace and security of mankind*" also "*those causing serious damage to the environment*" and considering them as international crimes. In addition, their legal nature as "*crimes against humanity*" (and not war crimes) was being discussed.

The Commission considered that although any damage to the environment could not constitute a crime against humanity, the development of technology and its effects could lead to some kinds of damage to the human environment being classified as crimes against humanity. It was pointed out that there are Conventions that forbid such tests that could harm the environment. Although these Conventions mainly concern military tests, the essential reason for the prohibition appeared to be the damage to the environment. This is particularly true of the treaties prohibiting nuclear weapons in the atmosphere, outer space, the seabed and the ocean floor and their subsoil.

In the 1984 ILC Report, the environment itself seems to acquire a global, rather than transnational, consideration. For the ILC, many of the world's most serious environmental problems were to be analysed as common problems, and in 1986 the debate continued, focusing on the concept of "serious harm to the environment" and the possibility of providing for as a crime against humanity "any serious violation of an international obligation of fundamental importance for the protection and conservation of the human environment," as stated in Article 12(4) of the draft.

The Special Rapporteur then presented new proposals to the ILC's forty-first session in 1989. Building on the wording that had been reported earlier, the draft Article 14 governing crimes against humanity stated in his seventh report that: *"[...] constitute crimes against humanity: [...] any*

[9] In 1985, Special Rapporteur Benjamin Whitaker proposed the inclusion of 'ecocide' in the definition of 'genocide', describing it as: "*negative, often irreparable alterations of the environment - for example through nuclear explosions, chemical weapons, severe pollution and acid rain, or rainforest destruction - that threaten the existence of entire populations.the existence of entire populations, either deliberately or through criminal negligence*'.

[10] Higgins P., *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet*, Shepheard-Walwyn Publishers Ltd, 2010

*serious and intentional harm to a vital human good, such as the human environment*". In Article 26 titled "*Intentional and Serious Harm to the Environment*" it provided for the punishment of those who intentionally cause-or order to cause-widespread harm to the natural environment. In the commentary to draft Article 26, it was stated that the draft provision had borrowed most of its elements from Article 55 of Additional Protocol I to the Geneva Conventions of August 12, 1949, but that its scope *ratione materiae* was broader in that it also applied in times of peace outside of armed conflict. It was pointed out that the latter draft article would apply when the following three elements were integrated: the presence of damage to the natural environment, widespread, long-term and severe damage, and third, the "voluntariness" of the damage.

### 3.1 The path to the Rome Statute of the ICC and its environmental dimensions: an analysis of Article 8(2)(b)(iv)

Today, the demand for the criminalisation of ecocide is once again the main focus of interest, in a different framework from the original one, and is expressed in both institutional initiatives and opinion movements. As evidence of this, the *Convention Citoyenne pur le Climat* was approved in France, from which the resolution encourages the Union and the States to promote the recognition of ecocide as an international crime under the Rome Statute of the International Criminal Court. The need for adequate legal protection of the common home was also highlighted by Pope Francis during the conference of the International Criminal Law Association, held in Rome on 15 November 2019.

Moreover, NGOs have also played a crucial role in the advocacy movement for the criminalisation of ecocide from the very beginning. Consider, in particular, the activities of Polly Higgins, founder of Earth Law Alliance and End Ecocide on Earth; End Ecocide Sweden; Global Alliance for the Rights of Nature. In the same vein are the initiatives the development of so-called global climate justice.[11]

In 1998, the Rome Statute of the International Criminal Court was adopted and "Resolution F", which established the Preparatory Commission after the work of the *ad hoc* Committee created in 1994 to review the main issues arising from the draft statute for an international criminal court prepared by the ILC. [12]

As of July 1, 2002, the Rome Statute entered into force, however, even within it there is no mention of ecocide as a crime against humanity and, predictably, not even as a war crime. In effect, Article

[11] UNEP, *The Global Climate Litigation Report*, 2020 available at https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review

[12] Kirsch P., Oosterveld V., *The Preparatory Commission For the International Criminal Court*, 2001 in Fordham International Law Journal, p. 563

8, in conferring jurisdiction on the Court to try war crimes, particularly when perpetrated as part of a political plan or scheme, or as part of a series of similar crimes committed on a large scale, mentions the environment only in paragraph 2(b)(4).

According to this provision, for the purposes of the Statute, "*war crimes*" include those serious violations of the laws and customs applicable, within the established framework of international law, in international armed conflicts, including "*intentionally launching attacks in the awareness that they will result in loss of life among the civilian population, injuries to civilians or damage to civilian property, or widespread, long-term and severe damage to the natural environment that is manifestly excessive in relation to the full range of concrete and direct military benefits anticipated*".[13] There have been several criticisms of this effectively limiting provision. Although it has been acknowledged that this provision can nevertheless be considered as the first "ecocentric" crime recognized by the international community, and that the incorporation in the Rome Statute of a norm that recognizes the environment, *per se*, as an object of international protection is nevertheless commendable, on the other hand it has been properly observed that the restriction of its application field to international armed conflict may not be considered sufficient.

The reason why it is considered that the provision in Article 8 is not sufficient is that it is very difficult to prove the unlawful conduct for two reasons. First, article 8 of the Statute implies that both the intention and the knowledge of the result caused by a certain conduct must be proven.

Secondly, the damage to the natural environment must be clearly excessive in relation to the intended military advantage. This requires a consideration of the principle of proportionality in international humanitarian law in which it is necessary to balance between the expected military advantage and the damage to the natural environment as a civilian object (unless an element of the environment, such as a forest, is considered a military target), consequently it may prove very difficult to demonstrate that the three required criteria of 'widespread, long-term and serious damage' are actually fulfilled.

Another symbol of weakness of this provision is that its area of application is limited to conflicts of an international dimension. Article 8, in fact, does not expressly guarantee any protection of the environment with regard to internal conflicts, but only indirect protection in specific scenarios: looting of cities, displacement of the civilian population for conflict-related reasons, destruction or confiscation of property, use of poison or poisonous weapons, asphyxiating gases or toxic gases.

[13] "*The International Response to the Environmental Impacts of War: Afternoon Panel Accountability and Liability: Legal Tools Available to the International Community*", Georgetown Environmental Law Review, pp. 616 – 624, 2004

### 3.2 The introduction of Ecocide as a "fifth crime" under the jurisdiction of the ICC: Article 8 ter, it structural elements and its limitations

It has been claimed that restricting the application of the criminal provision to war crimes exclusively would be improper, because serious environmental damage occurs mainly in peacetime[14], and it would therefore be necessary to go beyond the idea of military conflict, as the correlation between environmental degradation and human rights is internationally recognized, and this would be enough to advocate its more extensive criminalization. While agreeing with the broad criticisms outlined earlier, it must be added that the idea of ecocide as a war crime has been the most supported since the days of its idealization, born in the framework of the Vietnam War and developed in Richard Falk's project limited to military interventions. This does not preclude the possibility of rethinking ecocide and reframing it as a broader crime, unrelated to the presence or absence of armed conflict. And so it has been.

The most recent effort to introduce the crime of ecocide as a "fifth crime" under the jurisdiction of the ICC-along with genocide, crimes against humanity, war crimes, and the crime of aggression-was taken by the "Stop Ecocide Foundation," which convened a group of independent experts in 2020 to legally define ecocide[15]. The idea launched by the foundation, which was finalized in 2021, consists of the introduction of an Article 8-ter within the Statute, as well as simple amendments to the Preamble and Article 5, the latter two of a purely formal nature, which are aimed at introducing the designation of "ecocide" in the list of crimes falling under the Court's jurisdiction.

The proposal, of a purely substantive nature, provides for the introduction of Article 8ter whose first paragraph would include a definition of ecocide, understood as *"any unlawful or arbitrary act perpetrated with intent to cause, with substantial probability, serious and widespread or lasting damage to the environment".*

When analysing, in more depth, the features characterising the offence that emerge from this definition, it appears appropriate to highlight how the act is qualified as arbitrary, in other words perpetrated with particular disregard with reference to a damage that would be manifestly disproportionate to the social and economic benefits expected from the commission of this act.

The harm must be considered '*serious*', i.e. involve significant adverse change, destruction or deterioration of any component of the environment, including serious repercussions on human life or natural, cultural or economic resources. The harm must be also '*widespread*' and thus extend

[14] Saif-Alden Wattad M., *The Rome Statue and Captain Planet: What Lies Between 'Climate Against Humanity' and the 'Natural Environment'?*, 2009, p. 265-285, in details at p. 268: "*limiting such criminalization to 'war crimes' makes no sense, because serious environmental damage takes place, primarily, during times of peace*".

[15] Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text, 2021, available at: https://www.stopecocide.earth/expert-drafting-panel.

beyond a narrow geographical area, crossing national boundaries, or be suffered by an entire ecosystem or species, or by a significant number of human beings.

Another characteristic is the duration. The damage must be '*lasting*' and, therefore, irreversible or not healable naturally within a reasonable period of time.

Until now, in connection with the definition of ecocide, we have glimpsed some elements characterising the harm that results from the commission of this offence. An essential element contained in the Additional Protocol I and in the ILC draft Code of Crimes (1994) is, in fact, the widespread, long - term and severe threshold and constitutes the element that will allow the distinction between 'simple' domestic offences and those justifying international criminalisation. It is emphasised here that it is not possible to provide precise thresholds to qualify an offence as 'widespread' or 'long-term' since any precise number would be considered arbitrary and might not fit particular circumstances. Leaving the definitions of 'widespread' and 'long-term' open to a degree of interpretation, it will be up to the courts to establish appropriate thresholds in each case.

### 3.2.1 *Actus reus*: the material element

Finding a clear and non-controversial definition of ecocide is a major issue. The problem in defining this crime arises first and foremost from the fact that, until now, there is no common international definition of the 'environment', which can be interpreted in several ways up to being considered a shared resource that must be safeguarded. The path, therefore, to finding a shared definition of ecocide necessarily depends on achieving an agreement on what the environment is.[16]

A second step will then be to delineate what the material element of this crime is. On that point, according to Polly Higgins, ecocide can be inflicted through acts or omissions, whether in peacetime or in times of conflict, that may cause losses, damages or the devastation of ecosystems in a given territory. It can also be provoked by the absence of any prevention or support during climate-related events or extensive damages which are widespread or long-lasting.

