

International Criminal Law and Environmental Protection: Towards Recognition of Ecocide Before the International Criminal Court

القانون الدولي الجنائي وحماية البيئة: نحو الاعتراف بالإبادة البيئية أمام المحكمة الجنائية الدولية

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Abstract:

The development of new offenses that harm the environment, triggered by the use of pesticides during the Vietnam War, paved the way for the emergence of the concept of ecocide, considered by its serious and massive nature as an international crime. This notion, which appeared in the scientific world, has been transposed into the legal field, through proposals for codification in the statute of the International Criminal Court, but several obstacles hinder this quest as we will discuss in this article. It appears necessary to establish a definition of ecocide and to define which jurisdiction would ensure effective prosecution.

Keywords: Ecocide; Rome Statute; Environmental Damage; International Law Commission; Monsanto Court.

ملخص:

أدى استحداث جرائم جديدة تضر بالبيئة، نتيجة استخدام المبيدات الحشرية خلال حرب فيتنام إلى ظهور مفهوم الإبادة البيئية، الذي يُعتبر نظراً لخطورته ونطاقه الواسع جريمة دولية. وقد تم نقل هذا المفهوم الذي ظهر في الأوساط العلمية إلى المجال القانوني، من خلال مقترحات لتقنيه في النظام الأساسي للمحكمة الجنائية الدولية، إلا أن عدة عقبات تعرقل هذا المسعى كما سنناقش في هذه المقالة، يبدو من الضروري وضع تعريف للإبادة البيئية وتحديد ما هي الجهة القضائية التي من شأنها ضمان معاقبة فعالة. الكلمات المفتاحية: الإبادة البيئية؛ نظام روما الأساسي؛ الضرر البيئي؛ لجنة القانون الدولي؛ محكمة مونسانتو.

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Introduction:

The concept of international crime continues to generate doctrinal and jurisprudential debates that lie at the crossroads of international criminal law and international environmental law. While the Rome Statute establishing the International Criminal Court (hereinafter ICC) seems to have defined this crime in Article 5, listing four crimes falling within the Court's jurisdiction, namely: genocide (Article 6 of the Statute), crimes against humanity (Article 7), war crimes (Article 8), and the crime of aggression (Article 8 bis)¹, it is necessary to revisit the numerous debates held within the International Law Commission (hereinafter ILC) in the context of drafting an important document reflected in the Code of Crimes against the Peace and Security of Mankind.

These debates demonstrate that the idea of codifying the crime of ecocide was present from the beginning of the work related to the aforementioned Code, but without success. Other attempts from legal scholarship and actors of international civil society are emerging to include this violation in the category of international crimes, going so far as to propose amending the Rome Statute to extend the Court's material jurisdiction to this crime.

The fundamental argument advanced in these proposals lies in the ecological decay² that could affect the planet, the negative consequences of which will affect all of humanity. Serious harm to the environment has already been committed on several occasions. We can thus cite Operation Ranch Hand in Vietnam, and the events known as the Chernobyl and Fukushima disasters, which revealed the extent of environmental damage, thereby calling for global mobilization.

A complaint was filed with the ICC on July 26, 2020, by a coalition including several unions and organizations against Brazilian President Jair Bolsonaro, the purpose of which is to challenge his handling of the health crisis, deemed disastrous³. This was followed, on January 22, 2021, by the submission of documents to the ICC Prosecutor concerning "crimes against humanity" allegedly suffered by indigenous peoples of the Amazon, the perpetrators of which would be the President and ministers. This process, initiated by NGOs, is the result of the exponential development of violations of what legal scholars term "green criminality"⁴, and constitutes an alert mechanism for the international community to bring it to measure the extent of environmental damage and assume its responsibilities in this regard.

It appears clearly that the establishment of a new international criminal order in environmental matters is more than necessary. Disparate efforts are proving ineffective, and the few repressive laws demonstrate their limitations. The environmental crisis, exacerbated by the absence of international repression, aggravates the damage and calls for the more than urgent introduction of this crime into the sphere of international criminal law, notably by inserting this crime within the *ratione materiae* jurisdiction of the ICC, as was previously the case in the ILC draft.

This seemingly most effective solution is, however contested by several States that advocate for maintaining the ICC's material jurisdiction over the originally foreseen crimes. Other proposals have emerged to bring this offense into the sphere of international crimes, requiring criminalization in a specific text also calling for the creation of a specialized repressive jurisdiction. Ecocide requires specifying several of its aspects, notably how current international criminal law would address it, but also what obstacles this introduction would pose regarding the principles of international criminal justice.

In light of the scale and systematic nature of environmental damage, it seems necessary to consider the need to establish a suitable legal framework to address this offense and ensure its transfer to the legal sphere, thereby guaranteeing its status as an international crime and defining the competent jurisdiction.

The analysis of ecocide will be conducted through the study of various international instruments at the universal and regional levels, those originating from States and civil society, as well as certain domestic laws. A review of existing case law on the subject will also be undertaken to support the development of this rapidly evolving concept.

The approach that seems most suitable for carrying out this study is the one that will combine the historical method, tracing the evolution of ecocide and its mutation, the comparison between the different doctrinal and normative approaches as well as the analysis of the different options aimed at criminalizing and ensuring effective repression of this crime.

The study will first focus on the legal basis of ecocide in international law (Section I), in order to subsequently determine the jurisdiction that would ensure the repression of this crime (Section II).

