

NOVEMBER 2015

REPORT

# INCREASING THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW

DUTIES OF STATES, RIGHTS OF INDIVIDUALS



With the support of The Fondation pour le droit continental

ENVIRONMENT COMMITTEE



# INCREASING THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW

## DUTIES OF STATES, RIGHTS OF INDIVIDUALS

REPORT FROM THE CLUB DES JURISTES

Environment Committee

NOVEMBER 2015

With the support of:



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*"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?"*

René Cassin

"L'homme sujet de droit international et la protection des droits de l'homme dans la société universelle" (FR) ("Man, a subject of international law and the protection of human rights in a universal society"), *Mélanges Georges Scelle*, p. 67-91.

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# FOREWORD

## Treaties, States and Citizens

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In the run up to the Conference in Paris in December 2015, international leaders are working to reach an agreement on climate change. This is to be welcomed. **The ecological crisis does not stop at State borders.** Ecological territories have different boundaries to legal territories. In order to protect the environment, norms must be adopted internationally.

However, under the lawyers' demanding gaze, a concern has arisen: despite its symbolic successes, international environmental law has, until now, been marked by a **double failure**. Failure of the development process: slow, even paralysed, diplomatic negotiations, influenced by the short-term interests of the States, and which only rarely result in ambitious and binding agreements. Failure in the application: even when a treaty is finally adopted, in the absence of control mechanisms and effective sanctions, it is not always followed by results.

This report is based on a central idea: **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.**

Certainly, in practice, this requirement is now obvious. Non-state actors are more and more present in international forums: NGOs of course, but also companies, the scientific community, local and regional authorities and even indigenous people. In 1992, there were more than 20,000 representatives from NGOs at the Earth Summit in Rio. Today, "Non-state Actors" play a pivotal role in the action plans against climate change. Furthermore, they have a dedicated Internet portal called NAZCA (*'Non-state Actor Zone for Climate Action'*).

**However, the law is lagging behind this current reality.** International law is still based on traditional 19th century concepts: the treaties are designed by the States only, for the States only. The traditional view is that individuals have nothing to do with the international stage.

Today, such a view is outdated. It no longer corresponds to international society in the present day.

This report therefore calls for the outcomes of this development in practices to be drawn upon to produce legal advances. There should be a place specifically devoted to civil society within the rules of international law. Civil society should be given **rights and guarantees** at every stage of the process.

**Firstly, in the drafting of treaties,** instruments for participatory democracy should be transposed at the international level. The principal of public participation, which already exists in national law, should be fully maintained in the adoption of international norms. The Committee therefore proposes to give NGOs the right of initiative and to strengthen their position in the negotiation of environmental conventions.

**Secondly, in the application of treaties,** civil society should be involved in monitoring States' compliance with their international commitments. NGOs should be able to refer matters to the compliance committees. Currently, these non-judicial bodies, responsible for monitoring the application of each international convention, can only be referred to by States. These procedures should be made more transparent in order to open them up to external scrutiny by non-state actors.

Above all, the justice system cannot actually sanction States who breach their international commitments. Firstly, international justice is optional: contrary to the majority of European governments, **France does not recognise the compulsory jurisdiction of the International Court of Justice.** Shouldn't we bring this anomaly to an end when Paris hosts the COP21? Secondly, non-state actors are not currently entitled to bring proceedings before international judicial bodies. NGOs should have, *a minima*, the right to stand before some judicial bodies in order to officially present their observations when a dispute is ongoing.

Thirdly, contrary to common belief, **it is not possible, except in exceptional cases, to invoke multilateral environmental agreements before the national court.** In France's case law, these are most often considered as not having a direct effect on national law, on the grounds that they do not create rights for individuals.

This reasoning should be reconsidered: in environmental matters, more than anywhere else, citizens do indeed have a right to ensure their State complies with its international commitments. **A right of individuals corresponds to the duties of States.** The former is one type of fundamental right: the right to a healthy environment, which is enshrined in several national constitutions today.

Thus, **the national court should be the first to ensure that the States comply with the environmental treaties.** This aim has just been vividly illustrated by the decision delivered on 24 June 2015 by a national court in The Hague. Referred to by an NGO representing more than 900 citizens, the court ordered the Dutch state to reduce greenhouse gas emissions by at least 25% by 2020 compared with the 1990 level, in order to comply with its international commitments.

Finally, the Committee is interested in the **content of international environmental law.** It is characterised by a profusion of technical and sectoral norms, which are difficult to access. There are **more than 500 treaties** more or less directly related to the environment. The lawyers themselves sometimes struggle to navigate their way through them. They may not be aware of the existence of a treaty or the protocols it amended, and they can even encounter difficulties in identifying the States which ratified it. The Committee's first recommendation is to improve the **quality and accessibility** of these norms by creating an on-line inventory. More ambitiously, work could eventually be undertaken to group the multilateral environmental agreements together and place them in order.

The ultimate outcome of these changes resides in the Committee's last proposal: to adopt a **Universal Environmental Charter.**

This involves enshrining the main principles of protecting the planet in a founding text. **This Charter would supplement, unify and form the basis of international environmental law, by giving it the corner stone it lacks.**

The lawyers understand the value of these totemic documents, such as the *Magna Carta* of 1215 in the United Kingdom or the Declaration of 1789 in France. These principles form the foundations of the legal structure. They create an approach for interpretation and guide case law. Of course, declarations and charters have already been adopted on environmental matters, starting with the Rio Declaration on Environment and Development in 1992. However, none of them has legal force. They are simply proclamations, with symbolic and political significance. In order for it to be possible for them to be invoked before a court, the main environmental principles should be affirmed in an international convention with binding force.

The time has come to adopt a Universal Environmental Charter in the form of an actual treaty.

**Yann AGUILA**

Member of the Paris Bar Association  
President of the Environment Committee  
of the Club des juristes







# The *Fondation pour le droit continental* and environmental protection

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The *Fondation pour le droit continental* (Civil Law Foundation) was created in 2007 with the objective of bolstering the voice of jurists of the Romano-Germanic tradition at international talks where the perspective of such jurists would be advantageous.

This initiative arose from the combined will of public authorities, the French Deposits and Consignments Fund, legal professionals and judges as well as a number of multinational companies. These stakeholders recognised that more than two-thirds of all countries belong to the civil law system, in other words, 56.4% of global GDP and 60% of the world's population. Accordingly, they found it essential to foster the discourse from civil law jurists on the problems confronting our planet.

The Foundation cannot be indifferent to the issue of transitioning towards a model of sustainable development. Since 2009, we have collaborated with the French Embassy in China and the Chinese Environmental Minister in order to promote the techniques developed under the civil law system for safeguarding the environment, such as codification, describing the fundamental principles of environmental law, combating air pollution and also the development of green financing.

It is completely natural then for us to support the initiative of the *Club des juristes*. The topic gives rise to it a priori; the report's conclusions justify it a posteriori. The Foundation can only support the conclusions, which highlight the possible contribution of civil law to environmental protection, to which we must commit ourselves. We cannot help but agree with the report's observation that the proliferation of scattered international texts and the emergence of very general principles within the body of case law are causing legal uncertainty and the ineffectiveness of international law through the instability and inaccessibility brought about by these methods.

The civil law system particularly knows how to handle such deficiencies. The codification and preference for written laws, more accessible and stable rules with foreseeable sanctions are all techniques well-known to the system's practitioners. These techniques would be all the more effective because Romano-Germanic law is the pillar of the legal systems in the majority of countries. We can logically expect that the recourse to such methods within the sphere of environmental law would be easily adopted in all legal systems.

In accordance with its international mission, the Foundation supports this report with the aim of promoting its dissemination among jurists in the majority of countries as well as all relevant international organisations. The challenge is now in the hands of the reader to make this law, which is so necessary for our planet, potent.

**Jean-François DUBOS**

Chairman of the Fondation pour le droit continental



# INTRODUCTION

## International environmental law: a necessary yet ineffectual law

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Since the 2009 Copenhagen Conference that failed to reach an international agreement on the climate which would succeed the Kyoto Protocol<sup>1</sup>, there has been little progress made in maintaining the rise in global temperatures to a maximum of 2°C until the end of the century. Despite the minimalist consensus achieved during the 20<sup>th</sup> Conference of the Parties (“**COP20**”) of the UN **Framework Convention** on Climate Change (hereinafter, “**UNFCCC**”) in Lima in 2014, **no new obligation has been established** by States in relation to the reduction of greenhouse gases. A major issue for the 21<sup>st</sup> Conference, taking place at the end of 2015 in Paris (“**COP21**”), will thus be to gain a **universal and binding agreement** on this point.

This is a very ambitious objective. All parties certainly agree, particularly when faced with reports published by the scientific community, on the need to come to such an agreement. However, many obstacles make the negotiations particularly arduous. The following may be mentioned: the desire of negotiating States to preserve their national interests, the disparity in development between these same States, or even the gap between the **culture of immediacy** characterised by political action dependent on electoral cycles and **long-term imperatives**, which must govern the management of environmental and climate changes.

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(1) The Kyoto Protocol was eventually extended until 2020 as a result of the 18<sup>th</sup> Conference of the Parties that took place in Doha in December 2012.

Broadly speaking, these difficulties demonstrate the restrictions encumbering **international law on the issue of the environment**.

### Framework Convention, Conference of the Parties and protocols

The United Nations **Framework Convention** on Climate Change (“**UNFCCC**”) is one of three texts signed at the Rio Earth Summit in 1992; the other two being the Convention on Biological Diversity and the United Nations Convention to Combat Desertification. These three conventions establish a flexible and global framework. In subsequent meetings between the States, “*Conferences of the Parties*”, more specific and binding agreements, or “*protocols*” are adopted.

In 1997, in relation to climate change, certain parties at the UNFCCC signed the Kyoto Protocol which entered into force in 2005. The Kyoto Protocol has a limited period of application and must thus be renegotiated on a periodic basis; this is the aim of the 21<sup>st</sup> Conference of the Parties being held in Paris in 2015.

Given that environmental destruction ignores borders, we need, now more than ever, international norms **(I)**. Yet, international environmental law today remains a little binding and ineffectual law **(II)**.

**One solution** for enhancing the effectiveness of treaties could be found in a reappraisal of the individual’s role on the international scene. Indeed, **individuals are directly affected by international environmental norms**, since these rules help guarantee a particular individual right which should be respected: **the right to a healthy environment**. However, except in rare cases, **individuals cannot invoke international conventions before a court**. It is recommended to include civil society in monitoring whether States abide by their international commitments, by giving individuals, and especially NGOs, the ability to refer their State to a court if it does not respect multilateral environmental agreements.

The work of the Committee has therefore been guided by a strong insight: in order to improve the effectiveness of international environmental law, **the guarantees of an individual's recognised rights should be reinforced** at the international level **(III)**.

## I. The need for international norms in protecting the environment

Despite the development of international law in relation to the environment, our environment continues to deteriorate (1). Faced with this cross-border phenomenon, it is vital to respond with the enactment of strong international norms that bind States (2).

### 1. Environmental degradation does not stop at the border

On the eve of the Paris Conference (COP21), the seriousness of climate and environmental changes is neither debatable nor really disputed. All studies and reports, whether national, regional or global, prepared on the basis of public or private sources, come to the same unquestionable conclusion: for several decades, we have been witnessing continuous deterioration in the general condition of our planet.

The latest environmental assessment published by the **United Nations Environment Programme (UNEP)**, entitled *Global Environmental Outlook 5 (GEO5)*, highlights the alarming loss of biological diversity, deforestation, serious drops in fish stocks and even the continual deterioration of soil, air and water quality, most notably in the least developed countries.

The **sixth mass extinction event** could well be in progress, as demonstrated in a study published in June 2015 by experts at the US universities of Stanford, Princeton and Berkeley. Humans seem to be the main culprit; according to the study, the rate of species extinction is 114 times greater than it would be in the absence of human activity.

The latest report published by the **Intergovernmental Panel on Climate Change (IPCC)** has again shown that the atmospheric concentration of greenhouse gases is relentlessly increasing at an unprecedented rate. It is at such a level that the objective of maintaining the rise in global temperature to under the 2°C threshold is already jeopardised. In fact, France had its **hottest year on record in 2014** since the start of the 20<sup>th</sup> century. Some of these changes have already produced irreversible effects for humans – a very large proportion of the emitted carbon remains in the atmosphere for more than 100,000 years<sup>2</sup>. Moreover, those changes present serious risks: deterioration in food security and available drinking water, increases in flooding and storms, population displacement and possible conflicts in relation to access of resources.

This planetary degradation affects all regions of the world including those that, like the European Union, have implemented some of the most developed and protective environmental and climate policies in the last few decades, such as setting up the Natura 2000 network.

The 2015 **European Environment Agency** report shows for example that the European **natural capital** is being eroded. Although progress has been made in certain areas, such as air and water quality and reductions in greenhouse gas emissions, the global trend remains pointed towards deterioration. It can be seen in the use of farmlands, the impact of climate change on ecosystems, health risks tied to climate change and chemical substances and, especially, in the biodiversity of land and aquatic flora and fauna. A large proportion of protected species (60%) and habitats (77%) has an unfavourable conservation status. Europe is far from being in a position to halt the loss of biodiversity by 2020.

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(2) S. Solomon and al., "Atmospheric Composition, Irreversible Climate Change, and Mitigation Policy", in Hurrell J. W. & Asrar G. (Ed.), *Climate Science for Serving Society: Research, Modeling and Prediction Priorities*, Springer, 2013, pp. 415-436, cited by S. Aykut & A. Dahan, *Gouverner le climat ? 20 ans de négociations internationales*, Presses de Sciences Po, 2015, p. 33.



## 2. The need for international environmental norms has never been stronger

The Chernobyl nuclear disaster in 1986 provides the most tragic illustration of this point: pollution and subsequent environmental risks do not stop at borders. **Ecological territories have completely different boundaries to those of the law**, which are enclosed within administrative and legal limits. The advancement of globalisation and the resultant interdependence of economies also entail a global understanding of environmental phenomena. As the IPCC states in its first reports: “*climate change is a common concern of mankind*”<sup>3</sup>.

Environmental law must be considered outside the confines of the nation-State. In order to safeguard the environment and our ecosystem, **the law must have transboundary and international scope**, just as much as having local or national remit. It is therefore not surprising that the environmental concerns, when they entered the public debate at the start of the 1970s, were immediately conceived on a global scale, with the notable creation of the UNEP in 1972 following the Stockholm Conference.

The global approach of environmental rules can perfectly incorporate the diverse local levels<sup>4</sup>. In this way, a consensus emerges on the **principle of differentiated responsibilities** of States in relation to climate change. After the accumulation of intense industrial activities over two centuries, the responsibility of developed countries for the state of the environment is historically greater than that of the developing countries. The principle of “common but differentiated responsibilities” was confirmed in the 1992 Rio Declaration (principle 7). It involves taking into consideration the economic and social situation of each country in the establishment of objectives for the reduction of greenhouse gas emissions. It is a fundamental principle within international environmental law, which allows the derogation of rules usually governing international treaties and traditionally based on the principles of sovereign equality and reciprocity.

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(3) Annex to the synthesis report of Group III, IPCC, 1990c.

(4) S. Aykut & A. Dahan, *op. cit.*, p. 45

## II. The double failure in global environmental governance

International governance with regard to the environment is currently ineffectual in two ways. The failure of major international negotiations highlights an underlying procedural weakness in the **formulation** of international environmental law (1). Furthermore, even when an environmental norm is adopted, the mechanisms for monitoring its **application** are scant and without binding force (2).

### 1. Deficiencies in the environmental negotiation process

There are certainly numerous international conventions concerning environmental issues, whether with regard to waste, biodiversity, the sea or even nuclear energy. They are so numerous that one of the problems of international environmental law, dealt with later, derives from the plethora of norms.

However, international environmental negotiations are not always successful. On certain major issues, when States decide to enter into discussions, which is by no means mandatory, the negotiations rarely end in an agreement that is both **universal** (i.e. involving all countries concerned) and **binding** (promulgating strong and specific rules). With the aim of gaining the concurrence of the greatest number of countries, negotiators often limit themselves to establishing minimalist rules.

For example, in the case of **biodiversity conservation**, the Convention on Biological Diversity adopted at Rio in 1992 only provides a very general and nominal framework. It has not even been ratified by the **United States**. Subsequently, the successive meetings of the Conference of the Parties have not culminated in sufficiently specific and binding agreements that would assist in curbing the regular disappearance of species. The objectives established by States have not been achieved; the Living Planet Index, devised by the World Wildlife Fund (WWF) further demonstrates that the terrestrial and marine populations monitored under this index have declined since 1970, a trend that shows no sign of slowing down or being

reversed<sup>5</sup>. Negotiations advance too slowly in view of the speed and irreversible nature of the dwindling reserve of biodiversity.

