REPORT SUMMARY

ENVIRONMENT COMMITTEE - *November 2015*

INCREASING THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW

Duties of States, rights of individuals

This report contains **21 proposals** for enhancing environmental justice in the 21st century. It is the result of discussions among the Environment Committee of the *Club des juristes*. The Committee, coordinated by Yann Aguila, a member of the Paris Bar Association, and comprising academics, lawyers and judges, has produced this work in **contemplating the international environmental law of tomorrow**.

INTRODUCTION – International environmental law : a necessary yet ineffectual law

I- The need for international norms in protecting the environment

In the run up to the Paris Conference in December 2015, the COP21[1],negotiators are working towards the adoption of a new international agreement on climate change. This is to be welcomed. In fact, the observation that **the ecological crisis does not stop at State borders** points to the need for a strong international environmental law. Ecological territories have different boundaries to those of national jurisdictions. In order to protect the environment, **norms must be adopted at the international level**.

II- The double failure in environmental governance

However, international environmental law is today marked by a **double failing**, in both its formulation and its enforcement.

1 > Inefficiency in formulating international law

The failure of the Copenhagen Summit demonstrated that the inertia, or even the paralysis, in negotiations hinders the advancement of international environmental law. Likewise, several major States have not ratified the Kyoto Protocol or even the Convention on Biological Diversity adopted at Rio in 1992.
The adoption of ambitious norms is effectively frustrated by the principle of **State sovereignty, the reflection of the national interests and power relations of States**. Therefore, negotiators must lower their ambitions. In this way, it is difficult to conclude an agreement that is both :

- **universal**, involving all countries concerned,
- and **binding**, enacting strong and concise rules.

[1] The 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC).

2 > Difficulties in enforcing international norms

Even when a treaty is concluded, its effectiveness is often limited. The control and sanction mechanisms are ineffectual. The monitoring and compliance committees, the para-legal bodies attached to each convention, only possess weak powers. Moreover, international jurisdictions are optional. Only States, and not citizens, can bring a matter before these compliance committees.

III- Civil society : a necessary counterweight to omnipotent States

Some of these difficulties derive from the conception of international law inherited from the 19th century : that of an **international community devised by and for the States**. Without questioning the traditional principle of State sovereignty, it is necessary to counterbalance it by raising the role of individuals on the international scene.

This report is based on a central belief : **in order to make international environmental law more effective, civil society must take ownership of it**. States' compliance with the treaties should become the concern of all citizens.

This idea is not entirely new. In human rights, people are already considered a subject of international law, as stated by René Cassin, the father of the Universal Declaration of Human Rights[2].

The **right to a healthy environment** is numbered among human rights. This right has been chiefly established by international texts, such as the 1992 Rio Declaration[3],the case law of the European Court of Human Rights (ECHR) and even by many national constitutions. **Individuals therefore have a direct interest in States respecting international environmental norms.**

This right must be coupled with **guarantees enabling individuals to invoke it before the courts**. By analogy with human rights, the question posed by René Cassin in 1950 may be reiterated : *« How can the individual, a subject of law, gain universal respect for, and observance of, the rights he holds ? If necessary, will he be able to invoke safeguards or sanctions should his fundamental rights or freedoms be breached ? »*[4].

It is therefore necessary to explicitly establish, in the *rules* of international law, the role pertaining to civil society. Civil society should be given **rights and guarantees** at every stage of the process :

- firstly, **procedural** guarantees to better ensure the participation of non-state actors in the drafting of international environmental law ;
- secondly, **judicial** guarantees for easing access by non-state actors to compliance mechanisms and justice ;
- lastly, **written** guarantees which would provide the coherence and structure missing from international environmental law.