Section I: In Search of the Legal Basis of Ecocide as an International Offense

The emergence of the concept of ecocide in doctrinal, diplomatic, and jurisprudential debates in recent years demonstrates the extent of the damage caused to the ecosystem and the environment, the harmful effects of which continue to spread and harm both humans and nature. However, its appearance dates back several decades (A), and since then, several institutions have developed proposals to codify it concretely (B).

A) The Origins of Ecocide

One of the specificities characterizing several concepts of international environmental law is that they originate from the scientific world, ecocide being an illustrious example of an undisputed introduction into the legal sphere (1), with the growing number of environmental violations constituting a proven support for its integration into international criminal law (2).

1 – From the Scientific World to the Legal Sphere:

The word ecocide is composed of two elements: "eco," whose origin comes from the Greek word "oikos" meaning home, and "cide," referring to murder, in the sense of "killing the home"⁵, which is planet Earth. It refers to serious violations aimed at the irreversible destruction of the environment.

Although the term ecocide may seem recent due to its recurrent use in recent years, it should be noted that its appearance dates back to the early 1970s, linked to a context of war. The holding of the Conference on War and National Responsibility in Washington D.C. was the starting point for the introduction of the term by Arthur W. Galston, a renowned biologist specializing in herbicides at Yale University, who on that occasion advocated for a new international agreement prohibiting ecocide⁶.

This qualification followed the use by the US Army during the Vietnam War of a defoliant called Agent Orange⁷ directed against the country's forests, aiming to destroy vegetation and neutralize the Vietcong armed groups. The effects of this massacre remain visible several decades after the end of the war, as the soil contains a high concentration of Tetrachlorodibenzo-p-dioxin (TCDD), which is absorbed by crops and plants; and which will end up in the food chain.

Studies have shown that the dioxins contained in Agent Orange caused a remarkable increase in miscarriages, birth defects, cancers, and other health problems⁸. Since then, allusions to this concept developed by scientists have multiplied, to land in the legal world in the legal world. We can cite the position taken by Swedish Prime Minister Olof Palme on the occasion of the United Nations Conference on the Human Environment held in 1972, who accused the United States of America of practices of ecocide in Vietnam. These statements by scientists and diplomats have triggered a strong

mobilization that led to the concretization of the concept in a specialized international text relating to a draft convention, which we will develop further.

A draft international convention on the crime of ecocide was initiated in 1973, during a review quest of the 1948 Genocide Convention, originating from an academic text by American jurist Richard Falk⁹, a professor of international law at Princeton University, reacting following the use of Agent Orange during the Vietnam War, evoking in this regard "an Auschwitz for environmental values". This jurist reminds us the colossal work of another no less famous jurist, Raphaël Lemkin, who edited a book on genocide in 1944 entitled "Axis Rule in Occupied Europe", which led, after the Second World War, to the adoption by the United Nations on December 9, 1948, of the Convention on the Prevention and Punishment of the Crime of Genocide.

The Professor observes the urgent need to create a new legislation taking into account the acts committed in Vietnam and anticipating future environmental damage in times of war, and proposed a first definition linking it to genocide, thus developing the idea that this crime can be compared to counter-insurgency warfare that tends towards genocide against the people, as it tends to constitute ecocide regarding the environment. He proposed, in this context, a definition in his draft international convention on the crime of ecocide which rests on a set of acts committed with the intention of disrupting or destroying entirely or partially a human ecosystem¹⁰.

Legal scholars developed a series of studies aimed at deepening this concept and proposed a series of definitions to define it¹¹. English-speaking and Romano-Germanic tradition jurists thus combined their efforts to provide elements of definition, and several of them served as a source of inspiration for the draft convention on ecocide, as we will discuss later.

2 - Intensification of Serious Harm to the Environment and the Need to Establish Ecocide

Several factors argue in favor of establishing an international crime of ecocide and the urgent nature of development of the concept of international crime to take into account acts of environmental destruction that occur repeatedly and on a large scale. These harms are very varied, and we can allude, for example, to climate change, which today constitutes one of the most discussed environmental issues. Serious consequences of global warming are observed worldwide, ranging from the melting glaciers causing rising sea levels to species extinction and the enormous heatwaves across the planet¹², to mention just a few consequences.

This phenomenon calls for common action by different actors and joint efforts, the launching point of which is a legal corpus apparent in the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol, and the no less important 2015 Paris Agreement. While these conventional instruments contain obligations incumbent upon States Parties, they unfortunately lack effective enforcement mechanisms.

The international community is thus called upon to address this normative gap, and the inclusion of ecocide in the category of international offenses would contribute to the fight against climate change on solid foundations¹³. This criminalization should contribute to combating this phenomenon with a greater deterrent effect than the current state, notably with the granting of this competence to an international criminal jurisdiction, whatever its form, as we will clarify in Section 2 of this article. This would make individuals more likely to respect the rules criminalizing harm to the environment.

Thus, the necessity of international criminalization of this violation becomes evident, as it involves the dual safeguarding of the environment, the planet and the present and future human lives. Deforestation of the Amazon also constitutes a significant event with the progressive destruction of this tropical forest's ecosystem; which has led the international community to consider

the appropriate means to curb this danger; the action brought against the Brazilian president accelerating the process of criminalizing this environmental offense.