This definition embraces the criminalisation of ecocide originating from climate-related natural phenomena even though there are natural calamities which are not directly imputable to humans. The aim of this approach is to establish a rule that does not only discipline the operations of companies and states, but also imposes a duty of assistance on all countries when cases of ecocide resulting from weather agents and natural catastrophes occur.

This wide-ranging provision, however, appears to be mismatched with reality because the perpetrator of the material injury has to be identifiable as the one guilty of committing the offence.

[16] International law is based on the principle of lex certa assumable from the Latin brocardo, *Nullum crimen nulla poena sine lege scripta, praevia, certa et stricta* according to which the crime must be defined and the law must be clear..

While it is therefore true that states are reluctant to adopt such a wide definition to include the impacts of natural disasters, it is important to remember that when referring to ecocide, we are dealing only with that conduct / set of behaviours caused by humans, i.e. all cases arising from the detrimental consequences of the use of destroying weapons in times of war, up to the damaging effects of commercial operations in non-conflict situations.

In the light of the definition suggested by Eradicating Ecocide, the actus reus in accordance with Article 8 of the Rome Statute requires widespread, long-term and severe damage to the natural environment.[17]

This aspect also raises questions since this assumption is difficult to interpret and imposes a threshold of liability that is excessively broad. Such a high level of injury precludes an efficient judicial intervention. Several international environmental agreements require that the damage reaches a particular threshold in order to be classified as an international crime. Numerous attempts have been advanced to overcome these challenges: according to some scholars, [18]it would be more appropriate to mention 'serious', 'severe' or 'massive' damage; for others,[19] any environmental damage of a transnational dimension should be assumed to be 'massive'.

The above-mentioned expressions (e.g. 'serious harm') have the characteristic of being extremely general, however, it should be specified that a substantial amount of the corpus of international criminal law has been founded on extensive standards, known as 'chapeaux of international crimes', which, through time and in a gradual process, have been elaborated by the jurisprudence of the courts.

Another important point of contention will be the appropriate standard of guilt. Professor Kevin Jon Heller has rightly pointed out that although 'ecocide' sounds like 'genocide', the Panel's recent definition (and most other proposals) does not include the requirement of 'specific intent' as in genocide. While a 1973 proposal by Richard Falk suggested specific intent, the literature on ecocide has largely moved away from it. The reason, as Kevin correctly notes, is that 'specific intent' would not make sense in ecocide is that people rarely, if ever, set out to harm the environment as such. In this view, the noun '*cide*' (from the Latin *caedere*) simply means 'to kill' cull' and does not imply that there has to be specific intent or group concern. The 'intent' raises issues similar to those in the genocide discussion above; people rarely have a 'direct intent' (purpose) to harm the environment.[20]

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[17] Article 8, paragraph 2(b)(iv), Rome Statute

[18] Drumbl A., *Research Handbook on Environmental Law*, Edward Elgar Publishing, 2021

[19] Teclaff L., *The Impact of Environmental Concern on the Development of International Law*, Natural Resources Journal, 1973

[20] Vallini A., *La mens rea, in Introduzione al diritto penale internazionale*, Torino 2020, 143 ss

### 3.2.2 *Mens rea*: the psychological element

The psychological element (*mens rea*) of ecocide requires reflection on Article 30 of the Statute, which states that a person is criminally responsible and can be punished for a crime within the jurisdiction of the Court only if the material element is accompanied by intention and awareness. This provision would therefore allow for intent as the subjective element of the crime, however the panel suggests that for ecocide, intentionality (recklessness or *dolus eventualis*), which requires the awareness of a substantial likelihood of serious and widespread or long-term damage.[21] The psychological element of the offence would thus be of intermediate seriousness between intention and negligence, and this *mens rea* would be sufficiently onerous to ensure that only those persons found to be significantly culpable for serious damage to the environment would be held liable.[22]

The Statute indicates that a subject can reasonably be considered criminally liable for a offence only when the conduct is undertaken with both intention and awareness.

With respect to environmental violations, unless the cause-effect link between the behavior and the event appears to be very obvious, it may be difficult to determine the subjective element and, therefore, to demonstrate that the perpetrator acted with deliberate purpose or was at least conscious that the consequence would materialize. This complexity is exacerbated in cases where the damage only emerges years after the act was committed.

As for the *mens rea* of the offender, the 'End Ecocide' campaign argues for a strict liability offence where it is not mandatory to prove the defendant's intention or awareness that his/her action would produce a determined effect.

Conversely, the 'Eradicate Ecocide' initiative suggested an offence based on 'reckless knowledge'. In this case, the judge would have to ascertain that the perpetrator knew or could assume that his or her actions, whether active or omissive, would cause serious damage.

It is sufficient to examine these two divergent approaches to understand the difficulty of achieving a consensus on the psychological element of the crime. On this subject, some academics consider that the crime of ecocide does not necessarily request deliberateness. [23] This approach would privilege the precautionary principle provided by the objective accountability of the offender. This position

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[21] Fronza E., *Sancire senza sanzionare? Problemi e prospettive del nuovo crimine internazionale di ecocidio* in *Ecocidio: un giudice penale internazionale per i crimini contro la terra?* 2021 available at: https://www.lalegislazionepenale.eu/wp-content/uploads/2021/03/Fronza_LP.pdf

[22] Concerning the boundaries between recklessness and negligence and for a careful and in-depth analysis of the criminal jurisprudence international in this regard see A. Vallini, *La mens rea, in Introduzione al diritto penale internazionale*, Torino 2020,. It is worth mentioning here the recent draft Law French, presented on February 10, 2021,«*portant la lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets*» which proposes the introduction of a délit (and not a crime) of ecocide with the character of intentional.

[23] Gray M.A., *The International Crime of Ecocide* in California Western International Law Journal, 1996

would also overcome the issues of causality and evidence of intent that a crime of ecocide based on guilt would entail.

There is a further school of thought according to which the crime of ecocide is supposed to be an intent-based crime.[24] Among them, Richard Falk has conceptualized ecocide as a crime based on " intention," and similarly, Drumbl has asserted that establishing a crime of ecocide implies how to criminalize ecological injury generated by behavior characterized by deliberate will, imprudence, or negligence.

Under the light of these two scenarios, it is evident that deeming ecocide to be a crime of strict accountability would press companies and governments to adopt environmental preservation policies and monitoring mechanisms that would be useful in assessing the environmental and social impacts of the operations they undertake. Moreover, since the requirement of intentionality would disappear, the chance for corporations to avoid accountability by claiming non-consciousness of the impacts produced by specific activities would also be reduced. This is, doubtless, the reason why states that have already incorporated it into their national law have made it a liability crime .

It is worth mentioning, however, that environmental damage can be caused by non-predictable factors and unintentional conduct. In this case, it is reasonable to assume that cases of non-intentionality should incur lighter penalties something that could not occur if the *Mens rea* is not evaluated.

### 3.2.3 Materialization of harm or endangerment: the causal nexus

The International Criminal Court, as previously mentioned, has jurisdiction only over individuals, and this, as far as the crime of ecocide is concerned, is a deterrent to the guilty plea of corporation CEOs or boards of directors.

Another tricky aspect is the challenge of establishing accountability in the case of non-localizable environmental crimes. This is the case in all situations where injury has been generated in diverse locations or from multiple localities as with global warming. In such situations it is not hard to conceive of the multiplicity of actors who were involved in the crime and to whom the responsibility will have to be distributed.

The existence of multiple liable perpetrators has already been addressed in international criminal law, such as the Rwandan genocide that happened in 1994, which implicated an plethora of individuals on an unprecedented scale.

[24] Peter Stoett argues that ecocide law requires a "*concerted and systemic effort with intent*." P.J. Stoett, S.Mulligan, *Global Ecopolitics. Crisis, Governance and Justice*. II Ed. 2019

With reference to the concrete cases of ecocide, according to Drumbl it is important that accountability apply in equal proportion to individuals, legal bodies, corporations and states. Among these actors, it is worth highlighting the position of states. Ascertaining their liability is essential if restoration is to be achieved. In order to do this, the International Criminal Court should also possess the jurisdiction over states parties by widening its competence beyond individuals. In the event that this were to occur, states would assume, to their disadvantage, the status of subjects of international criminal law.

### 3.2.4 Legal standing: individual, states and corporations

The International Criminal Court can be brought before it by a variety of claimants: by a state party to the Rome Statute, by the UN Security Council, or by the Court's prosecutor. In innumerable situations the cooperation of states is required, which, however, with regard to environmental harms, might decline to cooperate in order to avoid jeopardizing interstate relations.

Similar trouble could occur with cases brought by the UN Security Council, which is a greatly politicized entity. That said, it is manifest how important is the role of the Court's prosecutor, who has the opportunity to autonomously undertake his or her own investigations.

There have been concerns about the option of extending the number of subjects who can appeal to the Court by providing the opportunity for individuals or non-government claimants to submit a complaint as well. On this point, some scholars have argued that every individual should have the right to appeal the Court since this is an aggression of the fundamental rights of each human being on the planet. Although on a theoretical level this argument may seem proper because it would ensure that every person would be entitled to demand the conservation of the earth in front of judicial bodies, in reality it is a hardly applicable suggestion.

First and foremost, it would be necessary to amend the Rome Statute by allowing individuals to be empowered to appeal to the Court, however, leading to ingestible claims that would result in an overload of work for the Court to the detriment of its effectiveness.

Consideration was also raised to broaden the number of claimants allowed to submit appeals by equalizing the position of Non-Governmental Organizations with that of states and the United Nations Security Council. This would give them the legitimization to appeal for individuals. In order, however, not to generate, again, an excess of recourses the solution might be to accord legitimacy only to those NGOs that already have advisory status with the Economic and Social Council of the United Nations.[25]

[25] Consultative status at the United Nations Economic and Social Council is accorded to NGOs to enable them to contribute to the activities of the United Nations and is organized into three different levels: general

A second proposal was to broaden United Nations Environment Programme (UNEP)'s mandate by legitimizing it to present appeals to the Court. UNEP is the principal environmental authority in the United Nations system by strengthening environmental standards and contributing to both national and international implementation of environmental obligations. [26]Exactly as the UN Security Council, this international body is not immune from political interference especially when considering that its existence is extensively dependent on funding from a number of states that, in fact, have greater influence over the institution.