Consequently, two undercurrents run through this report :

- on the one hand, it contains proposals aimed at **strengthening the effectiveness and efficacy of the current law**, in particular, by allocating a more important role to civil society,
- on the other hand, the report proposes a novel plan by adopting a **Universal Environmental Charter**, endowed with a binding compliance mechanism and enforceable before a national or international court. Such a treaty would assist in supplementing the body of international instruments for protecting human rights, notably composed of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[2] René CASSIN, « L'homme sujet de droit international et la protection des droits de l'homme dans la société universelle », in *Mélanges Georges Scelle, La technique et les principes du droit public, Paris*, L.G.D.J., 1950, t. 1, pp. 67-91.

[3] Rio Declaration, Principle 1: « Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. »

[4] René CASSIN, *op. cit.*, pp. 67-91.

FIRST PART – Procedural guarantees : strengthening the position of civil society in developing international environmental law

Only States and international organisations have the ability to obligate themselves under treaties. But, non-state actors are *de facto* playing an increasingly important role in environmental negotiations. During the 1992 Rio Conference, more than 20,000 NGO representatives were in attendance, double the number of governmental representatives.

However, **the law lags behind practice**. Today, the principle of public participation is only established for the formulation of *national* law. This **requirement for participatory democracy** must now be transposed to international law.

I- Establishing the influence of civil society in setting the agenda for environmental issues

Scientists, NGOs, companies and associations are the non-state actors playing an essential role for environmental governance. Through their technical knowledge and practical experience, they enlighten the policy-makers and form a valuable **source of proposals**.

- ***Proposal 1 : Introduce a global citizens' initiative under the framework of the United Nations or environmental bodies.***

Based on the existing model within the European Union[5],the initiative would establish a **citizens' right of initiative within all the institutions which have the power to launch an international legislative process**, such as the UN Secretary-General on behalf of the United Nations, but also the secretariats of the major multilateral environmental agreements, which could be persuaded to propose the adoption of additional protocols.

The initiative being promoted should be supported by a minimum number of citizens from a minimum number of States. It would enable individuals to call on the States or the UN to present a proposal for a text, specifically a resolution from the United Nations General Assembly on environmental matters.

- ***Proposal 2 : Establish a universal right to petition on environmental matters for international environmental bodies, in particular for organising debates or placing an item on the Conference of the Parties' agenda.***

Distinct from the right of initiative, the right to petition, which also exists in the European Union, must allow citizens to submit a request drawing the attention of policy-makers to a given subject. In the same vein as the EU mechanism, the UN could set up a right to petition it on environmental matters. This right may be limited at first to a particular category of NGOs that are specially accredited for this purpose.

II- Establishing the right of civil society to participate in environmental negotiations

The fora of international negotiations are increasingly open to civil society. The need for civil society to participate in international policies on the environment is laid down in the tasks of the UNEP[6].However, the degree to which NGOs participate in the decision-making process remains disparate, dependant on the pertinent rules adopted by each international forum. The role of NGOs in international negotiations ought to be placed within a long-term, harmonised and augmented legal framework.

[5] The European Citizens' Initiative provided for in Article 11 of the Treaty on the European Union and Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (consolidated version 10/2013).

[6] UNAG Resolution 2997 (XXVII) of 15 December 1972 adopted during the 27th session, § IV.5. This Resolution invites NGOs *« that have an interest in the field of the environment to lend their full support and collaboration to the United Nations with a view to achieving the largest possible degree of co-operation and co-ordination »*.

- ***Proposal 3 : Improve civil society's access to information held by the international institutions responsible for environmental negotiations, and organise means of appeal should access be denied.***

- ***Proposal 4 : Clarify and make the accreditation criteria for NGOs in environmental negotiations more transparent.***

This clarification could occur through the provision of a **unique accreditation procedure for environmental NGOs, organised by the UN and its Secretary-General** ; an accredited NGO would then be recognised as having a presumed representativity for participating in environmental negotiations. This rebuttable presumption could be challenged by a negotiating State and examined by the Secretariat of the environmental conference concerned. Reasons for rejecting accreditation must be given and made public in order to ensure that the process for selecting NGOs is completely transparent.