The same observation can be established for other areas of international environmental law or for certain regions. The beginning of 2015 was marked by the failed negotiations on **hydrofluorocarbon emissions**. These synthetic gases are used notably in refrigeration and air-conditioning and, according to the Institute for Governance & Sustainable Development, represent a global warming potential greater than a thousand times that of carbon dioxide<sup>6</sup>. The talks were scuppered due to opposition from **Kuwait** and **Saudi Arabia**. These two countries, whose populaces require air-conditioning to live in the hot climate, even refused the idea of a contact group on these toxic substances.

Concerning regional negotiations, it is noteworthy to cite the talks relating to the Convention on the Conservation of Antarctic Marine Living Resources which was adopted in 1980 and entered into force in 1982. In 2014, these talks ended in a third successive failure in their attempt to create new marine protected areas, due to opposition from **China** and **Russia**. Lacking international consensus, Antarctica continues to be threatened by the expansion of fishing and shipping.

Yet, it is obviously **the failure in the major climate negotiations** which is symbolic of the stalemate in which international environmental law currently finds itself. The 2009 Copenhagen Conference was conceived as a decisive moment for the world, both by States and by civil society and the many attending non-governmental organisations (NGOs). However, the only tangible result of the negotiations was a plain text in which about thirty countries, representing 80% of global greenhouse gas emissions, recognised the fact that climate change was a major challenge requiring a strong political will to avoid exceeding the 2°C threshold advocated by the scientific community.

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(5) World Wildlife Fund, *Living Planet Report*, 2014, available online at the following address: [http://www.wwf.ca/newsroom/reports/living\\_planet\\_report\\_2014.cfm](http://www.wwf.ca/newsroom/reports/living_planet_report_2014.cfm)

(6) Institute for Governance & Sustainable Development, *Primer on HFCs*, July 2015, available online at the following address: <http://www.igsd.org/documents/HFCPrimer7July2015.pdf>

A panorama of the various international negotiations relating to the environment shows that only the Montreal Protocol, which entered into force in 1989, yields an example of an adequate and efficient international response to a global environmental threat: the depletion of the **ozone layer**. In 2009, it became the first protocol in the history of the United Nations to achieve universal ratification<sup>7</sup>. It imposes on every country strict conditions aimed at phasing out chlorofluorocarbon gases (CFC) and hydrochlorofluorocarbons (HCFC), substances equally destructive to the ozone layer as well as contributing to the greenhouse effect. Its success has been paramount: the complete cessation in CFC production occurred in 2010 and the scientific community estimates that the ozone layer may return to its 1980 state between 2055 and 2065. Negotiations are now focusing on the reduction in and prohibition of the production and use of HFCs, which are suffering the problems mentioned earlier.

This success remains the exception to the rule. It is possibly explained by a favourable economic context, in which the relevant actors were relatively few and easily identifiable.

More often, international environmental law is characterised by its sluggishness, or rather **the paralysis of the negotiation process**. The difficulty in obtaining consensus explains the weakness and scant content found in the majority of negotiated texts.

## 2. The weakness of sanctions for breaching an international convention on the environment

Apart from the first difficulty in formulating international norms, there is another pitfall: international environmental law is characterised by its ineffectual nature. In other words, it is very often unable to produce the results assigned to it or the behaviour that it intends to encourage<sup>8</sup>. In fact, it suffers from a lack of control mechanisms in its application and from the weakness of sanctions when its norms are breached.

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(7) Concluded after the Vienna Convention for the Protection of the Ozone Layer adopted on 22 March 1985, the Montreal Protocol and the Vienna Convention were ratified by 196 States in 2009.

(8) Maljean-Dubois S., "La mise en œuvre du droit international de l'environnement", *IDDRI*, no. 03/2003., 2003, p. 23.

Originally, sanctions imposed within the international order emanated from the “private justice” between States. Even today, witnessing the current relations between Russia and the European Union which are governed by a form of “an eye for an eye” mentality, sanctions lead the Parties to participate in an infinite spiral of measures and counter-measures (diplomatic, economic and restrictive measures among others).

New compliance mechanisms have admittedly been developed in order to avoid the risk of conflicts, especially armed ones. Yet, even within this context, public international law prioritises a **cooperative approach over a punitive approach**.

International environmental law does not detract from the observation that **there are few multilateral environmental agreements that establish proper sanctioning mechanisms**. The monitoring of their application often passes through “non-compliance” procedures. Entrusted to simple committees without decision-making authority, the procedures result not in a judgement by a judicial body but in assistance for countries who fail to comply with their commitments. The most developed procedure to date is that of the Kyoto Protocol: when a State is in “*non-compliance*”<sup>9</sup>, three distinct coercive measures are available, which have the appearance of sanctions<sup>10</sup>. However, none of them have been used to date and the procedure has failed to prevent certain countries from shirking their commitments.

Moreover, States hold one further manoeuvre when they realise that they could be sanctioned: sovereigns, they can **denounce an international treaty** at any time. Thus, **Canada**, which had greatly exceeded its emission limits (28% increase in emissions instead of a 6% reduction), was threatened with a sanction and responded by unilaterally withdrawing from the Kyoto Protocol in December 2011.

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(9) Incidentally, the term used is not of a “breach” of the treaty.

(10) This mechanism was established after the Kyoto Protocol by the Marrakesh Accords adopted in 2001. For every tonne of emissions that has not been reduced, the State must, during the second period (2012-2020), offset such excess with a further decrease of 30%, which is added to the objectives established for this same period. Furthermore, the enforcement branch of the protocol suspends the State’s participation in the international market of emissions trading. Finally the enforcement branch requires the submission of an action plan for rectifying the non-compliance.

Admittedly, international law sometimes goes further and places dispute resolution within the remit of **genuine courts**. Accordingly, various courts have been established, some having general jurisdiction such as the International Court of Justice (ICJ), others with specialised jurisdiction such as the International Tribunal for the Law of the Sea or the Dispute Settlement Body (DSB) of the World Trade Organization. Yet, if the law is compulsory at a national level, in international law, recourse to legal or arbitration proceedings is **subject to the consent of the States**, the parties to the dispute. In the environmental domain, States are more reluctant to recognise the jurisdiction of third-party mechanisms in areas of their disputes<sup>11</sup>.

Consequently, a State has wide latitude in prioritising their short-term national interests over its international commitments. Even if it has signed and ratified a treaty, it can still deliberately choose not to undertake the resulting environmental measures. Worse still, the possible yet improbable sanction will only affect a distant successor to the current government. Therefore, for political leaders the temptation to place economic interests or immediate electoral issues in the ascendency over long-term international commitments is overwhelming, especially during an economic crisis.

### III. Civil society: a necessary counterweight to omnipotent States in international environmental law

To remove these impediments, it is necessary to abandon the traditional paradigm of public international law, according to which the treaties, created by **sovereign States**, do not concern individuals (1). Conceptions evolve and this doctrine is increasingly recognising people as a subject of international law (2). Especially **with regard to the environment, civil society and individuals should be given the rightful place they deserve** (3).

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(11) S. Henry, *L'efficacité des mécanismes de règlement des différends en droit international de l'environnement*, Doctoral Thesis, University of Nantes, 2011, p. 23.

## 1. An international community devised by and for the State

*"The Earth is one but the world is not"*. The distinguished Brundtland Report, published in 1987 by the World Commission on Environment and Development, begins with this phrase. It expresses the dilemma with which international environmental law struggles: environmental problems transcend the nation-State archetype but the international institutions and treaties depend wholly on these same States.

This situation illustrates the development exclusive to public international law: the current international community remains **a juxtaposition of sovereign States** responsible for the creation and enforcement of the law. A State holds the freedom to commit itself or not; by submitting to an international norm, it voluntarily decides to confine itself. According to a judgement in 1923 by the Permanent Court of International Justice, *"the Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty"*<sup>13</sup>. Within this traditional concept, by ratifying a treaty and placing obligations on itself, a State does not restrict its sovereignty but rather exercises it. This voluntarist theory of international law reflects the historical function of treaties: instruments regulating diplomatic relations.

But this blueprint is poorly adapted to confronting today's environmental issues. **The absolute sovereignty of States reflects their national interests and power relations; therefore, it constitutes the primary obstacle to advancing a common environmental law.**

Global climate negotiations again provide a symbolic portrait of this situation. The failure of the well-prepared and eagerly anticipated Copenhagen Conference was the outcome of the divergent interests of the internationally dominant powers, in particular **the United States and China**. A *top-down* approach was rejected by the Americans, whose soaring emissions made the ratification of the Kyoto Protocol politically

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(12) The report is well known for establishing the idea of sustainable development.

(13) Permanent Court of International Justice, Case of the S.S. "Wimbledon", 17 August 1923, Series A, no. 1.

and economically unacceptable because the protocol holds 1990 as the baseline year. Meanwhile, Beijing relentlessly defended the principle of differentiated responsibility in pointing out the historical responsibility of developed countries while not wanting to impede its own economic development. In this context, European Union members showed their complete disunity and were marginalised in the talks. **The climate negotiations thus floundered on the issue of national sovereignty.**

As an aside, it ought to be noted that international law, in general, is today witnessing a **profound change**. In being increasingly restricted by superior principles, **State sovereignty is currently being redefined**. It can no longer be considered absolute. This is shown, on humanitarian grounds, by ideas relating to the "*right of intervention*"<sup>14</sup> or, under a more recent concept, on the "*responsibility to protect*"<sup>15</sup>. At the time of this report, the influx of Syrian refugees to Europe dramatically depicts the fact that the international community cannot ignore the internal situation of a State since this may lead, one day, to consequences for neighbouring States. Some even assert that this restriction to sovereignty has always existed: in 1625, in *De Jure Belli ac Pacis*, Hugo Grotius referred to a "*right conferred upon human society*" to intervene in the case where a tyrant "*should inflict upon his subjects such treatment as no one is warranted to inflict*".

The same applies to environmental law. In this area as well, it is time to redefine the outline of the States' prerogative of sovereignty. In fact, some have been inspired by the humanitarian sphere and suggested the introduction of **the concept of a "right of environmental intervention"**<sup>16</sup>. Such a concept, except for possibly some emergency situations, does not appear entirely adapted to environmental problems. This report is instead guided by the idea that, while preserving the principle of State sovereignty, it is essential to give civil society a more prominent role in international law, alongside States.

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(14) A concept introduced in the 1980s, notably influenced by Bernard Koucher and Mario Bettati. See M. Bettati, *Le droit d'ingérence*, Odile Jacob, 1996.

(15) International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001.

(16) M. Bachelet, *L'ingérence écologique*, Frison-Roche, 1995.



## 2. People as subjects of international law

In general, individuals are today increasingly recognised as subjects of international law. This progress has especially taken place within the sphere of human rights, following the Second World War and due to the enshrinement of personal individual rights in universal or regional covenants. It is now agreed that States are no longer the only subjects of international law.

Originally, the classic concept of public international law assigned the character of legal subject to only States. International treaties historically could only create rights and duties for States. Whereas, individuals had no standing. **Such a concept was perfectly reasonable in the 19<sup>th</sup> century**, a time when the object of treaties only dealt with diplomatic relations in the settling border issues or the terms and conditions of peace.

This traditional outlook has been gradually eroded by the development of international conventions containing **rules directly affecting individuals**. For example, this was the case in the 1919 Treaty of Versailles which inaugurated the International Labour Organization and established, under Article 427, a genuine declaration of workers' rights. But it was obviously the events of World War II that gave impetus to the establishment of human rights at a global level, with the adoption of the **Universal Declaration of Human Rights in 1948**<sup>17</sup>. **Subsequently, the Commission on Human Rights**, the principal intergovernmental body on human rights within the United Nations, was tasked with placing the Declaration's principles into legally binding international treaties. As a result, two treaties were adopted in 1966: **the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights**. Other regional instruments have been enacted: the European Convention on Human Rights, the European Social Charter, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the ASEAN Human Rights Declaration and even, more recently, the Charter of Fundamental Rights of the European Union.

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(17) The Declaration in itself does not have legal force.

This change has been well portrayed by René Cassin, the father of the Universal Declaration, in an article unambiguously titled: *"Man, a subject of international law and the protection of human rights in a universal society"*<sup>18</sup>. He points out that simply proclaiming a personal right is not enough; it must also be wrapped in **guarantees**. An individual must be able to obtain, in court, respect for such rights when they have been infringed; otherwise, lacking any practical effect, they will have no prescriptive purview. This is the purpose of Article 8 of the Universal Declaration, which stipulates that *"[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law"*.

Within this framework, **René Cassin's question**, in the epigraph of this report, can be understood: *"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?"*<sup>19</sup>

By analogy, the same requirement regarding the **rights set forth under the Constitution** is found: only rights that can be enforced by a judge have any import. Hence, there is a need to create constitutional authority as referred to by Kelsen in a 1928 article accurately entitled "The judicial guarantee of the Constitution".<sup>20</sup>

Jurists know well enough: **a personal right has real significance only with it can be invoked by the individual holder before a court**, which will be able to penalise any infringement of the right. While the existing international courts are rarely open to individuals, international law has managed to create effective protection mechanisms for the personal rights proclaimed as human rights.

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(18) R. Cassin, "L'homme sujet de droit international et la protection des droits de l'homme dans la société universelle", *Mélanges Georges Scelle*, pp. 67-91.

(19) *Ibid.*

(20) H. Kelsen, "La garantie juridictionnelle de la constitution", *RDP*, 1928, p.197.

In this respect, numerous types of political or legal sanctions have been introduced for the proper protection of the human rights recognised in the Universal Declaration. This can be seen by the actions led by the **UN Security Council** on the basis of Chapter VII of the Charter of the United Nations. On this legal basis, the Security Council, in April 2015, again condemned the violations of human rights and international humanitarian law in Ivory Coast and extended the sanctions implemented against the country until April 2016<sup>21</sup>. Furthermore, the **International Criminal Court** was founded in 1998 for the purpose of punishing perpetrators of genocide or crimes against humanity. This is concurrent with other international criminal tribunals set up to penalise the egregious human rights abuses in the former Yugoslavia and Rwanda.

The most successful regional example remains the European Convention of Human Rights since its compliance has been entrusted to a particular judicial body, **the European Court of Human Rights** (ECHR). Individuals possess a right of direct application to the Court, like the States Parties to the Convention, guaranteed under Article 34 of the Convention. This right of individual application was initially optional and was not accepted by France until 1981. Since 1998 it has since been generalised with the entry into force of Protocol 11. The Court considers the right as a *"key component of the machinery for protecting the rights and freedoms"*<sup>22</sup>. Around 800 million European citizens thus have the opportunity to bring proceedings before the ECHR.

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(21) United Nations Security Council, Resolution 2219 (2015) of 28 April 2015.

(22) E.C.H.R., 4 February 2005, *Mamatkulov and Askarov v. Turkey*, no. 46827/99 and 46951/99.

### 3. The legitimacy of civil society's and the individual's role in international environmental law

As in the domain of human rights, the role of individuals and, in the broader sense, civil society ought to be recognised alongside that of States in the field of international environmental law (3.2). The right to a healthy environment is indeed a fully-fledged human right (3.1). The existing guarantees for human rights should therefore cover the environmental sphere (3.3)

#### 3. 1. *The right to a healthy environment - a human right*

Since the beginning of the 1970s, many individual rights relating to the environment have been declared along with, as an offshoot of a wider right, the right to a healthy environment<sup>23</sup>. The assertion of these fundamental rights has enriched human rights on the whole.

Consequently, declarations proclaiming rights have been adopted at several major environmental summits. Even though they lack legal force, they possess at least a strong political and symbolic importance. **The 1972 Stockholm Declaration** contains 26 principles presented together as an expression of a common belief<sup>24</sup>. The first principle notably stipulates that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being". Furthermore, this formulation creates a direct real link between the environment and human rights.

Ten years after Stockholm, in **1982**, the **World Charter for Nature** was adopted by a United Nations General Assembly resolution<sup>25</sup>, in other words, under the same legal basis as the Universal Declaration of Human Rights. It states several fundamental principles and establishes, in particular, for the first time the concept of "future generations".

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(23) See C. Le Bris, *L'humanité saisie par le droit international*. Doctoral Thesis, Paris I University, LGDJ, 2012.

(24) The declaration adopted upon the conclusion of the United Nations Conference on the Human Environment, held at Stockholm in 1972.

(25) UNGA Resolution 37/7 of 28 October 1982. It ought to be noted that it was adopted with 111 countries in favour, 18 abstaining and one against - the United States.

The **1992 Rio Declaration on Environment and Development**, adopted during the Earth Summit, comprises 27 foundational principles. The first principle proclaims that human beings “*are entitled to a healthy and productive life in harmony with nature*”. It notably describes the precautionary approach and the notion of sustainable development.

This body of principles is acknowledged as an integral part of human rights. In this regard, the United Nations Commission on Human Rights recognised the existence of “*human rights to life, health and a sound environment*”<sup>26</sup> in 1999. In line with this, a 2015 draft resolution of the Human Rights Council recalls that “*the urgent importance of continuing to address, as they relate to States’ human rights obligations, the adverse consequences of climate change for all*”<sup>27</sup>.