### 3.2.5 Remedies: the restorative justice

A final issue to be addressed is that of legal remedies. More specifically, Article 77 of the Rome Statute outlines the range of penalties that the International Criminal Court has the authority to inflict for violations: detention, fine, or confiscation of the income, assets, and properties resulting from the criminal misconduct.

The purpose of the sanction of a specific criminal behaviour, in that case, should be to deter environmental damage and, only secondarily, to repair it when it happens. The provisions, however, do not provide the Court with the authority to terminate the detrimental impacts caused by the conduct or omission, or even the power to restore and repair the damage. Indeed, the Court has neither injunctive jurisdiction, which is necessary to cease harmful activities, nor restorative authority with which to impose environmental restoration.

It is worth mentioning, however, that the Court has set up a Trust Fund for victims and their families, and with which it could, in an expansive view, not only assist victims of environmental crimes but also support land reclamation and rehabilitation.[27] If, therefore, ecocide were to be introduced into the list of crimes under the jurisdiction of the ICC, it would have to be accompanied by an expansion of available remedies so as to confer restorative as well as injunctive powers.

The restorative component of the ICC's work, which is carried out through the Trust Fund for Victims, is pursued with a certain level of legal supervision that can limit its operations. For instance, while the Fund can assist with medical recovery, mental rehabilitation, and material assistance in the Rome Statute signatory countries, in the Democratic Republic of Congo scenario

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consultative status, which may be given to organizations that deal with the majority of the Council's areas of operation, contribute substantially and lastingly in numerous sectors. Special Consultative Status, which may be conceded to organizations that deal only with certain of the Council's spheres of work. Finally, Roster Status is granted to organizations that can give sporadic support to the Council.

[26] UNEP, *Funding for UN Environment* available at https://www.unep.org/about-un-environment-programme/funding-and-partnerships/environment-fund

[27] Article 79, Rome Statute

the Fund has no mandate for medical recovery since such rehabilitation was not initially demanded by the Governing Chamber.

Moreover, targeting decisions accord precedence to war-related damages which reflect crimes covered by the Rome Statute than to wider requirements of specific populations.

That is precisely the feature that distinguishes Trust Fund support from the efforts of other aid agencies, demonstrating a shift toward reparative justice in the area of international criminal law.

### 3.3 The integrative proposal of the Centre for Criminal Justice and Human Rights at UCC University College Cork

The Centre for Criminal Justice and Human Rights at UCC University College Cork has recently published a supplementary proposal that aims to strengthen the substantive reform advanced by the Stop Ecocide Foundation.

The additional proposal advanced by the Centre for Criminal Justice and Human Rights consists of seven macro-amendments and is divided into two main parts. The first concerns the revisions of the so-called 'simple' crime of ecocide proposed by the Foundation. The second regards a new aggravated ecocide offence and the respective special procedure, characterised by the conjunction with technology, in particular in the field of environmental science. The proposal would have an impact on several levels, which we will see below.

At the normative level, the jurisdiction of the International Criminal Court from a temporal point of view (jurisdiction *ratione temporis*) is enshrined in Art. 11, while territorial and personal jurisdiction (jurisdiction *ratione loci*)[28] and jurisdiction *ratione personae*)[29] is enshrined in Article 12. By contrast, subject-matter jurisdiction (jurisdiction *ratione materiae*) is regulated in Article 8.

Therefore, it has been argued that the ICC's jurisdiction has 'four different facets', in perfect adherence to the fundamental principles of criminal procedure. The integrative proposal would change the discipline of jurisdiction *ratione temporis* with regard to a state's withdrawal. Indeed, under Article 127 of the Rome Statute, any State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from the Statute, but the withdrawal takes effect one year after the date of the notification's receipt (unless the notification specifies a later date).

Although paragraph 2 of Article 127 specifies that a state's withdrawal does not relieve it of its obligations under the Statute when it was a party to it, the one-year limit seems inappropriate for a crime such as ecocide because the environment, defined in the Stop Ecocide Foundation proposal as

[28] Vagias M., *The Territorial Jurisdiction of the International Criminal Court*, Cambridge University Press, 2014.

[29] Frulli M., *Jurisdiction ratione personae*, in Cassese A., Gaeta P. and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 532.

the Earth its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, and outer space, must have suffered "*serious and widespread or long-term damage*" for the crime of ecocide to be established, the ordinary withdrawal procedure may be inadequate as a practical matter.

Ecocide concerns very serious damage to the environment, lasting, beyond a limited geographical area, and capable of transcending the boundaries of a state, to the point of affecting an entire ecosystem, with characteristics of irreversibility and impossibility of restoration through natural recovery within a reasonable period of time.

Consequently, practical reasons for its investigation would justify the introduction of a longer time limit, which could be made to coincide - in a hypothetical compromise between environmental protection and the guarantees of the defendant - in the time of 5 years instead of 1.[30]

This amendment has to be coordinated with another one, that of Article 121 of the Rome Statute, concerning the regulation of amendments. Paragraph 6 of the latter provision provides that if an amendment has been accepted by the seven eighths of the Contracting States, any Contracting State that has not accepted the amendment may withdraw from the Statute with immediate effect by notifying its withdrawal within one year of the entry into force of the amendment. Coordination with the amendment to Article 127 proposed above would be achieved by the introduction of a paragraph 6-bis stating that this withdrawal option may not apply in cases where the Court has already authorised an investigation for the crime of ecocide (Article 8ter) in the territory of the State requesting withdrawal.

### 3.3.1 The limitation of the power to renew the suspension of investigation or prosecution by the UN Security Council

International Courts are qualified as general jurisdictions, aimed at exercising a punitive power originally belonging to states, which they transfer to the courts on the basis of an agreement; on the other hand, these international courts lend themselves to being used as instruments of inter-state justice. [31]

In analysing the functional relationship between the International Criminal Court and the United Nations, particularly when it comes to the mechanisms that enable the Security Council to activate the Court, but also to suspend its activity, we must consider the central role that the United Nations, and more specifically the Security Council, play in promoting respect for international humanitarian

[30] The amendment would take the form of the addition of a paragraph 1-bis within Article 127 OF THE Rome Statute, as follows: "*Article 127. Revocation. 1. [...] 1-bis. In the case of ecocide (Article 8-bis), revocation shall take effect five years after the date of receipt of the notification, unless the notification indicates a later date*."

[31] Mori P., *Prime riflessioni sui rapporti tra Corte penale internazionale e organizzazione delle Nazioni Unite*, in La Comunità Internazionale , Volume I, Giuffrè, Milano, 1999, p. 329

law and consequently in repressing the most serious violations of it, as well as other individual crimes of international importance.

It is precisely in connection with the recognition of the primary function of the Security Council, in the context of international peace and security, that States have wished to attribute to the Security Council a dual power *vis-à-vis* the Court, a power of impulse and a power of obstruction.

The power in question is the expression of the existence of a relationship between the Court and the Council, according to which the former is an instrument at the 'disposal' of the latter, by reason of a recognition of the primary role that the latter must in any case be accorded in the repression of the most serious international crimes. As for the power of impulse, regulated in Article 13 of the Statute, it has been attributed to the Security Council also with the intention of limiting the proliferation of ad hoc Tribunals.

Art. 16 of the Rome Statute regulates the suspension of the Court's investigations and proceedings, not only when these are initiated following a referral by the Security Council to the Prosecutor, but also when the Court's activation was the work of the Prosecutor *motu proprio* or of a State, or even as a preventive measure (as shown by Resolutions 1422/2002 and 1487/2003). The subject of a long and troubled debate in the Conference, the rule in Article 16 continues to meet with criticism insofar as it is precisely through the use of this provision that the blocking of the Court can in fact be brought about. From a more realistic, and not exclusively legal, point of view, the provision instead reflects the need to effectively guarantee the Security Council a power to 'direct' the work of the Court.[32]

The powers entrusted by the Statute to the Council (of impetus and blocking) must not be overestimated or lead one to believe that in reality the Court is left to the Council's initiative, since both states and the Prosecutor acting *motu proprio* can activate the Court's jurisdictional mechanism.

In order to limit, albeit minimally, the political influence of the UN Security Council on the ICC, and given that the crime of ecocide - unlike genocide, crimes against humanity, war crimes and crimes of aggression - primarily victimizes the environment as an abstract natural entity, different from the issues that traditionally affect the Security Council, it is proposed to limit the special renewal power granted to it by Article 16 of the Rome Statute.

The latter provision states that no investigation or prosecution may be commenced or continued for the twelve-month period following the date on which the Security Council, by resolution adopted under Chapter VIII of the Charter of the United Nations, has made a request to the Court. Moreover,

[32] Palmiano G., *La nuova Corte penale internazionale e il problema degli Stati terzi*, in Rivista della Cooperazione Giuridica, 1999, vol. 1, p. 46

it is expressly specified that such a request may be renewed by the Council in the same manner.[33] Therefore, placing a limit on the power of renewal, identifying it as no more than once, through the introduction limiting the postponement of the suspension of the investigation or prosecution in cases of ecocide could constitute an acceptable compromise between the political powers of the Security Council and the operational freedom of the Court. Thus, according to this proposal, if the investigation or prosecution concerns the crime of ecocide, the UN Security Council's request for renewal under Article 16 may not be renewed more than once.

### 3.3.2 The introduction of aggravated ecocide and the "privileged" scientific evidentiary sources of the United Nations Environmental Authorities

The next cornerstone of the proposed reform is based on the introduction of aggravated ecocide and its special procedure. Ecocide would be considered aggravated if it has, or has had, a substantial impact on greenhouse gas emissions or climate change, with the introduction of a subparagraph 3 in Article 8ter proposed by the Stop Ecocide Foundation. Consequently, Article 145 of the Rules of Procedure and Evidence relating to the determination of punishment and containing circumstances would also be amended to include Article 8-ter in the list of aggravating circumstances.

Ecocide is to be considered aggravated if, as a consequence of a wilful act or omission, it has a considerable impact on greenhouse gas emissions or climate change. Consequently, Article 145 of the Rules of Procedure and Evidence concerning the determination of the penalty and containing the circumstances would also be amended to include Article 8-ter in the list of aggravating circumstances. As will be seen in the next paragraph, this considerable impact on the greenhouse gas emissions or climate change can be deduced from the reports of the environmental authorities of the United Nations.

Another proposal advanced originates from the consideration that the evidence of considerable impact on greenhouse gas emissions or climate change is purely scientific in nature. The proposal is to assign preferential probative force to the reports of the main United Nations environmental authorities, namely the Intergovernmental Panel on Climate Change (IPCC), the recent "Special Rapporteur on the Promotion and Protection of Human Rights in the context of Climate Change"[34] and the "Special Rapporteur on Human Rights and the Environment."

