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What are states' obligations under international law to protect forests under their national jurisdiction, as a response to climate change and for the benefit of present and future generations?

MEMORIAL FILED ON BEHALF OF FRANCE



Team of LA ROCHELLE UNIVERSITY

Faculty of Law, Political Science and Management



MOOT COURT

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*« Peuples vraiment ingrats, qui n'ont su reconnaître
Les dons de nos forêts, peuples vraiment grossiers
De massacrer ainsi nos pères nourriciers ! »*

Pierre de Ronsard, « Contre les bûcherons de la forêt de Gastine »,
Elégies, XXIV¹

*« Forests are the green lungs of our planet, and we must care for
them in the same way we care for our own lungs. We will not meet
our climate targets without protecting the world's forests ».*

First Vice-President Frans Timmermans responsible for sustainable
development, « *Commission steps up EU action to protect the world's forests* »,
European Commission, Brussels, 23 July 2019

¹ Marcou François-Léopold, *Morceaux choisis des classiques français des XVI^e, XVII^e, XVIII^e et XIX^e siècles, à l'usage des classes de troisième, seconde et rhétorique*, 5^e édition, Paris, Garnier frères, 1885, 628 pages, p. 52.

I. STATEMENT OF JURISDICTION - LEGAL TEXTS

According to article 66 of the Statute of the International Court of Justice (ICJ)² :

« 1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such State entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide ».

In accordance with article 66 of the ICJ Statute, France expressed its willingness to submit a written statement and its request was accepted.

II. LEGAL QUESTION

What are states' obligations under international law to protect forests under their national jurisdiction, as a response to climate change and for the benefit of present and future generations?

² Charter of the United Nations, or Charter of San Francisco, and Statute of the International Court of Justice, 26 June 1945, 24 October 1945.

III. DEVELOPMENT

PART I : FRENCH CONTEXT

1. French involvement in international relations

Considering its particular role in the history of international relations, its position in international institutions and its forest heritage, France wishes to present the international obligation to protect forests in the interest of present and future generations from the point of view of a State and more particularly a developed State.

The French Republic is a founding member of the United Nations³. Since the foundation of the United Nations, it has had a permanent seat on the United Nations Security Council. Its role is also central on its continent as a founding member of the Council of Europe (London, 1949) and the European Union (Rome, 1957). The Court of Justice of the European Union ensures that the legislation of the European Union is interpreted and applied in the same way in all the countries of the European Union. Furthermore, the European Union, as an international organization, can make international environmental commitments that are binding for Member States, including France. However, the Union's competence in environmental matters is shared between the European Union as a subject of international law and the Member States. The principle of subsidiarity requires the Union, before any intervention, to check that this adds value to individual actions by States. In the field of climate change, which has a cross-border and global dimension, the competence of the European Union is indisputable. France must therefore respect the commitments made by the European Union in this area.

Moreover, France is a member of the Council of Europe⁴, whose purpose is the defence of fundamental rights and freedoms. France is a party to the Convention for the Protection of Human Rights and Fundamental Freedoms⁵ and hosts on its territory the European Court of Human Rights. The Council of Europe's action is deployed to defend environmental human rights insofar as this Convention represents the most accomplished model of international human rights

³ France being the second ratifying country of the Charter of the United Nations after the United States of America.

⁴ Statute of the Council of Europe or London Treaty of 5 May 1949.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, ratified by France on 3 May 1974.

protection. Through its participation in this organization, France expresses its attachment to the right to life and respect for substantive and procedural rights.

Concerning France's position in the context of the climate emergency and considering that global warming is a direct consequence of global anthropogenic emissions, France, and in particular its Overseas Territories⁶, is a region where global warming is more pronounced, with a 1°C⁷ rise in average atmospheric temperature over a century, which is 0.4 degrees higher than the world average between 1905 and 2000⁸. Scientific data are alarming, with anthropogenic global warming increasing by 0.2°C per decade⁹.

France is therefore one of the most affected countries by climate change: the alteration of French forest ecosystems is significant¹⁰, the accumulation of unfavourable climatic conditions is « unprecedented » in metropolitan France¹¹. Indeed, extreme weather disturbances are increasing in France. For example, Aquitaine suffers from global warming¹², being exposed to numerous storms and also to rising water levels, while it is the largest wooded region in France with 1.8 million hectares of forest¹³.

Droughts and extreme events adversely impact productive and non-productive uses of forests, which means that measures must be taken to manage the consequences on the supply chain and therefore on the functioning of the forestry industry. For example, there is a bark beetle crisis¹⁴: drought provides a favourable environment¹⁵ for insects that are responsible for massive mortality of spruce. In order to interrupt the development of this disease, it was necessary to cut down more than 600,000 m³ of forest in Eastern France as a matter of urgency¹⁶. Drought is also at the origin

⁶ Guadeloupe, French Guiana, Martinique, Mayotte, New Caledonia, Reunion, French Polynesia, Saint Martin, Saint Pierre and Miquelon and the Wallis and Futuna Islands.

⁷ Météo France, Anomalie de la température moyenne annuelle en France entre 1900 et 2014, Graphique, Le réchauffement climatique observé à l'échelle du globe et en France, 2020.

⁸ Intergovernmental Panel on Climate Change, *Climate Change 2007 Assessment Report*, 2007, p. 30.

⁹ Intergovernmental Panel on Climate Change, *Global warming of 1.5°C*, 2018, 616 pages.

¹⁰ Roman-Amat Bernard, *Préparer les forêts françaises au changement climatique*, Rapport à MM. les Ministres de l'Agriculture et de la Pêche, et de l'Ecologie, du Développement et de l'Aménagement Durables, Décembre 2007, 125 pages.

¹¹ Département de la santé des forêts, « La lettre du DSF », n° 55, Ministère de l'agriculture et de l'alimentation, 2020, 18 pages.

¹² Le Treut Hervé (dir.), *Anticiper les changements climatiques en Nouvelle-Aquitaine*, Comité scientifique régional AcclimaTerra, Région Nouvelle-Aquitaine, 2018, 488 pages.

¹³ Comité Scientifique Interdisciplinaire sur la Biodiversité et les Services Ecosystémiques en Nouvelle-Aquitaine, *Biodiversité en territoires forestiers*, Rapport, 51 pages.

¹⁴ Département de la santé des forêts, *Crise scolytes sur épicéas - Bilan fin 2019*, Rapport, January 2020, 6 pages.

¹⁵ J. Lévieux, F. Lieutier, A. Delplanque, « Les scolytes ravageurs de l'épicéa », *Revue forestière française*, vol. 37, n° 5, 1985, INRA, Centre de recherches forestières, 12 pages.

¹⁶ Office national des forêts, *Epidémie de scolytes : les forestiers de l'ONF sur le front*, 2020 ; Jung Sacha, « Crise des scolyte », Fibois Grand Est, Présentation, 24 juin 2019, 9 pages.

of the spread of forest fires¹⁷. According to a report¹⁸, « increase in the average temperature in the territory by 1°C increases the hazard of fire by about 20% over the whole of metropolitan France. In 10 years, nearly 115,000 hectares of forest have been affected by fires in France¹⁹. However, it should be noted that France has much better control of the risk: there were 3,005 starts of fires in 2018 compared to 8,000 in 1997²⁰.

In Europe, floods « may double in frequency » on the continent by 2050²¹. Sea level rise may, in the long term, directly impact the French Atlantic coast and Overseas Territories, so far as to result in the disappearance of certain islands, while these contain important forest ecosystems. Climate change may cause an increase in hurricanes and cyclones, which inevitably lead to the destruction of habitats such as forests²². Climate change manifests itself especially in the eleven Overseas Territories²³. The West Indies archipelago and the Indian Ocean islands (comprising Mayotte and Reunion Island) are respectively high and extreme risk areas linked to climate change. New Caledonia is close to areas of increased cyclonic activity.

At the same time, among developed countries, France is one of the least carbon-intensive countries²⁴. In terms of climate protection, forests play a key role in maintaining essential ecological processes and thus in protecting the general interest of mankind. Forests have ecological, economic, social, cultural, educational and recreational values. They also respond to ecological imperatives; the whole forest-timber sector contributes to the storage and development of carbon sinks: the forest alone can accumulate 20 to 50 times more CO₂ than any other system²⁵. The benefits of forests must also be valued in other perspectives such as the production of wood from a renewable energy source, the protection of soils against erosion, or the water cycle, as well as the

¹⁷ Rigolot Eric, « Impact du changement climatique sur les feux de forêt », *Forêt méditerranéenne*, n° 2, June 2008, pp. 167-176 ; Garbolino Emmanuel, Sanseverino-Godfrin Valérie et Hinojos-Mendoza Guillermo, « Effets probables du réchauffement climatique sur le risque d'incendie de forêt en Corse et application du dispositif juridique de prévention », *European Journal of Geography*, n°812, 2017, pp. 1-34.

¹⁸ Christian Chatry, Michel Le Quentrec, Denis Laurens, Jean-Yves Le Gallou and Jean-Jacques Lafitte, *Changement climatique et extension des zones sensibles aux incendies de forêts*, Rapport de la mission interministérielle, Ministère de l'écologie, de l'énergie, du développement durable et de la mer, July 2010, p. 29.

¹⁹ Office national des forêts, « La défense des forêts contre les incendies », Infographie, 2017.

²⁰ European Forest Fire Information, *Forest Fire in Europe, Middle East and North Africa*, European Commission, Joint Research Centre technical report, 2018, pp. 11, 26-29, 156.

²¹ Brenden Jongman et al, « Increasing stress on disaster-risk finance due to large floods », *Nature Climate Change*, 4/2014, pp. 264-268.

²² Bastien Alex, Alain Coldefy, Hervé Kempf, *Conséquences du dérèglement climatique pour le ministère de la Défense*, Annexe, EPS 2013-55, Institut de Relations Internationales et Stratégiques, 2014, p. 90.

²³ Jean Jouzel et Agnès Michelot, *La justice climatique : enjeux et perspectives pour la France* - Annexe 5, CESE, 2016, p. 97.

²⁴ France's emissions per unit of GDP are among the lowest in the world. Ministère de l'Environnement, de l'Énergie et de la Mer, « Key figures on climate », 2017, 80 pages.

²⁵ World Wide Fund for Nature, « Comprendre l'impact de la forêt sur le climat », Communiqué de presse, 25 septembre 2012.

conservation of natural habitats²⁶ and terrestrial biodiversity²⁷. There is obviously a utilitarian conception of the forest.

However, France wishes to recall that the world's forest area²⁸ has been declining since the 1990s. According to the Food and Agriculture Organization of the United Nations (FAO)²⁹, 13 million hectares of the world's forests disappear every year because of deforestation³⁰. The world's forest area has been declining since the 1990s, from 41.28 billion hectares to 39.9 billion hectares in 2015³¹. The mechanisms causing deforestation, degradation and fragmentation are numerous, and can be direct or indirect. But the most important factors are human-induced. These include the conversion of forests to agricultural land, unsustainable forest management, the introduction of exotic plants and invasive animal species, infrastructure development, urbanisation, oil exploitation, forest fires, pollution and climate change.