- ***Proposal 5 : Include the principle of public participation in every multilateral environmental agreement.***

This would put an end to a paradox. Starting with the 1998 Aarhus Convention[7],international law has set out the principle of public participation, but only for national laws. It does not apply this requirement to itself. This is probably due to the survival of the principle of sovereignty and the traditional concept of international law dating from the 19th century, which was only the concern of States and not of individuals. This is all the more regrettable given that, in practice, civil society is gaining an evermore significant role in international negotiations.

To bring the law in line with these practices, international texts should contain the principle of public participation in the drafting of international environmental law. This could first be established by each international convention on a case-by-case basis for the international norms expanded upon in the framework of the particular convention. Afterwards, the principle could be elaborated upon and placed in a more general text.

- ***Proposal 6 : Adopt a framework convention on public participation in developing international environmental norms.***

A framework convention could **group together and clarify the set of fundamental principles** for the drafting of international environmental norms : right of access to information, public participation, etc. Moreover, international organisations, alongside States, could be parties to this convention.

III- Is there a role for NGOs at the COP21 ?

NGO participation in the functions of the COP is expressly stipulated in the texts[8]. In practice however, access to official meetings is often limited for logistical reasons. NGOs can make speeches at the meetings of the subsidiary bodies where most of the negotiations take place. Furthermore, the UNFCCC Secretariat allows NGOs to make written statements which, once accepted by the Secretariat, can be accessed on the convention's website.

For the COP21 and alongside the official negotiations, France is planning to provide an area dedicated to the activities and statements of civil society in its various guises at the Bourget location (the « Climate generations » areas), which will be accessible to the wider public, observers and negotiators. This is where civil society organisations can present their projects, initiatives and solutions against climate change. Other exhibitions are planned in the Ile-de-France region and across the whole country with the support of regional authorities.

All of these initiatives are to be welcomed. Participation by civil society, companies and other non-governmental actors is now increasingly being taken into account. However, there is still progress to be made as,

[7] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed at Aarhus in 1998.
[8] Article 7 of the UNFCCC, expanded upon by Rule 7 of the COP's Rules of Procedure.

due to it not being very widely institutionalised, the contributions made by these actors remain informal and on the fringes of official negotiations. The final content of the Paris agreement will enable an assessment of the advances States are prepared to concede on this point.

SECOND PART – Judicial guarantees : allowing civil society access to environmental justice

The existence of practical compliance mechanisms and sanctions is a mandatory condition for an effective rule of law. From this perspective, international environmental law suffers from numerous failings. The treaties have often implemented flexible compliance procedures, of a non-judicial nature, which are aimed more at assisting a State in difficulty than at imposing sanctions. Furthermore, recourse to these compliance mechanisms is almost exclusively reserved to the States themselves. To strengthen these compliance mechanisms, an **external viewpoint, that of civil society, appears necessary**.

I- Improving the effectiveness of the compliance mechanisms for the application of multilateral environmental agreements

True judicial bodies, like the ECHR are few and far between in international law. Generally speaking, the application of an international convention is ensured by a flexible, non-judicial mechanism. It is entrusted to a « control » or « monitoring » committee : an administrative body that is more or less independent of the convention's Secretariat. Today, most environmental agreements include regular and sometimes continuous mechanisms for monitoring their implementation by the parties.

Within this framework, the States must provide the control committees with regular information on their progress in attaining the targets set by the convention (*reporting system*). Moreover, experience has shown that non-compliance with the provisions of environmental agreements is not always conscious or deliberate. States do not always have the resources or the expertise required to enable them to comply with the obligations they have undertaken. So, the **adoption of an approach for helping States comply with their obligations, rather than simply observing their non-compliance and imposing sanctions** became the prevailing idea.

Consequently, at the start of the 1990s, these new control systems were set up in the form of compliance procedures. They can be described as institutional mechanisms established to review the submitted reports of parties and devise methods to assist those States unable to comply with their commitments.