In particular, the IPCC is the United Nations body for the scientific assessment of climate change, established in 1988 at the initiative of the World Metereological Organization and the United

[33] Macpherson J., *Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings* available at http://www.asil.org/insights/insigh89.html .

[34] Intergovernmental Panel On Climate Change, 1988 available at https://www.ipcc.ch/site/assets/uploads/2019/02/WMO_resolution4_on_IPCC_1988.pdf

Nations Environmental Program (UNEP), and currently has 195 member states (formerly part of the United Nations or World Meteorological Organization). In view of the authority of the reports made by the IPCC, it is proposed that they be given the value of scientific evidence with the force of "sufficient basis" for the preliminary examination stage. The same proposal applies to the reports of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change and the Special Rapporteur on Human Rights and the Environment, the latter of whom is bound by UN Human Rights Council Resolution 37/8 to submit its report annually. The amendment is conveyed through the addition of a paragraph (d) in Article 13 that is devoted to the conditions of prosecution and a paragraph 1a within Article 15 that governs the powers of the Prosecutor.

Specifically, Article 13 provides that the ICC may exercise its jurisdictional power in relation to any of the crimes referred to in Article 5 if a State Party reports to the Prosecutor a situation in which one or more such crimes appear to have been committed, if the Security Council, in the context of actions under Chapter VII of the Charter of the United Nations, reports to the Prosecutor a situation in which one or more such crimes appear to have been committed, or if the Prosecutor has opened an investigation into the crime in question under Article 15.[35]

### 3.3.3 The change in the probative standard at the preliminary examination stage and at the investigative phase

Another interesting change resulting from the Centre for Criminal Justice and Human Rights proposal is the change in the evidentiary standard at the preliminary examination and investigation stages. It should, on this point, be preliminarily explained that, from a legal perspective, preliminary examination is different from investigation and the two concepts should be kept quite distinct, although the two phases can be considered intrinsically connected[36]. Preliminary examination is a preliminary stage preceding the investigation phase, intended to screen the report of the crime and necessary in order to assess whether all the prerequisites are in place for an investigation to be initiated. Only the latter, therefore, can be considered as a preliminary investigation, unlike preliminary examination which is defined as "pre-investigative phase," "pre-investigative process," or "amorphous status".

The preliminary examination is one of the main activities of the Prosecutor's Office and is a kind of "bridge" to the subsequent - and only eventual - preliminary investigation phase. Article 15

[35] The addition of paragraph (d) to Article 13 could be worded as follows: "[...] (d) if the Prosecutor has reasonable grounds to believe that the crime referred to in Article 8-ter paragraph 3 (aggravated ecocide) has been committed."

[36] Stahn C., *From Preliminary Examination to Investigation: Rethinking the Connection*, in X. Agirre, M. Bergsmo, S. De Smet, C. Stahn (a cura di), 2020, p. 37-66, in specie p. 38

paragraph 6 of the Rome Statute stipulates that if after the preliminary examination the Prosecutor concludes that the information provided does not justify the initiation of an investigation, he shall inform those who exposed or reported it. However, this does not preclude the Prosecutor from considering, in light of new facts or evidence, additional information that may have been submitted to him and related to the same situation. Article 42 also provides the power to "examine" the information communicated to him, with full independence and autonomy.

Preliminary examination may be initiated on the basis of information submitted by individuals or groups of individuals, states, intergovernmental or nongovernmental organizations, or a referral from a State Party or the UN Security Council under Articles 13 and 14. This may also be screwed on the basis of a declaration accepting the Court's exercise of jurisdiction under Article 12(3) of the Rome Statute, submitted by a state that is not a party to the Rome Statute. The management of this stage is the responsibility of the Prosecutor, based on the broad *proprio motu* powers conferred on him by Article 15 of the Rome Statute[37]. There are two main objectives of the preliminary examination. First, that of an "analysis of information", a screening of the information received by the Prosecutor in order to understand whether it is manifestly outside the jurisdiction of the Court, including by the use of the powers provided for in Article 104 of the Rules of Procedure and Evidence. [38]

Secondly, what has been termed by some authors as one of the most important "challenges" facing the Office of the Prosecutor, namely, the assessment under Article 47 of the Rules as to whether there is a reasonable basis for applying for permission to open a preliminary investigation, which, in the event, it has the legal duty to request.[39] This duty, however, is to be understood as merely formal, since at this stage the power to manage the preliminary examination is so broad as to make even the prosecution itself discretionary, as well as not subject to time limits. In the event that the prosecutor decides not to request authorization for the initiation of an investigation and to file the preliminary examination, the only burden under the statute is to notify the individuals who submitted the information of the filing. However, if the report was transmitted by a state party or

[37] Policy Paper on Preliminary Examination del novembre 2013, di seguito “Policy Paper”, al par. 2. https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf

[38] The cited provision stipulates that the Prosecutor, acting pursuant to Article 53, paragraph 1 Rome Statute, in evaluating the information made available to him, shall analyse the seriousness of the information received and to this end may request additional information from states, United Nations bodies, intergovernmental and nongovernmental organizations or other reliable sources it deems appropriate as well as receive written information or witness statements to be recorded in the Court's premises. In the latter case, the procedure set forth in Rule 47 to which reference is made shall apply.

[39] Note the criteria developed in the November 2013 Policy Paper on Preliminary Examination, a document of 106 paragraphs that serves as a guideline for the Prosecutor's Office regarding the discipline of Preliminary Examination

the UNSC, they may object under Article 53(3)(a) of the Rome Statute and ask the Pre-Trial Chamber to evaluate the prosecutor's decision.

Without going into a detailed analysis of the discipline here, it suffices to point out that this is a very limited power since the Pre-Trial Chamber does not have the power to abolish or reform the order, but only to invite the prosecutor to reconsider the case.[40] Only if the dismissal was motivated on the basis of Article 53 (1) (c) and (2) (c) of the Rome Statute, i.e. on the lack of the "interest of justice", the prosecutor is obliged to notify the Pre-Trial Chamber for the validation request.

That of the "interests of justice" is an elastic clause that the prosecutor can invoke - in the negative - if he is persuaded that a criminal investigation or prosecution is not in the interests of justice, and thus direct the proceedings toward dismissal, subject to review by the Pre Trial Chamber. Conversely, if the prosecutor wants to investigate or prosecute, he does not need to establish that an investigation or prosecution is in the interest of justice, it being sufficient to declare that such interest is not impaired or prejudiced.[41]

The prosecutor can always and in any case reconsider his decision to open (or reopen) a preliminary examination, as expressly provided for in subsection 4, and this is an additional element of discretionary power in his hands.

### 3.3.4 The relative presumption of "seriousness" and satisfaction of the "interests of justice"

As outlined in Article 53(1)(b) of the Statute of Rome and in Article 48 of the Rules of Procedure and Evidence, in determining whether there is a "*reasonable basis for proceeding*" with an investigation, the prosecutor considers whether the case is or would be admissible under Article 17 of the Rome Statute. In this case, the term "admissibility" can be translated as "prosecutability" and in fact the very heading of the rule is dedicated to "*questions of prosecutability*". The evaluations of procedability are three: "seriousness"[42], "complementarity"[43], and the "interests of justice"[44].

Complementarity is not touched by the proposed reform, which instead affects the gravity and interests of justice. This principle is contained both in the Preamble of the Statute, where it is stated that it is "*the duty of each State to exercise its criminal jurisdiction over those responsible for*

[40] Note, for instance, the *obiter dictum* in the ordinance of the Pre-Trial Chamber II, Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', https://www.icc-cpi.int/court-record/icc-roc463-01/14-3-tarb par. 7 ed 8.

[41] Pre-Trial Chamber III, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Coˆte d'Ivoire", https://www.icc-cpi.int/court-record/icc-02/11-14-corr par. 207-212.

[42] Article 17, paragraph 1 lett. d) of Rome Statute

[43] Article 17, paragraph 1, lett. a, b and c) of Rome Statute

[44] Article 53, paragraph 1, lett. c) of Rome Statute

*international crimes*" and in Article 1, where it is reiterated that the ICC is "*complementary to national criminal jurisdictions*".

The framework for its establishment is contained in Art. 17, which imposes a number of burdens on the prosecutor, including having to assess whether investigations or prosecutions conducted by the state's judicial authority are already underway, unless that state does not intend to conduct them or is unable to prosecute them or if investigations have already been concluded by the judicial authority of the state and a decision has been made not to prosecute, unless such a choice does not result from a "*unwillingness of the State*" or from the so-called "*inability of the State*"; if the person or persons involved have already been tried by the national judicial authority and therefore there is a case of *ne bis in idem* under article 20(3) Rome Statute [45]. In order to decide whether the so-called "defect of will of the State" exists, the Prosecutor must assess whether the criminal proceedings initiated by the domestic judicial authority are conducted with the intent to protect the suspect or defendant from criminal liability for crimes within the jurisdiction of the ICC, or with an unjustified delay incompatible with the purpose of securing the person concerned for justice, or in the absence of the guarantees of independence and impartiality.

With regard to "*incapacity of the state*" it must be considered whether it is the consequence of a total or substantial "collapse" of the domestic judicial system or the "*unavailability*", in cases where the state no longer has the capacity to obtain the presence of the accused, the collection of evidence or the subpoenaing of witnesses, or is in any other way "unable" to handle proceedings that have already been instituted.

Previous ICC jurisprudence has emphasized the importance of complying with the various "steps" imposed by Article 17, where in chronological order it is first necessary to ascertain whether there are ongoing investigations or criminal proceedings, or whether there have been investigations in the past, and whether the domestic judicial authority has decided not to prosecute suspects.

With regard to seriousness, the following criteria should be ascertained: the extent of the crime, its nature, the manner of its commission, and its impact. Given that ecocide, as formulated in its aggravated form requires that the harm must be "*serious*" "*widespread*" and with "*long-term*" consequences it is suggested that at least a relative presumption of "seriousness" and satisfaction of the "*interests of justice*" be introduced, through the insertion in Article 53 of the Rome Statute of a provision that the seriousness and interests of justice requirements shall always be considered satisfied unless proven otherwise.