2. France's natural forest heritage

Conversely, France was ranked as the 10th country with the highest annual net gain of forest area estimated at 0.7% between 2010 and 2015³², or 113 thousand hectares per year. The rate of afforestation in metropolitan France has increased over the course of a century, rising from 19% to 31% between 1908 and 2018³³.

France's forest heritage also extends to the ultra-marine territories comprised in the ten Overseas Territories, which alone make up 9.3 million hectares of forest. A major forest asset, the Overseas Territories have a forestation rate of 85%³⁴.

France should also be considered on a regional scale. Europe is the continent with the largest forest area in the world. Although France represents only 2% of the European forest area, in 2016 it was the 5th most forested country in Europe, after Russia, Sweden, Finland and

²⁶ Comité français de l'Union internationale pour la conservation de la nature, *La Liste rouge des écosystèmes en France - Les forêts méditerranéennes de France métropolitaine*, 2018, 28 pages.

²⁷ Brahic Élodie et Jean-Philippe Terreaux, *Évaluation économique de la biodiversité. Méthodes et exemples pour les forêts tempérées*, Éditions Quæ, 2009, 200 pages.

²⁸ FAO, « Terms and Definitions », *Global Forest Resources Assessment, 2020*, Rome, 32 pages.

²⁹ FAO, *Seventy Years of FAO's Global Forest Resource Assessment*, Rome, 2018, 67 pages.

³⁰ FAO, *Évaluation des ressources forestières mondiales 2015. Comment les forêts de la planète changent-elles?*, Rome, 2016, p. 33.

³¹ FAO, *Évaluation des ressources forestières mondiales 2015. Comment les forêts de la planète changent-elles?*, Rome, 2016, p. 3.

³² FAO, *Évaluation des ressources forestières mondiales 2015. Comment les forêts de la planète changent-elles?*, Rome, 2016, p. 17.

³³ Institut national de l'information géographique et forestière, *Le memento Inventaire forestier*, IGN, 2019, 19 pages.

³⁴ In 2015, according to the Global Forest Resources Assessment.

Spain. There are still some primary forests in Europe³⁵. The natural reserves of France account for 7,500 hectares of forests of a « natural character »³⁶ that have not been exploited for 50 years in metropolitan France. That being said, these are in fact « sub-natural » forests³⁷ in metropolitan France. Some areas have not been affected by economic activities, such as French Guiana, one of the last forest stands in the world that is not fragmented by human activities, and is made up of 99% of forests³⁸.

The ecological role of the forest is assessed not only in terms of forest area, but also in terms of forest biological diversity. In France, several climatic domains can be identified. In metropolitan France, the forest is said to be *temperate oceanic*, while French forests in the Overseas Territories are said to be *rain forests*. These French tropical forests, which are *very humid*, constitute a real potential, since they contain 37% of the carbon of the world's forests³⁹.

The geographical identity of France, bordered by reliefs, maritime areas and island territories, reveals the plurality and specificity of the forest cover. The particular features of French forests reflect the presence of a very rich, differentiated and even specific biodiversity in the Overseas Territories, which contain a high level of endemic species unique in the world. Examples include the amphibian *Anomaloglossus degranvillei*, the monkey *Chiropotes*, *Cryptonanus*, and so on⁴⁰.

France is aware of the responsibility entailed in the protection of forests in the interest of present and future generations on its territories and intends to participate actively, in accordance with the principle of common but differentiated responsibilities, in the fight against climate change⁴¹. France is keen to help comply with the international obligation to protect forests. Hence, France must protect forests under its jurisdiction.

³⁵ Sabatini F.M, Burrascano S., Keeton W.S. et al, « Where are Europe's last primary forests? », *Diversity and Distributions*, 2018, pp. 1426-1439.

³⁶ Eugénie Cateau, Loïc Duchamp, Joseph Garrigue, Lucas Gleizes, Hervé Tourmier et Nicolas Debaive, « Le patrimoine forestier des réserves naturelles », *Les réserves naturelles de France*, November 2017, p. 5.

³⁷ Réponse du Ministère de la Transition écologique et solidaire, « Préservation des forêts primaires », *JO Sénat*, January 17, 2019, p. 334.

³⁸ Gargominy Olivier et Bocquet Aurélie, *Biodiversité d'Outre-mer*, Collection Outre-Mer, Édition Roger Le Guen, 2011, Comité français de l'Union internationale pour la conservation de la nature, France, 266 pages.

³⁹ Lescuyer Guillaume et Locatelli Bruno, « Rôle et valeur des forêts tropicales dans le changement climatique », *Bois et forêts des tropiques*, 1999, n°260, p. 9.

⁴⁰ Comité français de l'Union internationale pour la conservation de la nature, *La liste rouge des espèces menacées en France - Faune vertebrée de Guyane*, 2017, 36 pages.

⁴¹ France advocates a policy of international protection of forests through the ONF International, a subsidiary of the French National Forestry Office (ONF) created in 1997.

PART II : THE INTERNATIONAL OBLIGATION TO PROTECT FORESTS

1. From general international law to international environmental law

In considering the recognition of an international obligation for the States to protect forests under their national jurisdiction, France wishes to recall, in general international law, the customary principle recognized by international jurisprudence⁴² of the permanent sovereignty of States over their natural resources. This principle allows States to use their resources in accordance with their environmental policy. This principle is articulated with the principle that a State must not interfere with the territories of other States⁴³, or of regions not under national jurisdiction⁴⁴. Indeed, territorial sovereignty implies for States to control and monitor activities in the territories under their jurisdiction in such a way that they do not interfere with territories under other jurisdictions. These first two principles are based on genuine international cooperation between all States with the aim of reducing, or even eliminating, damage to the environment. International environmental law was able to unfold on the basis of these fundamental principles of general international law.

Thus, according to Principle 24 of the 1972 Stockholm Declaration on the Environment, « international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing », and by taking due account of « the sovereignty and interests of all States ». This approach was reaffirmed by Principle 7 of the 1992 Rio Declaration on Environment and Development, which provides that « States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem ». From the perspective of the fight against climate change, the United Nations Framework Convention on Climate Change, in its preamble, recalls this principle of cooperation by stressing that « the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions »⁴⁵.

⁴² ICJ, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports* 2005, p. 168, para. 244.

⁴³ ICJ, *Sovereignty over certain frontier land (Belgium v. Netherlands)*, Judgment, *ICJ Reports* 1959, p. 209; ICJ, *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018, *ICJ Reports* 2018, p. 15.

⁴⁴ *Trail Smelter (USA v. Canada)*, 16 April 1938, 33 AJIL (1939) 182; ICJ, *Corfu Channel Case*, Judgment of 9 April 1949, *ICJ Reports* 1949.

⁴⁵ Common but differentiated responsibilities and respective capabilities and their social and economic conditions, Rio de Janeiro, 3-14 June 1992.

Specific principles of environmental law should be added to these general rules⁴⁶. The principle of prevention, which is essential in environmental law, is regarded as the basis of almost all conventional environmental law, for both ecological and economic reasons. Indeed, repairing the damage caused to the environment by the mismanagement of human activities is generally complicated and, where possible, very costly. It is therefore essential, in order to preserve the environment of which forests are a part, to assess the potential risks of each activity and to monitor the environment on an ongoing basis. In addition, the precautionary principle, recognized in several international conventions, notably in the 1979 Convention on Long-Range Air Pollution⁴⁷, represents a higher level of risk anticipation, with a renewed approach to anticipating damage to ecological functions.

Today, all of these principles represent a real foundation for the development of environmental protection rules, and the various conventional sources of environmental law are based on them to impose an obligation to protect forests, for the purposes of both conserving biodiversity and combating global warming.

2. From the international obligation to protect biological diversity to the international protection of forests

2.1 International commitments related to biological diversity

Since the United Nations Conference on Environment and Development⁴⁸, held in Rio in 1992, the preservation of biological diversity has become one of the main pillars of sustainable development. States parties to the Convention on Biological Diversity⁴⁹, including France, have committed to protecting and restoring biodiversity, which is essential for the protection of the rights of present and future generations. To do this, it is therefore above all necessary to protect the areas that contain it, particularly forest ecosystems that are home to endangered species⁵⁰.

⁴⁶ Kramer Ludwig and Orlando Emanuela, *Principles of Environmental Law*, Volume 6, Elgar Encyclopedia of Environmental Law, Edward Elgar Publishing Ltd, 2017, 768 pages.

⁴⁷ Convention on Long-Range Transboundary Air Pollution, Geneva, 17 November 1979.

⁴⁸ United Nations Conference on Environment and Development (UNCED), held from 3 to 14 June 1992 in Rio, also known as the « Earth Summit ».

⁴⁹ Convention on Biological Diversity, 5 June 1992, adopted during the UNCED, held from 3 to 14 June 1992 in Rio.

⁵⁰ Convention on Biological Diversity, 5 June 1992, Article 8 (k): « Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations ».

Although there are laws regulating activities in natural areas, such as logging, these legal norms primarily concern mainly the interests of the operators, and therefore those of individuals or the interests of present and future populations by preserving forest capital. The components of biological diversity have no legal existence, and their destruction is therefore a priori possible, since at first sight no harm is done directly to humans. The recognition of a legitimate interest for human beings is therefore essential to achieve real protection of biological diversity, and therefore of natural environments, such as forests. But here again the forest is not protected for what it really is, but rather for the different roles it will play, whether for landscapes, resource conservation, or biological diversity.

With the Convention on Biodiversity, the forest is finally considered in its entirety, and plays a particularly important role in achieving the objectives of the Convention. In particular, these include the idea that forest management must be carried out in the interests of both present and future generations, taking into account social, economic and ecological needs. Already, the 1972 Stockholm Declaration⁵¹ had affirmed that man has « a solemn responsibility to protect and improve the environment for present and future generations », and States were subsequently declared responsible for nature conservation at this level. This notion is important since it implies taking well-considered decisions that are viable in the long term.

On the other hand, the International Tropical Timber Agreement⁵², concluded in 1983 and amended in 1994 and 2006, provides a framework for effective cooperation between tropical timber producing and consuming countries. In this regard, policies for sustainable development and conservation of tropical forests and their genetic resources are strongly promoted. The importance of the Agreement lies in the fact that about 90% of international trade in tropical timber and more than 80% of the world's tropical forests are under the jurisdiction of the States that are parties to it.

Moreover, a work programme for forest biological diversity has been established in 1998, bringing together various principles to guide States towards the conservation and sustainable use of forest resources⁵³. Subsequently, the 10th Conference of the Parties (COP) of the Convention

⁵¹ Stockholm Declaration on the Environment, 16 June 1972, adopted at the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972.