The rights of indigenous peoples, closely linked to massive environmental harm, must be taken into consideration. In this perspective, Article 29 of the United Nations Declaration on the Rights of Indigenous Peoples¹⁴ grants these groups the right to the preservation and protection of their environment and the productive capacity of their lands, territories, and resources. States have an obligation towards these populations to establish and implement assistance programs without any discrimination.

The Declaration lists other obligations incumbent upon States to mitigate negative environmental impacts, notably by establishing a set of mechanisms ensuring fair and equitable reparation and taking adequate measures aimed at reducing multiple harmful effects of an environmental, economic, social, cultural, or even spiritual nature. Indigenous peoples rely considerably on the raw materials of their environment that safeguard their means of subsistence, and they depend on a clean and healthy environment. Furthermore, these populations rely on the raw materials found in their environment to ensure their subsistence.

Despite the measures and obligations provided for by this declaration, it is given very little consideration upstream, within the framework of actions to prevent damage caused to these communities. This demonstrates the urgency of establishing the crime of ecocide, which would help protect and strengthen their rights.

Water contamination, for its part, constitutes another problem of environmental harm. Huge oil spills like the Deepwater Horizon one on April 20, 2010, pose major problems; the explosion of the oil platform leased by the British oil company BP; to drill in the Gulf of Mexico caused an unprecedented ecological disaster in the United States¹⁵.

Several disasters occurring across the planet, regarding plastic pollution of oceans and water contamination in rural and urban areas, as is the case of rivers in Goa, India, are the reflected image of a real threat to the environment, whether for ocean flora and fauna, or people's livelihoods and health due to the toxins present. The protection of the rights of non-human species could also be a significant argument, as they are part of our planet and have rights to be protected, since large-scale environmental damage harms several animal species, often leading to their extinction. Reference international texts, such as the Convention on Biological Diversity adopted at the Earth Summit in Rio de Janeiro in 1992¹⁶, unfortunately do not guarantee effective protection.

Finally, this criminalization would help achieve the Sustainable Development Goals (SDGs) by repressing massive environmental harm, the results of which will materialize in the preservation of the environment, its resources, and its non-human inhabitants.

B) Attempts to Codify Ecocide.

Multidisciplinary efforts for the elimination of ecocide have provided food for thought for jurists, taking several forms in international law, including a draft special convention and work adopted by UN institutions (1), but several States have also managed to integrate this offense into their criminal legislation (2).

1 – Draft Convention on Ecocide, ILC Work, and Attempts to Amend the ICC Statute: Transnational Crime or Supranational Crime?

Doctrine strongly supports the introduction of ecocide into the international sphere to address the absence of an international legal instrument¹⁷, but a dialectic arises regarding the qualification of

this crime between proponents of its transnational character and its quality as a supranational crime, as we will develop below.

The first attempt, dating from 1973, is a draft International Convention on the Crime of Ecocide initiated by the UN organization, presented during a review process of the 1948 Genocide Convention. This unsuccessful draft, based on the doctrinal foundation of American jurist Richard Falk, aimed to broaden the definition concerning the element of the target of the genocidal acts, as it envisaged introducing, alongside the destruction of specific human groups, the destruction of the environment.

It is necessary to highlight one of the main causes of the failure of this initiative, relating to the controversy over the question of the mental element represented by special intent (*dolus specialis*), which constitutes the second element of this offense alongside the *actus reus*. Doctrine supporting the codification option through the adoption of a specialized convention instead of integrating it into the Rome Statute advances several arguments. The first relates to the genesis of the crimes recognized in the Rome Statute, which were first established in other international instruments before being incorporated into the ICC Statute, excluding from this observation crimes against humanity, which followed a path incomparable to other crimes¹⁸.

In 2015, a team of 16 jurists, under the direction of Laurent Neyret, published two draft international conventions: the first on "écorcimes" and the second on ecocide. The authors of these two drafts distinguish through this classification between "ordinary" and "extraordinary" environmental criminality. This reasoning appears clearly in the terminology of Article 1 of the draft Ecocide Convention, which encompasses environmental offenses that have reached a degree of gravity, perpetrated during ordinary situations as well as during war, and which impact the security of all humanity¹⁹.

This draft Convention is ambitious, as it provides in its Article 4 for the imprescriptibility of the offense and attributes criminal liability to legal entities²⁰, given that it requires any State Party to adopt internal legislative measures to ensure that these entities can be prosecuted criminally in the case of involvement of persons directing the entity, acting individually or as a governing body on its behalf. A range of sanctions is provided against the entities and natural persons to repair damages and compensate victims. Sanctions envisaged with regard to legal persons are both pecuniary and administrative. Those applied to natural persons are more severe, as they involve custodial sentences, without excluding pecuniary penalties. This draft convention innovates institutionally regarding the repressive mechanism, as it provides for the creation of a specialized international jurisdiction, which we will discuss in the second part of this study.

Another initiative comes from the International Law Commission (ILC), the body created by the United Nations General Assembly to create and develop international law norms, to crystallize customary rules in this area²¹, which worked on building the concept of ecocide during the decade preceding the end of the Cold War, in the draft Code of Crimes against the Peace and Security of Mankind. Nevertheless, Article 26 of the draft, providing for the criminalization of serious environmental damage, was ultimately withdrawn, constituting a reversal regarding the incorporation of ecocide alongside crimes constituting an attack against the peace and security of humanity, States having expressed reluctance regarding the introduction of this controversial crime into the list of already well-established crimes in international criminal law.

