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► **To cite this version:**

Sandrine Maljean-Dubois. International Litigation and State Liability for Environmental Damages : Recent Evolutions and Perspectives.. Jiunn-rong Yeh. Climate Change Liability and Beyond, National Taiwan University Press, 2017. halshs-01675506

**HAL Id: halshs-01675506**

**<https://shs.hal.science/halshs-01675506>**

Submitted on 15 Jan 2018

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*International Litigation and State Liability for Environmental Damages:  
Recent evolutions and perspectives*

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What does a State risk when a breach of its international obligations results in damage to the environment?

Considering that international law does not possess the best tools to react to possible infringements by States of the obligations it created is commonly accepted. It is a matter of fact that its means for reaction are less sophisticated and powerful than those available in domestic legal orders or even under European Union law. Additionally, classical tools reveal to be particularly inadequate in the environmental field.

For example, this is the case for the possibility – generally admitted in multilateral treaties – for one State to respond to the violation of a Treaty obligation through another State by suspending, in its turn, totally or partly, the application of the treaty<sup>1</sup>. This type of reaction is hardly conceivable for environmental treaties. The exception to the general rule, concerning humanitarian treaties and stated in Article 60 paragraph 5 of the 1969 Vienna Convention, should apply to environmental conventions. More generally, the threat of countermeasures can be efficient if States do have a mutual interest in the compliance with the treaty. But if the obligations which the latter contains are non-reciprocal and based on a general and superior interest, a “common good”, when “*the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention*” to use the words of the International Court of Justice<sup>2</sup>, the State author of the violation will much less fear any countermeasures. If it does violate the treaty, it is because it will obtain a higher benefit than when complying with it, at least in the short term.

Besides, practice has long been sporadic concerning the possibility to hold a State responsible for the violation of an international obligation to protect the environment, and to bring the potential dispute to courts. States are reluctant to use such mechanisms in the environmental field, judging them “*too heavy, often unpredictable, and of a politically damageable use*”<sup>3</sup>. Such attitude is based on various reasons, which have already been largely exposed elsewhere<sup>4</sup>. They relate notably to an often vague content of the obligations in this area, to the specificity of environmental damages, and to the fact that the disregard of such obligations is more often triggered by a difficulty or even an impossibility encountered with compliance, for technical or financial reasons, rather than by any bad intention of the

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<sup>1</sup> See Article 60 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331; see also Chapter II of the third part of the draft articles of the International Law Commission, adopted in second reading in 2001 and annexed to Resolution 56/83 of the General Assembly (12 December 2001).

<sup>2</sup> See its *Advisory opinion on reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, ICJ Reports, 1951, p. 23.

<sup>3</sup> P.-M. Dupuy, ‘À propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection de l’environnement’, in M. Prieur (ed.), *Les hommes et l’environnement*, En hommage à A. Kiss, M. Prieur ed., Frison Roche, Paris, 1998, p. 275 (our translation).

<sup>4</sup> P.-M. Dupuy, ‘Où en est le droit international de l’environnement à la fin du siècle ?’ (1997) 4RGDIP, 892 and following, ‘À propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection de l’environnement’, *op. cit.*, pp. 269 and following; A. Kiss, ‘La réparation pour atteinte à l’environnement’, in Colloque du Mans de la SFDI, *La responsabilité dans le système international*, (Paris: Pedone, 1991), pp. 226 and following; L. Boisson de Chazournes, ‘La mise en œuvre du droit international dans le domaine de la protection de l’environnement : enjeux et défis’ (1995) 1 RGDIP, pp. 50 and following; Y. Kerbrat, ‘International Law Facing the Challenge of Compensation for Environmental Damage’, in Y. Kerbrat, S. Maljean-Dubois (eds.), *The Transformation of International Environmental Law* (Paris, London : Pedone & Hart Pub., 2011), pp. 213-231.

State. With regard to the common interest pursued by all contracting Parties, it is in fact more coherent to make it possible for the “failing” State to comply with its obligations through technical or financial assistance, than to engage its responsibility. As exposed by P.-M. Dupuy, international responsibility is here, in a general manner, rather “*circumvented*”: upstream, through the development of mechanisms of prevention, of technical and financial assistance, intending to avoid the resort to classical procedures, and downstream, through the provision of assistance instead of sanctions<sup>5</sup>.

These past years however, the field has known important developments, which are not disconnected from the densification of primary obligations<sup>6</sup>, originating in both, customary and treatybased law. These developments could have three dimensions: an extension of the classical responsibility (in the sense of international State liability for a breach of its obligations), the implementation of a *soft responsibility*<sup>7</sup>, and the progress of the international protection of the human right to a healthy environment. Using the words of Gilles Martin concerning recent evolutions of French and European liability law, each of these branches could produce “*effects through irradiation well beyond the perimeter of environmental responsibility and affecting common law*”<sup>8</sup>.

## I. The extension of “classical” responsibility

When breaching its international obligations, a State risks to be held liable for it. It must respond to the grievances of the subject to whom it caused prejudice when violating the latter’s rights. As the Permanent Court of International Justice stated in 1928, “*it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation*”<sup>9</sup>. This obligation is even a very extensive one; the International Court of Justice confirmed this large interpretation again in the 1997 *Gabcikovo-Nagymaros*<sup>10</sup> case about the dam on the Danube river.

For a long time State liability has only rarely been invoked in front of Courts in the environmental field and use was not made more often of peaceful dispute settlement mechanisms either. However, we have been assisting the emergence of a double phenomenon these past years: the development of litigation on the one hand, and the adaptation of “classical” responsibility, which in itself opens new possibilities on the other hand.

### 1. Quantitative development of litigation

International “case law” has remained fairly scarce for a long time in the environmental field. The *Pribiloff Islands fur seals* case<sup>11</sup>, followed by the *Trail Smelter* case<sup>12</sup>, or, for another example, the *Lake Lanoux* case<sup>13</sup> have carved the foundations of international environmental law, especially concerning transboundary pollutions and shared natural resources. Some opportunities, however, were missed. In the *Nuclear Tests* cases I and II<sup>14</sup> or the *Certain Phosphate Lands in Nauru* case<sup>15</sup>, the International Court of Justice did not judge the merits of the case. Requests for advisory opinions on the *Legality of the Threat or*

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<sup>5</sup> P.-M. Dupuy, ‘Où en est le droit international de l’environnement à la fin du siècle ?’, *op. cit.*, p. 895.

<sup>6</sup> Y. Kerbrat, ‘Le droit international face au défi de la réparation des dommages à l’environnement. Rapport général sur le thème de la deuxième demi-journée’, in SFDI, *Le droit international face au défi de la protection de l’environnement* Colloque d’Aix-en-Provence (Paris: Pedone, 2010), p. 125.

<sup>7</sup> We use here the expression of P.-M. Dupuy, ‘À propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection de l’environnement’, *op. cit.*, p. 280.

<sup>8</sup> G. Martin, ‘La responsabilité environnementale’, in O. Boskovic (ed.), *L’efficacité du droit de l’environnement, mise en œuvre et sanctions* (Paris: Dalloz, 2010), p. 19 (our translation).

<sup>9</sup> *Factory of Chorżów*, 13 September 1928, series A, n°17, p. 29.

<sup>10</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, *ICJ Reports*, 1997, p. 3, §150.

<sup>11</sup> Arbitral Award, 15 August 1893, *Moore’s International Arbitration Awards*, 1898, p. 755.

<sup>12</sup> Arbitral Award, 11 March 1941, *Trail Smelter*, United States vs Canada, *R.S.A.*, volume III, pp. 907 and following.

<sup>13</sup> Arbitral Award, 16 November 1957, *R.S.A.*, XII, p. 285.