⁵² International Tropical Timber Agreement, adopted in 1983, amended in 1994 and 2006.

⁵³ *Work programme for forest biological diversity* approved at COP4 of the Convention on Biological Diversity (decision IV/7), which was followed in 2002 by the *Expanded Programme of Work on Forest Biodiversity* adopted at COP6 (decision VI/22).

on Biological Diversity adopted in 2010 in Nagoya (Aichi Province, Japan) the Strategic Plan for Biological Diversity 2011-2020. Among the 20 targets – the so-called « Aichi biodiversity targets » – that it set itself to achieve globally by 2050, two directly concern forest ecosystems: firstly, to halve by 2020, and if possible to reduce to close to zero, « the rate of loss of all habitats, including forests » (target 5); secondly, to ensure that areas under « sustainable forestry » are managed in a way that conserves biodiversity (target 7)⁵⁴.

Previously, the United Nations Conference on Environment and Development (UNCED) produced a declaration of principles⁵⁵ on forests, which highlights the need to use forest resources in accordance with the requirements of biodiversity conservation, notwithstanding the principle of sovereignty of States over their natural resources. Indeed, although the management of these resources is theoretically left to the good will of each State, it is essential, in order to maintain a balance in biodiversity, that this sovereignty should have limits. Thanks to this declaration of principles, a global consensus on the management, conservation and ecologically viable exploitation of forests has emerged. Although non-binding, the declaration is supposed to be authoritative.

In the various COPs to the Convention, the importance of cooperation between States is stressed. In order to act effectively, they must act in solidarity, for the same purpose, and each State is invited to set up national action plans relating to biodiversity. This echoes Agenda 21⁵⁶ which, through chapter 11 on combating deforestation, called on governments to ensure sustainable and balanced forest management, in particular by increasing the ecological, biological, climatic, socio-cultural and economic contributions of forest resources, developing reforestation, promoting wood substitutes, preserving ecosystems and strengthening institutional capacities for rational forest management.

In this context, the adoption of the New York Declaration on Forests on 23 September 2014 at the United Nations Climate Summit should also be highlighted. It includes two commitments aimed at reducing global CO₂ emissions by 20%: on the one hand, to halt the loss of natural forests by halving the rate of their disappearance by 2020, and then to halt their loss by 2030; on the other hand, to promote the rebuilding of degraded forests by restoring 150 million

⁵⁴ COP10, Decision X/2.

⁵⁵ Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, adopted at the Rio Conference in 1992.

⁵⁶ Action Plan for the 21st Century adopted by 182 Heads of State at the Earth Summit in Rio in June 1992.

hectares of degraded forest areas by 2020, and then at least 200 million additional hectares by 2030. More recently, the *United Nations Strategic Plan on Forests 2017-2030*⁵⁷ was framed on the basis of six global goals: (i) halting the loss of forest cover; (ii) enhancing forest-based economic, social and environmental benefits; (iii) significantly increasing the area of protected forests; (iv) mobilizing significantly increased financing; (v) promoting governance frameworks for sustainable forest management; and (vi) enhancing cooperation, coordination, coherence and synergies with respect to forests.

In addition, the 1994 United Nations Convention to Combat Desertification (UNCCD)⁵⁸ is the sole legally binding international agreement linking environment and development to sustainable land management. The Convention seeks to address the consequences of drought and desertification, mitigate the effects of drought, and contribute to sustainable development. Indeed, the causes of deforestation and desertification are very often similar, and forests perform functions that mitigate the effects of drought and prevent desertification by helping to stabilize soils. These two types of efforts are therefore highly interdependent. This Convention aims at the recognition of the economic functions of forests (fuelwood and other forest products), but also their ecological functions, through soil protection, water storage, biodiversity maintenance, and restoration of drylands.

Finally, two other conventions have now become essential for the protection of forests, although they were not necessarily meant to address this issue at the outset. First, more than 900 tree species have been listed in the appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora⁵⁹, many of them at its COP18 in 2019. In 2017, the Tree Species Programme was established under CITES to assist national authorities in managing and regulating trade in listed tropical timber species. In particular, principles have been developed to ensure that their exploitation does not adversely affect their survival. The three main objectives of the programme are: (i) sustainable management of rare species and their products; (ii) contributing to legal, traceable and fair trade in products derived from CITES-listed tree species; and (iii) strengthening forest governance and law enforcement capacity.

⁵⁷ Adopted by the General Assembly in its resolution 71/285 of 27 April 2017.

⁵⁸ United Nations Convention to Combat Desertification, in *Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, Paris, 14 October 1994.

⁵⁹ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, 3 March 1973.

Secondly, the Ramsar Convention⁶⁰ also plays an important role in the protection of wetland forests, especially mangrove forests. The Convention's list of Wetlands of International Importance includes three types of forested wetlands: intertidal forested wetlands, tree-dominated freshwater wetlands, and forested peatlands⁶¹.

Notwithstanding these international conventions, some States still find it difficult to consider forests as ecosystems to be protected rather than as mere resources to be exploited. Despite the absence of binding international legal standards, States or regions are nevertheless encouraged, through such conventions, to take legal protective measures at their level of competence in response to the threats to forest ecosystems. This is particularly the case at the European level.

2.2 Biodiversity-related contributions of European law

At the level of the Council of Europe, the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats⁶² provides that « each Contracting Party shall take steps to promote national policies for the conservation of wild flora, wild fauna and natural habitats » (Article 3). Furthermore, the 2000 Florence Landscape Convention aims to encourage public authorities to adopt policies and measures at local, regional, national and international levels for the protection, management and planning of European landscapes that support forest protection initiatives at national level and in a spirit of international cooperation. The aim is to restore landscape quality through the protection, management and planning of these environments. This Convention supports other legal instruments such as the UNESCO⁶³ Convention and the Bern Convention, as well as international initiatives or programmes such as the World Network of Biosphere Reserves⁶⁴ or the Pan-European Biological and Landscape Diversity Strategy⁶⁵.

At the European Union level, although no Union treaty specifically mentions forests, many European actions have had an impact on the protection of forests in Europe, and therefore in

⁶⁰ Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Ramsar, 2 February 1971.

⁶¹ *An Introduction to the Ramsar Convention on Wetlands*, Ramsar Handbooks, 5th Edition, 2016.

⁶² Bern Convention on the Conservation of European Wildlife and Natural Habitats, adopted on 19 September 1979, entered into force on 1st June 1982.

⁶³ Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972.

⁶⁴ The World Network of Biosphere Reserves (MAB Programme) covers internationally designated areas and encourages sustainable development. Its statutory framework was adopted through 28C/Resolution 2.4 of the UNESCO General Conference in November 1995.

⁶⁵ Strategy initiated by the United Nations and the Council of Europe as a follow-up to the Rio Earth Summit and in particular the Convention on Biological Diversity (Sofia, 25 October 1995).

France. Since 2003, the involvement of the European Union has intensified with the implementation of the Forest Law Enforcement, Governance and Trade Action Plan (FLEG) intended to combat illegal logging and associated trade, along with « imported deforestation ». In this respect, the European Union Timber Regulation of 20 October 2010⁶⁶, which entered into force on 3 March 2013, prohibits economic operators from placing on the European market timber that does not come from a sustainably managed forest. This ban seems to be the only measure of real binding value concerning forests today. One of its main objectives is to halt the decline in forest area by 2030. This was complemented in 2006 by the Forest Action Plan (2007-2011), which provides a uniform framework for sustainable forest management and increased efforts to combat deforestation. At the end of this action plan, in 2013, the Union drew up a new strategy for forests and the forestry sector, again with the aim of managing forests more sustainably, but also to strengthen the Union's contribution to promoting such sustainable management at global level. Finally, more recently, at the COP25⁶⁷, the European Commission renewed its objective of protecting and promoting biodiversity in the European Green Deal.

In Europe more broadly, sustainable forest management must comply with six criteria established at the Helsinki Conference in 1993⁶⁸, namely: maintaining production capacity; maintaining good health; satisfying the production function; respecting biodiversity; protecting soil and water; and providing various « amenities » (recreation, landscape quality, etc.).

In conjunction with these various action plans, it is important to emphasize that, since 1992, the Union has created the « Natura 2000 »⁶⁹ network, which is considered to be a fundamental tool of European policy for preserving biodiversity. Indeed, this initiative designates a number of sites as being protected because of the various habitats or species they contain, all of which being representative of Europe's biodiversity. This network involves the protection of certain European forest areas which are considered to be habitats of biodiversity. These areas now account for a large proportion of the habitats included in the Natura 2000 network, and their management is therefore subject to the network's common rules, with a view to better preservation of biological diversity and natural heritage, while taking account of economic, social and cultural requirements and regional specificities. The Court of Justice of the European Union confirmed in

⁶⁶ European Union Timber Regulation, n°995/2010, 20 October 2010.

⁶⁷ Climate Change Conference, Madrid, 2-14 December 2019.

⁶⁸ Ministerial Conference on the Protection of Forests in Europe, Helsinki, 16-17 June 1993.

⁶⁹ Circulaires relatives à la relance de Natura 2000 d'application de la directive 92/43/CEE du 21 mai 1992 concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages, non parues au Journal officiel.

2018 that States that do not respect this obligation of protection are in breach of European legislation⁷⁰. It is regrettable, however, that once again the protection of forests is only being considered with a view to achieving another goal, namely the protection of biodiversity.

Finally, a major change could come with the proposed Legally Binding Agreement on Forests in Europe⁷¹. Since 1990, the ministers responsible for forests in European countries have been meeting in the Ministerial Conference on the Protection of Forests in Europe to make recommendations and decisions on sustainable forest management. In 2011, they initiated the process of negotiating a legally binding agreement on Europe's forests through an Intergovernmental Negotiating Committee. The Committee held various meetings in 2012-2013 and prepared a Draft Agreement, the substance of which was broadly agreed upon, but the operational modalities (in particular secretariat functions) could not be finalized to date. Nevertheless, the Agreement could be finalized and concluded at the next Ministerial Conference, scheduled to take place in October 2020 in Bratislava. According to the negotiated draft, the Agreement aims, *inter alia*, « to conserve, protect, restore and enhance forests, their health, productivity, biodiversity, vitality, resilience to natural threats and risks and their adaptive capacity to adapt to climate change, as well as their role in combating desertification » (Art. 2), each Party being « responsible for the sustainable management of forests within its territory [...], taking into account national conditions and needs, while recognizing common interests and responsibilities relating to forests » (Art. 3). It also requires the adoption of legislative or administrative measures to « adapt forest management practices to climate change », including « to enhance the adaptive capacity of forests and reduce their vulnerability » (Art. 6).

Thus, the European Union continuously puts forward new strategies and action plans to improve and guarantee sustainable forest management. Through cooperation between Member States, it seeks to build up a greener and fairer Europe in order to protect present and future generations.