More recently, civil society and other actors have become involved in the process of establishing ecocide. Environmental activist lawyer Polly Higgins proposes not only amending the Rome Statute establishing the ICC by adding a 5th crime, which is ecocide, but also proposes a

definition containing precise elements²². Extending the scope of crimes covered by the ICC through the introduction of ecocide is not without legal problems, since it involves an eco-centric criminalization in an essentially anthropocentric text²³. Furthermore, in 2012, an international movement advocated for launching a European public opinion action, aiming to introduce this serious environmental offense into Community law²⁴.

Doctrine is also divided on the nature of this international offense. Some authors consider ecocide to be a transnational crime, whose particularity is being a national offense, its prevention and repression governed by international law, most often through treaties, to increase interstate penal cooperation for an offense punished by national laws²⁵. This qualification is supported at the regional level within the European Union, as the 2007 Treaty of Lisbon allows for strengthening a derived Community law text aimed at protecting the environment, by increasing the harmonization potential of the concept of environmental crimes and corresponding penalties, which could materialize in a revision of the 2008 directive on the protection of the environment through criminal law.

Another approach considers it rather a supranational crime, resulting from the criminalization process of public international law; who would be likely to be prosecuted independently of internal law provisions. Thus, alongside crimes against humanity, which implicitly enshrine the principle of human dignity and aim to sanction political violence, the aim would be to establish the crime of ecocide as a guarantee of the principle of planetary security and whose purpose would be to sanction ecological violence²⁶.

Initiatives aimed at establishing ecocide as being the 5th crime are the translation of this movement aimed at elevating this offense to the rank of crimes against international peace and security. Pending the materialization of these various proposals, some States have modified their internal legislation to make room for ecocide, as we will discuss below.

2 - Progressive Establishment in Domestic Law

The process of integrating ecocide into international criminal law is seeing proposals evolving in parallel within the framework of State initiatives; a resolution adopted by the Inter-Parliamentary Union in May 2021 invited national parliaments to work towards consolidating repressive legislation in the prevention and punishment of large-scale negative effects that directly impact the population.

The first State to introduce the crime of ecocide into its domestic legislation was Vietnam. After the end of the war, this country enacted Article 278 of its 1990 Penal Code, which established ecocide among the crimes "against humanity", stating that "the crime of destroying the natural environment or ecocide" consists of "the destruction of the natural environment during times of peace or war for the purpose of destroying the ecological and life conditions of the population"²⁷. This provision was maintained in the new 2015 Vietnamese Penal Code, which even strengthened the list of acts considered as ecocide²⁸.

Georgia followed in 1999, including in its Penal Code an article that incriminates "ecocide" as "the massive destruction of flora or fauna, poisoning the atmosphere or water resources, as well as other acts likely to cause an ecological catastrophe"²⁹. Ukraine also passed a law in 2001, which introduced ecocide as a crime against the environment in Article 441 of its Criminal Code, which provides for sentences of 5 to 10 years of imprisonment for "massive destruction of flora and fauna, poisoning of air or water, or any other act likely to cause an environmental disaster"³⁰.

More recently, new criminal codes, notably that of Kazakhstan in 2014, and that of the Republic of Moldova in 2015, have followed the same approach in their incriminations³¹. France chose a different path in 2021, integrating in its new Penal Code "the crime of ecocide" described as

"the act of committing, in an organized manner, one or more offenses [...] causing serious and lasting environmental damage, and knowingly exposing others to a risk of a serious nature to their health". The main difficulty encountered in this country is that the crime of ecocide is included in a "general reference to the environment", whose special intent is undermined by the cumulative condition of "organized" commission, which is not required in other universal or national texts³².

The European Union has also made a significant contribution to the development of the concept of ecocide, in particular through the 2008/99/EC directive on the protection of the environment through criminal law, which establishes criminalization of a list of acts that constitute a serious threat to the environment, imposing on Member States the obligation to incriminate them³³.

Nevertheless, it is interesting to see how existing ecocide crimes are applied by judges at the national level. To date, global prosecution has not been successful. In 2012, a crime of ecocide was investigated in the Kyrgyz Republic, but the case was closed due to lack of evidence. A few years later, in 2015, a massive palm oil spill in Guatemala caused a sensation as the substance was toxic, and the responsible company was accused of ecocide. Although successfully indicted, no real justice was served as the palm oil industry reopened again³⁴.

Even if the prosecution process remains limited, the principle is nevertheless established, and it will be engaged following internal and external pressures and the growing attention paid to environmental issues. This multitude of viewpoints regarding the criminalization of ecocide in international criminal law is revisited when determining the competent jurisdiction to repress this international offense, as we will demonstrate in the second part.

Section II: Repression of Ecocide and the Multiplication of International Jurisdictions: In Search of an Effective Jurisdiction

The question of the competent jurisdiction to repress the crime of ecocide raises a great debate, involving States, legal scholars, and civil society, thus inscribing itself in the acceleration of the phenomenon of multiplying international jurisdictions, which accentuates the fragmentation of international law. While a large part sees the permanent international criminal jurisdiction as the ideal solution, even if its jurisdiction is limited by several factors (A), other actors propose other jurisdictions based on various arguments (B).