<sup>14</sup> *Nuclear Tests I (New Zealand v. France)*, Judgment of 20<sup>th</sup> Dec. 1974, *ICJ Reports 1974*, p. 253 and *Nuclear Tests II*, (New Zealand v. France) Order of 22 Sept. 1995, *ICJ Reports*, 1995, p. 288.

<sup>15</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Order of 13 Sept. 1993, *ICJ Reports 1993*, p. 322.

*Use of Nuclear Weapons* raised important questions of international environmental law, but the Court did not consider the latter to be directly relevant<sup>16</sup>.

By contrast, the last fifteen years have known an important development of litigation. In the 1997 case on the dam on the Danube river, for the first time, the environment played a central role in a dispute brought before the International Court of Justice<sup>17</sup>. Even though the decision confirms to a large extent the “minimalist” tendency of the Court in this field<sup>18</sup>, it gave its judges an occasion to state certain fundamental principles of international environmental law, especially the principle of prevention of damages to other States’ environment, the principle of cooperation, as well as the necessity of an evolutionary interpretation of conventional rules<sup>19</sup>. Environment played the same central role in the *Pulp Mills on the River Uruguay* case (Argentina v. Uruguay), in which the Court handed down its decision on April 20<sup>th</sup>, 2010<sup>20</sup>. The cases *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua)<sup>21</sup> and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica) had also a strong environmental dimension<sup>22</sup>. The *Whaling in the Antarctic* (Australia v. Japan) case was as well interesting, but to a lesser extent<sup>23</sup>. A large part of the International Tribunal for the Law of the Sea case law concerns issues related to the protection of the marine environment and marine resources<sup>24</sup>. In the exercise not of its judicial but of its consultative competence, the Tribunal has given an extremely rich and important opinion on the international protection of the marine environment<sup>25</sup>. Also, various cases have given rise to interstate arbitrary decisions in the environmental field<sup>26</sup>.

This quantitative development of case law originates mainly from the above-mentioned densification of States’ primary obligations in the environmental field<sup>27</sup>. The International Court of Justice has also tempted States by establishing a Special Chamber in charge of environmental matters, “in view of the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within

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<sup>16</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996, *ICJ Reports 1996*, p. 226. On this point, see M.-P. Lanfranchi and Th. Christakis (eds.), *La licéité de l’emploi d’armes nucléaires devant la Cour internationale de Justice* (Paris: Economica, 1997), pp. 56 and following.

<sup>17</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, *ICJ Reports 1997*, p. 3.

<sup>18</sup> P. Sands, ‘La Cour internationale de Justice, la Cour de Justice des Communautés Européennes, et la protection de l’environnement’, in M. Prieur (ed.), *Les hommes et l’environnement*, En hommage à A. Kiss (Paris: Frison Roche, 1998), p. 334.

<sup>19</sup> S. Maljean-Dubois, ‘L’arrêt rendu par la Cour internationale de Justice le 25 septembre 1997 en l’affaire relative au projet Gabcikovo-Nagymaros (Hongrie/ Slovaquie)’ (1997) vol. XLIII *Annuaire français de droit international*, 286-332.

<sup>20</sup> S. Maljean-Dubois, Yann Kerbrat, ‘La Cour internationale de Justice face aux enjeux de protection de l’environnement : réflexions critiques sur l’arrêt du 20 avril 2010, Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)’ (2011), t. CXV, *Revue générale de droit international public*, 1, 39-75.

<sup>21</sup> See the order for the indication of provisional measures, 8 March 2011, not yet in the Reports.

<sup>22</sup> Judgment of 16 Decembre 2015, not yet published, <http://www.icj-cij.org/docket/files/152/18848.pdf>, consulted on 8 August 2016.

<sup>23</sup> Judgment of 31 March 2014, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, *Judgment, I.C.J. Reports 2014*, p. 226.

<sup>24</sup> See especially Cases No. 3 and No. 4 *Southern Bluefin Tuna Cases* (New-Zealand v. Japan; Australia v. Japan), Provisional measures; Case No. 7 *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile v. European Union); Case No. 10 *The MOX Plant Case* (Ireland v. United Kingdom), Provisional measures; Case No. 12 *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Provisional Measures.

<sup>25</sup> Case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory opinion, 1<sup>st</sup> Feb. 2011.

<sup>26</sup> See the *Southern Bluefin Tuna* (Australia and New-Zealand v. Japan) arbitration, award on jurisdiction and admissibility; the *Dispute concerning access to information under Article 9 of the OSPAR Convention* (Ireland v. United Kingdom) arbitration, award 2 July 2003; the *Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976* (Netherlands v. France) arbitration, award 12 March 2004; the *Iron Rhine* (Belgium v. Netherlands) arbitration, award 24 May 2005.

<sup>27</sup> Y. Kerbrat, ‘Le droit international face au défi de la réparation des dommages à l’environnement. Rapport général sur le thème de la deuxième demi-journée’, *op. cit.*, p. 125.

*its jurisdiction*”<sup>28</sup>. Fearing a multiplication of specialised courts, especially following the precedent of the creation of the International Tribunal for the Law of the Sea, the ICJ has sent a “strong signal” to States. This chamber has never been used and has not been renewed. Moreover, it has not been renewed. For its part, the ITLOS has also established a Special Chamber, the Chamber for the settlement of disputes related to the Marine Environment. For its part, the Permanent Court of Arbitration has issued in 2001 its *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment*, opening interesting possibilities.

## 2. Adaptations of “classical” responsibility

These adaptations concern both, the cause of action as well as the triggering and implementation of international State liability.

Two inextricable elements constitute the cause of action of State liability: the objective element materialized through the violation of an international rule (the wrongful act), and the subjective element, made of the linkage which relies this wrongful act to its author State (the causal link). The objective element consists thus of the violation of an international rule. However, in certain hypothesis, States can bear responsibility for injurious consequences arising out of acts not prohibited by international law; this phenomenon is commonly called liability without fault, for risk or objective liability. Such regimes are well known in domestic law, but the international sphere remains almost unaffected by them. The works of the International Law Commission have not been conclusive on this point. There is no principle in international customary law on such an objective State liability, including for environmental damages. There is only one Convention that provides for such a regime of objective international liability, namely the Convention on International Liability for Damage Caused by Space Objects<sup>29</sup>. To allow better reparation of environmental damages, around fifteen international conventions have developed regimes of objective liability but by shifting the responsibility on operators (managers and owners), thus drifting from public to private international law. Thus, several conventions aim at developing systems of “objective” liability, facilitating the settlement of potential disputes, and “channelling” the liability of operators. In order to do so, they provide for the constitution of compensation funds to allow the compensation of damages when the operator is bankrupt or when damages exceed a certain amount of money. They also determine the competent jurisdiction or ensure the execution of judgments. These shift in responsibility was however not undertaken in all areas; only certain activities are concerned, such as dangerous goods transportation, especially of hydrocarbons, nuclear energy or genetically modified organisms. States are reluctant towards the generalization of such principles, as illustrated by the lack of ratifications of the (too ?) ambitious Lugano Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, adopted by the Council of Europe, or the slowness of the works of the European Commission regarding the elaboration of a directive on this matter<sup>30</sup>.

These evolutions, that could seem disappointing at first sight, are however partly compensated by the remarkable development of States’ primary obligations, related to both, the multiplication and the increasing precision of conventional obligations, but also to the strengthening of a foundation made of customary rules. This is the case for the obligation of due diligence in the environmental field: each State must employ due diligence in order to ensure to the highest possible extent that dangerous activities which are being exercised on their territory or within their jurisdiction do not cause damageable consequences. This obligation is extremely large. Following on this point the case law of the International Court of Justice, the ITLOS Seabed Disputes Chamber has recently clarified its

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<sup>28</sup> Press Release of the ICJ, 19 July 1993, *Constitution of a Chamber of the Court for Environmental Matters*; see R. Ranjeva, ‘L’environnement, la Cour internationale de Justice et sa chambre spéciale pour les questions d’environnement’ (1994) vol. XL *Annuaire français de droit international* 433 and following.