A real awareness of the need to protect biodiversity through forests has therefore emerged since the United Nations Conference on Environment and Development. Legal instruments have been adopted and international initiatives have been taken to pursue the objectives of the 1992

⁷⁰ CJEU, 17 April 2018, C-441/17, European Commission v. Republic of Poland, concerning the felling of primary forests in Poland.

⁷¹ Initiated during the Ministerial Conference on the Protection of Forests in Europe, June 2011.

Convention on Biological Diversity, and there is real cooperation at both international and European levels. Unfortunately, these instruments merely consider forest protection as a means, not as an end. Therefore, it is very difficult to infer from them a direct obligation to protect all forests, not just those of interest for other purposes such as biodiversity conservation. However, although today the protection of forests appears to be essential for safeguarding biodiversity, this approach is not the only one used. Indeed, the protection of forests is also of real interest in the fight against global warming.

2.3 Forest protection as a challenge in the fight against global warming

The fight against global warming has become a major concern of the international community and of all humanity. Each report issued by the Intergovernmental Panel on Climate Change (IPCC) confirms the seriousness of the situation.

To fight global warming, the protection of forests has become indispensable. Deforestation now accounts for 20% of global greenhouse gas (GHG) emissions. Without forests, which absorb excess CO₂, global warming would be twice as fast⁷². However, forests will have to release the excess CO₂ they have absorbed at some point, and the consequences could be catastrophic. The preservation of forest stands is therefore of paramount importance.

It was in 1992 in Rio, with the United Nations Framework Convention on Climate Change (UNFCCC), that the international community became aware of the climate challenges it must face. This Convention is at the heart of the global policy to combat global warming. States parties undertake to stabilize GHG concentrations in the atmosphere « *at a level that would prevent dangerous anthropogenic interference with the climate system* ». This Convention therefore sets the starting point for the fight against global warming at the international level. It also stresses the importance of protecting the environment for future generations⁷³, referring to the principle of intergenerational equity. The international fight against global warming must therefore be conducted to meet the needs of both present and future generations. This concern stems in particular from the fact that the over-exploitation of natural resources is difficult to compensate, as these resources are too slow or too costly to renew.

⁷² Jérôme Chave, *La forêt : une véritable alliée dans la lutte contre le réchauffement climatique?*, Fondation pour la recherche sur la biodiversité, janvier 2019.

⁷³ Article 3.1: « The Parties should protect the climate system for the benefit of present and future generations of humankind ».

Many other conventions, programmes or methods have derived from the UNFCCC in order to preserve and consolidate what was set up in Rio. The Convention was first implemented through the 1997 Kyoto Protocol (COP3), which reinforces international action against climate change, and sets binding quantified commitments for countries. The committed countries are thus required to reduce emissions of the six main GHGs by at least 5.2% between 2008 and 2012 compared to 1990 levels. States parties⁷⁴ must thus meet their GHG reduction obligations. The Protocol then proposes a « purchase » of emission rights either from developed countries (which have a surplus) or from developing countries that are less constrained by their lower emissions. However, in recent years there has been an upward trend in the GHG emissions of developing countries (BRICS) which could cause them to be constrained in the same way as developed countries.

States will need to promote sustainable forest management, encourage the conservation of forests, enhance their role as GHG sinks and reservoirs, and promote afforestation and reforestation as well as renewable energies. These conventions include a willingness to protect forests from the effects of climate change by exploiting their particular capacities.

Later, in the 2000s, the REDD (Reducing Emissions from Deforestation and Forest Degradation) programme was established. This mechanism is part of the legal framework of the UNFCCC and highlights the role of natural forests in mitigating the effects of climate change⁷⁵. The aim here is to limit deforestation and forest degradation by encouraging developing countries not to carry out excessive cutting. In return, they will be compensated and financially rewarded.

On 18 October 2000, the United Nations Forum on Forests (UNFF) was established as a subsidiary body of ECOSOC⁷⁶ dealing with forest policies and sustainable development issues related to forests. It is mandated to promote sustainable forest management on the basis of Agenda 2030⁷⁷, Agenda 21, the Rio Declaration, the Forest Principles, the Global Objectives on Forests

⁷⁴ Kyoto Protocol, signed on 11 December 1997 by 184 of the 193 UN Member States.

⁷⁵ Dellaud Julien, *Le mécanisme visant la conservation des forêts tropicales de la convention-cadre sur les changements climatiques (REDD+) : illustration de l'adaptativité du droit international*, Thèse Université d'Aix-en-Provence, 2017, 737 pages.

⁷⁶ ECOSOC resolution 2000/35. This Forum took over from the Intergovernmental Panel on Forests (1995-1997) and the Intergovernmental Forum on Forests (1997-2000), both established under the aegis of the Commission on Sustainable Development.

⁷⁷ The 2030 Agenda for Sustainable Development, adopted in 2015 by the 193 Member States of the United Nations. Its target 15.2 calls for promoting sustainable management of all types of forests by 2020, halting deforestation, restoring degraded forests and substantially increasing afforestation and reforestation globally.

and the United Nations Forest Instrument. It prepares technical reports and analytical studies, and promotes dialogue to enhance cooperation and coordination on forest-related issues. It provides a comprehensive and integrated view of forests that encompasses economic, social and environmental aspects. It focuses on cooperation and communication among States.

There has been a real awareness of the climate-related role of forests since the 1992 Framework Convention. The Paris Climate Agreement of 2015 has become the first universal agreement to combat global warming. Indeed, it sets the framework for a transition towards low-carbon economies capable of coping with climate change. Article 4 of this Agreement states the specific objective of achieving carbon neutrality: « *Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, [...] and to undertake rapid reductions thereafter [...] so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of the century* ». This is what is known as « zero net emissions »: reducing our GHG emissions so that they are gradually offset by carbon sinks (forests, oceans, climate restoration and carbon capture and storage techniques).

In accordance with the Treaty on the Functioning of the European Union⁷⁸, the Union also adopts a number of directives to combat global warming, and thus to protect forests. Indeed, Article 191-1 of the Treaty provides that: « Union policy on the environment shall contribute to pursuit of the following objectives: - preserving, protecting and improving the quality of the environment, - protecting human health, - prudent and rational utilization of natural resources, - promoting measures at international level to deal with regional or worldwide environmental problems, in particular combatting climate change ».

The European Union has also established a framework for climate and energy action up to 2030⁷⁹, with strategic targets and objectives for the period 2021-2030. Targets for renewable energy and energy efficiency have been revised upwards in 2018 by the European Council. However, this climate target has been singled out, in particular for its inadequate impact on the fundamental human rights of citizens. The General Court of the European Union has recognized the impacts of climate change as a threat to human rights⁸⁰. Although the term « forest » is not explicitly used in the text of the Treaty, it can be inferred from its spirit, given the role of forests

⁷⁸ Treaty on the Functioning of the European Union (TFEU), 25 March 1957, also known as the Treaty of Rome, one of the two fundamental treaties on the European Union's political institutions, along with the Treaty on European Union.

⁷⁹ Framework for action on climate and energy up to 2030, agreed upon on 23 October 2014 by the European Council.

⁸⁰ Order of the General Court (Second Chamber) of 8 May 2019, Case T-330/18, *Carvalho and others v. Parliament and Council*.

in the fight against global warming and the preservation of natural resources, and the fact that their protection is a means of achieving the objectives set out in the Treaty.

Following the signing of the Paris Agreement, the European Union introduced several changes, including the creation of an Emissions Trading Scheme (ETS), considered to be the largest carbon market in the world. This ETS limits the amount of GHG emissions that can be emitted by a range of economic sectors and companies. The latter, in effect, buy « permits to pollute ». This system can be compared to the REDD mechanism.

With a view to sharing information, the European Forest Institute has created the European Forest Observatory⁸¹. This Observatory makes it possible to monitor and measure changes that could impact forest areas or any other climate change. It enables States, companies or any other body to become aware of the various changes they will be able to undertake in order to contribute to the fight against global warming.

The European Union has therefore, via several directives, set up a policy to protect forest areas in order to deal with deforestation and forest degradation, or even forest overexploitation. In May 2018, a new regulation was approved in order to improve the protection and management of land and forests⁸². With this regulation, greenhouse gas emissions from land use, land-use change and forestry (LULUCF) are now included in the Climate and Energy Framework for 2030.

Currently, the European Council is discussing the « European Green Deal »⁸³, which would set out the way forward to make Europe the first climate-neutral continent by 2050, i.e. without net emissions of greenhouse gases, while stimulating the economy, improving citizens' health and quality of life, preserving nature and leaving no one behind.

However, the fact is that forest policy remains primarily a national competence, and France must meet its international commitment to protect forests under its jurisdiction.

⁸¹ European Forest Observatory (EFO), inaugurated on 9 April 2010 in Nancy, France.

⁸² Regulation (EU) No 2018/841 of the European Parliament and of the Council of 30 May 2018.

⁸³ European Green Deal, presented on 11 December 2019 by the European Commission, COM (2019) 640 final.

PART III : FRANCE AND THE INTERNATIONAL OBLIGATION TO PROTECT FORESTS

1. The eventful history of French forests

Protection of forests under France's responsibility cannot be understood without reference to its historical context. Indeed, it is essential to know and understand the vision that France may have had, in order to understand the one it has now.

The 14th century was marked by a strong political will to undertake reforms in order to protect forests, with first of all the creation in 1318 of the *Maîtrise des eaux et forêts* and the establishment of forestry courts. In 1346⁸⁴, the first French « Forest Code » brought with it the notions of « possibility »⁸⁵ and « sustainable development »⁸⁶.

Throughout our history, forests have been heavily exploited primarily for economic purposes, but also because of the reliance on timber to meet vital needs of the French society. « The era of great land clearing »⁸⁷ (« ère des grands défrichements ») began as early as the 11th century. The Renaissance and Modern Times are dark times for the French forest. Jean-Baptiste Colbert, Minister of Louis XIV, said that France perish for lack of wood (« *La France périra faute de bois* »).

Nevertheless, it was under the reign of Louis XIV and the magisterium of Colbert that important and effective measures were taken. First of all, Colbert set up the « *Grande réformation* ». He promulgated an ordinance in 1669⁸⁸ aimed to guarantee⁸⁹ a supply of wood for the kingdom, in line with the renewal of the forest⁹⁰. These binding measures had excellent results and opened up a new era, with such a concept as the « proper use of forests ».

⁸⁴ Ordonnance de Brunoy, 1346, promulgating the first French « Forest Code » by Philippe VI de Valois (1293-1350) ; De Laurière Eusèbe et Berroyer Claude, *Table chronologique des ordonnances faites par les rois de France de la troisième race, depuis Hugues Capet, jusqu'en 1400*, Imprimerie royale, Paris, 1706, pp. 163 and 276.

⁸⁵ Capacity to produce.

⁸⁶ In a purely economic sense, notion of sustainability.