[45] Subparagraph (d) then contains the reference to seriousness, i.e., the case is to be declared inadmissible if the facts are not of sufficient gravity to warrant further investigation by the ICC.

### 3.3.5 The exclusion from the abbreviated guilty plea procedure

Forms of negotiated justice in international criminal procedure have always been viewed with particular skepticism, and so have the so-called "*guilty plea procedures*" embodied in Article 65 of the Rome Statute, which is still a highly controversial subject. For part of the doctrine,[46] forms similar to plea bargaining would have to be regarded as unseemly instruments if granted for crimes that, like those tried by international tribunals, are characterized by a heinousness and magnitude certainly more pronounced than those generally dealt with by national criminal courts.

Moreover, it would carry the risk of diluting the moral message that these tribunals intend to send, namely, that the international community is deeply outraged by the commission of such crimes and that for this reason it cannot shy away from securing full justice through the holding of a trial and not through negotiated justice.

Several reasons explain the skepticism toward plea bargaining in international criminal courts.

First, the granting of concessions to defendants of international crimes is perceived as improper given the heinousness and magnitude of the crimes in question. It is believed that plea bargaining dilutes the moral message that international tribunals are intended to convey-that is, the outrage of the international community and the assurance that it will bring to justice those responsible for the crimes committed. Second, plea bargaining is believed to interfere with the goal of uncovering the truth about international crimes.

Finally, it is believed that plea bargaining does not respect the victims' interest in a public trial and a sentence proportionate to the guilt of the accused.

The proposal for plea bargaining has also been criticized because, in reality, it would constitute a form of "partial amnesty/impunity on the part of the prosecutor" in manifest opposition to the "mission" of such magistrates, which is directed at establishing often horrible and inconvenient truths and aimed at avoiding impunity precisely in order to promote, through fact-finding, reconciliation between the warring parties [47]. In order to prevent access to the abbreviated guilty plea procedure from leading to a substantial amnesty for the crime of aggravated ecocide, and to allow greater publicity for the trial of crimes that would involve the entire global community, it was suggested that Article 8-ter defendants be excluded from the possibility of access to the procedure.

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[46] Turner J.I., *Plea Bargaining*, in International Criminal Procedure. The interface of Civil Law and Common Law Legal Systems, in L. Carter e F. Pocar, Edward Edgar Publishing Limited, 2013, p. 56

[47] Turner J.I., *Plea Bargaining*, in International Criminal Procedure. The University of the Pacific Law Review / vol. 48, SMU Dedman School of Law Legal Studies Research Paper n.. 347, 2017, p. 229: "*in a dissenting opinion, ICTY Judge Schomburg compared charge bargains to de facto granting partial amnesty/impunity by the Prosecutor and criticized them as conflicting with the Tribunals' mission to avoid impunity, to establish the truth, and to promote peace and reconciliation*"

At the beginning of the trial, the Trial Chamber has the accused read the charges previously validated by the Pre-Trial Chamber.

The Chamber of First Instance shall verify that the accused understands the nature of the charges and grant him the opportunity to admit guilt, in accordance with Article 65, or to plead not guilty. In the case of aggravated ecocide under Article 8b of the Statute, however, the possibility of access to the procedure would be excluded.

The institution of "*proceedings on admission of guilt*" was included in the Statute only after intense debate among representatives of member states. Originally, Article 38(1)(d) of the 1994 draft Statute of the International Law Commission, dedicated to the functions and powers of the Trial Chamber, provided tersely that at the beginning of the trial the court should notify the defendants of the possibility of pleading guilty or not guilty. This provision was reformulated in 1995 by the Ad Hoc Committee which, commissioned to evaluate the draft and propose the most appropriate amendments including in relation to Article 38, highlighted several critical issues, beginning with the very appropriateness of allowing for negotiated justice institutions for offenses subject to ICC jurisdiction. The provision, in any case, would not have been sufficiently exhaustive and should have been more detailed especially with regard to the effects of the guilty plea, as is well known very different in common law and civil law systems. A year later, in 1996, it was the Preparatory Committee that drew attention to the urgency of narrowing the gap between the different common law and civil law systems by seeking for common denominators. Within this framework, it suggested the establishment of a "contracted" trial phase subsequent to the sentencing agreement, in order to allow the judge to evaluate, at least summarily, a reasonable evidentiary basis to support the prosecution, and to permit the defendant to understand the nature and consequences of his or her guilty plea.[48]

That procedure would also have allowed the judge to better ascertain the voluntariness and lack of coercion of the plea, and the defendant's right to confirm it before the judge or to retract it and ask for a prosecution to proceed without adversely affecting the determination of responsibility could have been ensured. This opened the Committee to the idea of providing for plea-bargainable offenses while at the same time emphasizing the need for the Court's judicial review of agreements.

The proposal was part of the reflection aimed at promoting solicitous justice and avoiding secondary victimization of offended persons who would be called to witness at trial. It was the Argentine working paper sent on August 13, 1996 to the Preparatory Committee that again and explicitly evidenced the necessity of an intermediate solution between the two systems of common

[48] Turner J.I., *Plea Bargaining*, in International Criminal Procedure. The interface of Civil Law and Common Law Legal Systems, in L. Carter e F. Pocar, Edward Edgar Publishing Limited, 2013, p. 56

law and civil law in the development of a particular summary or abbreviated procedure (summary procedure). And again in that paper it was also revealed that the terminology of guilty plea would be foreign to most of the systems based on the European-continental model, and that in certain civil law states the transplantation of the Anglo-Saxon type of plea bargaining would be incompatible with the domestic system.[49] On the basis of this working paper, a joint Argentine-Canadian proposal was drafted and sent on August 20, 1996, to the Preparatory Committee itself, which provided further clarity and pioneered a new terminology: admission of guilt instead of guilty plea.

This terminology, not directly referable to either civil law or common law systems, was proposed as an intermediate solution to try to merge two profoundly different traditions. In that proposal, the idea was put forward to include an Article 38-bis, entitled "Abbreviated proceedings on an admission of guilt" (Abbreviated proceedings on an admission of guilt).

According to this rule, which except for a few changes would then be the one contained in the final text, when faced with a defendant who has admitted guilt, the Trial Chamber would have to verify: whether he understood the nature and consequences of that admission; the absence of coercion and therefore the voluntariness of that admission; and that the offenses covered by the confession are supported by a reasonable evidentiary basis. Only the court that has positively evaluated all these elements can convict the defendant. Otherwise, the court that is unconvinced or finds the evidentiary compendium and the truthfulness and comprehension of the admission to be deficient may order the trial to continue according to ordinary procedures and deem the admission to be *tamquam non esset*.[50]

If the court finds the admission valid but finds the evidentiary support lacking, or if it finds that additional discovery is necessary in the interest of justice, it may order the prosecutor to give additional evidence, including testimony.

In the subsequent final proposal of the Preparatory Committee, dated August 14, 1997 the content of the Argentine-Canadian proposal was substantially reproduced, and a 5th paragraph was added to Article 38-bis regarding the non-binding nature of the agreement. Underlying the latter choice was mainly the fear that subsequent to the guilty plea would pave the way for a plea bargaining binding on the court.

[49] Turner J.I., *Plea Bargaining*, in International Criminal Procedure. The interface of Civil Law and Common Law Legal Systems, in L. Carter e F. Pocar, Edward Edgar Publishing Limited, 2013, p. 70

[50] The expression is used in reference to rules of law or contract clauses, which are invalid or so deficient and imperfect that they can be considered as not existing, as unwritten

**4. The environmental protection through criminal law within Europe: Directive 2008/99/CE**

As we have seen in the previous chapters, environmental protection is certainly one of the most topical aims of criminal law, since the environment itself is a legal asset that is highly threatened by the development of the modern economy. In fact, environmental crime constitutes one of the largest criminal activities in the world, along with drug trafficking, human trafficking and counterfeiting.

To cope with the exponential growth of the phenomenon, over the years the European Union, as well as the international community, have dedicated massive efforts to the creation of instruments that could effectively reverse the course and preserve the environment as a super-individual asset functional to the life of each person.

Within this framework, studded with very important measures such as the European Green Deal, is the very recent project to reform EU Directive 2008/99 presented in 2021 by the European Commission.

The Directive 2008/99/CE has been a fundamental instrument for the impulse and conditioning of environmental criminal law within the Member States of the European Union, playing a fundamental role also in Italian legislation on the field. The results expected by the European Union with the enactment of this regulation, however, did not reach the hoped-for levels, failing to fill the existing gaps in the current management of environmental offences at EU level and within individual Member States.[1]

This is why the European Commission has presented a draft reform of the 2008 directive, which is decidedly more articulated (with a preamble of 40 points and no less than 29 articles, compared to the 8 planned in 2008) and expressly aims to give greater effectiveness to the criminal protection of the environment in the European Union, improving the response of state authorities to environmental crimes by means of a more exhaustive definition of incriminating cases.[2]

The proposal consists of several parts: a first part entitled 'Explanatory Memorandum', which describes the context of the proposal, the objectives, legal basis, guiding principles, risk assessments and expected outcomes, as well as the financial implications; a central part devoted to the articles of the directive; and a final part devoted to the legislative and financial statement.

[1] Rizzo A., *In search of Ecocide under EU Law. The international context and EU law perspectives* in Freedom Security and Justice European Legal Studies, 2021

[2] Draft european parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/CE in https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html

The specific reasons that led to the submission of this proposal are mainly related to incorrect transposition of Directive 2008/99/EC by the Member States, as well as problems and gaps contained therein.

According to the European Commission, the current sanctions provided for in the individual national systems for environmental offences are not dissuasive and there are serious gaps in enforcement, as well as shortcomings in state resources and cooperation between states, and a lack of coordination between administrative and judicial powers at local level. For this reason, the specific aim of the proposal is to improve the general framework of the fight against environmental crime through multiple measures, such as improving the effectiveness of investigative tools, ensuring effective, dissuasive and proportionate sanctions and improving transnational investigative cooperation. The possibility for the Commission to submit a proposal for a directive to the European Parliament and the Council concerning the protection by criminal law of a given legal good must obviously be justified and contextualised in the context of the legislative powers of the body in question, as well as the possibility for the European Union to impose certain criminal legislation on the Member States. It should be recalled that the European institutions, in fact, do not have the competence to enact incriminating legislation directly.[3]

In this regard, the legal basis for the enactment of the Directive is to be found in Article 83 of the Treaty on the Functioning of the European Union (TFEU). Article 83(1) provides for the possibility of the European Parliament and the Council to adopt directives establishing minimum rules concerning the definition of criminal offences and sanctions in particularly serious crime areas with a transnational dimension such as terrorism, trafficking in human beings, drug trafficking or sexual exploitation. Although the list is exhaustive, it can be extended by the Council itself by a unanimous decision after approval by the European Parliament. This proposal for a directive could *prima facie* already be justified on the basis of this first paragraph. Environmental crimes are certainly serious, but above all, they have very significant transnational implications. However, environmental crimes are not contained in the list drawn up by the Treaty.