<sup>29</sup> P.-M. Dupuy and Y. Kerbrat, *Droit international public* (Paris: Précis Dalloz, 2010), p. 526.

<sup>30</sup> Until today, no State has ratified the Lugano Convention (21 June 1993) on Civil Liability for Damage resulting from Activities Dangerous to the Environment, adopted under the auspices of the Council of Europe. See the Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 No. L143, 30 April 2004, p. 56.

scope<sup>31</sup>. It is an obligation of “means” and not of results: an “*an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result*”<sup>32</sup>. As Yann Kerbrat noticed, “*the evaluation of a responsible behaviour is based on the definition of a standard of prevention, the assessment of which is obviously contingent and subjective*”<sup>33</sup>. And yet, the ICJ has been really strict: “*it is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators*”<sup>34</sup>. The opinion of the Seabed Disputes Chamber echoes here perfectly the case law of the European Court of Human Rights when the latter states, for instance, that: “*States have above all the positive obligation, particularly in the case of dangerous activities, to implement rules in adequacy with the specificity of the said activity, especially on the level of risk that could result from it. This obligation must govern the authorisation, implementation, exploitation, security and control of the activity in question, and must impose on any concerned person the adoption of practical measures to ensure the effective protection of citizens whose lives could be exposed to dangers inherent to the relevant area*”<sup>35</sup>. The ITLOS Chamber has even deduced from this an international obligation to implement a precautionary approach, which goes beyond prevention. For the Chamber, “*it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations*”<sup>36</sup>. This extensive interpretation of due diligence, the customary character of which is established, has great consequences for States. Due to its “umbrella” character, it may compensate eventual lacks of conventional instruments. Beyond its preventive role, it opens the way for numerous disputes.

Evolutions also occurred that facilitated the imputation of environmental damages to States. Thus, when it was traditionally required to have a foreseeable, transboundary, and “grave” or “serious” damage, these three conditions have been “*distinctly softened*”<sup>37</sup>.

During these past years, clarifications were also provided on the implementation of a State’s responsibility, and especially on the right to act. Traditionally, international law does not allow for, in principle at least, “objective” actions. The existence of a real and actual dispute is a condition to the judicial function and litigation. And yet, the Court uses a narrow definition of the term “dispute”, restraining thus the borders of litigation and scope of action. For the Court, a dispute is a “*disagreement on a point of law or fact, a contradiction, a conflict of legal views or of interests between two persons*”<sup>38</sup>. Through these requirements, the Court eliminates “virtual” or “abstract” disputes. According to the Court, “*there is a dispute, in the judicial sense of the term, when a State has a claim that is legally opposed to a claim from another State*”<sup>39</sup>. The issue is thus not only about opposed legal views. There must be a claim which one State directs to another State which refuses to comply with it. In the same sense, “*it must be shown that the claim of one party is positively opposed by the other*”<sup>40</sup>. The *Northern Cameroons* case has offered a brilliant illustration. The Court declared that “*it would still be impossible for the Court to render a judgment capable of effective application*” since it was neither asked to “*address the alleged injustice*”, nor to “*award any reparation*”. It is reaffirmed that its function is indeed to guarantee the rule of law but “*in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties*” and that the

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<sup>31</sup> Case N°17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory opinion, 1<sup>st</sup> Feb. 2011.

<sup>32</sup> *Ibid.*, § 110.

<sup>33</sup> Y. Kerbrat, ‘Le droit international face au défi de la réparation des dommages à l’environnement. Rapport général sur le thème de la deuxième demi-journée’, *op. cit.*, p. 125.

<sup>34</sup> *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgement of 20<sup>th</sup> April 2010, *ICJ Reports* 2010, p. 14, §197.

<sup>35</sup> *Di Sarno and others v. Italy*, (Request n° 30765/08) case, ECHR decision of 10<sup>th</sup> Jan. 2012, § 110 (available only in French, our translation).

<sup>36</sup> Case N°17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory opinion of ITLOS, *op. cit.*, § 131.

<sup>37</sup> Y. Kerbrat, ‘Le droit international face au défi de la réparation des dommages à l’environnement. Rapport général sur le thème de la deuxième demi-journée’, *op. cit.*, p. 133 (our translation).

<sup>38</sup> *The Mavrommatis Palestine Concessions*, PCIJ, Reports series A, n°2, 1924, p. 11.

<sup>39</sup> Ch. De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice* (Paris: Pedone, 1966), p. 32.

<sup>40</sup> *South West Africa* (Ethiopia v. South Africa, Liberia v. South Africa) case, *Preliminary objections*, Judgement of 21<sup>st</sup> December 1962, *ICJ Reports* 1962, p. 328.

decision “*must have some practical consequences in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations*”<sup>41</sup>.

Thus generally, international law does not recognise *actio popularis*, that is to say the possibility for any State to help establishing the responsibility of another State that breached international law. In 1966, the Court stated “*although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present*”<sup>42</sup>. This principle suffers one exception however: *erga omnes* obligations, since they create *omnium* rights which can be invoked by any person. The Court has already evoked the notion explicitly and repeatedly. In the examination of preliminary objections in the *Bosnia and Herzegovina v. Yugoslavia* case, the Court confirmed that: “*the rights and obligations enshrined by the Convention [on genocide] are rights and obligations erga omnes*”<sup>43</sup>. The principle inherent to this notion is that all States have an interest to act when such an obligation is breached. This is exactly what the Court already outlined in the *Barcelona Traction* case, stating that “*all States may be held to have a legal interest in the protection of these rights*”<sup>44</sup>. It is thus well accepted that a violation of the prohibition of genocide “*gives to any other State the right to demand for such acts to not be committed. Any other subject of international law will be able to demand to another State that it does not commit acts of genocide, or, at least, the cessation of such acts. All States in the world have the right to ask for the prohibition to be complied with*”<sup>45</sup>.

The idea here is not to invoke a subjective right any more, but rather an objective interest for the respect of legality. This leads directly to an *actio popularis*, even a limited one. International law allows it in relation to two types of obligations:

- “entire” obligations, according to which the State has duties related to the status of the human person (human rights, humanitarian law);
- and so-called “interdependent” obligations, according to which it is sufficient for establishing an interest to act to be a party to the treaty whenever it is impossible to single out third persons or parties as creditors of the obligation<sup>46</sup>. Most obligations that are contained in environmental treaties seem to fit in this category. The ILC Draft articles on State responsibility such as adopted in 2001 allow that any State other than an injured State may invoke the responsibility of another State if “*a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or b) the obligation breached is owed to the international community as a whole*” (Art. 48). It follows from commentaries issued by the International Law Commission that paragraph a) concerns mainly obligations related to the protection of the environment<sup>47</sup>. And yet, in its opinion of 1<sup>st</sup> Feb. 2011, the ITLOS Chamber used this provision of the ILC project to consider that “*each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to the preservation of the environment of the high seas and in the Area*”<sup>48</sup>. We may observe here an important clarification that could facilitate the invocation of the responsibility of a State or of a group of States for damages to the environment.

One must add that the invocation of State responsibility is also facilitated by certain evolutions or even innovations. In the Iraqi case, the Security Council has developed, under Chapter VII of the Charter, an original and sophisticated mechanism allowing for war reparations, the United Nations

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<sup>41</sup> *Northern Cameroons* (Cameroon v. United Kingdom), *Preliminary objections*, Judgment of 2nd December 1963, *ICJ Reports* 1963, p. 15.