⁸⁷ Marc Bloch, *Les caractères originaux de l'histoire rurale française*, Les Belles Lettres, tome I, 1931.

⁸⁸ Ordonnance « sur le fait des Eaux et Forêts » of August 1669, Saint-Germain-en-Laye : Conférence de l'ordonnance de Louis XIV du mois d'août 1669 sur le fait des eaux et forêts, avec celles des Rois prédécesseurs de Sa Majesté, les édits, déclarations, coutumes, arrêts, réglemens et autres jugemens, tant anciens que modernes, rendus avant et en interprétation de ladite ordonnance, depuis l'an 1115 jusqu'à présent, contenant les loix forestières de France, enrichies d'explications historiques et curieuses, d'annotations et de décisions importantes, tome 1, Paris, Denis Mouchet, 1725.

⁸⁹ Jousse Daniel, *Commentaire sur l'Ordonnance des Eaux et Forêts, du mois d'août 1669*, Chez Debure père, Paris, 1772, 512 pages.

⁹⁰Note in particular a new forestry legislation, and the Marble Table forest court, the inventory of the royal estate, the overhaul of the control of waters and forests, as well as the establishment of a new forestry code with rules for silvicultural management. These measures are accompanied by the reservation of a quarter of the forests and a 100-year planning of their management.

During the revolutionary period, as early as 1789, the young National Assembly was worried about the vandalism of the mob and gangs against the forests⁹¹. Revolutionary governments hesitated between liberalism, « laissez-faire » or interventionism⁹² in the face of severe forest degradation. The period was marked by contradictory decisions.

In 1790⁹³, the law provided that « the Nation alone, through a new regime and an active and enlightened administration, can take care of the forests, their conservation, improvement and repopulation ». In the end, the Revolution definitively decided in favour of a centralized and hierarchical national administration⁹⁴. The 19th century will mark a turning point in the history of the French forest, after centuries of regression. French forests will experience a real renaissance in the 19th and 20th centuries.

In 1824 the first forestry school was created, and in 1827⁹⁵ a new Forest Code was promulgated. Aiming to regulate logging, like its predecessors, it did not provide for protection; the latter will come later, with the Environment Code. The real reversal of the trend took place from 1850⁹⁶ onwards. At the instigation of Napoleon III⁹⁷, a law of 19 June 1857 provided for the reforestation of the Landes⁹⁸. This continued throughout the Third French Republic⁹⁹. Martine Chalvet¹⁰⁰ asserts that « the surface area of the French forest has doubled since the 19th century », marking the irrepressible repopulation momentum that the forest has taken in metropolitan France for two centuries now. The forest, which has long been subject to the imperatives of economic profitability, is today a heritage to be conserved and developed¹⁰¹.

⁹¹ Decree of 11 December 1789, explanatory memorandum, *Mémorial forestier*, op. cit., volume I, year IX, p. 2.

⁹² Re-establishment of an administration of the same type as that of the Ancien Régime.

⁹³ Law of 2 August 1790, explanatory memorandum, *Mémorial forestier*, op. cit., volume I, year IX, p. 31.

⁹⁴ Law of 15 September 1791: Goujon Louis Joseph Marie Achille, *Mémorial forestier ou Recueil complet des lois, arrêtés et instructions relatifs à l'administration forestière depuis le 14 juillet 1789 jusqu'au 1er vendémiaire an X de la République française*, Paris, 1801-1808, 249 pages.

⁹⁵ Under the reign of Charles X (1757-1836); Decle, *Code forestier*, Paris, 1827.

⁹⁶ The Industrial Revolution will, ironically, be the main factor of this reversal : the industrialization of France, the exploitation of coal in the mines and the rural exodus to the cities, the development of a more productive agriculture, the use of metal in the construction of ships and buildings contributed to the desertification of the countryside, the reduction in the need for wood and, thus, the exploitation of forests.

⁹⁷ Second Empire (1852-1870) ; Napoleon III (1808-1873).

⁹⁸ Today, the Landes forest is one of the largest artificial forests in Europe ; loi du 19 juin 1857 relative à l'assainissement et à la mise en culture des landes de Gascogne ; Cuzacq Pierre, *Des concessions de terrains communaux dans le département des Landes : loi du 19 juin 1857 relative à l'assainissement et à la mise en culture des landes de Gascogne*, Bayonne, Imprimerie E. Lasserre, 1877.

⁹⁹ Third French Republic (1870-1940).

¹⁰⁰ Martine Chalvet, *Une histoire de la forêt*, L'Univers historique, Paris, Seuil, 2011, 368 pages.

¹⁰¹ Corvol-Dessert Andrée (dir.), *Les forêts d'Occident du Moyen-Age à nos jours*, Toulouse, Presses universitaires du Midi, 2004, 298 pages ; Corvol-Dessert Andrée, « Le groupe d'histoire des forêts françaises », *La revue pour l'histoire du CNRS*, 2003.

Nevertheless, with the development of silviculture, new techniques can take into account the forest as a living space and home for biodiversity. For example, irregular wood growth, which is a rising practice in France, is not yet a common trend¹⁰².

2. The management of a national heritage: public and private forests

Presently, private and public forests are clearly distinguished in France. The public forest is known as the « estate forest » and is under the « forest regime ». The private forest belongs to private owners or groups and represents 74% of the French forest area. The protection of forests set up by these private forest owners or groups is therefore essential insofar as it concerns 3/4 of the French forest cover¹⁰³.

In view of this major private property of forest assets in France and the risk of seeing forest owners degrading forests by abusing their right to exploit wood in particular, the French legislator has set up various laws, such as the law of 6 August 1963¹⁰⁴. This law had two objectives. The first is to encourage the profession to improve its structures at the regional and departmental levels and to induce action by forest owners by guiding them in the management of their forest assets. The second is to avoid speculation on abusive cutting that would compromise the future of such assets.

Sustainable management documents have also been put in place for private forest owners, including the Regional Silvicultural Management Plan, the Simple Management Plan, the Code of Good Silvicultural Practices and the Model Management Regulations. These documents provide a guarantee of sustainable management for owners who abide by their recommendations, enabling them to follow the objectives and requirements of forest management that have evolved towards the conservation of biodiversity and the fight against climate change. These documents, which are necessary for the proper management of the forest heritage, are required by State services, particularly when applying for aid, for example. The French State and its legislator are therefore working with forest owners and private groups to ensure that they are really invested in the new ecological and environmental forest-related challenges.

¹⁰² Method that is more favourable to biodiversity, consisting in the optimization of the role of each tree and, thus, in case-by-case cutting, which minimizes the impact of forest exploitation. It is advocated by the association Pro Sylva.

¹⁰³ Institut national de l'information géographique et forestière, *La forêt française. État des lieux et évolutions récentes. Panorama des résultats de l'inventaire forestier*, IGN, 2018, 56 pages.

¹⁰⁴ Loi n° 63-810 du 6 août 1963 pour l'amélioration de la structure de production et de tenure des forêts françaises, JORF du 8 août 1963, p. 7350.

The question of the application of French legislative innovations therefore arises with regard to these private forests. Indeed, if forest protection implemented in France for many years was focused only on State-owned forests, given the low forest cover they comprise, this protection would only be residual.

In this sense, despite being mostly under private ownership, forests are nevertheless part of the national natural heritage and their protection is in the general interest, whether private or public. In France, it is the Forest Code¹⁰⁵ that lays down the rules for the management of our metropolitan forests and certain French overseas forests. A revision of this code¹⁰⁶ in 2016 divided it into three main pillars : provisions common to all woods and forests (Book I); woods and forests of the State, territorial communities and public establishments subject to the forestry regime (Book II); and woods and forests of private individuals (Book III). It is therefore very clear that the Forest Code includes both private and public forests. It establishes the principle according to which « forest policy is the responsibility of the State »¹⁰⁷, thus making the forest regime a status in its own right. The forest then becomes a real heritage to be safeguarded in the same way as a historical monument.

The Forest Code is a special and inventive legislative tool through which our country has developed its law and innovated in providing for the protection of forests to combat climate change, for example. The Code sets out seven guidelines on which the State must ensure the « optimization of carbon storage in woods and forests, in wood and products made from wood », as well as the « maintenance of the biological balance and diversity and the adaptation of forests to climate change »¹⁰⁸. In this respect, we can clearly see that forest protection is at the heart of French environmental policy and, recently, of the fight against climate change insofar as the French legislator has devoted an entire guideline of the Code to the adaptation of our forests to climate change. However, it should be noted that awareness of the effects of climate change and the role that forests play in protecting the climate system is only very recent in France insofar as this new dimension only came into effect in 2014

¹⁰⁵ Forest Code résultant de l'ordonnance n°2012-92 of 26 January 2012.

¹⁰⁶ Law Loi n ° 2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages.

¹⁰⁷ Forest Code, Article L121-1.

¹⁰⁸ *Idem*.

3. Forest protection linked to the fight against climate change : recent advances

It is only since the *Grenelle de l'environnement*¹⁰⁹ that we have really taken climate change and its importance into account. Indeed, in Article 2 of the 2009¹¹⁰ Programming Law relating to the implementation of the *Grenelle de l'environnement*, the fight against climate change is placed on top of the priority list. Thus, the policies carried out by our country have been oriented towards ecological transition and gradually towards the adaptation to and the fight against climate change. However, the various responses provided are still sectoral, with a lack of transversality, even if this is improving. Important developments need to be made, in particular on forestry models, keeping in mind that the trees we plant today will only bear fruit, either ecologically or economically, in two or three generations. It is in this perspective that France must commit itself to protecting forests in order to preserve the rights of future generations in line with the notion of the common heritage of human beings. Actually, our Constitutional Council recently recognized that « the protection of the environment, a common heritage of human beings, is an objective of constitutional value »¹¹¹.

This recognition commits France and its citizens to preserving the environment, and therefore the forests, and prevents any regression that would lead to the destruction of this heritage. The French Environment Code also recognizes the principle of non-regression according to which « *environmental protection, ensured by the legislative and regulatory provisions relating to the environment, can only be subject to constant improvement, taking into account current scientific and technical knowledge* »¹¹² (Art. L110-1 of the Environment Code¹¹³). One may regret, however, that this principle of non-regression has not yet been given constitutional value in the same way as the prevention, precaution or polluter-pays principles set out in the Environmental Charter. Indeed, in 2005, the latter was incorporated into the French Constitution and it is regrettable that a principle such as that of non-regression has not been the subject of the same approach, although it is currently under discussion at the Citizen's Convention on Climate Change. Through this Charter, French citizens have obtained the constitutional right to live in a balanced environment that respects their health. Thus, the individual suffering a prejudice that goes against this new right can sue the instigator of the

¹⁰⁹ Meetings organized in France aimed at making long-term environmental decisions.

¹¹⁰ Loi n ° 2009-967 du 3 août 2009 portant mise en œuvre du Grenelle de l'environnement.