Even though these texts lack binding legal force, they are not entirely deprived of power. They can especially serve as a basis for the recognition, by the International Court of Justice, of **international custom**. Indeed, they may indicate the existence of an *opinio juris* that at least allows the idea of some environmental rights falling within customary rules<sup>28</sup>.

At the regional level, the first formulation of a right to a healthy environment came in the **African Charter on Human and Peoples’ Rights** of 1981, where its Article 24 stipulates that “[*a*]ll peoples shall have the right to a general satisfactory environment favourable to their development”. The American continent bestowed upon itself a similar text through the Protocol of San Salvador, signed in 1988 with the entry into force in 1999, which supplements the **American Convention on Human Rights**<sup>29</sup>.

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(26) Commission on Human Rights, Resolution 1999/23 of 26 April 1999.

(27) Human Rights Council, *Draft Resolution from Bangladesh, Bosnia and Herzegovina, France, Guatemala, Haiti, Mauritania, Peru, Philippines, Venezuela and Vietnam*, 30 June 2015, A/HRC/29/L.21.

(28) Two elements are required for the existence of a customary norm and its recognition by an international court: a material component (a practice, usage) and a subjective component, *opinio juris*, the belief of being bound by the rule. According to Article 38 of the Statute of the ICJ, the custom must be “*accepted as law*”. In the North Sea Continental Shelf case, in 1969, the Court defined this concept: “*The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even the habitual character of the acts is not in itself enough*”. In the same case, the Court indicated that *opinio juris* must “*be evidence of a belief that this practice is rendered obligatory by a rule of law requiring it*”.

(29) Its Article 11 states: “*1. Everyone shall have the right to live in a healthy environment and to have access to basic public services / 2. The States Parties shall promote the protection, preservation, and improvement of the environment*”.

Whereas Europe does not have a regulatory instrument dedicated specifically to the environment, it does possess binding legal texts on the issue. In particular, the extensive and progressive case law of the European Court of Human Rights (ECHR) has assuaged the absence of this right in the European Convention of Human Rights and Fundamental Freedoms<sup>30</sup>. It has explicitly established, on the basis of the convention's Article 8, an environmental human right<sup>31</sup> or a human right to a healthy environment.<sup>32</sup>

Finally, at a national level, more than a hundred **constitutions** include the protection of the environment within their provisions, by associating it with the rights of individuals or sometimes with the obligations of the State (as in the cases of Germany and Italy). This is clearly the case with France and its **Environmental Charter**, a veritable catalogue of fundamental principles which represents the third component in the triptych consisting of the 1789 Declaration (civil and political rights) and the Preamble to the 1946 Constitution (economic and social rights). The situation is the same in Europe with the Belgian, Spanish, Portuguese, Greek and Finnish constitutions as well as the constitutions of several countries of the former Soviet bloc: Romania, Poland, the Czech Republic, Slovakia and Slovenia raise environmental rights to the level of constitutionally protected human rights. Other large countries, such as Russia, Turkey and the United States, have followed suit at the state level<sup>33</sup>. South American countries, like Brazil and Peru, have long been committed to this direction.

In concluding this overview, one observation is clear: **individuals are directly concerned by the provisions of international environmental instruments**<sup>34</sup> The notion that only States are subjects in international law appears wholly inappropriate in the field of the environment.

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(30) It ought to be highlighted that the Inter-American Court of Human Rights also has a developed case law on issues relating to indigenous peoples.

(31) E.C.H.R., 8 July 2003, *Hatton and others v. The United Kingdom*, no. 36022/97.

(32) E.C.H.R., 27 January 2009, *Tătar v. Romania*, no. 67021/01.

(33) V. Rebeyrol, *L'affirmation d'un "droit à l'environnement" et la réparation des dommages environnementaux*, Doctoral Thesis, Paris 1 University, 2008.

(34) See J.H. Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, United Nations Human Rights Council, 30 December 2013, A/HRC/25/53.

### 3. 2. *The role of civil society in environmental governance*

Global governance of the environment is not the sole remit of States. Environmental issues and their negotiations include numerous stakeholders.

#### Civil society, NGOs, individuals: a question of terminology

The term “stakeholders” (also sometimes termed constituencies) was defined by a working group chaired by the former President of Brazil, Fernando Cardoso. The group proposed to place stakeholders into three large categories, alongside States, the report recognised the private sector and civil society<sup>35</sup>.

- The **private sector** groups together firms, business federations, employer associations and industry lobby groups.
- According to the report, the concept of **civil society** excludes the activities of both the State and the market. This category encompasses a heterogeneous grouping of peoples and organisations: persons/ citizens, citizen associations, indigenous peoples, universities and scientific communities, trade unions, professional associations, social movements, indigenous people’s organisations, religious and spiritual organisations and of course, non-governmental organisations (NGOs).

One other approach involves contrasting **States**, sole subjects, alongside international organisations, of international law<sup>36</sup>, with **non-state** or **infra-state actors**<sup>37</sup>, a vast category grouping together natural and legal persons under national law (citizens, businesses, NGOs, regional collectives, indigenous peoples, etc.).

(35) Report of the Panel of Eminent Persons on Civil Society and UN Relationships, Doc. A/58/817, 11 June 2004, p. 13. See also Pomade A., *La société civile et le droit de l’environnement. Contribution à la réflexion sur les sources et la validité des normes juridiques*, Doctoral Thesis, University of Orléans, LGDJ, 2010.

(36) Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174.

(37) The term “non-state actor” is more often used in English and it covers both the private sector and civil society.

The collection of these non-state actors actively contributes to the creation, development and effectiveness of environmental public policies. They provide a genuine font of inspiration and innovation for governmental and intergovernmental practices. Different sets of actors have seen their role and influence grow significantly during the last few decades.

First on the list are **NGOs**, which have very disparate characteristics and missions and can be local, national, regional or even international. Their actions relate to environmental protection as well as sustainable development, combating poverty etc. Environmental NGOs ensure their effectiveness by, among other functions, being watchful, raising awareness, providing public education and expertise along with critiquing public policies.

In relation to environmental protection, the **scientific and academic community** also plays a major role in identifying ecological problems, their causes and effects; moreover, they inform public opinion and the policy-makers of existing problems.

More generally, States can be directed towards **transferring certain duties to private parties** residing in the country in order to abide by their international environmental commitments.

This is the notable situation for **businesses**, the targets of national regulations implemented by States for the purposes of respecting their international undertakings or international custom<sup>38</sup>. In a similar vein, the European Court of Human Rights placed a positive duty on States to guarantee, by all necessary means, the right to the environment. Furthermore, the liability of businesses may be sought by States for breaches of international environmental rules<sup>39</sup>.

**Economic actors** must accordingly take into account ethical and environmental considerations in their activities. The economic policies concerning "*green growth*" depict this change that seeks to overcome the real or assumed contradictions between economic growth and environmental

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(38) The ICJ has very clearly established the obligation to perform "an *environmental impact assessment* where there is a risk that the proposed industrial activity may have a significant adverse impact in a *transboundary context*" as customary international law. *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgement, I.C.J. Reports 2010, p. 14, para. 204.

(39) See Maljean-Dubois, "La portée des normes du droit international de l'environnement à l'égard des entreprises", *Journal du droit international*, no. 1, January 2012.



protection. The same applies to the progressive establishment of the idea of **corporate social responsibility** in the financial sector and all other areas of the economy. The OECD guidelines for multinational enterprises are currently the most complete set of procedures on company responsibility towards the environment. Likewise, international criminal law could be used to impose obligations on private parties. Current proposals put forward in favour of creating a crime of ecocide obviously rest on this interpretation of international law: an international convention, aimed especially at multinational companies, could establish such offences<sup>40</sup>.

Finally, local communities, such as **regional collectives or indigenous peoples**, are increasingly included in the devising and implementation of action plans for sustainable development. One particular example comes from cities; often responsible for the public services of water and waste management, they now play a leading role.

This collection of non-state actors is today closely linked to the international policy of environmental protection. The "Lima-Paris Action Agenda", adopted in Lima, Peru, provides a good example: it is essentially devoted to the **actions of Non-state Actors (NAs)**. The NAZCA ("Non-state Actor Zone for Climate Action") website describes their commitments.

### 3.3. *The need to guarantee environmental rights*

The protection of the environment is a right of individuals. It is a fundamental right springing from a new generation of human rights. It is thus proper to ask the same question, made by René Cassin on human rights, to environmental rights; that is the **question of guarantees**: "*How can the individual, a subject of law, gain universal respect for, and observance of, the rights he holds?*" How can individuals, holders of these rights, be offered the legal means to ensure States respect their obligations in this field?

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(40) See L. Neyret (dir.), *Des écocrimes à l'écocide, Le droit pénal au secours de l'environnement*, Bruylant, 2015.

For fundamental rights, certain safeguards sometimes exist at the regional level. This is the case of the European Convention of Human Rights which has its own court, the European Court of Human Rights. Once the Court has a case referred to it by individuals, it can sanction the State's breaches of the environmental rights arising from the Convention. Another noteworthy case is the Court of Justice of the European Union, even if the European Union does not wholly fall under general international law.

Nevertheless, in the international sphere, the enshrinement of environmental human rights has more often than not been a purely symbolic concession. Even when the texts have legal force, they are not always applied or enforced. Deprived of authority, international environmental law proves to be impotent in resolving problems or managing global environmental risks.

**By strengthening the legal recourse available to civil society, a means of enforcement, exclusive of States, would be introduced, thus contributing to the improved effectiveness of international environmental law.**

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This report examines **three categories of guarantees for the right of individuals and of civil society**.

Firstly, the **procedural guarantees (First Part)**. Starting from the formulation stage of environmental agreements, the participation of civil society must be better assured. The issue here is enhancing the international environmental governance.

Then, the **judicial guarantees (Second Part)**. Under this section, the report proposes easing civil society's access to compliance mechanisms and international courts. In particular, NGOs offer an external view, which can greatly contribute to States complying with their international obligations.

Finally, the **guarantees written in the texts (Third Part)**. The current body of law and legal remedies demonstrate a major deficiency. The different existing declarations of environmental rights, being purely symbolic, are deprived of any legal scope and can rarely be invoked before a judge. It is advisable to go beyond this current state of affairs by adopting a Universal Environmental Charter, endowed with a binding compliance mechanism and enforceable before a national or international court. This foundational treaty would help 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.

# FIRST PART

## Procedural guarantees: strengthening the position *of civil society in developing international environmental law*

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Only States and international inter-governmental organisations have the power to make commitments through treaties, in contrast to individuals who do not have legislative power on the international stage. Nevertheless, on environmental matters, the past three decades have seen an increase in the number of NGOs becoming involved ahead of and during environmental negotiations. In particular, in the new UNEP forum, created after the Stockholm Conference, the classic approach to consulting NGOs and, more widely, civil society, has gradually transformed into greater active participation by these stakeholders in the decision-making process.

This expansion was endorsed in a spectacular way at the Rio Conference in 1992, where the number of representatives from NGOs reached 20,000, twice the number of governmental representatives. Their strike force was such that the NGOs organised a parallel summit to make their voices heard. **Principle 10 of the final Declaration of the conference enshrined the requirement for participatory democracy** in environmental matters by stipulating that: "*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including infor-*

*mation on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available [...]”.*

The **Aarhus Convention**, signed in 1998, also aims to promote public participation in decision-making on matters with an environmental impact. It is based on three pillars: the right of access to information (Articles 4 and 5), the right of the public to participate in preparing decisions (Articles 6-8) and the right to access justice (Article 9). The States party to the Convention commit to ensuring that these three rights are concurrent in their internal procedures for any decision concerning the environment.

In 2005 the Conference of the Parties to this convention adopted the **Almaty Guidelines**, which aim to promote the principles of access to information and public participation in the decision-making of international institutions dealing with environmental issues. Their principal objective is to provide general guidance to the States party to the convention. In particular, they provide that *“in any structuring of international access, care should be taken to make or keep the processes open, in principle, to the public at large”*.

In this context, NGOs have been able to develop different ways to put pressure on governmental actors depending on the form and phase of the treaty negotiations, particularly when putting an environmental issue on the agenda (I). However, the routes for action by NGOs during negotiations remain indirect and they are rarely recognised in the actual text of the international conventions (II). The COP21 in December 2015 in Paris could provide an opportunity to strengthen these procedural guarantees (III).

### Developing international treaties

Developing international treaties comprises several phases:

1) **The preparatory pre-negotiation phase:** during this phase, each State considers what it wants to grant, concede and conclude. It is not a formally open phase of the negotiation as yet. The parties have two options:

- make use of an existing negotiation framework, such as a Conference of the Parties which enables protocols to be adopted which clarify the obligations of the States party to the agreement;
- agree on an *ad hoc* adoption procedure by establishing rules of procedure and creating a secretariat.

2) **Negotiation**, during the course of the international conference which should result in the **adoption** of a legal text, generally by consensus. The parties vote article by article, and then on the text as a whole. Negotiation on the content of the articles is crucial as subsequently States will very rarely oppose the adoption of an article or a text to then simply refuse to ratify the latter.

3) **After the signing of the treaty comes the ratification.** Signing the treaty does not commit the States. States should then, in accordance with the adoption procedures defined in their Constitution, ratify or approve the treaty in order for them to become legally bound. A State which did not participate in the negotiations can always join the treaty later. If ratifying or approving the treaty commits States individually, the treaty generally provides for it to enter into force after a minimum number of ratifications (the ratification threshold).

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

While the scientists provide the technical information required for environmental governance, the NGOs often act as an alert and relay function between the scientific community, public opinion and governments. Through activities to disseminate scientific information and raise citizens' awareness, they contribute to putting these issues on the political agenda and putting pressure on the public administrations and policy decision-makers. Furthermore, through their presence on the ground and their proximity to citizens, they are able to attract the attention of governments and international organisations to problematic local situations and potential failings in national public policies<sup>41</sup>.

**The expertise** of the NGOs improves the quality of debates from a technical point of view.

More fundamentally, participation by civil society provides the decisions taken by States within inter-governmental forums with **greater legitimacy**. **An international organisation can therefore rely directly on the interest of citizens in order to counter-balance the power of States** and to give decisions a more democratic base. This concern can be observed within the European Union, through the sustained exchanges forged between the Commission and different economic and social actors, particularly during the development of European texts. With regard to the UN, in 1994 its Secretary-General, Boutros Boutros-Ghali, declared that NGOs "*are a fundamental form of public participation in the world today. Their participation in international organisations is, in a way, a guarantee of [their] political legitimacy*"<sup>42</sup>.

Therefore, more and more often, the role of NGOs goes beyond **the simple alert and awareness-raising function**. They also directly submit **proposals for texts** or articles to States, through the intermediary of

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(41) See M. Pallemmaerts and M. Moreau, "Le rôle des parties prenantes dans la gouvernance mondiale de l'environnement" (FR) ('The role of stakeholders in global environmental governance'), IDDRI, *Gouvernance mondiale* ('Global governance'), No. 07/2004.

(42) Cited by M. Pallemmaerts and M. Moreau, *ibid.*, p. 12.

government representatives. Often the actual idea of a treaty comes from civil society who will get one or several States to convene a conference on a specific subject. **Some conferences are therefore preceded by a report produced by experts**, which can predetermine the basis of the convention and act as a framework for the debates. For example, the Stockholm Conference combined these two aspects: it was organised following demonstrations and under the influence of different Swedish NGOs, based on the report by René Dubos and Barbara Ward called "Only one earth", which was produced at the request of the conference's Secretary-General.

We should also mention here the surprising process to adopt the **Earth Charter**. This document enshrines a set of fundamental principles for "building a just, sustainable and peaceful world". This text began as a United Nations initiative, called for by the Secretary-General of the United Nations, Boutros Boutros-Ghali, with the aim of deepening and consolidating the Rio Declaration. It was picked up again in 1994 by public figures<sup>43</sup>, this time as part of a civil society initiative with the support of the Dutch government. The drafting process took place over five years from 1995 to 2000 and was based on the consultation of a wide range of actors: scientific experts, international lawyers, religious leaders, etc. It led to the adoption of an Earth Charter on 29 June 2000 at the Peace Palace in The Hague. This is a good example of a text coming entirely from civil society, from its drafting to its adoption. Of course, it is not legally binding. It remains, nevertheless, a reference document which, as a "soft law" document, could gradually influence the actual content of legal texts and become "hard law".

However, these means of action remain informal: no international convention expressly provides a mechanism which would give civil society the official power to make legal **proposals** within the framework of environmental negotiations. Furthermore, NGO actions are mainly concentrated on climate negotiations. The negotiation agenda for other sectors of environmental law is more the result of state initiative. In this context, the Committee is in favour of implementing two mechanisms which would

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(43) Notably Maurice Strong, President of the Earth Summit, and Mikhail Gorbachev.



promote the **development of participatory democracy at international level: the citizen's initiative and the right to universal petition.**

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

This could be inspired by **the European Citizens' Initiative (ECI)**, which exists within the European Union<sup>44</sup>. It enables citizens to participate in the legislative process by calling on the European Commission to propose the adoption of a legal act. There are strict eligibility conditions: the initiative must be presented by at least one million citizens representing at least one quarter of the Member States. The European Commission is not obliged to act on it, but it must carry out an examination of the request. If the Commission rejects it, it must provide justification.