- ***Proposal 7 : Instigate compliance procedures for the environmental agreements that have none, and generalise publication of the regular reports produced by the States within the framework of the compliance procedures.***

Compliance procedures are relatively effective, insofar as the sanctions are not entirely binding. The procedures are rarely enacted and are often limited to publishing cases of non-compliance, shaming the defaulting State through bad publicity. Nevertheless, their usefulness is undeniable. The procedures have the virtue of defining as a principle **the obligation for States to account** for their application of the convention to an external body. Furthermore, they allow for the implementation of actions prior to the occurrence or aggravation of environmental damage. Yet, some conventions do not possess these procedures. These procedures must therefore be implemented for the maximum number of existing conventions and for any conventions adopted in the future.

- ***Proposal 8 : Allow referrals by civil society to the compliance committees, based on the model of the Aarhus Convention, and generalise the possibility for committees to use information provided by civil society or companies.***

To be effective, in view of the reticence of the States parties, the compliance committees must be more open to civil society, and particularly to NGOs. This solution is a logical extension to the reinforcement of civil society's participation in the upstream phase, that is, during the drafting of international conventions. **In parallel to the approach on procedures, as soon as civil society is involved in the creation of the international norms, it is only natural that it should also be able to participate in the monitoring of its application.**

- ***Proposal 9 : Strengthen the financial and technical capabilities of the committees responsible for compliance procedures and to encourage their coordination to enhance their mutual efficiency and, ultimately, consider merging certain committees.***

These procedures were created to ensure flexibility, as opposed to the conventional mechanisms for settling disputes, which has helped them to be accepted and subsequently to develop in number. Their efforts must thus be focussed on assisting a State that is or may soon be in a situation of non-compliance. **In this respect, the development of financial and technical assistance measures is essential, particularly for the less developed countries**.

- ***Proposal 10 : Allow compliance committee referrals by civil society for the new protocol to be negotiated in Paris at COP21.***

As an extension of the preceding proposals, the Committee considers it essential that, as part of the Paris agreements, the new compliance procedure be as transparent and as open as possible in order for civil society to be involved in it.

II- Guaranteeing the individual right to legal action

1 > Before an international judge

Even though a specialist environmental court has not been created, several international courts may hear disputes with an environmental aspect. However, these dispute resolution mechanisms remain optional : States can choose not to recognise the jurisdiction of a court, particularly that of the International Court of Justice (ICJ). **The jurisdiction of the ICJ has been recognised by the majority of the large European countries : Germany, the United Kingdom, Spain and Italy**. This is not the case, however, for several States, including France. This is a particularly deplorable situation for the host country of the COP21, at a time when the ICJ plays an increasingly important role in environmental law.

- ***Proposal 11 : Promote recognition of the mandatory jurisdiction of the International Court of Justice, in particular by the Member States of the UN Security Council, and notably by France.***

Furthermore, considerations underway **on the creation of a specialised court for environmental issues** must continue. There are a growing number of initiatives in favour of creating such a system[9] but the forms proposed diverge. Some suggest a criminal jurisdiction. A more technical jurisdiction can also be envisaged, limited to the application of certain specific conventions. Such a jurisdiction could be attached to the Universal Environmental Charter proposed later on. This is a highly relevant issue.

In any event, environmental protection, because of its cross-cutting nature, must be an objective covered across all jurisdictions, whatever they may be. The functions of a specialised judicial system should therefore

[9] See in particular the Charter of Brussels, launched on 30 January 2014 at the European Parliament or the initiative concerning an International Moral Tribunal for Crimes against Nature, supported by Edgar Morin.

be designed to be complementary to existing systems.