The second paragraph of the provision under consideration, addresses the issue of the competence of the European Union, and in particular of the European Parliament, to establish minimum rules concerning the definition of offences and sanctions in European policy areas which have been subject to harmonisation measures, where the approximation of criminal

[3]Pereira R., *Towards Effective Implementation of the EU Environmental Crime Directive? The Case of Illegal Waste Management and Trafficking Offences* in Review of European, Comparative and International Environmental Law, 2017

laws and regulations of the Member States is indispensable to ensure the effective implementation of such EU policy area.[4]

Environmental matters have certainly been the subject of different harmonisation measures, and with time it has become increasingly necessary to have unified and harmonised regulations concerning the definition of minimum characteristics of environmental offences at European level, precisely to ensure the effective implementation of the European policy on environmental protection.

In this sense, the objective of this proposal coincides perfectly with the requirements outlined in paragraph 2 of Article 83 TFEU, in which therefore the legal basis of the Commission's proposal is to be found.

The Commission identifies two fundamental general principles on which the very existence of the Proposal is based, namely the principle of proportionality and the principle of subsidiarity. With reference to subsidiarity, it is well known that criminal activities relating to the environment often have a transnational character, just as several environmental crimes have an impact on more than one country (e.g. illegal trafficking in waste or protected animal species).[5] The purpose of the directive is therefore to create a basic legal framework, common to all member states, that can guide them in their choice of definition of the main environmental offences and related criminal sanctions. It will then be up to the States to concretely implement the lines set by the Directive through national legislation.

With reference to the proportionality, as stated in Art. 5(4) TEU, the revision of EU Directive 2008/99 must be confined to what is necessary to adapt the legislation to the new threats to the environment. Both the new offences and the penalties must be limited to punishing conduct that seriously offends the legal good of the environment, while respecting proportionality.[6]

### 4.1 The evaluation of the Directive 2008/99/EC and the revision proposal

Before developing the Proposal under consideration here, the Commission carried out an evaluation of the Directive 2008/99/EC, which was published in October 2020, in which it considered four

[4] Harding C., *Exploring The Intersection of European Law and National Criminal Law* in European Law Review, 2000

[5] Hackett D. P., *An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* in American University International Law, 1990

[6] Rizzo A., *In search of Ecocide under EU Law. The international context and EU law perspectives* in Freedom Security and Justice European Legal Studies, 2021

main evaluation criteria: effectiveness, efficiency, coherence and relevance of the objectives to today's needs.[7]

The evaluation revealed six main problems: firstly, the purpose of the directive is outdated and complexly defined; secondly, it contains numerous unclear definitions of what an environmental crime is, which makes it difficult to investigate and prosecute crimes. From the point of view of effectiveness, the level of sanctions is not sufficiently dissuasive, nor is transnational cooperation and coordination sufficient. Among the problems, the Commission also highlights the lack of reliable, accurate and complete statistical data on prosecutions for environmental crimes in each Member State and the weakness of the various steps that make up the enforcement chain from the investigation phase to trial.

For these reasons, the Commission decided to reform the Directive, defining the problems and developing new objectives, also through extensive consultation of stakeholders: experts, police forces, public police networks, judges, professors, NGOs and European investigation organisations such as Europol.

In consideration of the above-mentioned issues, the Commission has developed the following objectives. Primary importance is attached to increasing the effectiveness of investigations and trials by updating the scope of the directive and by clarifying or eliminating vague terms used in the definitions of environmental crimes. Ensure effective, dissuasive and proportionate types of sanctions, including aggravating circumstances and accessory sanctions. Promote transnational investigations and trials through measures that directly foster transnational cooperation, such as harmonised investigative tools, the obligation to cooperate through Europol and Eurojust, and the implementation of jurisdiction rules.

Alongside these, another fundamental objective is to improve information in decisions concerning environmental crimes through the collection and reporting of statistical data.

This implies an obligation for member states to regularly collect and transmit statistical data on environmental crimes to the Commission according to common, harmonised standards.

Finally, it will also be necessary to improve the operational effectiveness of the national enforcement chain to facilitate the detection, investigation, prosecution and punishment of environmental crimes.[8]

[7] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law available in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0099

[8] Rizzo A., *In search of Ecocide under EU Law. The international context and EU law perspectives* in Freedom Security and Justice European Legal Studies, 2021

Directive 2008/99/CE is structured in two distinct parts: the first part is devoted to the forty introductory points and the second part is devoted to the articles, of which there are 29. The introductory points have the function of contextualising the Directive, first of all identifying its sources, such as Art 3(3) TEU and Art 191 TFEU, according to which the European Union must ensure a high level of protection and improvement of the quality of the environment.
The points then specify the critical aspects of the existing system of sanctions for environmental crimes at the European level, pointing out the need for improvement in this sense, through the introduction of sanctions for conduct that is harmful or dangerous to the environment, committed intentionally or negligently. According to the Commission, this legislation must be continuously updated: thresholds for punishable dangerous conduct and aggravating and mitigating circumstances must be provided for each offence. During investigations and prosecutions, particular attention must be paid to the possible involvement of organised criminal groups and attempt and instigation must also be criminalised.[9]
Furthermore, the criminalisation of legal persons and the provision of measures for the freezing and confiscation of assets pertaining to the offence should be of paramount importance.

### 4.2 The offence: material and psychological element, liability and sanctions

After the introductory points, the draft consists of 29 articles. According to Article 1, the Directive lays down minimum rules for the definition of criminal offences and sanctions for the purpose of more effective protection of the environment, while Article 2 is devoted to the precise definition of certain terms used in the document. According to this article, anything that infringes a rule contained in EU legislation or a law or regulation of a Member State implementing an EU rule shall be considered 'unlawful'. Conduct shall also be considered unlawful when it is permitted by an authorisation of the competent authority, where such authorisation was obtained fraudulently or through bribery, extortion or coercion.
According to paragraph 2 of the Article, then, 'habitat within a protected site' shall mean any habitat of a species for which an area is classified as a protected area under Article 4(1) or (2) of EU Directive 2009/147, or any natural habitat or habitat of a species for which a specific site is designated as a special area of conservation under Article 4(4) of Council Directive 92/43/EEC31.
Again, "legal person" shall mean any legal entity having such status under national law, excluding States, public bodies exercising State authority and international organisations.

[9] Fois P., *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente*, Editoriale Scientifica, 2007

Public concerned' shall mean all persons directly affected or likely to be affected by the offences provided for in the Directive. It is also specified that all persons having a sufficient interest as well as non-governmental organisations aiming at the protection of the environment may be considered as having an interest. [10]

With regard to the "victim", reference is made to the concept as set out in Article 2(1)(a) of Directive EU 2012/29 of the Parliament and of the Council. [11]

The Directive outlines in Article 3 the basic features of various criminal conducts, and then devotes all the subsequent articles to the definition of the penalty system in all its facets. As regards the active and passive subjects of the conduct listed by the Directive, it is specifically provided that both natural persons (Art. 5) and legal persons (Art. 7) may be prosecuted, the latter being subject to ad hoc rules, which will be discussed below.

From the point of view of the offender, offended persons may be individuals who are directly or indirectly affected by the consequences of the offence or associations pursuing the protection of the environment, and the right to take civil action in proceedings brought must always be guaranteed.

With regard to the material element, in environmental matters the European penal systems are characterised by a strong presence of offences of a purely punitive nature, with high thresholds of punishability and many offences of danger.

In the definition of conduct, the Proposal requires in some cases that in order to be punishable, at least a stage of damage that is 'substantial' must be reached. In order to define damage as substantial, Article 3(3) requires national legislation to take into account the following elements: the basic condition of the environment concerned, the duration of the damage, which may be permanent, medium-term or short-term, the severity and extent of the damage, and the reversibility of the damage.

In other cases, however, the Directive requires that the action, in order to be punishable, must 'probably cause' damage to the quality of the air, soil or water, or to animals and plants. In this case, the directive requires certain characteristics to be taken into account. First of all, consideration must be given to whether the conduct relates to activities that are considered hazardous or dangerous and that require a permit that has not been obtained or to which the

[10] Pereira R., *Towards Effective Implementation of the EU Environmental Crime Directive? The Case of Illegal Waste Management and Trafficking Offences* in Review of European, Comparative and International Environmental Law, 2017

[11] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA in https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012L0029

conduct has not been adapted. The other elements to be taken into consideration are: the extent to which the values, parameters or limits laid down in legal acts or in an authorisation issued for the activity are exceeded, the state of conservation of the fauna and flora involved, and the costs of repairing the environmental damage.

In the Explanatory Memorandum, the Commission expressly includes negligent conduct among those punishable under the Directive. In the Commission's view, a high standard of protection is necessary in order to ensure that activities that are intrinsically risky for the environment because they involve, for example, potentially harmful and dangerous materials or instruments can be carried out). In such a context, it is essential to bear in mind how negligent conduct can lead to sometimes catastrophic consequences. The inclusion, therefore, of negligent conduct among punishable conducts will serve to discourage their commission. The Proposal seems, in short, to use fault, in its meaning of 'serious negligence', as a tool to direct the behaviour of agents in activities that are potentially dangerous for the protected legal asset.

To ensure the effectiveness and proportionality of penalties, Article 8 of the Directive provides for several aggravating circumstances. In fact, the following circumstances must be taken into account if they are not already constituent elements of the offence: if the conduct causes the death or serious injury of a person, the destruction or permanent or semi-permanent damage to the ecosystem. If the conduct is committed within the framework of a criminal organisation as described in Council Framework Decision 2008/841/JHA. [12]If the conduct involved the use of false documents or if it was committed by a public official in the performance of his or her duties. Whether the offence generated, or was intended to generate, financial benefits, or was intended to avoid substantial costs. If the conduct of the active party gives rise to liability for environmental damage but he fails to fulfil the remedial obligations provided for in Article 6 of Directive 2004/35/EC. If the active subject does not cooperate with the investigating authorities when required by law or if he obstructs the investigation by intimidating or interfering with witnesses or injured parties;

On the other hand, mitigating circumstances are provided for in Article 9, which provides for the following conduct as mitigating circumstances: if the offender restores the environment to its state prior to the commission of the offence and if the active subject provides the judicial or administrative authorities with information that they would not otherwise have obtained, helping them to identify or apprehend possible competitors or to find evidence.