In the same vein, it would be possible to organise 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 large environmental conventions (e.g. climate change, biological diversity, etc.), which could be persuaded to propose the adoption of additional Protocols or even secondary legislation. There are probably many possible methods for introducing an initiative such as this: multiple amendments made to each of the conventions concerned, or a framework-convention making the UN Secretary-General or the States themselves, the recipients of these initiatives.

The initiative being promoted should therefore be supported by a minimum number of citizens and issued by 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.

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(44) 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).

**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 also exists within the European Union. It involves allowing citizens to submit a "petition" only, namely a **request drawing attention to a given subject**. In reality, even without a text, it is always possible to address such a request to an institution. However, this request has more value as it is specifically provided for in a text and it obliges the relevant department to examine and respond to it.

Thus, such a right to petition is today expressly provided for by Article 227 of the Treaty on the Functioning of the European Union and Article 44 of the Charter of Fundamental Rights of the European Union<sup>45</sup>. **Any European Union citizen may address a petition to the European Parliament**, in the form of a complaint or a request, on the subject of an issue covered by the Union's area of competence. The petitions are examined by the European Parliament's Committee on Petitions, which rules on their admissibility and is responsible for processing them in collaboration with the European Commission.

In the same vein, the UN could have a right to petition on environmental matters. Perhaps initially it could be limited to specific categories of NGOs which have been especially accredited for this purpose.

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(45) [http://www.europarl.europa.eu/aboutparliament/fr/displayFtu.html?ftuld=FTU\\_2.1.4.html](http://www.europarl.europa.eu/aboutparliament/fr/displayFtu.html?ftuld=FTU_2.1.4.html)

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

### 1. Civil society's active but unequal participation in environmental negotiations

Inter-governmental forums are gradually opening up to civil society, which has several ways of becoming involved ahead of and during negotiations, particularly with the development of the Internet. However, due to the **financial costs involved in participating in negotiations** (whether a financial contribution is required or not), it is **the largest** organisations which are able to participate - Greenpeace International, Friends of the Earth and the World Wildlife Fund (WWF) are at the top of the list. Some NGOs also organise themselves into networks in order to share their resources and adopt a joint position.

Before negotiations begin between the State representatives, contact groups are generally tasked with preparing a draft preparatory text. NGOs can participate in these groups in three ways: the framework convention governing the negotiation arrangements can provide for their participation in contact groups, they can be included in **State delegations** along with the representatives from the administration, or they can also have **observer** status.

During the actual negotiation phase, once the international conference has begun, three new options are available to NGOs. If they have obtained observer status, NGOs can attend all the negotiations and participate in them, *a minima*, **by speaking before all the States**. However, they never have **voting rights**. Conversely, NGOs may refuse to take part in the negotiations if they believe there is a risk that their presence could be used by the States to legitimise the treaty to be adopted. Lastly, there is a middle path for participating, that of accreditation. This status enables NGOs to be at the conference venue and to organise conferences and events in parallel to the negotiations, but they cannot participate in the meetings between the negotiators.

The role of NGOs is now formally recognised, institutionalised even, in many inter-governmental forums, but the arrangements for their participation are dependent on the terms of each treaty and therefore remain unequal depending on the subject in question. This wide diversity in systems is again due to the reluctance of some governments to accept the institutional participation of non-state actors in traditional inter-governmental decision-making processes. Therefore, formalising the role of civil society in negotiations once again clashes with the very nature of public international law, which is founded on the concept of national sovereignty.

The most successful procedures are those used in the United Nations Environment Programme (UNEP)<sup>46</sup> and the largest environmental conferences.

The participation of civil society in international environmental law is **inscribed in the UNEP's objectives** by Resolution 2997 (XXVII) of 15 December 1972 of the UN General Assembly, developed during the **Stockholm Conference in 1972**. 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"*<sup>47</sup>.

Furthermore, during the Stockholm Conference in 1972, the UN General Assembly instructed the Secretary-General to invite NGOs **"to be represented as observers at the Conference, based on the criteria recommended by the Preparatory Committee"**<sup>48</sup>. These criteria provided not only for the participation of international NGOs with consultative status in the Economic and Social Council (ECOSOC) or those registered on the "list", but also for "other truly international NGOs"<sup>49</sup>.

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(46) The UNEP is a subsidiary body of the UN which leads action programmes and acts as a driving force. It comprises a framework for discussion, but is not an independent international organisation, although it is becoming more and more independent.

(47) The UN General Assembly, Resolution 2997 (XXVII) of 15 December 1972, para IV.5.

(48) UN General Assembly, Resolution 2850 (XXVI) of 20 December 1971, para 5.

(49) Secretary General's Report, Doc. A/CONF.48/PC.11, 30 July 1971, p. 72, para 245.

In 1992, the **United Nations Conference on Environment and Development in Rio** also gave many NGOs accreditation and access to meetings. The relevant NGOs, and those with consultative status with ECOSOC, could make a speech, if necessary through a spokesperson. They could also distribute written documents during the negotiation meetings.

The **World Summit on Sustainable Development organised in Johannesburg in 2002** also provided for the accreditation and participation of NGOs<sup>50</sup>. The accredited organisations had access to the meeting venue and a representative sample were invited to speak at the plenary session after the speeches by the government representatives. The summit enabled many round tables to be organised between the NGOs and the governments on specific issues, in the form of multi-party dialogues.

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(50) Decision 2001/PC/3 on the provisions concerning the accreditation of non-governmental organisations and other relevant large groups at the World Summit for sustainable development and their participation in the preparatory process, which is contained in the Report of the Commission on Sustainable Development acting as the preparatory committee for the World Summit on Sustainable Development\*, organisational session, 30 April - 2 May 2001, Doc. A/56/19.

### The status of NGOs within the Economic and Social Council

ECOSOC is the only main United Nations body within which the consultative status of NGOs is specifically recognised. This principle is provided for in Article 71 of the United Nations Charter<sup>51</sup>. Resolution 1996/31 of the Council<sup>52</sup>, which updated Resolution 288 B(X) and Resolution 1296 (XLIV), established the practical arrangements for this type of consultation<sup>53</sup>. We should highlight the following conditions, in particular:

- the NGO does not necessarily have to be international, but could henceforth be national, regional or international (Art. 4);
- it must carry out activities in the fields falling within the competence of ECOSOC and its subsidiary bodies (Art. 1);
- its objectives must comply with the principles of the UN Charter (Art. 2);
- it must be of recognised standing within the particular field to which it is dedicated, or be of a representative character (Art. 9), and have a democratic decision-making process (Art. 10).

ECOSOC has developed an accreditation procedure for NGOs which grants them consultative status and enables them to obtain different privileges in terms of participating in the Council forum (*see below*).

(51) Article 71: *"The Economic and Social Council may make any appropriate provisions to consult non-governmental organisations which are concerned with matters falling within its competence. These provisions may be applied to international organisations and, if necessary, to national organisations after consultation with the Member of the Organisation concerned"*.

(52) ECOSOC, Resolution 1996/31 of 25 July 1996, "Consultative relationship between the United Nations and non-governmental organizations".

(53) ECOSOC, Resolution 288 B(X) of 27 February 1950, "Review of Consultative Arrangements with Non-Governmental Organizations", para 8, as amended by Resolution 1296 (XLIV) of 23 May 1968, "Arrangements for Consultation with Non-Governmental Organizations", para 7.

## 2. Establishing civil society participation

In the absence of a detailed binding international text, such as the Aarhus Convention, the nature and degree of NGO participation will continue to develop in a varied and *ad hoc* way depending on each convention's rules. It is for this reason that the Committee calls for the legal framework regarding the role of NGOs to be strengthened. This would involve clarifying the rules on NGOs' access to **information, accreditation** and also on their **participation** in the negotiation process. These different rules could be grouped together into an **international Convention on public participation in developing international environmental law**.

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

In some States, this aspect is particularly advanced at a national level<sup>54</sup>. In contrast, in the practice of international organisations, it is still poorly organised at a multilateral level despite the adoption of the Almaty guidelines. Access to information is often considered from the perspective of the information and data sent by the NGOs to the negotiating States or to the secretariats of the Conventions and rarely in the opposite direction. This paradox is indicative of the state tropism in international public law.

However, some conventions do not (or only slightly) restrict public access to the information available. For example, since 1997 the UNFCCC's Secretariat has allowed NGOs to consult some negotiation documents. Outside of the environmental field, some international organisations, such as the

(54) In France, the Aarhus Convention was ratified following Law No. 2002-285 of 28 February 2002. However, today, the main obligations, in this regard, come from the European regulations. The European Community, signatory to the Convention from 1998, having approved it by Council Decision in 2005, adopted a directive on 28 January 2003 on access to environmental information, reinforcing the obligations from the first directive adopted on 7 June 1990. A second directive of 26 May 2003 concerned public participation in certain plans and programmes. It modifies two existing directives: the "Environmental Impact Assessment" Directive (85/337) and the Directive on categories of installations (96/61).

FAO (Food and Agriculture Organisation of the United Nations)<sup>55</sup>, have developed procedures to provide access to the information they hold. However, each organisation has its own rules, and the means of appeal (should access be denied), where they exist, are not always satisfactory. Furthermore, the legal rules concerning the archives held by international organisations and the public's right to access these archives are often ignored by these institutions.

However, the right to information has been recognised as fundamental in environmental matters by the Aarhus Convention, which has had several effects on the national laws of the States which ratified it. The same practice that exists in this Convention demonstrates that it is possible to ensure maximum transparency of inter-governmental decision-making processes by opening up access to the meetings and documents to all members of the public and not only to organised and accredited civil society representatives.

The Committee felt that it was possible to draw valuable inspiration, in this regard, from the following principles, developed in the Almaty Guidelines in 2005:

- "14. In any structuring of international access, care should be taken to make or keep the processes open, in principle, to the public at large"; [...]
- "23. [...] any member of the public should have access to environmental information developed and held in any international forum upon request, without having to state an interest";
- "24. Environmental information requested by a member of the public should be provided as soon as possible following the request, and subject to an appropriate time limit, given that the Convention provides for a time limit of one month";

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(55) Food and Agriculture Organisation, the FAO's policy and strategy for cooperation with non-governmental and other civil society organisations, 1999.



- "25. Requests for environmental information should only be permitted to be refused on specific grounds, taking into account the relevant provisions of the Convention, including the requirement that grounds for refusal should be interpreted in a restrictive way, taking into account the public interest in the disclosure of the information".

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

This clarification could take several forms. For example, through the provision of an **accreditation procedure for environmental NGOs only, 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.

The Cardoso group had already declared its support for a single depoliticised accreditation procedure within the United Nations in 2004. The report proposed amalgamating all the existing UN accreditation procedures into one single mechanism, placed under the authority of the General Assembly. The group also recommended deeper initial assessment of applications for accreditation led by the Secretariat, by reducing the role of inter-governmental assessment, in order to depoliticise the current selection process. However, the final decision on the accreditations to be granted will still rest with Member States<sup>56</sup>.

It is also possible to provide for different accreditations, which would open up various advantages to NGOs, based on the model of the procedure which ECOSOC uses. The Council's **NGO Committee**, which receives the applications for accreditation from NGOs and meets annually, can allocate NGOs with one of the three following types of status (or refuse to accredit it):

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(56) Cardoso Report, op. cit., p. 13 and 62ff.

- a general consultative status for organisations which are interested in most of the Council's, and its subsidiary bodies', activities;
- a special consultative status for NGOs whose particular expertise and activities relate to only some of the Council's, and subsidiary bodies', areas of activity;
- lastly, the NGOs registered on the "list" consist of the organisations which can sometimes (on issues falling under their area of expertise) make a valuable contribution to the work of the United Nations, along with the NGOs granted similar consultative status within another UN institution or body.

ECOSOC developed an interesting exchange with NGOs participating in its work which could be replicated in other institutions: every four years organisations with general or special consultative status are required to present a report to the committee responsible for NGOs on their contributions to the United Nations' work<sup>57</sup>.

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

This involves bringing an end to the paradox which international environmental law currently faces: some conventions, firstly the Aarhus Convention, include binding provisions for enforcing public participation in national law during national projects. However, there is no equivalent provision for international negotiations. The environmental conventions therefore participate in creating norms and principles which they themselves do not comply with.

The example of the International Labour Organisation (ILO) provides an illustration of the concrete forms which the institutionalisation of civil society participation could take. The ILO statutes effectively grant voting

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(57) EECOSOC, Resolution 1996/31 of 25 July 1996, Part IX. See also the ECOSOC's web page "Guidelines for submission of quadrennial reports for NGOs in general and special consultative status with the economic and social council", at <http://www.un.org/esa/coordination/ngo/>

rights to representatives from employer and employee organisations, who are members of the Member States' national delegations. Of course, on environmental matters, the number and diversity of the stakeholders who could qualify for an active role is greater than those involved in labour law, where a tripartite structure based on social partners has been in place for a long time. Nevertheless, the Committee feels that it would be possible to draw inspiration from this procedural system for environmental negotiations, for example by providing for **the creation of consultative committees** representing each stakeholder within each international organisation qualified to deal with environmental issues - in first place, the United Nations. These committees could meet during the international conferences in order to consult civil society more formally.

In order to institutionalise civil society participation in environmental matters, an option could therefore involve creating **different colleges** within the consultative committees, which would be composed of environmental NGO representatives, representatives of organisations defending specific economic interests, public sector representatives and political authorities (other than the negotiating governments, whether members of parliament, local and regional elected officials, even indigenous people from certain countries). This option would require a suitable model to be established in terms of the representativity of the organisations represented, which could build upon the accreditation procedure described in the preceding proposal.

This accreditation would result in a number of rights. It is also possible to draw inspiration once again from the systems in place within the ECOSOC. The Council allows accredited NGOs to participate to different degrees. All the organisations it has accredited, irrespective of their status, receive ECOSOC's provisional **agenda**. However, only an organisation which has been granted general consultative status can suggest an issue, which interests them especially, to be put on the agenda. NGOs can appoint observers to attend the public meetings of the Council and its subsidiary bodies. They also have the option to issue written observations. However, only organisations granted general consultative status can make oral presentations in the meetings.

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

All these rules could be **grouped together under a single convention**, laying down the fundamental principles of the procedure for drafting international environmental norms, to which international organisations could be party to.

To a large extent, much of this has already been undertaken with the writing of the **Almaty Guidelines**. Adopted in 2005 by the Conference of the Parties to the Aarhus Convention, the guidelines aim to promote the implementation of the Convention’s principles in international forums. This involves promoting public participation in the international decision-making process.

However, these Guidelines have limited scope and legal value<sup>58</sup>. It is therefore necessary to transfer the substance of the guidelines into a legally binding treaty. In particular, this convention should ensure:

- civil society access to documents held by the conference organisers, specifically reports and studies, as well as negotiation documents (initial version of the negotiated text, proposed amendments, etc.);
- civil society participation in pre-negotiations and negotiations through the accreditation procedures;
- public information on the potential monitoring and sanctioning procedures in place for a given convention.

Several developing countries currently have a constitutional environmental law which includes the rights to information and to participation. The inclusion of these principles in a binding international text would enable the same principles to be transposed into international institutions.

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(58) Legally, these “guidelines” consist of a decision by the Conference of the Parties to the Aarhus Convention. They are compulsory for the States party to the Convention except if they voted against the decision. However, the impact of the guidelines is limited because the Meeting of the Parties confined itself to “inviting” the States to take these guidelines into account.

The Committee considered that it was possible to promote the opening up, and transparency, of international environmental governance by enshrining in one single text each of the three aspects contained in the preceding proposals - information, accreditation and participation.

### III. Is there a role for NGOs at the Paris Conference (COP21)?

The example of the climate negotiations is the best illustration of the major role played by NGOs in international environmental law. Their role is essential. These words from the UNFCCC Secretariat perfectly summarise the benefits of their contribution: "*The participation of NGOs is a **fundamental element of the Convention process**. It helps to bring **transparency** to the workings of a complex intergovernmental process, facilitates inputs from **geographically diverse sources** and from a wide spectrum of **expertise and perspectives**, **improves popular understanding of the issues**, and promotes accountability to the societies served. The participation of NGOs in the Convention process is both flexible, and active, supporting the global trend towards more informed, participatory and responsible societies*"<sup>59</sup>.

#### 1. General provisions from the framework Convention

The participation of NGOs in the work of the Conference of the Parties (COP21) to the Convention and their subsidiary bodies is expressly provided for in **Article 7 of the UNFCCC**, paragraph 6, which enables "*any body or national, international governmental or non-governmental organisation competent in the fields covered by the Convention*" which has applied for permission to participate in meetings as an observer, unless at least one third of the contracting parties objects.

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(59) UNFCCC, *Promoting effective participation in the Convention process*, 16 April 2004, Doc. FCCC/SBI/2004/5, p. 5, para. 12.