¹¹¹ Decision n°2019-823 QPC of 31 January 2020.

¹¹² Principle declared in conformity with the Constitution in Constitutional Council decision n°2016-737 DC of 4 August 2016.

¹¹³ Mise en œuvre par la loi n ° 2016-1087 du 8 août 2016 sur la biodiversité

environmental damage in court. This innovation protects the environment generally, and consequently French forests. Moreover, knowing that three quarters of French forests are held by private persons, this enables French citizens to effectively protect their property from a polluter or destructor, whether a natural person, legal entity or the State itself. It also allows the State to prosecute those who damage public forests.

This process of constitutionalization of the major environmental principles is more and more marked in France insofar as a reform proposal¹¹⁴ aims to insert in Article 1 of our Constitution a provision whereby France « *should act for the preservation of the environment and biological diversity and against climate change* ». Only time will tell whether this reform in favor of increased environmental protection will see the light of day, but the signal is there: we are part of a process of reinforced protection of the environment, and therefore of forests.

On the other hand, it should be noted that this enhanced protection is only very recent and has followed the growing awareness of today's fundamental climate issues. Until a few years ago, forest protection was particularly focused on protecting the biodiversity it hosts. Indeed, France made commitments in view of the importance of this biodiversity, having participated in the first Earth Summit in Rio, which took it into account for the first time. In fact, in 1994 it ratified the Convention on Biological Diversity, and in 2004 it set up a National Biodiversity Strategy (NBS). The latter was implemented to protect France's natural terrestrial heritage, which is particularly rich, especially in Overseas Territories such as French Guiana and New Caledonia. This significant biological diversity results in particular from our multiple forests, which play a fundamental role in biodiversity maintenance. In short, the international obligation to protect biodiversity has meant protecting our national forests.

In 2004, the NBS¹¹⁵ set up three sectoral action plans concerning forests in particular. These action plans then gave rise in 2011 to twenty objectives set to preserve, restore, strengthen and enhance biodiversity and ensure its sustainable and equitable use. Reading these commitments, it is obvious that France has become aware of the importance of forests in terms of biodiversity, and it is to this extent that it wishes to protect them. Indeed, Objective 11 entitled « *Controlling pressures on biodiversity* » explains that it wishes to « *pay particular attention to more fragile or threatened*

¹¹⁴ Constitutional bill « for a renewal of democratic life », No. 2203, of 29 August 2019.

¹¹⁵ After an initial phase in 2004-2010 based on sectoral action plans, the NBS 2011-2020 aims for greater involvement of stakeholders in all sectors of activity, at all territorial levels, in metropolitan France and Overseas.

ecosystems such as [...] primary forests ». Based on this desire, a commitment was made to halve the rate of impoverishment of all natural habitats, including forests, by 2020, or even to reduce this rate to close to zero. It is therefore very clear that the fight to preserve biodiversity through the protection of forests has led France to take into account the elements of climate change.

Already, in a 2001 law¹¹⁶, France had become aware that the forest policy should « *take into account climate changes and phenomena* »¹¹⁷. The forest has thus been protected by France with the aim of preserving biodiversity above all else. However, taking into account climatic phenomena, particularly those caused by climate change, is a parameter that was already in the French sights in 2001, although it was not the priority objective.

Moreover, and very recently, as part of the UNFCCC COP25 organised in Madrid in December 2019, France has continued its fight against the deterioration of biodiversity by creating a new trust fund dedicated to it. The link between biodiversity and forests is fundamentally present here, since our country wanted to direct the actions of this new fund towards projects dedicated to the fight against deforestation in Latin America, particularly in the Amazon, and therefore in French Guiana.

In short, the protection of forests is indeed a fundamental commitment of France, even though it has done so, firstly, in an effort to protect biodiversity, and not so much to combat climate change. However, it should be noted that France is gradually becoming aware of the importance of this second struggle and of the role of forests in this respect.

Over the last 10 years, climate change has gone from being a simple parameter to be taken into consideration to a real struggle. Indeed, it is the so-called *Grenelle de l'environnement* laws that, as of 2009¹¹⁸, have placed climate change among the most important environmental considerations. In 2014, a new law¹¹⁹ designated mitigation and adaptation to the effects of climate change as a real goal and recognised as being in the general interest the fixing of carbon dioxide by woods and forests, the storage of carbon within them and products made from wood, which thus contribute to the fight against climate change. In short, it recognised the contribution of forests to the fight against climate change as being in the public interest¹²⁰. Indeed, in France, the forest is a real player

¹¹⁶ Loi n°2001-602 of 9 juillet 2001 sur les orientations forestières.

¹¹⁷ Article 1 de la loi n° 2001-602 odu 9 juillet 2001.

¹¹⁸ Loi n° 2009-967 du 3 août sur la mise en oeuvre du *Grenelle de l'environnement*.

¹¹⁹ Loi n° 2014-1170 du 13 Octobre 2014 sur l'avenir de l'agriculture, de l'alimentation et des forêts.

¹²⁰ Article 67 de la loi n° 2014-1170 du 13 octobre 2014 sur l'avenir de l'agriculture, de l'alimentation et des forêts.

in the fight against climate change insofar as it represents a stock of more than 8 billion tonnes of net CO₂ equivalent per year and fixes 80 million tonnes of net CO₂ equivalent per year, i.e. more than 15 million tonnes of the national emissions¹²¹.

Very recently, under the 2019 Energy and Climate Law¹²², Regional Climate, Air and Energy Plans set out 2020 and 2050 guidelines aimed at mitigating and adapting to climate change, preventing or reducing air pollution or mitigating its effects. The issue of forests is addressed: the last article of the law¹²³ recalls the interest of forest ranges and wood for the sequestration of the carbon « which results from them within the framework of a dynamic and sustainable management ». The importance of sustainable forest management, and therefore of forest protection, is then taken into account in a fundamental way to fight against climate change. Since last year, France has therefore relied quite explicitly on sustainable forest management for this fight, which depends on the proper application of the « Forest Action Plan» and the « National Biodiversity Strategy ». Indeed, these aim to mobilize and sustainably renew forest resources, for example. Thus, if they are not properly implemented, the fight against global warming through the protection of forests risks being called into question. At the UNFCCC COP21, for example, France was keen to highlight civil society initiatives that contribute to the climate solution through a « positive agenda ». Civil society and particularly private foresters are participating in the fight against climate change by setting up carbon projects in the field, for example.

In short, if the commitments made by France at COP21 or in the NBS are not properly fulfilled, current and recent projects to combat climate change will not be able to be carried out. It is particularly in view of this that France has relied on scientific bases to adapt its forests and fight climate change through them. Indeed, the National Forest and Timber Plan 2016-2026¹²⁴ recalled the importance of networking between area managers and researchers because it allows the enrichment of the database on ecosystems and, thus, the improvement of forest area management. Owners who are informed through pooled scientific and empirical analyses will be

¹²¹ According to the report « Chiffre clé du climat - France, Europe, Monde » (Key Climate Figures - France, Europe, World) by the French General Commission for Sustainable Development.

¹²² Loi n° 2019-1147 du 8 novembre 2019 sur l'énergie et le climat.

¹²³ Article 69: « The Government shall submit to Parliament within one year a report on possible enhancement and incentives mechanisms for carbon sequestration by forest ranges and the wood they produce as part of a dynamic and sustainable management. This report takes into account all forest management issues and deals with the specific case of Overseas Territories, particularly Guyanese forests».

¹²⁴ Plan introduit par la loi du futur de l'agriculture, de l'alimentation et des forêts du 13 octobre 2014. Il fixe les orientations de la politique forestière, en forêt publique et privée, en France métropolitaine et à l'étranger, pour une durée de dix ans. Il a été approuvé par le décret n° 2017-155 du 8 février 2017 portant approbation du programme national forestier et forestier.

able to better protect themselves from the risks associated with climate change, and therefore better adapt and protect their forests. The same National Forest and Timber Plan also introduced an obligation to « analyse regional orders relating to forest reproductive material eligible for State aid with regard to the risks linked to climate change ». This analysis is carried out by the National Commission on Forest Genetic Resources, from which forest owners will draw lessons. Through these continuous scientific analyses, France remains as close as possible to real forest needs and is able to combat climate change more effectively.

The National Forest Office also works closely with the research sector, which is essential for adapting forests to tomorrow's climate and preserving carbon stocks. Indeed, who better than scientists can envisage sustainable solutions to the fight against climate change? Actually, climate change is modifying the phenology, the functioning of trees, etc., and the research sector is best placed to offer concrete answers to all this. It is to this extent that France is combating climate change by protecting forests in the most effective way possible: i.e., by relying on scientific data. It was moreover based on such data that it turned out that forests could help implement the low-carbon transition.

Climate change is indeed caused by human-caused greenhouse gas (GHG) emissions linked to our consumption patterns. In order to combat these emissions and thus climate change, the UNFCCC COP21 developed in 2015 new national strategies for a so-called « low-carbon » transition. The aim of this transition is to reduce our use of exhaustible natural resources and fossil fuels, which will inevitably lead to greater market demand for timber. In short, to combat climate change, France as a State party to the Paris Climate Agreement must protect its forests so that they become sustainable and are able to benefit from the low-carbon transition. In order to meet the increasing demand for timber without damaging the forest, a National Forest and Timber Plan has been put in place by France for the period 2016-2026. Within this Plan, the increase in wood removals is planned along with the appropriate renewal of resources and sustainable forest management.

In short, through this low-carbon transition imposed by international conventions, France is meeting its international commitments by protecting its forests in order to adapt them to climate change while combating it by using the energy resource that is wood. Several objectives are therefore planned by France within this Plan, such as strengthening the climate change mitigation effect of forests and wood by boosting the absorption and sequestration of carbon dioxide by

stands and soils, through the choice of adapted and differentiated species and silviculture types. France is therefore protecting its forests and counting on them to achieve its GHG emission reduction targets.

This low-carbon transition implies a real energy transition, which France has framed in a law of 17 August 2015¹²⁵. This law provides for a « Regional Biomass Plan which defines, in coherence with the Regional Forest and Timber Plan and the energy and climate objectives set by the European Union, objectives for the development of biomass energy ». According to the law, this Plan aims to ensure that « *the right regional balance is achieved and that the different uses of wood are properly coordinated in order to optimise the use of the resource in the fight against climate change* ». In short, we can see that France protects its forests and relies on them in its fight against global warming while taking care not to degrade them.