<sup>42</sup> This sentence was strongly contested, even within the Court itself. See *South West Africa, Second phase*, Judgment of 18<sup>th</sup> July 1966, *ICJ Reports* 1966, p. 47 and the separate opinion of Judge Jessup, Rep. 1966, esp. pp. 387-388.

<sup>43</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 11<sup>th</sup> July 1996, *ICJ Reports* 1996, p. 616, § 31.

<sup>44</sup> See *Barcelona Traction Light and Power company, Ltd, Second phase* (Belgium v. Spain), Judgment of 5 Feb. 1970, *ICJ Reports* 1970, p. 32. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion of 9 July 2004, §§87-88, in which the Court considers that the right of peoples to self-determination is a right opposable *erga omnes* and develops legal consequences for “other States” than Israel.

<sup>45</sup> A. Cassese, ‘La Communauté internationale et le génocide’, in Mél. M. Virally, *Le droit international au service de la paix, de la justice et du développement* Mél. M. Virally (Paris: Pedone, 1991), p. 186.

<sup>46</sup> C. Santulli, *Droit du contentieux international* (Paris: Montchrestien, 2005), p. 240.

<sup>47</sup> International Law Commission, *Draft articles on State responsibility internationally wrongful act with commentaries*, 2001, p. 345.

<sup>48</sup> Case N°17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory opinion of ITLOS, *op. cit.*, § 180.

Compensation Commission for Iraq. It is a subsidiary organ of the UN Security Council that addresses the responsibility of Iraq for war damages resulting from the invasion of Kuwait, on August 2<sup>nd</sup> 1990, and its consequences<sup>49</sup>. For Jean-Christophe Martin, “*the efficiency of this mechanism – original both in its composition, procedure and material competence – makes it an interesting model for the future in dealing with environmental claims: although circumstances that presided over its creation are singular, it opens a new area and, in particular, the coming practice should take inspiration from the innovative Follow-Up Programme on environmental conditionality*”<sup>50</sup>. It must also be added that international courts are not the only ones to control the respect of international obligations. National judges may also punish their violation, as does the European Court of Justice that possesses an extremely large jurisdiction in this respect<sup>51</sup>. The implementation of mixed agreements – concluded both by the Union and its member States – also raises interesting questions on joint responsibility<sup>52</sup>.

Progress in this whole area relates also and maybe especially to the development of a *soft responsibility*.

## II. The development of a *soft responsibility*

In search for adapting the law and procedures to the interests at stake, specific hurdles to implementation in the field of environmental protection have induced the progressive development of specific techniques for implementation grounded on *soft responsibility*.

### 1. The development of non-compliance mechanisms

In the environmental area, numerous periodical monitoring mechanisms have been developed, allowing for the evaluation of parties’ actions, knowing that the assessment may be general and not focused on the behaviour of one identified party, or, on the contrary, focused precisely on individual behaviours in order to identify and correct non-compliance cases. Such procedures also allow for an assessment of the efficiency of agreed upon norms, which may lead to clarify or adapt them. By doing so, they favour a collective learning process of such rules (*learning by doing*). The increase of transparency also allows for trust-building and limiting *free riding* behaviours. These so-called “non-compliance” procedures organise the reaction to violations as well. The objective is to identify difficulties encountered by States as early as possible and to tackle them with graduated and adapted means, ranging gradually from support measures to punishment, not leaving out incentives (*carrots and sticks*).

The first non-compliance procedure has been developed in 1992 under the Montreal Protocol of 1987 on substances that deplete the ozone layer. This creation resulted from a historical evolution. The first international conventions on environmental protection did not provide for any internal and specific monitoring techniques, nor did they institutionalize the cooperation between contracting parties, condition *sine qua non* of such control. Moreover, these conventions were not very efficient. From the middle of the 70’s on, cooperation has been institutionalised and various control techniques have been experimented, taking inspiration with respect to some elements from the human rights area or disarmament field. The technique which has been most used is the reporting system. Not devoid of interests, it is however not part of the stronger techniques of monitoring existing in international law. Furthermore, it suffers from numerous limits. Enquiry has been developed as well. From the 90’s on,

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<sup>49</sup> See J.-C. Martin, ‘La pratique de la CINU en matière de réclamations environnementales’, in Colloque de la SFDI d’Aix-en-Provence, *Le droit international face aux enjeux environnementaux* (Paris: Pedone, 2010), p. 257.

<sup>50</sup> *Ibid.*, p. 273 (our translation).

<sup>51</sup> C. Tietje, ‘The Status of International Law in the European Legal Order: The Case of International Treaties and Non-binding International Instruments’, in J. Wouters, A. Nollkaemper, E. de Wet (dir.), *The Europeanisation of International Law: The Status of International Law in the EU and Its Member States*, (The Hague: TMC Asser Press, 2008), pp. 55 and following. See also Y. Kerbrat and Ph. Maddalon, ‘Affaire de l’Usine MOX : la CJCE rejette l’arbitrage pour le règlement des différends entre États membres (commentaire de l’arrêt du 30 mai 2006, *Commission c. Irlande*)’ (2007) RTDE, 2007, 1, 154-182. See also the case on the “étang de Berre”: Case C-239/03, *Commission v. France* [2004] ECR I-9325.

<sup>52</sup> For instance, concerning the Kyoto Protocol, see A.-S. Tabau and S. Maljean-Dubois, ‘Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union’ (2010) 21 *The European Journal of International Law* 3, 749.



under different conventions, mechanisms have been systematised and reinforced thanks to the development of ambitious so-called “non-compliance” procedures.

These procedures have been formalised, generally through one or various resolutions of the plenary organ of the relevant convention – usually the Conference of the Parties. A compliance committee is established, the composition, mandate, decision process, and relations with other organs of which are set in the decision(s). Besides this formalisation, these procedures are different from other techniques or procedures of implementation that have been used in the environmental field since they possess a global and coherent character. Ideally, they should allow to prevent the occurrence of non-compliance situations through cooperation, to ensure conformity, to provide assistance in case of non-conformity. They should also contain a mechanism for the settlement of disputes, and even compulsory enforcement measures. If they can be distinguished from a theoretical point of view, these different aspects are, in practice, closely linked: processes are dynamic and the same facts may trigger the whole set of measures through time.

The Montreal Protocol procedure has been largely copied since, as show (non exhaustively) procedures instituted in the 1979 Geneva Convention on long-range transboundary air pollution, the 1991 Espoo Convention on environmental impact assessment in transboundary context, the 1995 Basel Convention on the control of transboundary movements of hazardous wastes and their elimination, the 1998 Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters, the 2000 Cartagena Protocol on biosafety, the 1973 Convention CITES on international trade in endangered species of wild fauna and flora, the 1997 Kyoto Protocol to the UNFCCC, the 1991 Alpine Convention, the 1999 London Protocol on water and health to the 1992 Convention on the protection and use of transboundary watercourses and international lakes, the Barcelona Convention for the protection of the Mediterranean sea against pollution and its protocols, the Protocol on pollutant release and transfer registers to the Convention on access to information, public participation in decision making and access to justice in environmental matters, the 2001 international Treaty on plant genetic resources for food and agriculture and the 2010 Nagoya Protocol to the Convention on biological diversity. Such a procedure is also in project under the 1998 Stockholm Convention on persistent organic pollutants and the 2001 Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade.