Article 7 of the **COP's Rules of procedure** specifies the arrangements for civil society and NGO participation: "*Such observers may, upon invitation of the President, participate without the right to vote in the proceedings of any session in matters of direct concern to the body or agency they represent, unless at least one third of the Parties present at the session object*"<sup>60</sup>.

In practice, access to official meetings is often limited for logistical reasons. However, NGOs can also make **speeches** at the meetings of the **subsidiary bodies** where most of the substantial negotiations take place. Furthermore, the UNFCCC Secretariat also allows NGOs to make **written statements** which, once accepted by them, can be accessed on the Convention's website.

In order to manage the participation of this very large number of non-governmental representatives, the UNFCCC Secretariat has encouraged the development of an informal system of categories of stakeholders so as to organise and structure their participation. NGOs themselves have become accustomed to organising themselves and grouping together when they share the same areas of interest, in order to make their participation more effective. In practice, therefore, participation is often by *groups* of NGOs rather than by one NGO in particular.

## 2. A large number of initiatives to promote civil society participation

In order to access the centre of the COP as accredited observers and to organise official parallel events, each civil society organisation had to complete an **accreditation procedure** with the Convention Secretariat at least eighteen months before the COP21, due to take place in Paris in December 2015. These accreditations allow access to part of the negotiations, in accordance with the UNFCCC's usual arrangements, as described above.

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(60) More specifically, this refers to the "Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies", applied without ever having been formally adopted.

Alongside the negotiations, France is planning to provide a space dedicated to the activities and expression of civil society in its diversity on the Bourget site (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.

With a large number of applications for support for projects or initiatives being sent to the government teams, the French government has established a certification process, centralised by the COP21 Secretariat. The applications are appraised by the relevant French government department, based on their subject matter.

Lastly, the UNFCCC Secretariat organised a world-wide citizens' debate in June 2015 on climate, with several hundred participants from 83 countries, called the World Wide Views on climate and energy. The recommendations made by citizens were presented to the negotiators during the intersession on 15 June 2015.

All of these initiatives are to be welcomed. Participation by civil society, companies and other non-governmental actors is now given more thought than previously. However, there is still progress to be made as, due to it not being very widely institutionalised, the contribution made by these actors remains informal. It is only effective on the margins of the official negotiations. The final content of the Paris agreement will enable the advances the States are prepared to concede on this point to be measured.

## SECOND PART

# Judicial guarantees: *allowing civil society access to environmental justice*

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The existence of efficient control mechanisms and sanctions is a mandatory condition of the effectiveness of a rule. There is no law without constraint . Even the most comprehensive international conventions are worthless if States can ignore them without being penalised. However, international environmental law suffers from precisely such failings in this area. The treaties have often implemented flexible monitoring procedures, of a non-judicial nature, which are aimed more at assisting a State in difficulty than at imposing sanctions. Furthermore, referral to these control mechanisms is almost exclusively reserved to the States themselves.

An **external viewpoint**, that of civil society, must be introduced into these control mechanisms. Judicial and quasi-judicial procedures must be opened up to non-governmental institutions. For control to be effective, the guardian must be a third party, separate from the State subject to the control.

It is interesting to read the diagnosis of Pope Francis in his encyclical letter, *Laudato Si'*. Having observed that the Rio accords "*have been poorly implemented, due to the lack of suitable mechanisms for oversight, periodic review and penalties in cases of non-compliance*"<sup>62</sup>, he believes that

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(61) M. Prieur, "L'environnement entre dans la Constitution" (Environment enters the constitution), *LPA*, 7 July 2005, p. 14.

(62) Pope Francis, Encyclical letter *Laudato Si'*, 18 June 2015, Vatican Press 2015, p. 131.



control by citizens is necessary: **"Public pressure has to be exerted in order to bring about decisive political action. Society, through non-governmental organizations and intermediate groups, must put pressure on governments to develop more rigorous norms, procedures and controls. Unless citizens control political power – national, regional and municipal – it will not be possible to control damage to the environment."**<sup>63</sup>.

The first step to improving the effectiveness of international environmental law implies allowing referral to compliance committees by civil society and by NGOs in particular (I).

The same applies to judicial procedures. Since the end of the Second World War, the number of judicial mechanisms for settling disputes between States has increased considerably. This phenomenon has also affected international environmental law. Although no jurisdiction has yet been created to deal exclusively with environmental disputes, several jurisdictions have been called upon to examine cases with an environmental dimension.

However, **international justice remains optional**: the States may choose not to recognise the jurisdiction of these judicial bodies. Referral to such bodies is also reserved to States, thus limiting their effectiveness. Furthermore, on a national level, the judges' understanding of environmental conventions remains limited due to restrictive case-law concerning the claimants' legal standing or the direct effect of these texts on national legal systems.

Civil society must have access to international justice and be able to invoke the treaties before national judges if the validity of the rights recognised by multilateral environmental agreements is to be guaranteed (II).

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(63) *Ibid.*, p. 137-138.

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

Echoing the multiplication of norms related to environmental conventions since the 1970s, a large number of institutions have been created, often in relation to a treaty, sometimes directly linked to the United Nations (see below, Part three). Many of them have a mission to monitor the application of environmental conventions, but only very few provide actual non-compliance procedures that can result in sanctions against a State (1). Allowing civil society access to these control and compliance mechanisms would enhance their efficiency (2).

### 1. Rare, inefficient compliance mechanisms and non-compliance procedures

True judicial bodies, like the European Court of Human Rights, 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 often entrusted to a "control" or "compliance" committee, an administrative body that is more or less independent of the convention's Secretariat, a permanent administrative service for management of the convention (1.1). The powers of this committee are often relatively limited (1.2).

#### 1. 1. Numerous conventions, few compliance mechanisms

The first international conventions for environmental protection did not provide for any specific means of controlling their implementation. It was not until the middle of the 1970s that cooperation began to be institutionalised and compliance and implementation mechanisms gradually came into being, based on human rights conventions or treaties concerning the control of arms and disarmament<sup>64</sup>. Today, most conventions charged with

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(64) For example, the International Covenant on civic and political rights, United Nations, Treaty Series, vol. 999, p. 171, or the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction.

application of an environmental protection convention include regular and sometimes continuous mechanisms to monitor their implementation by the parties. A network of *ad hoc* instances thus corresponds to the equally dense network of international norms<sup>65</sup>.

Within this framework, the States must provide the compliance committees with regular information on their progress in attaining the targets set by the convention (reporting system). It is true that the parties do not always comply with their obligations in terms of regular reporting: reports are sometimes submitted late or not at all or only partial reports are submitted<sup>66</sup>. However, this procedure has the virtue of defining the principle of the **obligation for States to justify** to an external organisation how it is applying the convention.

The purpose of these procedures has changed over time. Experience shows that non-compliance with the provisions of environmental conventions is not always wilful or deliberate. The States do not always have the human or financial means, nor the expertise required, to enable them to comply with the obligations they have undertaken<sup>67</sup>. This is why it has gradually become accepted to adopt an approach to help the States to comply with their obligations, rather than simply observing their non-compliance and imposing sanctions.

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(65) Alongside the flexible, and shape-shifting institutionalisation phenomenon within the conventional framework described, are other, more general environmental institutions. Within the UN, two flagship institutions are thus responsible for international environmental governance: the UNEP and the Commission on Sustainable Development. The main mission of this Commission, created by the General Assembly of the United Nations in December 1992 to provide effective follow-up of UNCED, is to examine the progress achieved in implementing the "Action 21" programme and the Rio Declaration on Environment and Development, both adopted in 1992. A large number of more limited environmental bodies have also been created by almost all the UN institutions that have set up environment programmes. It was replaced in 2013 by the High-level political forum on sustainable development.

(66) See, for example, HELCOM Ministerial Meeting, "HELCOM Ministerial Declaration", 25 June 2003, Bremen, Section VI. For a statistical reminder of the parties' respect of their obligations in terms of report communication within the framework of fourteen multilateral environment agreements, also see Compliance Committee under the Cartagena Protocol on biosafety "Information on Reporting Rates and Related Experiences under other Multilateral Environmental Agreements", doc. UNEP/CBD/BS/CC/6/2 (22 September 2009).

(67) See Henry S., *op. cit.*

These mechanisms thus differ from judicial procedures in the **nature of the decision**: it is more about **prevention** than **punishment**.

This approach is particularly relevant to environmental rules. As recalled by the ICJ decision published in 1997 in the *Gabčíkovo-Nagymaros* case: *"in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage"*<sup>68</sup>.

Thus, in the early 1990s, new control systems were set up in the form of **non-compliance procedures**, or compliance mechanisms. These cover the different realities from one convention to another, but they can be defined as formal, institutional mechanisms created to examine the information provided by the States Parties regarding compliance with their obligations and to envisage measures to enable the State to improve its level of compliance, if applicable.

At present, around fifteen multilateral environmental agreements have actual compliance procedures, for which independent committees have been created. Among them, the following can be mentioned: the Montreal Protocol, the Cartagena Protocol on the prevention of biotechnological risks to the Convention on biological diversity, the Kyoto Protocol, the Aarhus Convention and the Espoo Convention<sup>69</sup>.

## 1.2. Limited powers

The compliance procedures aim to enable a rapid response, in order to correct the situation upstream before environmental damage is caused. However, their effectiveness is limited for a number of reasons.

Firstly, the **powers of the committee** responsible for the non-compliance procedure are limited. Generally speaking, the main measure available

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(68) ICJ, Report of Judgements, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997, p. 78.

(69) Appendix 2 presents the characteristics of each of the non-compliance procedures related to these five conventions

is the **publication of cases of non-compliance** intended to instill the fear of bad publicity into the defaulting State, both nationally and internationally (name and shame). Aside from these moral and psychological sanctions, a committee only very rarely has real decision power. Being in a **subordinate relationship with the Conference of the Parties (COP)**, it can actually do no more than formulate **recommendations**. In other words, a committee can take no directly opposable measure on the party concerned<sup>70</sup>, which implies a number of disadvantages, starting with the loss of the committee's credibility. The States Parties can therefore continue to fail to meet their obligations, without taking any real risks. One such example is Ukraine's attitude towards the Espoo Convention committee concerning a procedure launched in 2004. The committee, after referral by a NGO, formulated its recommendations in March 2005. During the following years, it regularly examined the situation, only to observe that the Ukrainian government had not initiated the procedure requested. Not being able to take any more severe action itself, in the end, the committee informed the meeting of the parties in 2009 and had to let it deal with the procedure in question. To date, Ukraine has still not been sanctioned for its default, which has already lasted for more than a decade.

**As for the COP, while it has genuine power, it only rarely uses it.** This is partly due to the decision mechanism, which requires consensus within the COP. This implies that all the parties, including the defaulting party, accept the proposed decision. The State concerned will obviously be tempted to contest the measures taken against itself<sup>71</sup>. Secondly, a COP will not impose sanctions immediately since measures are always implemented gradually. Only a few COPs have adopted real punitive sanctions.

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(70) There are political and legal reasons for requiring more severe action to be taken by the COP. Firstly, it is obvious that the States did not want the committees to be able to impose such measures. For the measures to be accepted, it is important that they be decided collegially by the political system, particularly since such measures may incur further expense. From a legal standpoint, it would be different to grant the power to decide measures creating obligations for the parties to an institution created by a COP decision, without the parties having agreed to them individually.

(71) An innovative solution has however been implemented for the Montreal Protocol, concerning the Russian Federation. Since Russia had not fulfilled its obligations, the COP wanted to impose trade sanctions against it. Obviously, Russia was against the idea. The COP therefore used what has come to be known as "*consensus minus one*", the one in question being Russia. See *Report of the 7th Meeting of the Parties*, Montreal Protocol, doc. UNEP/OzL.Pro.7/9/Rev.1 (4 December 1995), p. 18-19.

The few cases involving such sanctions were situations of high concern and a long period had expired since the start of the compliance procedure. This was the case for the Conference of the Parties of the Aarhus Convention with respect to Ukraine in 2005: the COP waited three years before observing, after the committee, that the country was not fulfilling its commitments and simply invited the Ukrainian government to provide it with up-to-date information.

However, a notable exception to this distribution of competence is that of the **Kyoto Protocol**. The powers of the two branches comprising the committee (enforcement branch and facilitation branch) are greater than for the other protocols and conventions. In particular, the enforcement branch can take decisions, such as drafting of an action plan, which would have to be approved by the COP for other procedures<sup>72</sup>.

## 2. Allowing civil society to initiate non-compliance procedures

To improve the effectiveness of these procedures, they must be made more transparent, and open to scrutiny from outside. Referrals to the compliance committees must be more frequent and faster. Since the party States are not always particularly diligent, it seems essential to involve other parties in the procedure, starting with civil society, not only to collect the information required by the committee, but also to trigger the non-compliance procedure.

Furthermore, involving civil society in the collection of information that differs from that provided by the States is sometimes stipulated explicitly. This is the case of the Kyoto Protocol: competent intergovernmental organisations and NGOs can provide written information<sup>73</sup>. Another example is the Cartagena Protocol mechanism<sup>74</sup>. The committee can compare the

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(72) See the list of consecutive measures applied by the enforcement branch (section XV of the compliance committee decision concerning the Kyoto Protocol).

(73) See rule 20§1 of the decision to create the non-compliance procedure for this Protocol.

(74) Cartagena Protocol on the prevention of biotechnological risks to the Convention on biological diversity. See section 2 of Title V of the decision to create the non-compliance procedure for this Protocol.

information provided by the States with that provided by civil society and thus obtain a more accurate view of the reality.

However, referral to the compliance committees by **non-governmental parties** is very rarely possible. Only the Aarhus Convention provides for such referral at present<sup>75</sup>. This Convention is actually a model in terms of non-compliance procedures. The procedure it organises deserves a mention for its originality. In application of Article 15 of the Convention, the States Parties created a **committee to review** compliance with the provisions of the Convention<sup>76</sup>. However, under this deliberately minimalistic term, the decision creates a **procedure that is open to all. Communications** (which are similar to requests) are sent to the committee by **any individual or association** to enable the committee to make **observations** (which are similar to decisions) on non-compliance with the convention. The committee sends a draft observation to the parties (the requesting party and the State concerned) and asks for their response. After deliberation, its observation is published. All of these elements make this committee a quasi-judicial body.

In this context, the Committee's debates resulted in the following proposals.

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

While the non-compliance procedures are relatively ineffective, their usefulness remains undeniable. They often enable *ex ante* action, unlike judicial procedures, which, by definition, can only intervene *ex post*, after the occurrence of environmental damage. However, the vast majority of

(75) In the interests of completeness, this is also the case for the water and health Protocol to the 1992 Convention on Protection and Use of Transboundary Watercourses and International Lakes, adopted in 1999.

(76) See ECOSOC, decision I/7, 23 October 2002, Review of compliance with obligations.

conventions have no such procedures<sup>77</sup>. These procedures must therefore be implemented for a maximum number of existing conventions, and for any conventions that are adopted in the future, particularly within the framework of a Universal Environmental Charter (see below).

Furthermore, several treaties stipulate that the States must provide the committee with regular reports on application of the convention obligations. These documents are, in certain cases, information goldmines. Their publication is sometimes stipulated, but not always. Publication enables useful information to be broadcast as widely as possible. It also offers an opportunity for a form of “counter-expertise”, if necessary. This proposal thus aims to extend the Committee’s proposals in favour of the participation of civil society and companies in the processes concerning the drafting of international environmental norms. It would enable these parties to participate more effectively in the implementation of a treaty, for example by formulating observations to be considered by the compliance bodies.

***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 of the Committee’s proposal to reinforce civil society’s participation in the upstream phase, during drafting of international conventions. In application of a sort of parallel procedure

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(77) Only twelve treaties/protocols provide for a real institutionalised compliance procedure: the Montreal Protocol, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Cartagena Protocol on Biosafety, the Kyoto Protocol, the 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1979 Geneva Convention on Long-range Transboundary Air Pollution, the Aarhus Convention, the Alpine Convention, the Espoo Convention, the Barcelona Convention for the Protection of the Mediterranean Sea, the Protocol on Water and Health to the 1992 Convention on Protection and Use of Transboundary Watercourses and International Lakes and the Protocol on Pollutant Release and Transfer Registers.



approach, if civil society is involved in the creation of the international norm, it is only natural that it should also be able to participate in the control of its application.

There is no risk of an overflow of compliance procedures because of a more open referral system. This did not happen for the Aarhus Convention.

Furthermore, the generalisation of use of information provided by NGOs and companies is all the more feasible, since the committees can, in almost all cases, request help from experts or consultants<sup>78</sup>. Furthermore, the moral sanctions adopted by the committee or the Conference of the Parties, leading to stigmatisation of a defaulting State, will be all the more convincing if a large number of non-government parties can participate in the debates and provide the general public with information.

Information from civil society can be just as valuable as information from the States. For the Aarhus Convention, the committee responsible for compliance with this convention has stated that it is not required to make any distinction between its sources of information<sup>79</sup>.