A) The International Criminal Jurisdiction: Opportunity and Limits

The question of environmental harm has for some time already sparked the interest of international jurisdictions. On July 19, 1993, the principal judicial organ of the United Nations announced the constitution of a special chamber for environmental issues, the creation of which responds to the question of the role it could play in the settlement of disputes concerning the environment and sustainable development. Nevertheless, the criminal aspect being outside the jurisdiction of the principal UN court, the crime of ecocide is already foreign to its field of action, even through this special chamber.

The ICC, operational for two decades, constitutes for many States the competent jurisdiction for the purpose of prosecuting the crime of ecocide; its Statute must be amended to recognize this crime (1), whereas the specificity of the crime calls for the creation of a specialized international jurisdiction (2).

1 – Extension of the Jurisdiction of the International Criminal Court

The material jurisdiction of the ICC, which covers the most serious international crimes affecting international peace and security, is called upon to be extended to accommodate ecocide as a new crime in addition to those already defined in Article 5 of the Rome Treaty. Amendments to the Rome Statute are necessary to establish the ICC's material jurisdiction for this crime. Added to this is

the question of providing an article specifying the constituent elements of the crime, particularly the intentional element; and finally, revising the Rome Statute³⁵, a delicate step that requires a two-thirds majority vote of the Assembly of States Parties³⁶.

This idea, supported by several States, however faces limits. In addition to those relating to the required quorum as specified above, it appears clearly from the jurisprudential practice of the Court that the latter shows very little interest in environmental criminality. However, a beginning of a change of direction can be observed. The Office of the Prosecutor has indicated that it "will pay particular attention to crimes provided for in the Rome Statute involving or resulting in, inter alia, ecological devastation, the illegal exploitation of natural resources or the illegal expropriation of land"³⁷, considering an extension of crimes against humanity.

This position follows the referral to the ICC in 2014 of the situation in Cambodia, a country experiencing a series of land expropriations due to agricultural and real estate development projects, causing the destruction of the area's ecosystems. Reference should also be made to the concept of war crimes, which encompasses damage caused to the environment in Article 8(1)(b)(iv) as follows: "Intentionally launching an attack in the knowledge that it will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated", a definition that approximates the definition of ecocide³⁸.

The justification for the ICC's complementary jurisdiction for this environmental criminality is based on the need to face the impunity of acts threatening the public order of universal human society³⁹. This proposal is in line with the proponents of extending the ICC's jurisdiction by adopting a flexible solution⁴⁰.

2 - Creation of an International Criminal Court for the Environment

The specificity of the crime of ecocide calls for entrusting its repression to a specialized international jurisdiction, the International Criminal Court for the Environment, a solution supported by civil society organizations and scholar societies, including End Ecocide in Europe, the International Academy of Environmental Sciences, and the Lelio Basso Foundation⁴¹ before the European Parliament on January 30, 2014, within the framework of the Brussels Charter initiative in favor of creation of a European Criminal Tribunal and an International Criminal Court for the Environment and Health.

The initial idea of this specialized jurisdiction was presented during the proposal to adopt a convention for the repression of the crime of ecocide, modeled on the Convention for the Prevention and Punishment of Genocide, as already specified in Section I of this contribution. The initiators of this solution determine the modalities for creating and operating this specialized jurisdiction by convening an international conference under the auspices of the United Nations.

The UN Secretary-General would then designate a working group composed of States Parties to gather the opinions of other members and draft the provisions of the Statute for the future jurisdiction. While the advantage of this court lies in the establishment of a specialized jurisdiction, the solution risks, however, burdening the landscape of international jurisdictions. Any new jurisdiction requires additional funds, as well as the designation of judges and the allocation of a seat and adequate resources. This seems uncertain in the current international context, leading to the search for other solutions.

B) In Search of Other Competent Jurisdictions:

Actors advocating for the establishment of ecocide suggest several alternatives to the ICC and a specialized Criminal Court for the repression of this criminality, proposing a moral tribunal (1) or seeking potential jurisdiction of regional human rights protection bodies (2).

1- The Contribution of Opinion Tribunals: The Monsanto International Tribunal

International law has seen the use of new forms of jurisdictions qualified as opinion tribunals or moral tribunals. These examine, according to the judicial method, the rules of law applicable to highly problematic events or situations that concern and directly affect individuals or groups of people, as well as society as a whole⁴². They constitute a form of justice administered "by and for" the people. Although non-binding, they serve to challenge States and companies regarding their failures.

These tribunals have multiplied since the first opinion tribunal, the Russell Tribunal, founded in 1966 by philosophers Bertrand Russell and Jean-Paul Sartre to judge the war crimes of the United States in Vietnam⁴³. From the 2000s onwards, a real proliferation of "environmental opinion tribunals" has been observed. The Monsanto Tribunal it constitutes the most recent example led by international civil society.

Created by the Monsanto Tribunal Foundation, whose bylaws were approved on June 4, 2015, it is an alternative and extrajudicial justice mechanism whose objective was to issue an advisory opinion by answering six questions to clarify the legal consequences arising from certain activities of the American firm Monsanto, within the framework of the terms of reference established by the Tribunal's organizing committee. Its genesis lies in the efforts of René Lehnherr, co-founder of the Swiss cooperative Longo Maï, who, alongside the European Civic Forum, began in 2014 to take an interest in the destructive consequences of the company's activities⁴⁴.

The creation of this tribunal, which contributes to the development of international and national law concerning the crime of ecocide, was supported by the presence of jurists, which reflects the desire to involve jurists of international renown, including Françoise Tulkens, former Vice-President of the European Court of Human Rights.