Keeping in mind the fact that such conventions have been adopted for the “common good”, without benefits for States on short or middle term, these procedures are based on the idea that it is without any doubt more important to help a State experiencing difficulties in complying with its obligations rather than to punish non-compliance. The use of sanctions could disserve the objective of the convention, and in particular discourage State participation. Thus, various reasons justify that reactions to failures are, in the environmental field, more collective than individual, based on organs that are designed for the implementation of conventions, when traditional reactions to violations only play a marginal part, the emphasis being put more on the promotion of the respect of the rule of law. A spirit of cooperation logically replaces punishment or compensation. Pursuant to the objective of promoting the convention, ways to address the situation will be proposed to States, guided when necessary. An incentive may also be proposed under the form of assistance – legal, technical, financial. Non-compliance procedures are based on the institutionalisation of international cooperation, which is a major characteristic of cooperation in the environmental field. Collectivised, control loses its traditional reciprocal character: it is entrusted to *ad hoc* organs created by the different environmental conventions – Conferences of the Parties, committees and secretariats – that play a fundamental role in this regard. Moreover, the “multilateralisation” of control contributes to better acceptance by States.

Inspired by the same model, these procedures do however not form a homogeneous set. Beyond their common characteristics, they present numerous specificities relating notably to the scale of action, object of the convention and context of its adoption. Some procedures present very innovative characteristics. Thus, the Kyoto Protocol procedure has quasi-judicial features<sup>53</sup>. It is also very intrusive and may result – at least in theory – in true sanctions. For its part, the Aarhus

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<sup>53</sup> L. Boisson de Chazournes and M. Mbengue, ‘À propos du caractère juridictionnel de la procédure de non-respect du Protocole de Kyoto’ in S. Maljean-Dubois (ed.), *Changements climatiques. Les enjeux du contrôle international* (Paris : La documentation française, 2007), pp. 73-109.

Convention has developed a procedure which leaves considerable room to civil society since it confers “one or more members of the public” the right to present “communications”, and thus to trigger the compliance mechanism. Two conditions are set: the concerned Party must accept this right of the public, which it may however refuse by means of notification sent to the depositary (during a period of 4 years maximum); communications, sent to the Committee through the Secretariat, must be “strongly supported”. The Committee conducts an examination of admissibility. It “examines each communication of this type unless it established that the communication is a) Anonymous; b) Abusive; c) Clearly unreasonable; d) Incompatible with the provisions of the present decision or with the Convention”. Without implementing a strict exhaustion of local remedies, it is stated that “*the Committee should in all relevant stages, take into account, if necessary, the existence of a domestic procedure unless this procedure exceeds reasonable delays or does not clearly offer an effective and sufficient remedy*”<sup>54</sup>. This striking originality derives from the human rights approach adopted by the Aarhus Convention, at the crossroads of environmental and human rights law. The innovation has been strongly criticised at the moment when the procedure was adopted, especially by the United States, which expressed their disagreement joining a declaration to the report of the Conference of the Parties that adopted the procedure, without being able to prevent this adoption since they are not parties to this Convention<sup>55</sup>. In practice, the public presents the major part of communications. The Aarhus Convention has inspired other procedures on this point of view<sup>56</sup>.

Non-compliance mechanisms exert an undeniable – and surely increasing – influence on the practice of parties to international conventions in the field of environmental protection. The interpretation of conventional provisions to determine if domestic legislations comply with them is thus entrusted to third persons, and sometimes because of the demand not of a State or an international institution but of the “public”. Thus, the Aarhus Convention Committee has, on 14<sup>th</sup> April 2011, concluded to the non-conformity of the primary European Union law such as interpreted by the Courts of the European Union concerning the access to environmental justice. The Committee did not, however, recognise a violation of the Convention, the examined cases being anterior to its entry into force. On the contrary, it considered that the Union would breach its obligations if its case law were maintained<sup>57</sup>. Without any doubt, this pressure partly explains the evolution of the case law of the European Union, as reflected in its decision of 12<sup>th</sup> May 2011<sup>58</sup> that the Aarhus Committee has now to evaluate<sup>59</sup>.

## 2. Perspectives for non-compliance mechanisms

Models of the *learning by doing* method adopted under numerous conventional regimes, the construction of such mechanisms goes “along the way” through successive decisions of the Conferences of the Parties. The experience gained helps making the mechanisms more sophisticated little by little<sup>60</sup>. For their part, NGOs and civil society take over progressively these mechanisms and

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<sup>54</sup> Our emphasis.

<sup>55</sup> Statement by the delegation of the United States with respect to the establishment of the compliance mechanism, Report of the First Meeting of the Parties, 2002, ECE/MP.PP/2, p. 21.

<sup>56</sup> For example, the Compliance Committee of the Protocol on pollutant release and transfer registers of the Alpine Convention (Decision I/2, Conference of the Parties, point D, §51 and following) “shall process the requests for reviewing supposed non-compliance with the Convention and its Protocols submitted to it by the Contracting Parties and Observers” (Article 2.3, Conference of the Parties, Decision VII/4 Mechanism for Reviewing Compliance with the Alpine Convention and its Implementation Protocols). See also the Protocol on water and health, whose Committee for the examination of compliance is open to communications sent by members of the public (Point VI, § 15, Procedure on the respect of dispositions, Conference des Parties, Decision I/2).

<sup>57</sup> *Findings and Recommendations of the Compliance Committee with regard to communication, ACCC/C/2008/32 (Part I) concerning compliance by the European Union*, 14 April 2011. See especially point 64 (“it may reveal whether the Party concerned will be in compliance with the Convention if relevant jurisprudence remains the same”) and points 87-88.

<sup>58</sup> Case T-338/08, *Stichting Natuur en Milieu et Pesticide Action Network Europe contre Commission européenne* [2012], not yet published..

<sup>59</sup> “With regard to communication ACCC/C/2008/32 (European Union (EU)), the Committee noted that on 14 May 2012, the General Court had issued its judgment on the *Stichting Milieu* case.1 The Committee decided that it would consider how to proceed with the case at its thirty-eighth meeting, depending also on whether the European Commission appealed the Court’s judgment”, see *Compliance Committee, Report of the Compliance Committee on its thirty-seventh meeting*, ECE/MP.PP/C.1/2012/5, 8 August 2012, p. 4.

<sup>60</sup> V. Richard, ‘Learning by doing. Les procédures de non-respect de la Convention d’Espoo et de son Protocole de

contribute to their empowerment. The multiplication, diversity and originality of non-compliance procedures well tested with regard to the implementation of international conventions on environmental protection demonstrates the great vitality of international environmental law that is often presented as the laboratory of future international law. Institutional and normative innovations that intervene through the development of non-compliance procedures play a part in the progressive establishment of a global administration and raise the question of the existence of a true “*global administrative law*”<sup>61</sup>. However, the evolution is not linear. Thus, the 2015 Paris Agreement on climate change will lead to the establishment of a less stringer and more respectful of States’ sovereignty procedure<sup>62</sup>.

Different procedures were sometimes even combined to put a greater pressure on the State. Thus, the Canal of Bystroe case opposing Ukraine to Romania sketched a coordination between different MEA’s organs and beyond, concerned international institutions, which were particularly numerous regarding the ecological richness of the zone. The case resulted in a non-compliance procedure under the Bern, Espoo and Aarhus Conventions<sup>63</sup>. The increase of non-compliance cases creates a risk of multiplication of interlinkages of procedures that usually work in different conventional circles and that should, here, collaborate. Now, various procedures formalise this inter-conventional cooperation under an “*ongoing synergy process*”<sup>64</sup>. Thus, under the procedure of the Aarhus Convention, “*in order to enhance synergies between this compliance procedure and compliance procedures under other agreements, the Meeting of the Parties may request the Compliance Committee to communicate as appropriate with the relevant bodies of those agreements and report back to it, including with recommendations as appropriate. The Compliance Committee may also submit a report to the Meeting of the Parties on relevant developments between the sessions of the Meeting of the Parties*”<sup>65</sup>. Similarly, according to the non-compliance procedure of the Protocol on water and health, “*the Committee may transmit information to the secretariats of other international environmental agreements for consideration in accordance with their applicable procedures on compliance. The Committee may invite members of other compliance committees dealing with issues related to those before it for consultation*”<sup>66</sup>.