- ***Proposal 12 : Envisage the creation of an international judicial system for environmental matters and articulate its jurisdiction with that of existing systems.***

When States do recognise the compulsory jurisdiction of an international court, in the majority of cases, they are the only parties able to initiate a legal action. The role of non-governmental players in the environmental field would now justify granting them more access, notably by augmenting their legal standing before an international court. A **right of intervention for NGOs**, through the production of statements before these international courts, should be recognised.

- ***Proposal 13 : Establish a genuine right of intervention, particularly in contentious cases, and amend the Court's practice directions by drawing up a list of experts and NGOs that can be consulted by the Court, subject to the adversarial principle, for both its decisions and advisory opinions.***

In some cases, it is possible to go further and provide a genuine right to a judicial remedy. Under more stringent conditions and in a limited number of particular instances, **recourse to international environmental justice could be opened to a certain category of non-governmental actors**.

- ***Proposal 14 : Promote the wider opening of international judicial bodies to certain categories of non-governmental players in order to control the effectiveness of multilateral environmental agreements.***

This opening-up of legal remedies would also apply to the Court of Justice of the European Union. In fact, individuals can at present refer a case to this court but only in an extremely limited number of circumstances.

- ***Proposal 15 : Broaden access to the Court of Justice to private individuals within the European Union, particularly for infringement procedures against Member States.***

2 > Before national judges

National judges, more accessible to citizens, ought to assume the role of an international justice of general law so as to become the primary guarantor of the State's compliance with its international commitments.

Yet, national judges limit the admissibility of arguments based on breaches of an international convention. As an example, to date, **most major multilateral environmental agreements cannot be invoked before the Conseil d'État of France**. Indeed, to consider whether a treaty provision may be invoked before a national court, the judge often imposes a condition related to its direct effect. This classical notion is applied to an international convention that **creates in itself rights and obligations with respect to private individuals**. Only those conventions having a direct effect may be invoked before the national courts. This concept was justifiable in the 19th century when treaties only governed the relations between States (« contract » treaties) ; however, today it is questionable with the development of « law » treaties, which establish rights for individuals.
Therefore, the direct-effect requirement should now be made more flexible to ease the citing of environmental agreements before national courts. The Committee therefore advocates amplification of the judicial changes in progress, in order to give full effect to treaties in national legal systems.

- ***Proposal 16 : Continue and amplify the judicial changes in progress, in order to give full effect in national legal systems to the treaties, and particularly multilateral environmental agreements because of the very nature of environmental law, which is universal in scope.***

Already in France, the Conseil d'État, in its *GISTI* decision of 11 April 2012, provided a broader definition of the notion of direct effect : a provision is now considered as having direct effect if it « *is not intended solely to rule over relationships between States* » and « *does not require the intervention of any further act to produce effects on private individuals* »[10]. The first condition is thus expressed negatively : a treaty is presumed to have direct effect, unless it only rules over relationships between States. The second condition is dissociated from the treaty text : the decision specifies that « *the absence of such effects cannot be deduced from the simple circumstance that the provision designates the States parties as subjects of the expressed obligation* ». With this new interpretation guide, **French superior courts could review the various environmental agreements and re-examine previous case-law in order to recognise what is now direct effect**.

Finally, the Committee would like to draw the attention of environmental agreement drafters to the issue of **invoking these conventions in national legal systems**. The issue of whether a convention can actually be invoked before national courts and whether such bodies apply it correctly is a matter of interest to international law. It should be settled by the convention itself and dealt with by its compliance mechanisms. The Committee has formulated two proposals, based on this principle.

Firstly, it is recommended that those negotiating environmental agreements ensure that the provisions are written in sufficient detail, to avoid any subsequent dispute in national courts regarding their direct and binding nature.

- ***Proposal 17 : Ensure that multilateral environmental agreements are drafted with a sufficient level of clarity and precision and without conditions to ensure that their provisions are truly restrictive with respect to the States and that they may be recognised as having direct effect by national judges.***

Secondly, it is recommended that a chapter dealing specifically with the right to legal remedy be included systematically in environmental agreements, which is based on the model of the Aarhus Convention. It would explicitly state that the convention has direct effect and therefore may be invoked before a national court.