One of the achievements of this moral tribunal is to provide a definition of the crime of ecocide, which constitutes a major contribution to the codification process of this serious offense. The Tribunal concluded that if such a crime of ecocide existed in international law, then Monsanto's activities could fall under this offense.

Several activities could result from the crime of ecocide. These notably include: the production and supply to Colombia of herbicides containing glyphosate as part of its aerial spraying plan for coca crops, leading to negative impacts on the environment and public health; the very large-scale use of dangerous agrochemical products in the agricultural industry; and the production, as well as the marketing and dissemination of genetically modified organisms⁴⁵. While this experience remains purely awareness-raising and serves to translate international civil society action into the sphere of international law, regional jurisdictions can offer a more effective prosecution framework.

2- What Jurisdiction for Regional Courts?

Two regional specialized human rights courts contribute through their case law to sanctioning environmental harm. These are the European Court of Human Rights (ECtHR) and the future African Court of Justice and Human Rights (ACJHR).

The Strasbourg Court, under an increasingly developed jurisprudence, continues to affirm the link between the rights set forth in the Convention and the quality of the environment, thereby extending its *ratione materiae* jurisdiction. To illustrate the role of these two jurisdictions, we could refer to two cases. In the *Lopez Ostra v. Spain* case (1994), the applicant complained about pollution emanating from a leather industry waste treatment plant (gas emissions, pestilential odors, and contaminations) harming the health of nearby residents⁴⁶.

In response to his claims, the Court concluded that the defendant State had failed in its obligation to maintain a balance between the economic well-being of the town and the applicant's effective enjoyment of her right to respect for her home and her private and family life. In the case of *Tătar v. Romania* (2009), a gold mine whose extraction process used sodium cyanide and was located near the applicants' home released approximately 100,000 m³ of treatment water containing cyanides into the ecosystem following an ecological accident in January 2000. The Court affirmed that even if the causal link between the fact (exposure of the applicants' son to sodium cyanide) and the harm (his asthma) could not be established, the State remains bound to apply the precautionary principle.

The future Malabo Court, whose criminal division would play the role of the ICC for Africa, enjoys a broader material jurisdiction than that of the ICC, which includes, according to the provisions of Article 28 A of the Protocol amending the Protocol on the Statute of the ACJHR: illicit trafficking in hazardous waste and illicit exploitation of natural resources, with the major innovation being serious harm to the environment committed by legal persons in Article 46 C of said protocol. The entry into force of this protocol will allow effective repression of acts that would be qualified as ecocide.

Conclusion:

In the era of the International Criminal Court, the International criminal law is called upon to develop to take into account new forms of environmental criminality embodied in the crime of ecocide, which States and other international actors advocate for its codification, through a process that unfolds over time and space.

While establishing an environmental public order⁴⁷ constitutes a priority for the international community, opinions remain divided between, on the one hand, States that, without opposing the codification of this offense, prefer to control its normative and institutional modalities, and, on the other hand, legal scholars and civil society, which are multiplying initiatives both from a normative and institutional perspective.

The journey of the various proposals demonstrates that there is no single answer to this criminality of the millennium, the urgency of which recommends incorporation into a binding text containing its definition and the body responsible for its repression. The common values shared by members of the international community and the inherent rights of nature must constitute the driving forces to allow for comprehensive integration and effective prosecution, with the political will of States needing to go beyond difficulties for the good of humanity.

Citations:

1 In this regard, Article 5 provides: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."

2 Christian TSHIMALA BANUNGANA, "Vers l'intégration de l'écocide dans le Statut de Rome", *Canadian Yearbook of International Law*, 2022, p. 236.

3 In a 65-page document, with 21 annexes, crimes against humanity committed against indigenous peoples of the Amazon are specifically imputed to the Brazilian President and ministers. Based on Article 7 of the ICC Statute, the following acts are targeted: "murder" (Art. 7 § 1-a); "extermination" (Art. 7 § 1-b); "enslavement" (Art. 7 § 1-c); "deportation or forcible transfer of population" (Art. 7 § 1-d); "persecution" (Art. 7 § 1-h). available online at: <https://www.unilim.fr/iirco/2021/06/09/le-procureur-de-la-cour-penale-internationale-saisi-dune-nouvelle-plainte-visant-jair-bolsonaro-et-quatre-de-ses-ministres/>, consulted February 20, 2026.

4 Christian TSHIMALA BANUNGANA, "Vers l'intégration de l'écocide dans le Statut de Rome", *op. cit.*, p. 238.

5 Romaine DE RIVAZ, "La notion d'écocide: définitions et perspectives", Master's thesis in law, University of Geneva, 2022, p. 1, available online at <https://archive-ouverte.unige.ch/unige:166317>, consulted February 20, 2026.

6 Initiative note by representative Van Raan: "Écocide: le crime contre la paix manquant", p. 29, available online at <https://www.partyfortheanimals.com/uploads/Initiative-paper-Dutch-Party-for-the-Animals-Ecocide-The-missing-crime-against-peace-FR.pdf>, consulted March 5, 2026.

7 This name was given to a mixture of herbicides used by the US Army to defoliate forests and clear crops that served as refuge for Vietnamese fighters. See: "Ecocide: The need for a fifth international crime", p. [page number missing], available online at https://www.duo.uio.no/bitstream/handle/10852/95891/1/PILTHESIS_7009.pdf, consulted March 5, 2026.