Besides, recent practice shows that non-compliance procedures can also be used to solve strictly bilateral disputes under the framework of multilateral environmental conventions. Thus, the canal of Bystroe dispute between Romania and Ukraine induced different non-compliance procedures under different conventions, following the requests either of the parties. Somehow, it was also linked to the dispute on the maritime delimitation in the Black Sea brought before the ICJ and resulted in a decision given on 3<sup>rd</sup> Feb. 2009<sup>67</sup>.

Of course, in general, international responsibility and mechanisms of peaceful settlement of disputes seem less adapted to the management of non-compliance cases than specifically adopted procedures. They do not have the same preventive character since by essence, they are triggered subsequently to a violation. They are more adapted to the settlement of bilateral disputes, when non-compliance procedures allow for responding to the collectivisation of stakes and the multilateralization of obligations, through a collective reaction. Finally, in their global and graduated management of non-compliance cases, specific procedures seem more tailored.

Yet, if the sole mechanism of State liability appears as an insufficient and inadequate means of implementation, may it not be used in combination with non-compliance procedures? Each of the studied conventions contains indeed a classical provision on the peaceful settlement of disputes, which

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Kiev’ (2011) *Revue juridique de l’environnement*, 3, 327-344.

<sup>61</sup> See S. Cassesse, ‘Le droit administratif global : une introduction’(2007) *DA*, 5, 17.

<sup>62</sup> See its Art. 15, FCCC/CP/2015/L.9/Rev.1, at 30.

<sup>63</sup> S. Maljean-Dubois, ‘Les organes de contrôle du respect des dispositions internationales’, in B. Jadot (ed.), *Acteurs et outils du droit de l’environnement : développements récents, développements (peut-être) à venir* (Bruxelles: Anthémis, 2010), pp. 249-278. V. Richard, *Learning by doing*. Les procédures de non-respect de la Convention d’Espoo et de son Protocole de Kiev’, *op. cit.*, p. 327.

<sup>64</sup> See Decision IX/10 of the Basel Convention COP, “Cooperation and coordination between the Basel, Rotterdam and Stockholm Conventions” (2008).

<sup>65</sup> Decision I/7 of the COP; see *mutatis mutandis* § 37 of the non-compliance procedure of the Protocol on water and health (decision 1/2, Jan. 2007).

<sup>66</sup> *Ibid.*, § 38.

<sup>67</sup> *Maritime delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3<sup>rd</sup> February 2009, *ICJ Reports 2009*, p. 61.

may be used to support the invocation of State liability for the violation of treaty obligations. Provisions providing for prior acceptance of a judicial mechanism – be it the ICJ or any arbitral tribunal – are optional however and only a few States accept them. As a matter of fact, none of such conventional provisions has been used until today. Systematic monitoring and non-compliance mechanisms become thus simple substitutes to these mechanisms, whereas non-contentious and contentious procedures would deserve a better articulation. The intervention of the judge could constitute the prolongation of violations observed through systematic controls and procedures of non-compliance, particularly in the case of repeated violations and collaboration refusals. If the texts do not clearly recognise a right of *actio popularis*, by contrast with what exists in human rights law, the words used (“*In case of a dispute relating to the interpretation and application of the Convention...*”) and the fact that they are treaties that all States have a legal interest to see respected may lead us to the conclusion that such a provision could be interpreted extensively. The hypothesis of collective actions, which are undoubtedly more acceptable when looking at the precedents existing before the ECHR organs, is maybe conceivable.

The rules of procedure of non-compliance mechanisms generally state that the latter are applicable “*without prejudice*” to more classical conventional mechanisms of dispute settlement. Thus, it is affirmed under the Montreal Protocol that “*the described procedure is established pursuant to the Montreal Protocol Article 8. It is applicable without prejudice to the procedure relating to the settlement of disputes of Article 11 of the Vienna Convention*”. Another example, the Cartagena Protocol states that “*the described procedures and mechanisms are established pursuant to Article 34 of the Cartagena Protocol on biosafety, are distinct and do not prejudice the procedures and mechanisms for the settlement of disputes established pursuant to Article 27 of the Convention on biological diversity*”. Thus, we may consider with P.-M. Dupuy that the invocation of classical mechanisms of responsibility is and remains possible, although they are less adapted than *ad hoc* non-compliance procedures<sup>68</sup>. They remain however secondary, if not in principle then at least in practice, with regard to the special mechanism established by Parties<sup>69</sup>. Even if it is not exactly a non-compliance procedure, another example of States’ reluctance can be found in the 2015 Paris Agreement on climate change regarding “*loss and damages*” associated with the adverse effects of climate change. The Agreement institutionalises the Warsaw International Mechanism for Loss and Damage in its Article 8. But Parties clearly stated that “*Article 8 of the Agreement does not involve or provide a basis for any liability or compensation*”<sup>70</sup>.

Thus, better tailored to the environmental field than classical means of implementation of international law, these procedures result, in general and most of the time without confrontation, in remarkable results. They contribute efficiently to the implementation of the Conventions in question.

### **III. Progresses in the international protection of the right to a healthy environment**

Progresses in the international protection of the human right to a healthy environment follow two paths. On one side, they put extremely large positive obligations upon States. These obligations are substantially close to those already mentioned above in the context of the extension of “classical” responsibility. They are international obligations of the State as well. But here, a right to act is offered to individuals, against the State, before international organs of control. On the other side, these norms of international human rights protection also reach companies, for which they create both mediate and immediate obligations.

#### **1. Extended positive obligations for States**

The recognition of the human right to a healthy environment, combined with an international mechanism of protection, represents also a very favourable evolution for the protection of the environment. Of course, such a mechanism does not allow either the protection of the environment *per se* nor an ordinary compensation of the damage caused *to* the environment. It is a human right that is

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<sup>68</sup> P.-M. Dupuy, ‘Où en est le droit international de l’environnement à la fin du siècle ?’, *op. cit.*, p. 897.

<sup>69</sup> M. Koskenniemi, ‘Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol’ (1992) *Yearbook of International Environmental Law*, p. 134.

<sup>70</sup> Paris Decision, FCCC/CP/2015/L.9/Rev.1, § 52, at 8.

protected here, in a vision which by definition is anthropocentric. Here lies an important limit. Despite this, the progress made is remarkable, particularly at the European level.

It is known, the right to a healthy environment is not recognised in the 1950 ECHR. This is not surprising since the question was not current in 1950. The General Assembly of the Council of Europe questioned at different times the opportunity to complete the Convention with an additional protocol “concerning the rights of the individual to a healthy and viable environment”<sup>71</sup>, but without success until now. This step has not been taken yet<sup>72</sup>. The formal recognition of the right to a healthy environment has been rejected once again, by fear that, because of the lack of precision as to the scope of this right, the Court could be overwhelmed with ambitious and speculative applications<sup>73</sup>. Yet, the ECHR imposed strong *positive* obligations on States in this respect. Step by step, it developed a constructive and dynamic case law leading to the guarantee of a human right to a healthy environment. It played here (as it did for other questions) a fundamental role for the development of law. By doing so, the Court made it possible for a text written in a particular post-war context to remain “a living instrument which must be interpreted in the light of present-day conditions”<sup>74</sup>, according to two of its expressions. Right from 1991, the Court said that it did not ignore that today’s society is more and more conscious of the preservation of the environment<sup>75</sup>, adding more recently that the environment constitutes a value, which defence causes for the public opinion, and consequently for public authorities, a constant and supported interest<sup>76</sup>. Environmental law has indeed known important developments, at the international, regional or national level. Numerous domestic legislations have recognised the human right to a healthy environment, including at the constitutional level<sup>77</sup>.