[12] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0841

Article 5 of the Directive on penalties for natural persons provides that penalties must be effective, proportionate and dissuasive. With reference to the sentencing framework, Article 5 specifies that the conduct referred to in Article 3 must be punishable by a maximum sentence of at least 10 years in all cases where it causes or is likely to cause death or serious injury to persons.

The offences described in Article 3, points a-j, n, q, r shall then be punishable by a maximum sentence of at least six years, and those described in points k, l, m, o, p by a maximum sentence of at least four years.

Member States will also have to ensure that persons who have committed the offences referred to in Articles 3 and 4 are subject to accessory penalties. This is undoubtedly the most important novelty of this provision. By accessory penalties we mean the obligation to restore the environment within a peremptory term, a fine, disqualification from access to public funds, including tender procedures, subsidies and facilities, disqualification from managing establishments of the type used to commit the offence, withdrawal of permits and authorisations to carry out the activities that led to the commission of the offence, temporary disqualification from public office and elections, and national or European publication of the sentence.

Article 10 contains the obligation for Member States to ensure that the competent authorities provide for the freezing or confiscation of the proceeds of the offence or instrumentalities used or intended to be used in the commission or aiding of the commission of the offences referred to in the Directive.

Analysing the liability of natural persons, Articles 6 and 7 deal with the liability of entities. The former provides for the obligation of the Member States, when transposing the Directive, to ensure that legal persons may also be prosecuted for the offences provided for when such offences have been committed for their benefit or when such offences have been committed, either individually or as part of an organ of the entity, by a person who plays a leading role within the entity.

In addition, the entity will also have to answer for the offence whenever it has been committed to its advantage by a person under the authority of one of the persons with an apical role described above, and the commission was made possible by the lack of supervision or control. In any case, the punishability of entities does not exclude the possibility of criminal proceedings being brought against natural persons who are the authors, instigators or accomplices of the offences envisaged.

Article 7 then indicates the sanctions applicable to legal persons, which must also be effective, proportionate and dissuasive.

These sanctions consist of fines, obligations to restore the state of the environment within a peremptory term, exclusion from entitlement to public benefits or aid, exclusion from access to public funds, including tender procedures, subsidies and facilities, and disqualification from business activities, the withdrawal of permits and authorisations to carry out the activities that led to the commission of the offence, judicial supervision, judicial winding-up, temporary or permanent closure of industrial plants used to commit the offence, the obligation to set up diligence and compliance schemes to comply with environmental standards, and publication of the conviction.[13]

### 4.3 Directive 2008/99/CE: the procedural aspects and the development of preventive, investigative and procedural tools.

The rules on jurisdiction are contained in Article 12 of the Directive, which provides that Member States must establish their jurisdiction over offences committed pursuant to Articles 3 and 4 of the Proposal, where the offence was committed in whole or in part in the territory of the State, where the offence was committed on board a ship or aircraft flying the flag of the State, where the harmful event occurred in the territory of the State, or where the offender is a national or habitual resident in the State.

Member States will have to inform the Commission when they decide to extend their jurisdiction to offences committed outside their territory, when the offence is committed for the benefit of a legal entity established in the territory of the State, when the person offended by the offence is a national or habitual resident in the State, or when the offence has created a serious risk for the environment in the territory of the State.

When an offence falls under the jurisdiction of more than one Member State, they will have to cooperate to determine in which state the criminal proceedings should take place and, in accordance with Article 12 of Council Framework Decision 2009/948/JHA, the case may, when necessary, be referred to Eurojust.

In cases where the offence has caused harm in the territory of a state, or the offender is a national of that state, jurisdiction may not be subject to the condition that there is a complaint from the state where the offence was materially committed.

[13] Setzger H., *The Harmonisation of Criminal Sanctions in the European Union. A New Approach*, in Eucrim, 2019

Article 13 of the Proposal provides for the adoption of all necessary measures to ensure protection for all persons who denounce the environmental offences provided for in Articles 3 and 4 of Directive 2008/99/EC. Furthermore, the Member States will have to ensure that persons who report such offences or cooperate with the investigative bodies are guaranteed the necessary support and assistance in the proceedings at all times.[14]

In order to prevent such offences, Article 15 requires Member States to take all necessary measures to reduce the commission of environmental crimes through the promotion of ministerial information campaigns, research and education programmes for the population with the aim of raising collective awareness and reducing the risk of the population becoming victims of environmental crimes. The member states must also ensure that the national authorities in charge of investigating environmental crimes have sufficient qualified personnel and financial, technical and technological resources for the proper implementation of this directive. To this end, the utmost importance is attached to the training of judges, prosecutors, police officers and judicial employees.[15]

It is also up to the Member States to set up appropriate mechanisms for coordination and cooperation between the competent authorities involved in preventing and combating environmental crimes, with the aim of ensuring a continuous exchange of information, consultation in individual investigations, exchange of best practices and assistance to European networks working to combat environmental crimes. Coordination mechanisms could take the form of specialised bodies, national law enforcement networks or coordinated training activities. Member States will always have to ensure that the preventive and repressive strategy is reviewed and updated at regular intervals, not exceeding five years, on the basis of a risk assessment, to take into account the development of new threats related to environmental crime. Also with a view to prevention and organisation, Article 21 of the directive provides for the collection of statistics to monitor the effectiveness of each Member State's systems for combating environmental crime. These statistics are to include the number of environmental offences reported and investigated, the average length of investigations relating to environmental offences, the number of convictions for environmental offences, the number of natural and legal persons convicted of environmental offences, the number of prosecutions dismissed in the field, and the types and levels of sanctions imposed for environmental offences. These statistics are to be transmitted annually to the Commission by the Member States.

[14] Cannizzaro E.., Il diritto dell'integrazione europea, Giappichelli, 2020, pp.52- 84

[15] Setzger H., *The Harmonisation of Criminal Sanctions in the European Union. A New Approach*, in Eucrim, 2019

### 4.4 The non-uniform implementation of Directive 2008/99/EC: the fragmentation of national environmental criminal law of Member States

On the European legislative side, as in the international arena, the regulatory scenario may be set to change following the recent launch of a process of reform of the existing legislation on environmental crimes. In fact, since 2016, the Union has undertaken a process to review the level of implementation of the Directive, which was recently concluded with the publication in October of the 2020 of the Commission's final report. Just in 2016, the Council had invited the Commission to monitor the effectiveness of EU legislation in the field of combating environmental crime and had identified the implementation of environmental criminal law in the EU as the subject of the eighth round of mutual evaluation. In the same year, the EU Action Plan to combat wildlife trafficking had established the need to review the EU's policy and EU legislative framework on environmental crime, in line with the European agenda on the security, in particular by reviewing the effectiveness of the Environmental Crime Directive, including criminal penalties applicable to wildlife trafficking throughout the EU. 16In 2017, it had been recognized that the need to address the issue of criminal environment, and in particular the issue of illegal export of waste and illegal trafficking of wildlife species, as a priority in the EU's 2018-2021 policy cycle. [17]

In the year following, the Commission had adopted an Action Plan to improve compliance and governance in environmental matters, which included the need to indicate effective strategic approaches to combating environmental crime and to strengthen the supervision of national judicial authorities and supervisory and inspection bodies. Finally, with the opening in 2021 of the so-called "European Green Deal," the Commission pledged to promote action by the EU, its member states and the international community to intensify efforts against environmental crime and to review by 2021 the entire legislation EU waste legislation

The final evaluation document issued by the Commission unveiled a discouraging picture with respect to the achievement of the originally goal of sufficient harmonization of national criminal laws. The implementation of the text has occurred in a rather heterogeneous manner due to the wide margin of discretion with which the states have been able to interpret the vague terms used by the Directive in describing the criminally relevant conduct. Different approaches have been followed, for example, in the reception of the element of unlawfulness.

[16] European Commission, *EU Action Plan gainst Wildlife Trafficking*, 2016 available in http://ec.europa.eu/environment/cites/pdf/wap_en_web.pdf.

[17] Frédéric M.. *The Problem of an International Criminal Law of the Environment*, Columbia Journal of Environmental Law, 2010

Many jurisdictions have used all-encompassing definitions such as "contrary to the rule of law" that allow any update or amendment of national legislation transposing EU environmental protection standards to be brought within the scope of criminal law, complicating the reading of domestic criminal legislation given the considerable fragmentation of legal acts transposing. Only Malta has implemented in a literal way the definition in Article 2 of the Directive by referring directly to the legislation listed in the annex to it. But this choice, while more faithful to the content of the requirements imposed by the text, has produced the opposite effect of too rapid obsolescence of the criminal discipline in relation to changes affecting the extra-criminal regulations referred to.

Equally unsatisfactory results have been achieved on the side of the implementation of the offensive requirements of the fact for which there has been a strong lack of homogeneity in the solutions adopted at the national level. In most cases, the choice has been made to resort to an almost slavish transposition of the notion of "substantial damage," which has ended up entrusting national legislators with the task of defining the actual contours of the offense. In the jurisdictions that have instead preferred to use more precise definitions, there has been more fragmentation and heterogeneity with respect to the way in which event value is understood.[18]

Some states have used the parameter of the economic impact of the harm, quantifying it in monetary terms according to purely civilist. In others, however, the relevant harm has been connoted in terms of duration, reversibility and impact on the environment.

For example, Austrian legislation requires "lasting deterioration of the state of water, soil and air." In contrast, Portuguese legislation establishes qualitative criteria, while Polish case law understands significant damage as irreparable harm affecting vegetation or large numbers of animals. Similarly vague notions are found in our legal system where the event of the crime of pollution is defined as.

significant and measurable impairment and deterioration, while environmental disaster consists of the irreversible alteration of the balance of an ecosystem or the alteration of the balance of an ecosystem, the elimination of which is particularly burdensome.