8 Biologist Galston played an important role in denouncing the harm committed by the US Army during the Vietnam War, openly opposing the exploitation of his doctoral research for purposes harmful to humans and the environment. See: Romaine DE RIVAZ, , *op. cit.*, p. 1.

9 See: Camille MONTAVON, Marie DESAULES, "Regards croisés sur le crime d'écocide: des tentatives de concrétisation du concept, entre société civile et institutions (inter)nationales", *Droit et société* 2022/3 (No. 112), p. 645, available online at file:///C:/Users/PC%20LENOVO/Downloads/DRS1_112_0643.pdf, consulted March 5, 2026.

10 See: Romaine DE RIVAZ, , *op. cit.*, p. 31.

11 For a panorama of doctrinal definitions presented in detail in: Romaine DE RIVAZ, , *op. cit.*, pp. 31-35. We notice that these definitions converge on several elements, including the destruction of the ecosystem, the other side of genocide, or the serious damage resulting from human activities.

12 Climate change constitutes the most serious phenomenon of the 21st century threatening humans and all species living on our planet. Several international bodies are sounding the alarm about the serious risks generated by this phenomenon. Thus, the UN Secretary-General, António GUTERRES, warned that the planet does not have a minute to lose to avoid the worst. See: "Climat: le GIEC publie son dernier guide de survie pour la planète", available online at <https://news.un.org/fr/story/2023/03/1133417>, consulted March 15, 2026.

13 For more details See in: "Ecocide: The need for a fifth international crime", *op. cit.*, p. 10.

14 The declaration adopted by the General Assembly on September 13, 2007, establishes a universal framework of minimum standards to guarantee the survival, dignity, well-being, and rights of the world's indigenous peoples. It addresses both individual and collective rights, cultural rights and identity, and rights to education, health, employment, and language.

15 The explosion caused the death of eleven people, causing a fire and then a large-scale oil spill; the volume of oil spilled is estimated at 4.9 million barrels, or 780,000 m³, approximately the equivalent of three supertankers. The resulting pollution affects the local economy and ecosystem, threatening more than 400 species, including whales, dolphins, manatees, and numerous birds.

16 This convention entered into force on December 29, 1993. It has three main objectives: the conservation of biological diversity, the sustainable use of biological diversity, and the fair and equitable sharing of benefits arising from the use of genetic resources.

17 See For more details see, : Mamoud ZANI, "Pour une justice pénale internationale en matière environnementale: à propos de la répression des atteintes à l'environnement par une juridiction internationale spécialisée", *Cahiers de la recherche sur les droits fondamentaux*, p. 129, available online at <http://journals.openedition.org/crdf/6472>, consulted March 5, 2026.

18 This is the case for genocide recognized in the 1948 Genocide Convention, war crimes in the 1949 Geneva Conventions, and crimes against humanity and the crime of aggression in the Statute of the International Military Tribunal of Nuremberg.

19 A list of acts committed intentionally in the context of widespread or systematic action harming planetary security, including: discharge, emission, or introduction of a quantity of substances or ionizing radiation into the air or atmosphere, soils, waters, or aquatic environments; collection, transport, recovery, or disposal of waste, including monitoring of these operations as well as subsequent maintenance of landfill sites, notably actions carried out as a trader or broker in any activity related to waste management; operation of a plant where a dangerous activity is carried out or dangerous substances or preparations are stored or used; production, processing, handling, use, possession, storage, transport, import, export, or disposal of nuclear materials or other dangerous radioactive substances; killing, destruction, possession, or capture of specimens of protected or unprotected wild fauna and flora species. See Mamoud ZANI, *op. cit.*, p. 129.

20 The article provides that: "any entity having legal personality under applicable law, with the exception of States or public entities exercising public prerogatives and public international organizations."

21 It is the spectacular and shocking ecological catastrophes that will lead to recent international regulation to react to damage exceeding the threshold of normal nuisance. See: Céline NEGRE, "Les atteintes massives à l'environnement", in Alain PELLET and Patrick DAILLIER, *Droit international pénal*, PEDONE, 2000, p. 537.

22 The definition in its English version includes: "the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished." International criminalization of ecocide should, for Higgins, allow prosecuting and punishing heads of state and corporate leaders who "allow themselves to destroy the planet." In a 2011 op-ed on The Guardian website, she does not hesitate to describe certain corporate leaders as tyrants and compare them to Nazis, denouncers of ecocide becoming resisters. Learn more at: <https://www.laculturegenerale.com/ecocide-definition-signification-exemples/>, consulted March 5, 2026. See also: Tifaine PONS, "L'émergence de l'écocide comme catégorie juridique dans la société internationale contemporaine", Tarragona 2020, p. 68, available online at <http://hdl.handle.net/20.500.11797/TFM632>, consulted March 5, 2026.

23 In this perspective, this project underlines the necessity of adding to the preamble of the Rome Statute a rationale explaining the urgency of facing threats facing the environment in the test of destructive and devastating behaviors endangering the survival of biodiversity and the regulation of natural systems. See Christian Tshimala Banungana, "Vers l'intégration de l'écocide dans le Statut de Rome", *op. cit.*, p. 264.