In different environmental cases, the Court decided that there had been a violation of Article 8 of the Convention. In 1990, in the *Powell and Rayner v. United Kingdom* case in which plaintiffs, living near Heathrow airport, complained about the noise caused by planes during daytime, the Court decided that Article 8 had to be taken into account since “affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”<sup>78</sup>. In the *Hatton and others v. United Kingdom* case, the Court clearly affirmed that “there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8”<sup>79</sup>. At the time of the *López Ostra v. Spain* case, the Court declared in 1994 that Article 8 could include a right to be protected against serious environmental damages because they may “affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health”<sup>80</sup>. In the *Hatton*

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<sup>71</sup> See Recommendation 1431 (1999) of the General Assembly “Future action of the Council of Europe for the protection of the environment” in which it recommends to the Committee of Ministers to entrust the appropriate bodies of the Council of Europe with examining the feasibility: (...) b. of an amendment or an additional protocol to the ECHR, concerning the rights of the individual to a healthy and viable environment; see also the Agudo Report to the General Assembly, Doc. 9791, 2003.

<sup>72</sup> In 2003, the Assembly endorsed the proposal of “drafting an appropriate instrument, in the form of guidelines or a manual, recapitulating the rights as interpreted in the Court’s case-law. Such an instrument could also emphasise the need to strengthen environmental protection at national level, notably as concerns access to information, participation in decision-making processes and access to justice in environmental matters. The Committee of Ministers shares the view that by making more explicit the protection indirectly afforded by the Convention to the environment, an instrument of this kind would also be a useful way of promoting greater awareness in member states of the implications of their existing obligations under the Convention in environmental matters”, Recommendation 1614 (2003).

<sup>73</sup> Council of Europe, Parliamentary Assembly, session 29 Sept. 2009, Opinion on the elaboration of an additional protocol to the ECHR on the right to a healthy environment, Doc. 12043.

<sup>74</sup> *Tyrer v. United Kingdom* (Application n° 5856/72), ECHR decision of 25<sup>th</sup> April 1978, § 31.

<sup>75</sup> *Fredin v. Sweden*, decision 18 Feb. 1991, § 48.

<sup>76</sup> *Hamer v. Belgium*, decision 27 Nov. 2007, § 79.

<sup>77</sup> See esp. Article 1 of the French Charter for the environment according to which “Everyone has the right to live in a stable environment which respects health” (our translation).

<sup>78</sup> Request n°36022/97, decision 9 Dec. 1994, series A n°303-C, § 51.

<sup>79</sup> *Hatton and others v. United Kingdom* (Application no. 36022/97), ECHR decision of 8 July 2003, Reports of Judgments and Decisions 2003-VIII, § 96, quoting *Powell and Rayner v. United Kingdom* (Application n° 9310/81), ECHR decision of 21<sup>st</sup> Feb. 1990, series A n° 172, § 40.

<sup>80</sup> *López Ostra v. Spain* (Request n° 36022/97), ECHR decision 9<sup>th</sup> Dec. 1994, series A n° 303-C, § 51.

*and others v. United Kingdom* case, the Court clearly affirmed that “*there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8*”, that protects private and family life<sup>81</sup>.

Moreover, in the 2004 *Oneryildiz v. Turkey* case, the Grand Chamber clearly confirmed that a violation of the right to life protected by Article 2 could be conceived in relation with environmental questions. Following an accidental explosion of methane in a garbage-stocking place, a landslide covered eleven houses situated below the stocking place including M. Oneryildiz’s house, who lost nine members of his family in the accident. The Court considered that Turkey had violated its positive obligation to take all necessary measures to protect life pursuant to Article 2, which above all implied for every State Party to the Convention the primordial duty to develop a legislative and administrative framework providing for the prevention of violations of the right to life<sup>82</sup>. In different cases, other provisions have been invoked with success on environmental issues, such as Article 1 of Protocol n°1 on the right to property, or Article 13 protecting the right to an effective remedy.

The Court placed positive obligations upon States which shall guarantee the right to a healthy environment by taking “*all necessary measures*”. State responsibility may thus derive from an administrative authorisation, an absence of regulation, or from inadequate measures relating to activities of the private sector<sup>83</sup>. In the *Hatton* case, the Grand Chamber of the Court has indeed confirmed that, “*Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly*”<sup>84</sup>. The recognised right to a healthy environment thus has an extended scope since it may be invoked not only if the pollution or nuisance is the fact of the State or its organs, but also if it results from private activities, according to the theory of indirect horizontal effects of the Convention<sup>85</sup>.

In one of these recent – and remarkable – decisions in this field, the Court took the occasion to precise that: “*The positive obligation to take all reasonable and adequate measures (...) implies, before anything else, for all States, the duty to develop an administrative and legislative framework for the efficient prevention of environmental damages and human health (...). When a State has to address complex questions of environmental and economic policy, and especially when it is about dangerous activities, it is necessary, in addition, to reserve a special place for regulations adapted to the specificities of the activity, especially for the risk that could result from it. This obligation must determine the authorisation, implementation, exploitation, security and control of the activity and impose to everyone concerned the adoption of practical measures that can guarantee the effective protection of citizens whose lives could be exposed to dangers inherent to the area (...). It is also necessary to underline that the decision process must include the conduction of appropriate enquiries and studies, to prevent and evaluate in advance the effect of activities that can damage the environment and violate individual rights, and that allow the establishment of a just balance between the different concurrent interests (...). The importance of public access to the conclusions of these studies as well as information that allows an assessment of the danger it is exposed to makes no doubt (...). Finally, concerned individuals must also be able to stand a claim against any decision, act or omission before courts if they consider that their interests or observations were not sufficiently taken into account in the decision-making process (...)*”<sup>86</sup>. Thus, the Court uses the triptych of the Aarhus Convention, placing extremely clear and precise positive obligations upon States on each of the triptych elements<sup>87</sup>. The Court also recalled recently that “*the importance of public access to the conclusions of environmental studies as well as information that allows an assessment of the danger it is exposed, that is part of the positive obligations under Article 8*”<sup>88</sup>.

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<sup>81</sup> 8 July 2003, Rec. 2003-VIII, §96.

<sup>82</sup> *Oneryildiz v. Turkey* (Application n° 48939/99), ECHR decision of 30<sup>th</sup> Nov. 2004, case, Rep. 2004-XII.

<sup>83</sup> F. Haumont, ‘Le droit fondamental à la protection de l’environnement dans la Convention de sauvegarde des droits de l’homme et des libertés fondamentales’ (2008) *Amén.*, n° spécial, 25.

<sup>84</sup> *Hatton and others v. United Kingdom*, ECHR decision of 8<sup>th</sup> July 2003, *op. cit.*, § 119, and also § 98.

<sup>85</sup> On this theory, see for instance J.-P. Marguénaud, ‘La Charte constitutionnelle de l’environnement face au droit de la Cour européenne des droits de l’homme’, in *La charte constitutionnelle de l’environnement*, Actes du colloque organisé avec la Cour de cassation les 20 et 21 juin 2005 (2005) *RJE* n° spécial, 206.

<sup>86</sup> *Tatar v. Romania* (Request n° 67021/01), ECHR decision of 27 January 2009, § 88, our translation.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Tănăsioaica v. Romania* (Request n° 3490/03), ECHR decision of 19<sup>th</sup> June 2012, § 44, our translation.