PART IV- FRANCE'S COMMITMENT TO CLIMATE JUSTICE FOR FUTURE GENERATIONS

1. Alarming findings on compliance with French climate commitments

In terms of reducing climate change, the French State had a duty to develop, from the end of the 20th century, a national and international approach to mitigate climate change by virtue of its accession to the United Nations Convention on Climate Change. France has not implemented the specific measures that it had itself identified as necessary to achieve its objectives. The State's culpable failure is therefore characterized with regard to its binding and specific commitments and objectives in the fight against climate change. The French State acknowledges and admits, on the one hand, that it will not be able to achieve its future short and medium term objectives for the 2030 or 2050 deadlines and, on the other hand, that it has not met its annual objectives, which are just as much obligations of result, even though they have been identified as indispensable for the ecological and solidarity transition. Such is the case of the « Law on Energy Transition for Green Growth »¹²⁶, adopted by the French parliament in 2015, which provides for a 40% reduction in greenhouse gases in France by 2030 compared to 1990. France's greenhouse gas emissions in 2016 were 15.3% lower than in 1990; however, they were 1.3% higher than in 2015.

¹²⁵ Loi n°2015-992 du 17 octobre 2015 sur la transition énergétique pour une croissance verte.

¹²⁶ Loi n°2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte.

The State's failure to meet its obligations to combat climate change has led to an increase in the average temperature of approximately 1.4°C in metropolitan France since 1900¹²⁷. Consequently, French citizens, because of this delay in meeting these commitments, are already suffering the consequences of global warming and are exposed to the risk of serious harm to the environment and human health.

The responsibility of States and companies in the area of climate change is growing rapidly in France and throughout the world since the Urgenda Case, accompanied by an increase in the number of climate legal actions. This is also linked to the publication of the 2018 IPCC Report as well, which scientifically highlights the results of climate change. The use of science in these cases is essential.

In this way, the District Court of The Hague condemned the Dutch State in the Urgenda Case of 25 June 2015¹²⁸. The Court found that the State had failed to meet its commitments to reduce greenhouse gas emissions on the basis of the State's duty of vigilance in climate matters. This historic decision demonstrates that recourse to justice is an effective tool in the hands of citizens and non-governmental organizations to address the failure of governments to take part in the climate challenge. Urgenda, a Dutch research institute, invoked Articles 2 and 8 of the 1950 European Convention on Human Rights, which grant the right to life and the right to respect for private and family life respectively, according to which the government must not only protect the lives of its citizens, but also their homes and family life, which could be threatened by the unequal effects of climate change. In its decision, the Court reaffirmed the precautionary principle in environmental matters and also affirmed a « duty of care », which is based on the idea of the moral responsibility of the government towards its present and future citizens. That judgment specified that the capacity of forests to absorb carbon dioxide decreases as a result of deforestation, which was confirmed in 2018¹²⁹ by The Hague Court of Appeal.

The Urgenda case is a bold move in asserting that states can be held liable for failure to meet their environmental obligations. Climate justice may have an international scope, by establishing that an internationally wrongful act creates an obligation of reparation attributable to

¹²⁷ Météo France, « Le climat futur à l'échelle du globe ».

¹²⁸ Urgenda case, Rechtbank Den Haag, C/09/456689 / HA ZA 13-1396, 24 June 2015.

¹²⁹ Tabau Anne-Sophie, « Nouvelles perspectives pour la justice climatique. Cour du District de La Haye, 24 juin 2015, Fondation Urgenda contre Pays-Bas. », *Revue juridique de l'environnement*, 4/2015, p. 672-693.

the State concerned¹³⁰. The obligation of « due diligence », originally conceptualized in the field of international neutrality¹³¹, may be considered in an environmental perspective; it would then be a matter of taking into account a « precautionary due diligence ». Such an advance would make it possible to impose on States an obligation of means¹³². It is in this direction that The Supreme Court of the Netherlands seems to want raise awareness¹³³.

The International Court of Justice has had the opportunity to resolve environmental disputes in the case of Gabčíkovo-Nagymaros Project¹³⁴. It recognized that the « natural environment » could constitute an “essential interest” of the State, thus fulfilling one of the component elements (the situation must also be that of a “grave and imminent peril”) of the state of necessity which may be invoked by a State in the face of the wrongfulness of an act. Thus justice makes it possible to consider already existing international tools in an environmental perspective: intrinsically, there is no obstacle to an State invoking ecological necessity in the interest of forest protection. It should be added that the « grave » and « imminent » criteria could be reinforced by proving the remaining uncertainties « as to the existence or extent of risks to human health »¹³⁵, adding the various reports referred to throughout this brief that testify to the many damaging risks for present and future generations. The Urgenda case should also remind States that their institutions can themselves take radical measures to protect the environment, and more particularly forests. In France, the Court de cassation has admitted the existence of ecological damage¹³⁶, which was later introduced into the French Civil Code « Anyone responsible for ecological damage is obliged to repair it »¹³⁷. Further still, civil society can very well take initiatives in the same direction, with the protection of forests becoming a common concern.

In France, four associations – Fondation pour la nature et l'homme, Greenpeace France, Notre affaire à tous, and Oxfam France – initiated a lawsuit against France on 17 December 2018¹³⁸. This so-called « Case of the Century » aims to sue the French State for the first time for

¹³⁰ Permanent Court of International Justice, Case concerning the Factory at Chorzów, 13 September 1928.

¹³¹ Tribunal of Arbitration, Alabama claims of the United States of America against Great Britain, Award of 8 May 1871.

¹³² International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro, Judgement of 26 February 2007.

¹³³ Urgenda Case, The Supreme Court of the Netherlands, Number 19/00135, 20 december 2019.

¹³⁴ International Court of Justice, Gabčíkovo-Nagymaros Project, Hungary v. Slovakia, Judgment of 25 September 1997.

¹³⁵ Court of Justice of the European Union, United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities, 5 May 1998.

¹³⁶ Cour de cassation, Troisième chambre civile, Affaire Erika, commune de Mesquer contre société Total France, n°1317, pourvoi n°04-12.315, 17 décembre 2008.

¹³⁷ Articles 1246 et suivants du code civil, introduit par l'article 4 de la loi n°2016-1087 du 8 août 2016 pour la reconquête de la biodiversité, de la nature et des paysages.

¹³⁸ Greenpeace : l'affaire du siècle.

its inaction in the fight against global warming. In particular, these associations intend to carry out a socially just climate revolution and an ecological transition based on solidarity. They put forward the supreme obligation of the State to act for the good of future generations who otherwise would find themselves harmed by the mistakes of the past.

France's disregard of its general obligations to combat climate change has few legal consequences. It must be noted that the French State has not been convicted of any failure either to protect forests or to meet its climate obligations. However, it should not be excluded that inaction by States may lead to civil disobedience.

In a logic of continuity of humanity, it is necessary to develop the capacity and will to live together in solidarity to face climate change. A common agreement on the ambitions of protecting forests on an international scale linked to climate issues would be the best solution to respect the sovereignty of States while facing the climate emergency in the interest of present and future generations. Global warming must engage the cooperation of countries around the world. This is how international claims have arisen around the notion of climate justice. This issue appeared as a central theme at the opening of the UNFCCC COP 21. This has been a strong demand of civil society at the international level since 2003. The Paris Climate Agreement gives little space to the notion of « climate justice » in its preamble, perhaps opening up other perspectives for understanding and combating climate change, but without giving it a precise definition.

Considering the multiple dimensions entailed in forest protection, the challenge it poses for the preservation of the global climate system and thus for present and future generations, the issue of climate justice deserves to be taken into consideration in this presentation. Indeed, France is one of the rare developed countries to have initiated an articulated political project involving the reorganization of all its public policies around a national climate justice project under the impetus of organized civil society, represented in the third French constitutional assembly, the Economic, Social and Environmental Council (ESEC).

2. A French concept of climate justice

Climate justice is a principle recognized in public policies that allows envisioning a development model that is more inclusive and respectful of everyone's rights. To face the inequalities generated by the impact of climate change, the duty of the present generations is to

remedy the loss of confidence in the future that has taken hold in recent years in France, and to relearn how to consume in a way that is more respectful of the interests of future generations.

In order to anticipate the most serious consequences of climate change, particularly in terms of protecting its forests in mainland and overseas, France will have to put in place public policies to reduce its greenhouse gas emissions. If no programme attempts to reduce greenhouse gas emissions, the average global warming trajectory would be between 4 and 5 degrees by 2100¹³⁹. The consequences of such a warming would be significant at the national and international levels and would lead to considerable inequalities between States, individuals or communities, and between present and future generations, considering that the latter will have to suffer the consequences of previous choices. Furthermore, States are obliged to take into consideration nature, which is essential to life on earth, and whose quality will have an impact on future generations.

The French ESEC has constructed a definition of climate justice at national level based on the objectives of combating inequalities, considering that failure to take account of climate change in public policies could increase the risks of social fracture. According to the preamble of its 2016 opinion, it « is not only our behaviour and our model of society that are being questioned, but also our capacity to live together and to face in solidarity changes that will increase and even threaten the balance of our society by risking, if we are not careful, to amplify the social divide »¹⁴⁰. In the second National Climate Change Adaptation Plan (NCCAP 2), the reference to climate justice is explicitly based on the ESEC opinion. Thus, it is stated that « NCCAP 2 measures will take into account the social and economic vulnerabilities of individuals, territories (particularly Overseas Territories) and sectors of activity, inequalities in terms of both exposure and adaptation capacities, while respecting the principle of climate justice »¹⁴¹. Finally, as we have already indicated, the need for a « just transition » is recalled in the opinion given by the High Climate Council in its 2019 report¹⁴².

¹³⁹ Jean Jouzel et Agnès Michelot, “Quelle justice climatique pour la France ?”, *Revue de l’Observatoire français des conjonctures économiques*, n°165, 1/2020, p. 71.

¹⁴⁰ Jean Jouzel and Antoine Bonduelle, Avis du Conseil économique, social et environnemental, « l’adaptation de la France au changement climatique », 2016.

¹⁴¹ NCCAP 2, p. 2, https://www.ecologique-solidaire.gouv.fr/sites/default/files/2018.12.20_PNACC2.pdf.

¹⁴² Annual Report of the High Climate Council, *Acting Consistently with Ambitions*, June 2019, p. 15.

France has particularly favourable conditions for carrying out a climate justice project at the level of a developed country. The territory under French sovereignty is made up of a wide diversity of areas spread geographically in several regions of the world thanks to overseas France. Consequently, its natural heritage is made up of varied terrestrial and marine ecosystems exposed to a wide variety of climatic risks. France is therefore in an interesting position to grasp the challenges of climate justice in all its dimensions. Moreover, it has developed sound social policies and is embarking on an ecological transition that is leading to decisive economic choices for the future. Finally, France benefits from the European Union's action on the international scene and is based on the principles that presided over its creation : democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the United Nations Charter and international law. These principles are in line with climate justice.

In order to reduce inequalities linked to climate change in the long term, France must provide for climate justice on four levels.

3. A multi-level national climate justice project

3.1 Interstate climate justice

According to the Intergovernmental Panel on Climate Change (IPCC), climate justice requires global mitigation, local abatement and national and international actions to limit global warming, for which cooperation is essential, in addition to the changes projected for the coming decades. France, true to its founding values, wishes to commit itself to adopting new rules in order to correct inequalities and eliminate the growing gap between developing and developed countries.