There are numerous differences between national criminal legislations on the typification of conduct and offenses, and even more numerous are the discrepancies present on the side of the sanctions treatment provided by each national legislation. The fact that the profile of sanctions has remained outside the scope of Directive 2008/99/EC since it was already regulated by the almost coeval Framework Decision on the Protection of the Environment through Criminal Law, has

[18] Vagliasindi G.M., *La direttiva 2008/99/CE e il Trattato di Lisbona: verso un nuovo volto del diritto penale ambientale italiano* in Diritto del commercio internazionale, 2010

allowed member states to proceed in no particular order with respect to the choice of the type and penalties to be applied to offenses against the environment.

The result has been a fragmented picture marked by a strong discontinuity of regimes application (especially with regard to financial penalties), so varied as to make it impossible to comparison between the respective national systems. Increasing the level of fragmentation has also been the extraordinary multiplicity of accessory, administrative and civil penalties provided by each national legislation to complement the criminal response subject to very different disciplines from state to state.

### 4.5 The revision of Directive 2008/99/EC and the introduction of the crime of ecocide.

The European Commission decided to reform European Directive 2008/99 on the protection of the environment through criminal law based not only on the growth of environmental crime outside and inside the European Union, but also because of the Directive's disappointing results to date.

Indeed, during an evaluation of the Directive conducted between 2019 and 2020, the need emerged for a clearer definition of the criminal offenses envisaged and for the inclusion of new criminal offenses, review and addition of new forms of sanctions, as well as for strengthening cooperation between member states and across borders. For this reason, the Commission launched a public consultation aimed at improving this legislation, receiving between February and May 2021 about 500 responses, mainly from private citizens.

It then formulated the proposed revision seen earlier thus activating the European legislative procedure, and the process of the revision is underway these months. In detail, last March 21, the Legal Affairs Committee of the European Parliament voted unanimously to include and make punishable also the crime of ecocide among those expressed in the Directive. [19]

This position was supported by the European Parliament, meeting in plenary session on March 29. In the coming months, therefore, in accordance with the planned process, representatives of the Parliament, the Council and the Commission will meet to discuss it, following the negotiation process known as a trilogue. Trilogues are informal negotiations in which some representatives of Parliament, Council and Commission take part. During these negotiations, the three institutions agree on policy guidelines and draft amendments regarding legislative proposals made by the Commission. What is agreed upon in the trialogues is then presented to the plenaries of the Council and Parliament and forms the subject of debate and, frequently, adoption.

[19] Report on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC (A9-0087/2023) n https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_IT.html

This is a historic stance given that if the Parliament's proposal is accepted, all 27 EU Member States would have to introduce the crime of ecocide within their national legislations.

This does not mean that some countries have not already recognized, on their own, the crime of ecocide, such as Belgium, which has included this crime within its Criminal Code, becoming the first state in the European Union to recognize and introduce this crime into its legal system. The term refers to all illegal actions involving the massive destruction of the environment and nature in the broadest sense, and penalties will range from 10 to 20 years in prison if convicted "for serious and permanent damage on a large scale." So far, in the European Union, only Belgium and France have taken this step, while worldwide there are 11 countries including Georgia, Armenia, Ukraine, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan and Vietnam.

**Conclusions**

At the Nuremberg Trials, the Allied Forces prosecuted the most important Nazi leaders for the atrocities committed during the Holocaust during the Second World War. Nazi hierarchs were charged with the crime of genocide, which, a few years earlier, Winston Churchill had called 'a crime without a name'.

A half-century later, genocide has become one of the crimes prosecutable by the International Criminal Court along with three other crimes: crimes against humanity, war crimes and the crime of aggression committed by one state against another. In addition to these crimes, there is another one being introduced: the devastation of ecosystems and the environment, the Ecocide.

The idea that environmental damage can be curbed by resorting to international laws is not new. However, so far all crimes examined by the International Criminal Court focus on the protection of human beings according to an anthropocentric approach. By contrast, the current definition of ecocide is based on the idea that environmental protection should be understood as an end in itself. Therefore, it should have its own independent basis and be considered as a different kind of crime instead of being slipped into definitions of other crimes.

In order to include the crime of ecocide among the crimes over which the International Criminal Court has jurisdiction, it will be necessary to amend the Rome Statute. This must be proposed by one of the signatory states and subsequently approved by at least two thirds of the others. International criminal law functions as an emergency measure with imperfections. Although countries often amend their national laws to comply with global agreements, in several cases governments merely delete undesirable provisions. Saudi Arabia for example ratified the UN Convention on the Elimination of All Forms of Discrimination against Women in 2001, but refused to accept laws that contradict sharia law. Certain states have not even ratified the Rome Statute, such as China and the United States. Nevertheless, despite these problems, it is undeniable that naming an international crime is the first essential step in establishing the law.

Moreover, the cases brought before the international court provide lasting testimony of violations and remove the illusion of impunity from the perpetrators.

If it is true that defining the crime of ecocide is the first fundamental step to give a juridical basis to all the legal provisions, national and international, that will follow, it is also true that it is necessary to create a solid structure not only from a substantial but also from a procedural point of view.

The question arises, in fact, whether the introduction of the crime of ecocide in the Rome Statute in order to extend the jurisdiction of the International Criminal Court over this crime may be sufficient for the effective and efficient prosecution of criminal conduct.

One of the first problems that emerges is undoubtedly that of the legitimacy of referral to the International Criminal Court. Today, only states that have ratified the Rome Statute, the UN Security Council or the Court's prosecutor can bring complaints to it. Positive views have been expressed on the possibility of expanding the number of parties entitled to bring complaints to the Court by also giving individuals or non-governmental claimants the possibility to submit a complaint. In this regard, even with the limitations seen, some scholars have argued that every individual should have the right to appeal to the Court, since this is an assault on the fundamental rights of every human being on the planet.

And it is at this point that the integrative proposal of the Centre for Criminal Justice and Human Rights at UCC University College Cork, according to which certain changes are necessary to ensure an effective sanctioning response, comes into play. International courts are qualified as general jurisdictions, aimed at exercising a punitive power originally belonging to states, which they transfer to the courts on the basis of an agreement; on the other hand, these international courts lend themselves to being used as instruments of inter-state justice in analysing the functional relationship between the International Criminal Court and the United Nations, particularly when it comes to the mechanisms that enable the Security Council to activate the Court, but also to suspend its activity, we must consider the central role that the United Nations, and more specifically the Security Council, play in promoting respect for international humanitarian law and consequently in repressing the most serious violations of it, as well as other individual crimes of international importance.

It is precisely in relation to the acknowledgement of the primary function of the Security Council, in the context of international peace and security, that states wished to attribute to the Security Council a dual power vis-à-vis the Court, a power of impulse and a power of obstruction. The powers entrusted by the Statute to the Council (impetus and obstruction) should not be overestimated or lead one to believe that in reality the Court is left to the Council's initiative, as both states and the Prosecutor acting *motu proprio* can activate the Court's jurisdictional mechanism.

It will therefore be essential to limit the UN Security Council's power to renew the suspension of investigations or prosecutions. Another proposal is to introduce aggravated ecocide and to assign preferential evidentiary force to the reports of the main UN environmental authorities, in particular the Intergovernmental Panel on Climate Change (IPCC),

Other interesting changes resulting from the Centre for Criminal Justice and Human Rights' proposal are the modification of the evidentiary standard at the preliminary examination and investigation stages, the related presumption of 'seriousness' and satisfaction of the 'interests of justice' and, finally, the exclusion of the abbreviated guilty plea procedure.

On the European level, on the other hand, the picture is undoubtedly more defined since, as we have seen, the European Parliament has given a significant signal on the recognition of this crime by starting the process of the revision of Directive 2008/99/EC. On 21 March, the Legal Affairs Committee of the European Parliament had voted unanimously to include and make punishable ecocide. This position was endorsed by the European Parliament, which met in plenary session on 29 March. This means that in the coming months, representatives of the Parliament, the Council and the Commission will meet to discuss this issue, following a negotiation process. This is an historic stance because if the Parliament's proposal is accepted, all 27 EU member states would have to introduce the crime of ecocide into their national legislation.

The statement 'There are no simple solutions to complex problems' may well fit the situation under examination. Fighting environmental crimes and the effects of the climate crisis requires the implementation of every means at the disposal of states and international law. To tackle these issues, it will be necessary to adopt appropriate coordination and cooperation mechanisms between the competent authorities involved in preventing and combating environmental crimes, with the aim of ensuring a continuous exchange of information, consultation in individual investigations, exchange of best practices and assistance to European networks working to combat environmental crimes. It will also be crucial to take all necessary measures to reduce the commission of environmental crimes through the promotion of ministerial information campaigns, research and education programmes for the population with the aim of raising collective awareness and reducing the risk of people becoming victims of environmental crimes. The Member States must also ensure that the national authorities in charge of investigating environmental crimes have sufficient qualified personnel and sufficient financial, technical and technological resources for the proper implementation of this directive. It will also be crucial to build a continuous intertwining of law, jurisprudence, and science, in which scientific knowledge takes the role of an indispensable tool for the extrinsicisation of the individual.

Regarding, in particular, the legal remedies, the relationship between international environmental law and international criminal law it’s worth to highlight how the use of both of these branches of law is crucial to address complex challenges such as transnational environmental crimes that require solutions which combine the requirements of criminal law such as precision and predictability with environmental law that involves balancing different interests and principles.

To delineate internationally punishable activities, criminal law in fact requires precise definitions, while international environmental law involves balancing and compromise, with few prohibitions expressed in a rigid and peremptory manner.

The international criminal law will play a key role in the protection of the ecosystem, but it’s crucial to remind that criminal law should be used as the last option when all other means are insufficient. "Only necessary punishment is appropriate. Punishment is a tool to achieve a goal. The idea of an objective requires, however, the adaptation of the means to the aim and the maximum parsimony in its application'. These famous words of Franz von Liszt, an expert criminalist and philosopher of law, although dating back in time, resonate today even in the field of environmental protection, which calls for a reconsideration of criminal intervention based on the extreme ratio.

The legal notion of the environment is changeable, as it is strongly affected by the context and the evolution of cultural, social and political sensitivity regarding its protection. In addition, it should be noted that environmental matters have strong links with economic and political needs, which inevitably induce new, and perhaps more appropriate, legal solutions. It is therefore necessary, in order to effectively protect the ecosystem, to recur not only to punitive measures but to sanctioning measures inspired by a logic of reparation, especially with reference to legal persons.

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