These developments spread and touch all continents. Thus, the new African Convention on the protection of nature has an Article 16 entitled “procedural rights” that states:

“1. The Parties shall adopt legislative and regulatory measures necessary to ensure timely and appropriate

a) dissemination of environmental information;

b) access of the public to environmental information;

c) participation of the public in decision-making with a potentially significant environmental impact; and

d) access to justice in matters related to protection of environment and natural resources.

2. Each Party from which a transboundary environmental harm originates shall ensure that any person in another Party affected by such harm has a right of access to administrative and judicial procedures equal to that afforded to nationals or residents of the Party of origin in cases of domestic environmental harm<sup>89</sup>.

Thinking at these potentialities becomes little by little a reflex for claimants. From this point of view, it is Worth mentioning the recent request for an advisory opinion presented to the Inter-American Court of Human Rights by Colombia concerning the interpretation and scope of Article 1(1) (Obligation to Respect Rights), 4(1) (Right to Life), and 5(1) (Right to Humane Treatment/Personal Integrity) of the American Convention<sup>90</sup>. The main issue is : how should the Pact of San José be interpreted when there is a risk that the construction and operation of major new infrastructure projects will have a severe impact on the marine environment of the Wider Caribbean Region and, consequently, the human habitat that is essential for the full exercise and enjoyment of the rights of the inhabitants of the coasts and/or islands of a State Party to the Pact, in light of the environmental laws established in treaties and in customary international law applicable between the respective States? This request is interestingly bridging between human rights and the States’ due diligence obligations as defined by the ICJ or the ITLOS.

This offers another means to invoke State responsibility for a breach of international law in case of environmental damages, even though it is not, in general, an interstate procedure but a procedure opposing a State and an individual.

## 2. The scope with regard to companies

The “Ruggie” Report echoes real difficulties when it notices that “[t]he failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to **environmental**, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation”<sup>91</sup>.

International human rights law could help to increase environmental protection. Following the ECHR case law, some national courts refer directly to international human rights law to solve disputes between private persons<sup>92</sup>. This constitutes a shock wave, the effects of which are not yet extinguished. The European continent is not the only one concerned. Thus, the African Commission of human rights has underlined in its decision Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria of October 2001 (in the people Ogoni case) that the State has to protect rights holders against other individuals, through legislation and the development of effective remedy<sup>93</sup>.

Similarly, one has to mention also numerous instruments of co- or auto-regulation that are developing at the international level, leading companies to take action in favour of the protection of the environment and human rights. This is the case of international normalisation, or of initiatives such as the UN Global Compact, an attempt according to which businesses may commit themselves to aligning their operations and strategies with ten universally accepted principles in the areas of human rights,

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<sup>89</sup> Art. XVI of the African Convention on the conservation of nature and natural resources, Maputo, 11 July 2003.

<sup>90</sup> S-DVAM-16-024746, 14 March 2016.

<sup>91</sup> Report of the Special Representative of the Secretary general in charge of the question of human rights and transnational societies and other companies, John Ruggie, 21 mars 2011, A/HRC/17/31, our emphasis, p. 9.

<sup>92</sup> Yann Kerbrat, ‘La responsabilité des entreprises peut-elle être engagée pour des violations du droit international ?’, in H. Ghérari and Y. Kerbrat (eds.), *L’entreprise dans la société internationale* (Paris: Pedone, 2010), p. 93.

<sup>93</sup> Communication n°155/96 – Social and Economic Rights Action Center, Center for Economic and Social Rights / Nigeria, § 56, 15th Annual Report of activities of the African Commission of Human and People’s Rights, 2001-2002, 31<sup>st</sup> ordinary session of the African Commission held from 2 to 16 May 2002 in Pretoria, South Africa, Annex V.

labour, environment and anti-corruption. Furthermore, the Global Compact refers to more classical instruments: the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, ILO Fundamental Principles, etc. One could ask if, despite its weaknesses, the Global Compact did not constitute a progress, even a timid one, towards a form of legal responsibility independent from national laws<sup>94</sup>. Codes of conduct, guiding principles or guidelines proposed by international organisations result from the same thinking. In this respect one may refer here to the Declaration on investment and multinational companies adopted by the member States of the OECD in 1976. “Guidelines for multinational enterprises” have been annexed to this Declaration and have been completed different times, on human rights, environmental protection or consumers’ rights issues. A compliance mechanism has been instituted, with “national contact points” or NCP, that receive complaints from trade unions, NGOs, civil society concerning companies that would not comply with the “principles” and thus play the role of a mediator. Besides, through a boomerang effect that has not always been anticipated, a company may be asked to provide for information on the realisation of its voluntary commitments on social responsibility or adherence to a code of conduct. Created voluntarily beyond or at the borders of law, these *soft tools* do not totally escape from its sphere of influence since law has a remarkable tendency to seize all acts and facts<sup>95</sup>. Many other examples could be given which illustrate this tendency to take the company in a creel of obligations, often derived from international law<sup>96</sup>. Liberty, constraint and incentive are conjugated here in complex configurations<sup>97</sup>. Beyond the pressure of citizens-consumers-trade unions-shareholders-investors, that are often themselves comforted by the existence of international standards, the company is finally “captivated” by regulations deriving from *hard* and *soft* law instruments, mandatory and voluntary, public and private, international and domestic, with increasing sanctions, if not always judicial, at least by the market.

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The developments that have been realising in the three branches presented seem to move towards a better effectiveness of norms of international environmental protection. These are only small steps however, that must be put into perspective regarding the worsening of environmental damages at the beginning of the XXIst century... They risk being truly insufficient with regard to the state of the world’s biosphere that might be on the verge of an “*abrupt and irreversible shift*” according to the authors of an article released in *Nature* on 7<sup>th</sup> June 2012<sup>98</sup>. This study, co-signed by around twenty scholars from different fields, working in around fifteen international scientific institutions, highlights the imminence – that is to say, on a planetary time scale, within “a few generations” – of a brutal transition towards a state of the earth’s biosphere unknown to homo sapiens since the emergence of the species, around 200 000 years ago. If a transition towards an economy that would be more respectful of the environment is not managed quickly, governments will have to bear the responsibility of a level of degradation and consequences without precedent enunciates Achim Steiner, the director of the United Nations Programme for the Environment (UNEP), while presenting the GEO5 Report *Environment for the future we want*<sup>99</sup>. With this respect, the Rio+20 Conference did unfortunately not manage to match the stakes.

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<sup>94</sup> H. Ascensio, ‘Le Pacte mondial et l’apparition d’une responsabilité internationale des entreprises’, in L. Boisson de Chazournes and E. Mazuyer (eds.), *Le pacte mondial des Nations Unies 10 ans après. The Global Compact of the United Nations 10 year after* (Bruxelles: Bruylant, 2011), p. 167.

<sup>95</sup> P. Deumier, ‘La question de la sanction’, in L. Boisson de Chazournes and E. Mazuyer (eds.), *Le pacte mondial des Nations Unies 10 ans après. The Global Compact of the United Nations 10 year after* (Bruxelles: Bruylant, 2011), p. 155.

<sup>96</sup> See S. Maljean-Dubois, ‘La portée des normes du droit international de l’environnement à l’égard des entreprises’ (2012) *Journal du droit international* 1, 93-114.

<sup>97</sup> P. Deumier, ‘La question de la sanction’, *op. cit.*, p. 155.

<sup>98</sup> A. D. Barnosky et al., ‘Approaching a state shift in Earth’s biosphere’ (2012) 486 *Nature* 7<sup>th</sup> juin 2012, 52-58. F. Biermann, ‘Planetary boundaries and earth system governance: exploring the links’ (2012) 81 *Ecological Economics*, 4.

<sup>99</sup> PNUE, *Environment for the future we want GEO5*, PNUE, Nairobi, June 2012, <http://www.unep.org/french/geo/geo5.asp> consulted on 8 August 2016.