In this respect, France wishes to support a project of climate justice between States in line with the principle of common but differentiated responsibilities that emerged in 1992. It is a question of taking into account the duty and possibilities of each State according to their responsibilities and their means. It is the idea that « the North has consumed more than its share of these goods common to all humanity »¹⁴³, which is why industrialized States have a special responsibility in the process of reducing climate change. Furthermore, globalization has increased

¹⁴³ Jean Jouzel et Agnès Michelot, *La justice climatique : enjeux et perspectives pour la France*, 2016.

interdependence to the point where no single State can meet on its own the growing global challenges in all areas of life in society. The challenge of climate risks has changed global governance. Moreover, Europe recognises its historical responsibility and has already implemented a prevention approach which it imposes on all its citizens through a « due diligence » obligation.

Interstate climate justice is essential in terms of cooperation, of precaution, of information and of prevention at the international level for decision-making. The States of the South feel aggrieved by « the law of the strongest ». In order to alleviate this sense of injustice, collective decision-making seems to be essential for a good ecological transition advocating long-term benefits.

3.2 Climate justice between individuals

There is climate justice to be expected between individuals. According to judge Ann Aiken, « the right to a climate system capable of sustaining human life is essential to a free and orderly society »¹⁴⁴.

According to Article 25-1 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 : « Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control ». Thus, States are responsible for the wellbeing of persons whose situation is aggravated by climate change, a circumstance beyond their control. This approach was renewed in the proposed 2015 Universal Declaration of Humankind Rights drafted by Corinne Lepage¹⁴⁵. It states in its preamble that « Whereas humanity and nature are in danger and that in particular the adverse effects of climate change, accelerated loss of biodiversity, degradation of land and ocean, are all violations of human rights and a vital threat to present and future generations ».

The Environment Charter affirms the right of everyone to live in a healthy and balanced environment. This principle could be useful for the fight against climate change in that it implies

¹⁴⁴ Raphaël Mathevet, *La solidarité écologique. Ce lien qui nous oblige*, 2012.

¹⁴⁵ Lawyer and French politician committed to the protection of the environment.

that the protection of the environment, including forests, must be improved and expressly recognised in French law. In this desire to contribute to better protection of forests, it is worth recalling that France's Forest Code does not protect forests against climate change and would deserve a substantive improvement to adapt to new risks through provisions common to all woods and forests in metropolitan France and Overseas Territories. Indeed, individuals must respect the rights of everyone and it is up to the State to ensure this through the right to a healthy environment, the right to life and the right to health, which are protected by the 2005 Environment Charter.

Global warming increases inequalities between individuals depending on their conditions. The example of indigenous people from overseas France is a good illustration of this notion of inequality, as they are the first to be affected by the loss of their natural heritage, including the forest, essential to their survival. Their role in the protection of forests is crucial, because it is through their ancestral traditions and their true emotional attachment that these populations confer particular importance to the good management of their resources. Therefore, as part of participatory democracy, they should be particularly involved in the management of forests at the local level in order to ensure their livelihoods, and not from a profit-oriented perspective.

3.3 Intergenerational climate justice

Moreover, putting a major focus of climate justice is ensuring a healthy environment for future generations. It is intergenerational justice that was first addressed in the 1972 Stockholm Declaration, which affirmed man's « solemn responsibility to protect and improve the environment for present and future generations » (Principle 1). The economic, social, cultural and environmental rights of present populations must be combined to preserve the viability of future populations. In the same vein, the UNFCCC provides in Article 3.1 : « The Parties should protect the climate system for the benefit of present and future generations of humankind ». This theory of intergenerational equity is found in the doctrine of international law but it needs to be further elaborated at the state level in order to have real repercussions for the future.

Another perspective on the law of future generations emerges through the notion of world heritage. There is no legal instrument on this notion other than the 1972 UNESCO (United Nations Educational, Scientific and Cultural Organization) « World Heritage Convention ». States parties recognise in Article 4 their duty of « ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage » situated

on their territory. The definition of the « natural heritage » given in Article 2 includes, *inter alia*, « natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty ». This Convention has resulted in a programme for forests, known as the « World Heritage Forest Programme »¹⁴⁶. It aims to enhance the consideration of forests by the World Heritage Convention so as to make it an effective instrument for better forest conservation on a global scale. Nevertheless, it seems difficult to go from this to declaring that a forest is a common good for all of humankind. The principle of sovereignty of States over their territory makes the task most complicated¹⁴⁷.

3.4 Justice for nature: the potential for applying the principle of ecological solidarity

It should be noted that climate justice takes on another dimension, that of justice between species, and therefore for nature in order to preserve it. It is in this sense that the Post-2020 Global Biodiversity Framework foresees the achievement of the 2050 Vision of « living in harmony with nature »¹⁴⁸.

It is in this logic that the Colombian High Court declared, on 5 April 2018¹⁴⁹, that Amazonia, as a forest and an entity that is part of the environment and nature, enjoys legal rights and warrants protection under the Constitution. The Court considered that the survival of the populations, but also of the entire « climate system », was at stake, with what the forest renders as « climate services » by allowing natural regulation of the carbon and water cycles. France could consider acknowledging rights for nature based on principles established by other States.

In the meantime, France has recognized a principle : ecological solidarity. It was introduced by the Article 2.6 of Law of 8 August 2016 for the recovery of biodiversity, nature and landscapes¹⁵⁰ and in Article L 110-1, paragraph 6 of the Environment Code that provides : « The principle of ecological solidarity, which calls for taking into account in any public decision-making having a significant impact on the environment of the territories concerned, the interactions of ecosystems,

¹⁴⁶ World Heritage forest sites cover an area of more than 75 million hectares (1.5 times the size of France) and represent more than 13% of the world's protected forests (<https://whc.unesco.org/fr/forets>).

¹⁴⁷ Michel Prieur, « Que faut-il faire pour l'Amazonie ? », *Revue juridique de l'environnement*, 4/2019, pp .665-669 ; Pierre-Marie Dupuy, « Amazonie : le droit international en vigueur apporte des réponses substantielles », *Revue juridique de l'environnement*, 4/2019, pp. 671-675.

¹⁴⁸ The Global Biodiversity Framework for Post-2020: Discussion Paper, CBD/POST2020/PREP/1/1, 25 January 2019.

¹⁴⁹ Colombian High Court : <http://theconversation.com/justice-climatique-en-colombie-une-decision-historique-contre-la-deforestation-95004>.

¹⁵⁰ Principle of ecological solidarity, law n°2019-773 du 24 juillet 2019 portant création de l'Office français de la biodiversité, modifiant les missions des fédérations des chasseurs et renforçant la police de l'environnement.

living beings and natural or developed environments ». This principle, which has potential on the national legal level, could be transposed into international law in order to ensure sound and sustainable environmental law – a transposition that would allow a continuity of humanity for future generations.

Ecological solidarity allows us to consider responsibility for our behaviour towards other living beings linked to the impact of climate change. An idea of respect emerges from the concept of ecological solidarity, suggesting respect not only for other human beings, but also for the biosphere, for nature. Causalities are circular, every action having repercussions elsewhere. Human beings are intimately linked to nature but have disassociated themselves from it in the course of human evolution. It is a matter of reconciling ourselves with this nature that has been « plundered »¹⁵¹. Ecological solidarity requires collaborative work, we must think together for the good of all.

All these principles, such as intergenerational cooperation, the no harm principle, the principle of common but differentiated responsibilities and the precautionary principle, are part of customary international law and are supported by the International Court of Justice rulings in new environmental disputes. Indeed, the 2010 case of the Pulp Mills on the River Uruguay¹⁵² provided a further opportunity for the ICJ to demonstrate its ability to resolve environmental disputes. This judgment presented the sustainable development conundrum squarely, balancing environmental and human health with economic development. The ICJ further recognized environmental impact assessment as its duty under international law. With this decision, the Court reaffirmed the relevance of the fundamental principles of international environmental law.

The United Nations Human Rights Committee has also made a clear connection between the rights to life and to the environment. In paragraphs 26 and 62 of General Comment 36 on article 6 (right to life) of the International Covenant on Civil and Political Rights, the Committee recalled that human beings are part of nature, and that human rights are closely linked to the environment in which we live. Environmental damage impedes the enjoyment of human rights and, conversely, contributes to the protection of the environment and the promotion of

¹⁵¹ F. Osborn, *La planète du pillage*, 2008.

¹⁵² Argentina v. Uruguay, Judgment of 20 April 2010, Pulp Mills on the River Uruguay.

sustainable development¹⁵³. In the 2020 case *Ioane Teitiota v. New Zealand*¹⁵⁴, which involved an application for refugee status based on risks to life posed by climate change, the Committee clarified that refugee claimants are not required to prove that they would face imminent danger if returned to their country. According to the Committee, before taking any expulsion decision, States must take into account the risks related to climate change in the country of origin, given that « the risk of an entire country becoming submerged under water » is such an extreme risk »¹⁵⁵.

Sustainable development based on solidarity could also lead to the consideration of the crime of ecocide. The concept of environmental crime evolved in the twentieth century and has been incorporated into the domestic law of about ten countries¹⁵⁶. France could introduce this crime insofar as a bill tabled in National Assembly on 12 December 2019 defines ecocide as « the act of causing serious and lasting harm to the environment and the living conditions of a population, in execution of a concerted action tending to the destruction or the total or partial degradation of an ecosystem » (Art. 1). The concept of ecocide applied in international law would allow for enhanced protection of forests and biodiversity in general. Indeed, « ecocrimes » engage the responsibility of States and other culprits. However, in criminal law this notion has a reduced scope compared to the concept of ecocide, which should be more intransigent towards those responsible for serious or irreversible damages to the ecosystem. The aim is to give nature a more coercive legal status.

¹⁵³ Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 30 October 2018.

¹⁵⁴ Human Rights Committee, « Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016 », CCPR/C/127/D/2728/2016, 7 January 2020.

¹⁵⁵ *Idem*, para. 9.11.

¹⁵⁶ Laurent Neyret (dir.), *Des écocrimes à l'écocide. Le droit pénal au secours de l'environnement*, 2015.

FINAL SUBMISSIONS ON BEHALF OF FRANCE

- We kindly remind States of their obligation to protect forests under their national jurisdiction not only in the interest of their own citizens or to safeguard their national heritage, but also to respect the general interest of humankind related to forest ecosystems and to preserve associated interests of present and future generations;
- We recommend to apply the principle of non-regression to the obligation to protect forests for the benefit of present and future generations;
- We suggest to take inspiration from the principle of ecological solidarity which leads to support an international obligation to protect forests under national jurisdiction;
- We highly recommend to follow the imperatives of international climate justice, which involves protecting forests for the benefit of present and future generations;
- We suggest considering the creation of a crime of ecocide for serious and irreversible damage caused to the forest ecosystems.

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