***Proposal 9: Strengthen the financial and technical capabilities of the committees responsible for non-compliance procedures and encourage their coordination to enhance their mutual efficiency. 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. Effort must now be focussed on the assistance provided to 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.

(78) See part 5, section VIII of the decision to create the non-compliance procedure for the Kyoto Protocol.

(79) See Aarhus Convention, *Report on the Second Meeting of the compliance committee*, doc. MRPP/C.1/2003/4 (15 October 2003).

Finally, the institutional profusion resulting from the multiplication of international environmental norms is not helpful to the effectiveness of international environmental law. This institutional development has occurred on a case by case basis, without supervision, with no analysis of needs and priorities, and with no concern for avoiding duality.

The report by UNEP's executive director for 2001 already pointed out that: *"The continuous increase in the number of international bodies with environmental competence carries the risk of reduced participation by States due to limited capacity in the face of an increased workload, and makes it necessary to create or strengthen the synergies between all these bodies. Weak support and scattered direction have left institutions less effective than they could be, while demands on their resources continue to grow"*<sup>80</sup>. This situation has barely changed in 15 years.

The coordination of compliance committees is a solution that can be implemented relatively easily in an attempt to resolve this situation<sup>81</sup>. The Barcelona Convention mechanism contains an original and interesting provision in this respect: the committee can *"solicit specific information, upon request by the Meeting of the Contracting Parties, or directly, from compliance committees dealing with comparable matters"*<sup>82</sup>. This option would enable enhanced synergies between the compliance procedures and ensure the coherency of their decisions. The committees could schedule an annual meeting, with participants from civil society. This improved coordination of procedures would enable savings in terms of operating costs, which would then facilitate the adoption of financial or technical assistance measures.

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(80) PNUE, "International Environmental Governance", Report of the Executive Director, UNEP/IGM/1/2 (4 April 2001), p. 17.

(81) However, the Committee has not given its verdict on the question of creating a United Nations organisation for the environment or a worldwide environment organisation. Even if this perspective, which has been proposed a number of times, may appear of interest, it was deemed that the subject fell beyond the scope of this report.

(82) See section 37 of the decision to create the non-compliance procedure for the Barcelona Convention.

We could ultimately consider the possibility of **merging certain committees**. Of course, such a consolidation operation would not be simple to implement. However, it could offer a number of advantages. If a single committee was responsible for several conventions, would it not have greater independence and a stronger intervention capability? This group could then **prefigure the emergence of a judicial system specialised in environmental matters**, to which the sectorial conventions could choose to refer for the settlement of disputes. At this stage, such a scenario remains purely prospective, but the idea certainly deserves consideration.

### ***3. Innovating at the Paris 2015 Conference (COP21)***

The purpose of the Paris Conference will be to negotiate a new protocol for the UNFCCC to replace the Kyoto Protocol, with implementation of a new compliance committee. France, the host country of the Conference, wants to build an agreement around four pillars:

- a universal, legal agreement: within which all countries are subject to the same rules so that each one can verify the efforts made by other States and be assured of the fulfilment of commitments. These measurement, reporting and verification (MRV) rules should form the legally restrictive part of the new Protocol;
- contribution figures for each State for 2025 or 2030, regarding the reduction of greenhouse gas emissions;
- a financial chapter;
- firm commitments from non-government players (better known as "Lima Paris Action Agenda" or "Solution agenda")<sup>83</sup>.

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(83) Speech by Mr. Laurent Fabius, Minister of Foreign Affairs and International Development, at the closing of the climate meeting of European mayors, Paris, 26 March 2015, available here (FR): <http://basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=bafir2015-03-26.html#Chapitre5>

### ***3. 1. Participation of non-government players in the current non-compliance procedure***

The non-compliance procedure associated with the Kyoto Protocol is based upon Article 18 of this Protocol, which stipulates: *"The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol."*

After difficult negotiations, the mechanism was adopted by the first COP in 2005. Several aspects were later detailed in the rules of procedure of the compliance committee, adopted by the second COP in 2007. This describes the participation of individuals in different forms.

Generally speaking, access to committee meetings is intended to be relatively open. Meetings of the Protocol's facilitative and enforcement branches are broadcast on-line, for example. Several instruments allow for the participation of observers at the meetings. These observers can be representatives of specialised, national, international, governmental or non-governmental organisations, non-party States or members of the general public. Observers have no voting rights. Finally, their presence can be refused by at least one third of the parties present at the meeting.

Furthermore, the NGOs can communicate information in writing to the branches, which have plenty of freedom to consult the information presented to them. However, it would appear that NGOs do not always make most of this opportunity, which is to be regretted. The Kyoto Protocol enforcement branch, for example, in its examination of the communication concerning Greece in 2008, indicated that no NGO had provided any information<sup>85</sup>.

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(84) See rule 20§1 of the decision to create the non-compliance procedure for this Protocol.

(85) *Kyoto Protocol, Report of the Third Meeting of the Enforcement Branch, Compliance Committee*, doc. CC/EB/3/2008/2 (18 mars 2008), p. 1.

Finally, the enforcement branch may consult experts from civil society, and it has done so, particularly for its examination of the cases of Greece and Canada<sup>86</sup>.

### **3. 2. Negotiating a new non-compliance procedure open to individuals**

France has expressed its ambition to leave a large place for organised civil society at COP21. The French Minister of Foreign Affairs and International Development, Laurent Fabius, thus recalled that it had been decided “*not to limit the Paris Conference and future COPs to just governmental aspects and to mobilise civil society as a whole. Starting with local communities, cities and regions, companies and NGOs*”<sup>87</sup>. The impetus of this trend came from Lima, Peru, with the adoption of the “Solutions agenda” or “Lima-Paris Action Agenda”, which will list all the initiatives proposed by non-governmental players and the commitments of local public authorities and companies in support of the environment.

Civil society, NGOs and companies in particular, are thus encouraged to make firm commitments to combat global warming and these commitments will be published on the **NAZCA portal (“Non-state Actor Zone for Climate Action”)**<sup>88</sup>. There is a logical consequence of this move: **if all the players commit to the protocol, control of its application must be open to each of them.**

The Committee therefore considers it essential that, as part of the Paris agreements, the new non-compliance procedure be as transparent and as open as possible.

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(86) For Greece, see Kyoto Protocol, *Report of the Third Meeting of the Enforcement Branch, Compliance Committee*, doc. CC/EB/3/2008/2 (18 March 2008), p. 2, sections 7-9; for Canada, see Kyoto Protocol, *Report of the Fifth Meeting of the Enforcement Branch, Compliance Committee*, doc. CC/EB/5/2008/2 (23 June 2008), p. 2, sections 9-11.

(87) Intervention by Mr. Laurent Fabius, Minister of Foreign Affairs and International Development, Economic, social and environmental council, Paris, 28 April 2015.

(88) On 18 August 2015, the portal listed 3,709 commitments for environmental action from 425 cities, 85 territories, 1,122 companies and 263 investors. These commitments concern the reduction of greenhouse gases, improvement of energy efficiency and renewable energy. Projects are both cooperative and individual and include specific deadlines.

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

## II. Guaranteeing the individual right to legal action

On an international scale, while no specialised judicial system exists to deal exclusively with claims related to the environment, several international or regional systems are called upon in such matters. However, all of these dispute settlement mechanisms remain largely dominated by the States, which cannot recognise the jurisdiction of a judicial system and, if they do, are generally the only parties able to initiate legal proceedings. The role of non-governmental players in the environment sector would justify granting them more access, notably by increasing their legal standing before an international judge (1).

National judicial systems could, theoretically, also be required to ensure the States' application of multilateral environmental agreements. However, obstacles remain in national judicial systems, preventing individuals to invoke international treaties before the judge, which thus limits their effectiveness (2).

## 1. Before an international judge

### Brief overview of international justice:

International judicial systems were created in the wake of the major conflicts of the 20<sup>th</sup> century. The International Court of Justice, founded in 1945, is the only judicial body with general jurisdiction: it is responsible for settling disputes between the States that have acknowledged its jurisdiction.

There are also a large number of specialised judicial bodies, whose jurisdiction is limited in material and/or geographic terms.

In criminal law, the jurisdiction of the International Criminal Court is relatively broad to judge the people who have committed the most serious crimes. Judicial bodies have also been created by the UN or by treaty after specific conflicts: their role is to judge, over a specific period, delimited facts only: such institutions include the international criminal courts for ex-Yugoslavia and Rwanda.

In matters of human rights, several regional judicial bodies have been created: the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on human and people's rights.

Another regional judicial institution, the European Union's Court of Justice, also deserves a mention, even though its status is unique, due to the specifics of European Union law, which is closely integrated with national legal systems. However, it plays an important role in environmental law, this topic being largely governed by European texts.

Other areas of international law have also seen the introduction of specialised judicial bodies or an increase in the number of arbitration courts. In the commercial sector, for example, there is the International Center for Settlement of Investment Disputes (ICSID), or the WTO's Dispute Settlement Body (DSB). In matters relating to the sea, the United Nations Convention on the Law of the Sea, signed in 1982 and entered into force in 1994, enabled the creation of the International Tribunal for the Law of the Sea (ITLOS).

We can also cite the administrative judicial bodies devoted to international civil service institutions, such as the International Labour Organisation's Administrative Tribunal, the United Nations Administrative Tribunal and the World Bank Administrative Tribunal.

The international judicial bodies liable to judge claims with an environmental aspect are mainly the ICJ, the arbitration tribunals, the ITLOS and the WTO's DSB. On a regional level, the judicial bodies for the protection of human rights are most concerned, i.e. the ECHR, the Inter-American Court of Human Rights and the African Court of Human and People's Rights. Before most of these judicial bodies, the States have a pre-eminent role over individuals: the States themselves decide whether or not to accept the jurisdiction of the court.

However, individuals have every interest in seeing the States fulfil the environmental obligations of international conventions. Direct or indirect ignorance of these conventions results in infringement of the various rights of individuals and particularly of the right to a healthy environment.

Decisions made by governments in this area and the environmental damage that may result, weighs on society as a whole. Furthermore, the States are not always the best placed to represent the interests of individuals or populations: NGOs or associations, which are more intimate with certain local issues, could be more efficient representatives. It is therefore both logical and fair to offer non-governmental players the possibility of taking legal action on a world-wide scale.



### ***1. 1. Promoting the recognition of the mandatory jurisdiction of the International Court of Justice***

In international law, justice remains optional. Under the principle of sovereignty, States may refuse, or accept with reservations, to entrust the settlement of their disputes to third parties. Even the International Court of Justice, which is often seen as a world tribunal, depends on the States' acceptance of its jurisdiction<sup>89</sup>.

Environmental matters are no exception to this, and quite the opposite in fact. States rarely accept the jurisdiction of the international bodies in such matters, adopting reservations<sup>90</sup>.

Among the 72 States having declared acceptance of ICJ jurisdiction, **almost 10% have added to this declaration reservations for environmental issues.** The strictest reservations (absolute rejection of the court's jurisdiction) are those of **Poland** and **Slovakia**<sup>91</sup>. This has already given rise to situations in which the Court cannot judge an environmental dispute because of these reservations, such as the *Fisheries jurisdiction* case (Spain vs. Canada: the latter having expressed reservations which blocked settlement of the dispute by the ICJ).

The optional nature of the conventional mechanisms for settling disputes is particularly problematic with respect to the countries among the planet's biggest polluters, such as the **USA**. These countries reject, with regrettable persistence, the jurisdiction of the ICJ, ICC, ITLOS and the Inter-American Court of Human Rights. Certain environmental conventions transfer the settlement of disputes to the ICJ<sup>92</sup> or to specific arbitration tribunals<sup>93</sup>. But again, it is only in exceptional cases that these clauses are mandatory: they are mostly based on the notion of mutual consent among the parties.

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(89) Under Article 34§1 of its statute. Also see the Monetary Gold case decision in Rome in 1943 (Italy vs. France, United Kingdom and United States of America), decision of 15 June 1954: ICJ Series 1954, p. 19. In this decision, the Court states that it "*can only exercise jurisdiction over a State with its consent*". The Court must always therefore verify that this consent exists.

(90) In this respect, the WTO's DSB is something of an exception, since the 153 States of the international organisation are held to the rules of the memorandum defining its jurisdiction (Understanding on rules and procedures governing the settlement of disputes).

(91) Henry, *op. cit.*, p. 35.

(92) This possibility is provided in Article 36§1 of the court statute. Article 15§2 of the Espoo Convention provides for such transfer to the ICJ.

(93) The CITES Convention, for example – see Article XVIII.

Another disadvantage of these declarations of acceptance is that they can be withdrawn at any time by the States: France exercised this right in 1974, after the ruling against it in the *Nuclear tests* cases. Thus, today France is **one of the States that does not accept the mandatory jurisdiction of the International Court of Justice.**

And yet, **the ICJ plays an increasingly important role in environmental law.** It hears disputes with implications on the protection of biological diversity or pollution and, at the same time, gradually establishes precious case-law in this field. As part of its legal or consultative actions<sup>94</sup>, the ICJ has developed the corpus of environmental norms: it has confirmed the legal value of the principle of prevention and certain procedural principles, such as the principle of cooperation or the principle of prior evaluation of the incidence of an activity on natural resources. It has also recalled that: "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn*"<sup>95</sup>. In future disputes, States may invoke such foundation principles.

It is therefore regretful that countries among the planet's leading polluters do not recognise the jurisdiction of the ICJ. This is, in particular, the case of the host country of COP21, France, in spite of this country's desire to give a universal dimension to environmental protection with the adoption in 2004 of the Environment Charter, Article 10 of which stipulates that it intends to "*inspire France's European and international action*". France is thus an exception in Europe, since **the vast majority of European countries have accepted ICJ jurisdiction:** United Kingdom, Germany, Spain, Italy, Belgium, Netherlands, Portugal, Greece, Poland and Austria. Even outside the European Union, Australia, Canada, Switzerland, India and Japan have all accepted ICJ jurisdiction. This situation is all the more surprising since French, along with English, is one of the two working languages of the ICJ, and the current President of the court, Ronny Abraham, is French.

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(94) Under Article 65 of its current statute, the Court "*may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request*".

(95) Legality of the threat or use of nuclear weapons, Advisory opinion, I.C.J. Series 1996, p. 226, §29.

**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.*

Finally, the Committee considered that current debates on the creation of a **judicial system specialised in environmental matters** must be continued, even if it has no desire to take a stand on this topic.

There are a growing number of initiatives in favour of creating such a system<sup>96</sup> but the forms proposed diverge. Some suggest a jurisdiction for **criminal matters**. We could also envisage a **more technical** jurisdiction, limited to the application of certain specific conventions, for example by grouping together compliance committees (see below). Another solution could also be to **associate such a judicial body with the Universal Environmental Charter** proposed hereafter: this institution would be to the Charter what the European Court of Human Rights is to the European convention of the same name. An even more ambitious proposal, would be to link this subject in the long run with the often suggested creation of an international environmental organisation. The international environmental policy would thus be based on a triptych: Universal Charter, International Court and World Environmental Organisation.

This is thus a topical question, but the possible forms of such a judicial system are far from being defined as yet.

Above all, the Committee considers it fundamental that environmental protection should remain an objective ensured by **all judicial systems**, whatever they are. Due to the **transversal nature** of such matters, any dispute may have an environmental dimension. The missions of a specialised judicial system should therefore be designed to be complementary to existing systems.

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(96) See in particular the Charter of Brussels, launched on 30 January 2014 at the European Parliament (<https://www.endecocide.org/downloads/artwork/Documents/CharterOfBrussels-en.pdf>), or the initiative concerning an international moral tribunal for crimes against nature, supported by Edgar Morin.

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

### **1. 2. Opening international judicial systems to non-governmental players**

While the right of individuals to petition a judge is considered to be an essential, fundamental liberty in national legal systems, individuals very rarely have the right to stand before the Court in international judicial systems.

However, since the 1990s, a number of amendments have gradually been introduced to open the dispute settlement mechanisms to non-governmental players. The first such case involved the ITLOS, before which action could previously only be brought by States: under Article 20§2 of this Court's statute, the Court is open to entities other than States for action related to the sea bed.

**The International Court of Justice also accepts, albeit informally, the production of briefs by NGOs via the *amicus curiae* procedure,** which is specified in the ICJ practice directions for its advisory opinions: these briefs are not included in the procedure and are not cited in the Court's opinions, but they are available to the judges, who can take them into account in their examination of the case.

This possibility should be supported by the adoption of an identical procedure for Court decisions and, more broadly, the assertion of a genuine right of intervention for NGOs, *via* the production of observations, whose scope would be fully recognised in current consultative or contentious procedures. Such a right would, of course, have to be defined: only registered NGOs or organisations with grounds for intervention related to their purpose as defined in their statutes, would be eligible.