24 See in detail: Camille Montavon, Marie Desaulles, "Regards croisés sur le crime d'écocide", *op. cit.*, p. 645.

25 For more elements, see: Laurent NEYRET, "Pour la reconnaissance du crime d'écocide", *Revue juridique de l'environnement*, 2014/HS01, vol.39, p. 186, available online at <https://www.cairn.info/revue-juridique-de-l-environnement-2014-HS01-page-177.htm>, consulted February 20, 2026.

26 The emergence of a global community sharing certain universal values whose protection implied the direct criminalization of their violations in international law is the foundation for classifying ecocide in the category of supranational crimes. See Laurent NEYRET, "Pour la reconnaissance du crime d'écocide", *op. cit.*, p. 188, and Ankita SHARMA and J.J. MOZIKA, "Transforming the Green

Criminology Discourse: From Environmental Crime to Ecocide," the *Indian Journal of International Law*, Vol.64, January-June 2024, n°s 1 and 2, p 73.

27 See in this sense: Julia THIBORD, "Ecocide: l'occasion manquée", p. 2, available online at https://notreaffaireatous.org/wp-content/uploads/2021/09/Ecocide-_loccasion-manquee.pdf, consulted March 5, 2026.

28 See: "Ecocide: The need for a fifth international crime", *op. cit.*, p. 26, and Tifaine PONS, *op. cit.*, p. 47, and Rachel KILLEAN and Damien SHORT, A critical defence of the crime of ecocide, p 5. Environmental Politics, 2025, available online at <https://doi.org/10.1080/09644016.2025.2492441>, consulted February 20, 2026.

29 This enumeration makes prosecutions more effective, as it allows prosecutors to conduct investigations and judges to prosecute cases related to this criminality. See: "Ecocide: The need for a fifth international crime", *op. cit.*, p. 26.

30 The Belgian context thus shows that the concretizations of the crime of ecocide in domestic and international law are intimately linked. For a detailed analysis: Camille Montavon, Marie DESAULES, *op. cit.*, p. 655, and Céline BIMBENET, "L'écocide en tant que crime de droit international dans le nouveau Code pénal: une nouvelle arme contre les pollueurs?", p. 3, available online at [file:///C:/Users/PC%20LENOVO/Downloads/lecoide-en-tant-que-crime-de-droit-international-dans-le-nouveau-code-penal-une-nouvelle-arme-contre-les-pollueurs%20\(1\).pdf](file:///C:/Users/PC%20LENOVO/Downloads/lecoide-en-tant-que-crime-de-droit-international-dans-le-nouveau-code-penal-une-nouvelle-arme-contre-les-pollueurs%20(1).pdf), consulted February 20, 2026.

31 See: Julia THIBORD, *op. cit.*, p. 2.

32 The first trend includes positive points that support environmental protection but fails due to the difficulties generated for jurisdictions. The second point of view allows providing a benchmark for judges who know and master this protected value but neglects the global aspect that environmental damage may have. See: Anne-Lise Besse, Margaux Dubois, "Réflexions sur l'introduction du crime d'écocide dans le Code Pénal", p. 1, available online at <https://notreaffaireatous.org/wp-content/uploads/2019/05/Le%CC%81cocide-dans-le-CP.pdf>, consulted March 5, 2026.

33 See: Camille MONTAVON, Marie DESAULES, *op. cit.*, p. 660.

34 "Ecocide: The need for a fifth international crime", *op. cit.*, p. 26.

35 See: Mamoud ZANI, *op. cit.*, p. 126.

36 As planned in Article 121, paragraph 3, of the Rome Statute.

37 See Tifaine PONS, *op. cit.*, pp. 64-65.

38 The justification for the ICC's complementary jurisdiction for this environmental criminality is based on the need to face the impunity of acts threatening the public order of universal human society. See: Christian Tshiamala TSHIAMALA BANUNGANA, La judiciarisation des atteintes environnementales : la cour pénale internationale à la rescousse?, p. 208, available online at https://www.sqdi.org/wp-content/uploads/205-243-521_Banungana.pdf, consulted March 5, 2026, and Peter DORAN, Rachel KILLEAN, Mary-Carmen Mc DERMOTT, Karena MC ERLEAN, Lydia MC ERLEAN, Stephanie RODGERS, "Criminalizing 'Ecocide' at the International Criminal Court", *EJNI Briefing Paper*, School of Law, Queen's University Belfast, p. 5, available online at <file:///C:/Users/PC%20LENOVO/Downloads/SSRN-id3827803.pdf>, consulted March 5, 2026.

39 This proposal is in line with those who advocate expanding the ICC's jurisdiction through the adoption of a flexible solution, See: Mamoud Zani, *op. cit.*, p. 126.

40 See: Mamoud Zani, "Pour une justice pénale internationale en matière environnementale", *op. cit.*, p. 130.

41 See: Mamoud Zani *op. cit.*, p. 130.

42 Monsanto International Tribunal, Advisory Opinion, The Hague, April 18, 2017, p. 9, available online at <https://www.actu-environnement.com/media/pdf/news-28835-avis-juridique-tribunal-monsanto.pdf>, consulted March 15, 2026.

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44 Camille MONTAVON, Marie DESAULES, *op. cit.*, p. 648.

45 Monsanto International Tribunal, Advisory Opinion, *op. cit.*, p. 54.

46 See: Mamoud Zani, *op. cit.*, p. 127.

47 This question is at the heart of concerns of this community for over fifty years. See: Camille MONTAVON, Marie DESAULES, , *op. cit.*, p. 660.

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