- ***Proposal 18 : Include in each multilateral environmental agreement provisions regarding the right to invoke the convention before a national court and the existence of the right to an effective remedy before national legal bodies to ensure respect of the convention by the State.***

THIRD PART – Guarantees written in the texts : adopting a Universal Environmental Charter

I- Improving the accessibility and readability of international environmental law

Today, there are more than 500 international treaties concerning environmental matters more or less directly, including around 300 regional agreements. International environmental law does not suffer, therefore, from a lack of norms, but from their **diffusion**, or fragmentation even. From one perspective, conventions are limited on the basis of both **geography** (they are often regional agreements) and **sector** (the agreements are very specialised). This situation affects the accessibility of the environmental norm, which is little known about and, therefore, poorly applied.

The quality and accessibility of the international environmental norm could be, *a minima*, improved by better publicising the existing corpus of norms via a specific website. There are currently private websites which list the most significant environmental agreements. The idea would be to broaden these initiatives by proposing that a comprehensive, rational and well-considered overview of the existing provisions be presented on the

[10] Assemblée du Conseil d'État, Groupe d'information et de soutien des immigrés (GISTI) et autres, 11 April 2012, No. 322,326.

website of a large international organisation, for example, the UNEP.

To take it further, work could be carried out on the actual substance of these conventions. The issue would be to reorder them, better link them and even regroup them. Their codification could be planned afterwards.

- ***Proposal 19 : Undertake a piece of work to identify and order the multilateral environmental agreements.***

II- Enshrining the founding principles in a universal text with binding force

Several environmental declarations and charters already exist at the international level : the 1972 Stockholm Declaration, the 1982 World Charter for Nature and also the 1992 Rio Declaration. The Earth Charter can be added to these. This document came from civil society. It does not have binding force, but is symbolically influential. In a similar vein, a declaration may be adopted at the COP21 taking place in Paris in December 2015. A draft of the « Declaration of the Rights of Humanity » in relation to preserving the planet was delivered by Corinne Lepage to the French President. This type of initiative should be welcomed. Hopefully, it will be taken up at one of the upcoming world summits. The adoption of such a text would enrich the corpus of principles recognised by the international community.

All these texts are valuable, for their political and symbolic significance, but they present a major limitation : they lack legal force. As a result, they cannot be invoked before a court. Therefore, they cannot constitute a real guarantee of rights, which is the central concern of this report. A text with binding legal force must be adopted : a Universal Environmental Charter. This text would be the corner stone of international environmental law. It would lay down the founding principles, from all the sectoral environmental agreements by analysing the variation in, and implementation of, these principles in the specific fields.

This Charter would supplement, unify and form the basis of international environmental law. By establishing material and procedural rights, it would create jurisprudential force from which all courts could be inspired.

By being adopted as an international treaty and thereby giving it legal force, the Charter would **complement the two international pacts on human rights**, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. **This treaty would be to the Rio Declaration what those two covenants were to the Universal Declaration of 1948** : a binding supplement bringing legal effect to the principles previously established in a simple declaration.

- ***Proposal 20 : Adopt a Universal Environmental Charter in the form of an international convention with binding legal force.***

However, the adoption of this text will only have real legal force if it is accompanied by an effective monitoring and compliance mechanism. Each State would have to submit a report on its application of the Charter to a compliance committee on a regular basis. The committee's examination of the report would represent an opportunity to proceed with, for the country concerned, a comprehensive assessment of the state of the environment and the measures taken by the State in this field.

- ***Proposal 21 : Provide in the Universal Charter, firstly, an effective compliance mechanism for examining both the periodic reports from the States Parties to the Charter and the complaints from civil society, and, secondly, provisions relating to its enforceability before national courts.***

Report available on November 17th on our website : www.leclubdesjuristes.com