**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.*

However, these arrangements do not provide for a true procedure for private individuals before international judicial bodies. The European Court of Human Rights, which is directly open to private individuals, is an exception. France, which initially expressed a reservation on this point, only accepted this individual right to procedure in 1981. It was generalised in 1998, with the entry into force of Protocol no. 11, which made this right a mandatory mechanism. Thus, according to the judge of the Court, "individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention"<sup>97</sup>. This is a most original aspect of this Convention, which enables almost 800 million people to bring cases before an international court.

It could also be envisaged, under stricter terms, to allow certain categories of non-governmental players **the possibility of bringing action before international environmental judicial systems**. Different conditions of admissibility could be envisaged for such a possibility. For example, there could be a general condition of legal standing, and then leave the judicial system to define this notion on an individual case basis<sup>98</sup>. Another solution could be to grant this right in advance to certain registered NGOs: this would raise the issue of registration, already discussed in reference to the participation of NGOs in international negotiations. The Committee has preferred not to answer such questions, which depend upon technical choices and can therefore be left open.

(97) ECHR, 4 February 2005, *Mamatkulov and Askarov v. Turkey*, no. 46827/99 and 46951/99, §122.

(98) Based on the model of reasoning upheld by supreme national courts. In environmental matters, one of the most enlightening decisions on this subject is that of the Supreme Court of the United States in 2007, *Massachusetts v. EPA*, 2 April 2007, No. 05-1120, Ref. 549 U.S. 497 (2007). The Supreme Court authorised thirteen federated States to act against the Environmental Protection Agency for damage caused by global warming.

**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.*

We could also envisage opening up the **possibilities for procedures before the Court of Justice of the European Union (CJEU)**<sup>99</sup>. The Court has jurisdiction over infringement procedures which enable a Member State to be sanctioned if it fails to meet its obligations under European Union law. At present, these procedures can only be brought by EU States or institutions. Actions for annulment, which enable annulment of a measure introduced by a European institution, are open to individuals if they are directly concerned<sup>100</sup>. **Opening infringement procedures to individuals** would bring an additional means to the control exercised by individuals over the application of EU law; it would be more formal and more institutionalised than the already very efficient but less transparent system than allows **private individuals to lodge a complaint with the Commission** if a State fails to comply with its Treaty obligations.

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

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(99) Reminder: the CJEU has three separate judicial bodies:

- the Court of Justice, which deals with preliminary hearings on cases brought by national judicial bodies, and certain annulment and appeal procedures;
- The Grand Court, which rules on annulment procedures introduced by private individuals, companies and, in some cases, Member States;
- the Civil Service Tribunal, which settles disputes arising between the EU and its personnel.

(100) Annulment procedures come under the jurisdiction of the Court of Justice when introduced by States, but under the jurisdiction of the Grand Court when introduced by private individuals.

## 2. Before national judges

The judge most accessible to citizens remains the national judge. Consequently, to improve the effectiveness of multilateral environmental agreements, it appears necessary to **make the national judge the tort law judge and first guarantor of the State's compliance with its international commitments.**

This is a realistic ambition. There are obviously certain limits to the legislative scope of public international law: a State is free to decide whether or not to sign an international convention. However, **once a State has chosen to ratify a treaty, and if it adds no reservations, it creates obligations for itself that must be fully opposable against it.** In this case, there is no reason why a national judge should not be able to verify that a **State** complies with its obligations.

One such example in this matter comes from a district court in The Hague, which accepted the admissibility of a request registered on 14 April 2015 by almost 900 citizens, to establish **the Netherlands' liability for its failure to take action against climate change** and for the resulting violations of international environmental law. The decision, published on 24 June 2015, **orders the Dutch State to reduce its greenhouse gas emissions, based on its duty to protect the environment.** This decision is the first of its kind in national law and remains to be confirmed at an international level. However, it is being taken as a warning to all States<sup>101</sup>.

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(101) Kerbrat Y., "Réchauffement climatique : tous responsables!" (*Global warming: shared liability*) *Droit de l'environnement*, no. 233, April 2015, p. 122-123.

**Ability to rely on rules, direct effect and standing:  
fundamental legal concepts**

The ability to rely on a norm before a judge refers to the capacity of a subject of law to invoke this norm in a dispute. For example, in France, a private individual can always invoke a law or norm adopted by the European Union to contest a decree, but a multilateral environmental agreements can only be invoked in certain specific cases (see below).

Direct effect refers to the norm's ability to create rights or obligations directly for subjects of law that can then be invoked by the latter before a national judge. This notion is closely linked to that of the ability to rely on rules: for example, in the French administrative legal system, an international convention whose direct effect has been recognised by case-law can be invoked before a judge.

Standing refers to the reason that gives a person the right to bring a case before a judge. A legal body can refuse the action of an individual as being inadmissible, based on its view that the person has no legal standing. Standing is therefore a legal characteristic that helps to define the contours of a lawsuit and particularly the parties of the dispute.



## 2. 1. The direct effect condition

The national judge has strict control over the admissibility of arguments related to violation of the provisions of an international convention in an environmental dispute. For example, **to date; most major multilateral environmental agreements cannot be invoked before the Conseil d'État**<sup>102</sup>.

Indeed, to consider that an international provision cannot be invoked before a national court, the judge often imposes a condition related to its direct effect<sup>103</sup>. This ancient notion identifies an international convention which, notwithstanding its contractual origin between States, **in itself creates rights and obligations for private individuals**, who can invoke said rights and obligations before national courts<sup>104</sup>.

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(102) The Conseil d'État has explicitly recognised the direct effect of:

- the following articles of the Aarhus Convention:

o Article 6 paragraphs 2 and 3 (*Syndicat d'agglomération Nouvelle Ouest-Provence*, 28 December 2005, no. 277 128 ; *Fédération transpyrénéenne des éleveurs de montagne et autre*, 9 May 2006, no. 292 398);

o Article 6 paragraphs 2, 3 and 7 (*Commune de Groslay et autre*, 6 June 2007, no. 292 942);

o Article 6 paragraph 9 (*Association coordination interrégionale Stop THT et autres*, 12 April 2013, no. 342 409);

- Articles 2-1a) and 3 of the Convention dated 22 September 1992 for the protection of the marine environment of the North-East Atlantic (*CRILAN et association Le réseau sortir du nucléaire*, 4 August 2006, no. 254 948).

The absence of direct effect has been declared for:

- the following articles of the Aarhus Convention:

o Article 6 paragraphs 4 and 8 (*Association citoyenne intercommunale des populations concernées par le projet d'aéroport de Notre-Dame-des-Landes*, 28 December 2005, no. 267 287);

o Article 6 paragraphs 4, 6, 8 and 9 (*Commune de Groslay et autre*, cited above);

o Articles 7 and 8 (same decision);

- Article 8 of the Rio Convention (*Fédération transpyrénéenne des éleveurs de montagne et autre*, 23 February 2009, no. 292 397) ;

- Bern Convention (judged for Articles 6 and 9 in decision *Commune de Breil-sur-Roya*, 8 December 2000, no. 204 756 then for the entire Convention in the aforementioned decision, *Fédération transpyrénéenne des éleveurs de montagne et autre*);

- ESPOO Convention (*Commune de Binnengen*, 19 March 2008, no. 297 860);

- Paris 1902 Convention for the protection of birds useful to agriculture (*Ligue pour la préservation de la faune sauvage et la défense des non-chasseurs*, 9 November 2007, no. 289 063).

(103) Condition demanded by the judge independently of the question of treaty application by the other party States, if a condition of reciprocity is stipulated by a text.

(104) Conclusions of the *rapporteur public*, G. Dumortier, in the decision of the Assemblée du Conseil d'État, *Groupe d'information et de soutien des immigrés (GISTI) et autres*, 11 April 2012, no. 322326.

This requirement is largely shared by national and international legal bodies, even if the latter does not recognise the same level of direct effect and the conclusions reached are not always the same. The ICJ has adopted the same approach as the Permanent Court of International Justice before it, and considers the absence of direct effect of treaties to be the rule and direct effect to be the exception<sup>105</sup>. The Supreme Court of the United States does the same, rejecting any “self-executing” nature of ICJ decisions, for example<sup>106</sup>.

The CJEU, which has developed substantial, detailed case-law on the search for direct effect, has adopted an identical approach for the international treaties signed by the Union. In a recent decision, it ruled that the provisions of Article 9§3 of the Aarhus Convention lacked direct effect because they were not unconditional and precise enough<sup>107</sup>.

**The notion of direct effect is not, however, always perfectly clear. Doctrine often distinguishes two cumulative conditions** of direct effect, one that is “subjective”, depending on the parties’ intent with respect to the beneficiary of the treaty (States only or private individuals too), and another that is “objective”, related to the material need for content that is sufficiently complete to rule over an actual legal situation immediately. Judicial practice is sometimes circular, the parties’ intent with respect to the beneficiary being sought in the subject and content of the treaty or sometimes in its simple written expression. Furthermore, national judges sometimes limit themselves to partial recognition of direct effect, for a single provision, or even a single paragraph, of a convention<sup>108</sup>. If a treaty is found to have no direct effect, regardless of the reason, it cannot be invoked by private individuals before a national judge.

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(105) For example, see *LaCrund (Germany v. USA)*, decision, Report 2001, p. 466

(106) For example, see Supreme Court of the United States, *Medellin v. Texas*, 25 March 2008, no. 06-984. Ref. 552 U.S. 491 (2008).

(107) CJEU, 13 January 2015, *Council and Commission v. Stichting Natuur en Milieu et Pesticide Action Network Europe*, cases C-404/12 P and C-405/12 P.

(108) For example, see Conseil d’État, 25 June 2005, *Syndicat d’agglomération Nouvelle Ouest-Provence*, no. 277128, which ruled that only paragraphs 2 and 3 of Article 6 of the Aarhus Convention have direct effect.

**This interpretation was justified in the 19<sup>th</sup> century**, when treaties were limited to governing relationships between the States. As **“contract” treaties**, they contained no stipulations of concern to private individuals. Today, with the development of **“law” treaties**, there is room for doubt, particularly during the second half of the 20<sup>th</sup> century, which establishes rights for private individuals.

It therefore appears that more flexibility is necessary regarding the direct effect requirement.

## ***2.2. Making it easier to invoke multilateral environmental agreements before national judges***

In its *GISTI* decision of 11 April 2012, **the Conseil d’État provided a broader definition of the notion of direct effect**: a stipulation 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”*<sup>109</sup>. 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 alone: the decision specifies that *“the absence of such effects cannot be deduced from the simple circumstance that the stipulation designates the States Parties as subjects of the obligation it defines”*. Furthermore, in this matter, the decision actually makes a flexible application of this definition, by recognising the direct effect of the treaty in question.

With this new interpretation guide, the highest courts should **review the various multilateral environmental agreements** and re-examine previous case-law in order to recognise what is now direct effect. The presumption of direct effect should come fully into effect in environmental matters: a provision aimed at protecting the environment is not generally *“solely intended to rule over relationships between States”* and is of the greatest relevance to the right of private individuals to a healthy environment.

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(109) Assemblée du Conseil d’État, 11 April 2012, *Groupe d’information et de soutien des immigrés (GISTI) et autres*, n° 322326.

However, in the *GISTI* decision, **the Conseil d'État did not go so far as to approve the objective control proposed by the *rapporteur public***, Gaëlle Dumortier, in her conclusions, which is to be regretted. In substance, this means **that a treaty can always be invoked, as a minimum, against a rule or law**, i.e. against a legislative instrument of the State. This is what Gaëlle Dumortier stated in her conclusions, as Ronny Abraham had done 15 years previously, in other conclusions<sup>110</sup>. It cannot be denied that even when there is no direct effect with respect to *private individuals*, a treaty always has legal significance with respect to the State: it engages France's liability internationally and, within the national system, has "force of law", according to the 1946 Constitution.

We could thus distinguish two types of dispute. In **subjective and individual disputes**, in which a private individual claims the benefit of a specific law, the condition of direct effects makes perfect sense: only a treaty with a direct effect for individuals can be invoked. In this type of dispute, the requirement of the second condition of the *GISTI* decision is understandable: there must be a "*further act*" to enable the treaty to "*produce effects on private individuals*". However, if it is an **objective dispute**, in which the conformity of a law or regulation to a treaty is contested, the question is different: has the State, in the exercise of its legislative function, respected the higher norms incumbent upon it? In other words, the "*further act*" passed by the State, which is the condition of the direct effect, is to be controlled. Since this legislative act of the State "*completes*" the treaty, for it to be applicable in national law, it must of course be conform to the treaty, which is for the national judge to decide. Demanding that the treaty has direct effect to enable control of such acts with respect to the treaty would be the same as setting a condition with no theoretical justification. In reality, in this second type of dispute, typically in **a procedure against a regulation, it should be possible to invoke any treaty before the judge**. However, the Conseil d'État has not, until now, taken up the invitation made in this sense in these conclusions.

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(110) Ronny Abraham expressed his favourable view of this objective control in his conclusions on the Section decision *GISTI* in 1997 (Conseil d'État, Section, 23 April 1997, no. 163043).

In environmental matters, the State's respect of its obligations is, in principle, a **right** of private individuals. **Multilateral environmental agreements should therefore benefit from the presumption of direct effect.** While only imposing explicit obligations on States, they comprise implicit rights for individuals: the right to have the State respect its environmental protection obligations.

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, whose vocation is universal.*

Finally, the Committee would like to draw the question of the ability to rely on the rules of multilateral environmental agreements in national legal systems to the attention of the writers of such conventions. It is sometimes considered, by a sort of principle of subsidiarity, that this subject falls beyond the jurisdiction of international law, being a question of national law only. In reality, this is far from the truth, particularly for the conventions that concern human rights matters. This can be deduced from the European Convention on human rights. This convention contains a special provision, Article 13, on the possibility for private individuals to have access to national legal systems enabling the provisions of the convention to be invoked<sup>111</sup>. The Council of Europe has also considered<sup>112</sup> this question, for example in its *"Guide to good practice in respect of domestic remedies"*<sup>112</sup>, which contains a specific chapter on *"Consideration of the Convention by national courts and tribunals"*.

(111) Article 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority".

(112) Guide available from the Council of Europe website: [http://www.echr.coe.int/Documents/Pub\\_coe\\_domestics\\_remedies\\_ENG.pdf](http://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf)

The same should apply to environmental matters: **the question of whether a convention can actually be invoked before national judicial bodies and if 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. This is already the case of the Aarhus Convention, whose Article 9 concerns “access to justice”. Having discussed the rights concerning information and public participation in previous articles, this is more a matter of stipulating that any person whose rights have been ignored “*should have the possibility of bringing a procedure before a judicial court*”.

The Committee has formulated two proposals, based on this principle.

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

***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 procedure**, and more specifically the ability to rely on the rules of the convention before national legal bodies, be included systematically in environmental conventions, based on the model of the Aarhus Convention. If these conventions bestow rights upon people, it should be stipulated that these people have the right to effective remedy before national courts in order to ensure the respect of these rights by the State.

**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 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*

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International environmental law is characterised by a profusion of norms with the environment or sustainable development as their main or secondary focus, backed by many international institutions and organisations (I).

The adoption of a universal text with binding force which amalgamates all of the founding principles would give international environmental law the corner stone it needs (II).

### **I. Improving the accessibility and readability of international environmental law**

Given the speed and scale of its development, international environmental law is a living, evolving law. While the first milestones were proposed at the beginning of the 20<sup>th</sup> century with, for example, the Paris Convention on the Protection of Birds Useful to Agriculture in 1902, it is from the beginning of the 1970s onwards that international regulations aimed at protecting the environment began to increase rapidly. Under the pressure of public opinion, alerted by the scientific community and by many NGOs, States developed international law as a means of combating environmental risks, starting with pollution and global warming. Awareness of the fragility of the ecosystem, and the transnational character of the risks it faced, prompted international cooperation on a legal level, firstly bilaterally and then multilaterally.



Today, there are more than **500 international treaties** concerning environmental matters more or less directly, including around 300 regional agreements. We can therefore speak of a real “abundance of conventions”<sup>113</sup>. The approach to establishing conventions allowed different legal systems to be formalised, sector after sector (e.g. pollution, climate change, air and water quality, biodiversity, etc.). One field may have given rise to the ratification of several conventions or protocols. By considering the major treaties, presented in the following table, we can get an accurate idea of the **profusion of sectoral conventions in force**<sup>114</sup>:

Field	Treaty name - date of adoption
<b>Air and climate</b>	<ul style="list-style-type: none"> <li>- United Nations Framework Convention on Climate Change and its additional protocols (such as the Kyoto Protocol) - 9 May 1992</li> <li>- Vienna Convention for the Protection of the Ozone Layer (and the Montreal Protocol) - 22 March 1985</li> <li>- Convention on International Civil Aviation (called the Chicago Convention) - 4 April 1947</li> </ul>
<b>Biodiversity</b>	<ul style="list-style-type: none"> <li>- Convention on Biological Diversity - 5 June 1992</li> <li>- Cartagena Protocol on Biosafety - 29 January 2000</li> <li>- the CITES Convention on International Trade in Endangered Species of Wild Fauna and Flora - 3 March 1973</li> <li>- Convention on the Conservation of European Wildlife and Natural Habitats - 19 September 1979</li> <li>- Convention on the Conservation of Migratory Species of Wild Animals (called the Bonn Convention) 23 June 1979</li> </ul>

(113) Bettati M., *Droit international de l'environnement* (FR) ('International Environmental Law'), Odile Jacob, 2012, p. 21

(114) See: <http://www.diplomatie.gouv.fr/fr/IMG/pdf/ratifications.pdf>

	<ul style="list-style-type: none"> <li>- International Plant Protection Convention - 6 December 1951</li> <li>- Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa - 17 June 1994</li> </ul>
<p><b>Marine environments</b></p>	<ul style="list-style-type: none"> <li>- United Nations Convention on the Law of the Sea - 16 November 1973</li> <li>- Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea - 10 December 1992</li> <li>- Convention for the Regulation of Whaling - 2 December 1946</li> <li>- Convention on Wetlands (called the RAMSAR Convention) - 2 February 1971</li> <li>- Convention for the Protection of the Mediterranean Sea Against Pollution - 16 February 1976</li> </ul>
<p><b>Marine pollution</b></p>	<ul style="list-style-type: none"> <li>- International Convention on Civil Liability for Oil Pollution Damage - 29 November 1969</li> <li>- International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties - 29 November 1969</li> <li>- Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil - 2 November 1973</li> <li>- International Convention for the Prevention of Pollution from Ships (called the MARPOL Convention) - 2 November 1973</li> <li>- Convention on Oil Pollution Preparedness, Response and Co-Operation - 30 November 1990</li> <li>- IMO Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea - 3 May 1996</li> </ul>

	<ul style="list-style-type: none"> <li>- IMO Convention on Civil Liability for Bunker Oil Pollution Damage - 23 March 2001</li> <li>- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter - 13 November 1972</li> <li>- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea - 3 May 1996</li> </ul>
<p><b>Waste and Chemicals</b></p>	<ul style="list-style-type: none"> <li>- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal - 22 March 1989</li> <li>- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (called the PIC Convention) - 10 September 1998</li> <li>- Stockholm Convention on Persistent Organic Pollutants (called the POP Convention) - 22 May 2001</li> </ul>
<p><b>Environmental procedure</b></p>	<ul style="list-style-type: none"> <li>- Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters including the procedures concerning all sectors of the environment - 25 June 1998</li> <li>- Convention on Environmental Impact Assessment in a Transboundary Context (called the Espoo Convention) - 25 February 1991</li> </ul>

International environmental law does not suffer, therefore, from a lack of norms, but from their **dispersal**, their fragmentation even. The conventions are limited both **geographically** (they are often regional agreements) and sectorally (the agreements are often specialised). This situation affects the accessibility of the environmental norm, which is little known about and, therefore, little applied.

The **quality and accessibility of the international environmental norm** could be, *a minima*, improved by centralising the existing corpus of norms via a specific web portal. There are currently private websites which list the most significant multilateral 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 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. It would involve identifying the relevant provisions, placing them in order, making them more comprehensible, removing duplicates and even eliminating inconsistencies. Some conventions could be amalgamated. In the longer-term, a possible "codification" of these conventions could be considered. This would involve considering amalgamating them into three or four large conventions or even into one single convention divided into different parts<sup>115</sup>. The Committee is fully aware that an endeavour such as this would be a very lengthy piece of work which would take several years.

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

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(115) In order to maintain the flexibility of the system, we could envisage, if required, various membership options by giving States the option to join only one or other parts of the Convention.

Undoubtedly, **amalgamating the conventions** in this way could, consequently, raise the question of **amalgamating the institutions** created by these conventions. In fact, behind the majority of these international agreements there is a permanent administration, most often a "Secretariat", which may have a large workforce. As an example, the UNFCCC Secretariat, based in Bonn, has around 500 members of staff. Amalgamating these many institutions under the umbrella of one single institution seems ultimately desirable. This is the reason for creating a **Global Environmental Organisation**. Supported in particular by Jacques Chirac, the President of the French Republic, in 2007, this project is, for the time being, no longer on the agenda. As it is not central to the issues being addressed in this report, it has not been formally included in these proposals. Nevertheless, the fact remains that this prospect remains highly desirable.

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

Firstly, it is important to clarify the scope of the debate. The content of the principles is not being questioned here, nor even their existence, but the **legal value** of the text they are based on. There are many declarations, but they do not have binding force (1). It is necessary to include all the founding principles into a truly binding treaty, which could be the "Universal Environmental Charter" (2).

### 1. A large number of declarations without legal force

There are, in fact, many declarations and charters at international level. This report mentioned some of them in the introduction: **Stockholm Declaration of 1972, World Charter for Nature of 1982, Rio Declaration of 1992**, etc. **The Earth Charter** can be added to these. This document came from civil society. It does not have binding force, but is symbolically influential<sup>116</sup>.

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(116) See above, developments on the Earth Charter in the first part of this report.

In the same vein, in September 2015 the former French Environment Minister, Corinne Lepage, delivered a draft of the “Universal Declaration of the Rights of Humanity” on preserving the planet to the President of the Republic, François Hollande. In the spring of 2015, the team led by Professor Michel Prieur at the University of Limoges, developed and disseminated a similar Declaration. This type of initiative should be welcomed. Hopefully it will be taken up by negotiators 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 highly valuable due to their **political and symbolic impact**.

Most often their content brings together a broad consensus. They enshrine the recognised principles, such as everyone’s right to a clean environment, the duty of prevention, the principle of differentiated responsibilities of states and also the principle of public participation.

However, they have a major limitation: they **lack binding 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.

At best they can inspire the **case law of the International Court of Justice** or that of some judicial bodies when they enshrine an **international custom**<sup>117</sup>. It is true that, in the latter hypothesis, transforming one of the principles laid down by these non-legal texts into a customary rule could then confer them with true binding force. This was the case with the principle of prevention (principle of non-harmful use of the environment): recognised by the International Court of Justice as an international customary law, it henceforth applies to all States. ITLOS also enshrined the customary value of the precautionary principle.

The advantage of this legal process is that it enables international norms to emerge without having to gather the States’ prior consent, in derogation to the voluntary theory of international law detailed in the introduction. It could be argued then that the adoption of a Charter is not

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(117) See, for example, ECHR, 27 January 2009, *Tatar c. Roumanie*, *op. cit.*, which includes a quote from the Rio Declaration and mentions the Stockholm Convention.

essential, because the case law of the Court could gradually make up for the absence of the legal value of the existing texts. However, the disadvantage of the case law process is that it is opaque, both in how the rule is formed (which remains at the Court's discretion) and, above all, in its dissemination: the customary principles do not meet the requirement for accessibility to the law. In addition, at least in France, an **international customary law does not have the same value as a treaty** in the hierarchy of norms. While an international agreement takes precedence over the law, pursuant to Article 55 of the Constitution, a custom is superseded by a contrary law.

## ***2. Towards the adoption of a Universal Environmental Charter***

For all these reasons, the Committee believes that a text of universal scope on environmental matters needs to be adopted. This text would **be the corner stone of international environmental law**. It would lay down **the founding principles**, from all the sectoral environmental conventions by analysing the variation in, and implementation of, these principles in the specific fields. Furthermore, it could also be envisaged that the Charter would contain a final interpretive clause so that all the sectoral environmental conventions could be interpreted in the light of the major principles which will have been thus enshrined<sup>118</sup>.

It could be adopted in the form of an **international treaty**, so as to give it binding force. It would, therefore, **complement the current diptych of 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. Fundamentally, **this treaty would be to the Rio Declaration what these two pacts were to the Universal Declaration of 1948**: a complementary act bringing binding legal force to the principles previously established in the form of a single declaration.

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(118) In international law, when a sector is governed by a general convention and a more specific sectoral convention, it is the *lex specialis* that is to be applied (provided that the parties to the conventions are identical). A Universal Environmental Charter would therefore act as a reference with regard to the legal power of the major environmental principles when a regional convention is applicable or would itself apply in the absence of a regional text.

The Committee did not want to give an opinion on its content, which remains to be discussed. The same applies to its title. For convenience, this report has used the term "Universal Charter", but the text could just as well be called a "pact" or a "convention" even.

The question of terminology is not very important, except perhaps with regard to the **adjective: "universal"**. Indeed, it is no coincidence if this adjective is used with regard to the "universal" (and not "international") Declaration of human rights. In fact, René Cassin, the father of this text, wanted to emphasise the fact that the principles enshrined in it went beyond the framework of the States and were connected more fundamentally to the **rights of humanity**. The same reason could justify the use of the adjective "universal" for a text which enshrines the founding principles of environmental protection.

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

A universal text would be easier to read, easier to access and easier to understand for the public.

Having binding force, this text could, in particular:

- enshrine the environmental procedural rights contained in the Aarhus Convention, such as the principle of public participation;
- amalgamate the main substantive rights established in the existing sectoral conventions, in particular the major principles recognised as customs by the International Court of Justice and some regional judicial bodies, such as the principles of prevention, cooperation and good neighbourliness;
- contain a final interpretative clause so that all the sectoral environmental conventions can be interpreted in the light of the major principles, which will have been thus enshrined.



It would also enable a national court to monitor compliance with the laws and regulations of the major environmental principles, which is not currently possible in respect of simple declarations without legal force. Certainly, some countries have already enshrined these principles in texts with constitutional value, such as France with the constitutional Environment Charter in 2004. However, this is not the case with many countries which, at best, have confined themselves to establishing one sole principle in their constitution - the right to a healthy environment. Having a **true catalogue of the mandatory founding principles** will usefully supplement the legal structure.

Furthermore, adopting such a text would give international environmental law the legal force it needs. Similar to that which occurred in France following the adoption of the **constitutional Environment Charter in 2004**, which now belongs to the constitutional corpus, the adoption of a general text with superior legal force is not purely cosmetic: it facilitates the interpretation and understanding of, and the compliance with, the rights it enshrines. Judicial experience shows that a founding text feeds the case law. It creates a **jurisprudential force** which inspires all the judicial bodies.

In the same vein, it is worth noting that the Prince of Wales also called for the adoption of a founding text on environmental protection by making a comparison with the value that **the Great Charter of 1215 (or Magna Carta)**<sup>119</sup> has gained in the legal history of the United Kingdom.

However, the adoption of this text will only have real legal force if it is accompanied by an effective compliance and control mechanism. Echoing the proposals presented in the second part of this report, above, the Committee believes that various legally binding tools need to be included in the Universal Environmental Charter.

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(119) *"The Magna Carta—the 800th anniversary of whose signing in England we celebrate this year—established some of the central principles of human rights and individual liberty that hold today. Such a totemic document has proved extraordinarily valuable over the years and, in the same vein, I cannot help wondering if the Sustainable Development Goals and the climate agreement in 2015 could form the basis for a similarly long-standing contract for the earth and humanity's relationship to it".* Speech by the Prince of Wales at the 2015 OECD Forum, available at the following address: <http://www.oecd.org/forum/oecdyearbook/towards-a-new-charter-for-our-earth.htm>

In particular, it is necessary to provide for the creation of a **Compliance Committee**, responsible for monitoring the implementation of the rights it establishes, for example based on the model of the Human Rights Committee for the International Covenant on Civil and Political Rights. On a periodic basis, for example every 4-5 years, **each State shall send a report to the Committee on the application of the Charter**. The Committee's examination of the report will 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. This type of mechanism is by no means purely artificial: it introduces the right of the international community to look into the affairs of the State, and provides a means of information for civil society, and could lead to legislative developments.

It would also be essential to include a chapter in the Charter devoted to the right to appeal with a view to making its provisions enforceable, by expressly providing that **the Charter shall be invoked before national courts**.

**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.*

# APPENDIX 1

## List of the report's 21 proposals

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

**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.

**Proposal 3:** Improve civil society's access to the 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.

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

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

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

**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.

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

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

**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.

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

**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.

**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.

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

**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, whose vocation is universal.

**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.

**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 effective remedy before national legal bodies to ensure respect of the convention by the State.

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

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

**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.

# APPENDIX 2

## The compliance committees of the major environmental conventions

COMPOSITION AND FUNCTION		
Espoo Convention	Aarhus Convention	Cartagena Protocol
<p><u>Composition:</u> The Committee consists of eight Parties to the convention. Each Party appoints a member to the Committee.</p> <p><u>Main functions:</u></p> <ul style="list-style-type: none"> <li>- Examine any submission made to it or any other possible non-compliance by a Party of its obligations.</li> <li>- Review periodically compliance by the Parties of their obligations on the basis of the information provided in their reports.</li> </ul>	<p><u>Composition:</u> The Committee comprises eight members, acting in a personal capacity, who are nationals of the signatory Parties to the Convention. These members must be recognised experts in the fields to which the Convention relates, and possess legal experience.</p> <p><u>Main functions:</u></p> <ul style="list-style-type: none"> <li>- Examine any request, issue or information submitted to the Committee.</li> </ul>	<p><u>Composition:</u> It is composed of 15 members: 3 members from each of the 5 regional groups of the UN. These members must have recognised expertise in the field of biotechnological hazard prevention or other relevant field and, in particular, have specialised legal or technical knowledge.</p> <p><u>Main functions:</u></p> <ul style="list-style-type: none"> <li>- Determine the exact circumstances or possible causes for different cases of non-compliance submitted to it.</li> </ul>

FUNCTIONS OF THE COMMITTEES	
Montreal Protocol	Kyoto Protocol
<p><u>Composition:</u> Ten members elected by the Meeting of the Parties for a two-year term, on the basis of equitable geographic distribution.</p> <p><u>Main functions:</u></p> <ul style="list-style-type: none"> <li>- Receive, consider and report on any submission made to it.</li> <li>- Request, where necessary, <i>via</i> the Secretariat, further information on matters under consideration.</li> </ul>	<p><u>Composition:</u> The Committee functions through a plenary, a bureau and two branches, namely, the facilitative branch and the enforcement branch.</p> <p>The Committee consists of 20 members elected by the Conference of the Parties serving as the meeting of the Parties to the Protocol, ten of whom are elected to serve in the facilitative branch and the other ten elected to serve in the enforcement branch.</p> <p>The facilitative and enforcement branches interact and cooperate in the performance of their functions.</p> <p><u>Main functions:</u></p> <p>1) Plenary of the Committee:</p> <ul style="list-style-type: none"> <li>- Report on the Committee's activities including a list of decisions taken by the branches to each session of the COP.</li> <li>- Apply the guidelines received from the COP.</li> <li>- Submit proposals on administrative and budgetary matters to the COP.</li> </ul>

COMPOSITION AND FUNCTION		
Espoo Convention	Aarhus Convention	Cartagena Protocol
<ul style="list-style-type: none"> <li>- Prepare the reports with a view to providing any appropriate assistance to the Parties concerned.</li> </ul>	<ul style="list-style-type: none"> <li>- Prepare, upon request of the Meeting of the Parties, a report on the compliance with or the implementation of the provisions of the Convention.</li> <li>- Assess compliance issues with the Convention and make recommendations where appropriate.</li> </ul>	<ul style="list-style-type: none"> <li>- Examine the reported information on issues of compliance with obligations or cases of non-compliance.</li> <li>- Provide the Party concerned with recommendations and/or assistance, where appropriate, on issues of compliance with obligations with the aim of assisting such compliance.</li> <li>- If necessary, take measures or submit recommendations to the COP.</li> </ul>



FUNCTIONS OF THE COMMITTEES	
Montreal Protocol	Kyoto Protocol
<ul style="list-style-type: none"> <li>- Identify the facts or possible causes in the considered individual cases of non-compliance and submit appropriate recommendations to the Meeting of the Parties.</li> <li>- Upon invitation by the Party concerned, undertake information gathering in the territory of that Party for fulfilling its functions.</li> </ul>	<p>2) Facilitative Branch: The facilitative branch is responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance of Parties with their commitments under the Protocol, taking into account Parties' common but differentiated responsibilities and respective capabilities.</p> <p>3) Enforcement Branch: The enforcement branch is principally responsible for determining whether or not the Parties are in compliance with their commitments on limiting and reducing emissions under Article 3, paragraph 1, of the Protocol and on reporting.</p> <p>The enforcement branch also determines whether to apply adjustments to inventories under Article 5, paragraph 2, of the Protocol, in the event of a disagreement between an expert review team and the Party concerned.</p>

ROLE OF THE MEETING		
Espoo Convention	Aarhus Convention	Cartagena Protocol
<p>After reviewing a report and any recommendations submitted by the Committee, the Parties may decide on the measures to be undertaken for complying with the provisions of the Convention as well as any general measures to assist a Party in fulfilling its obligations. The decision is adopted, where consensus is impossible, by a majority vote of three-quarters of the Parties present.</p>	<p>After reviewing a report and any recommendations submitted by the Committee, the Meeting of the Parties may decide on appropriate measures for achieving full compliance of the Convention.</p>	
REFERRALS TO THE MEETING		
Espoo Convention	Aarhus Convention	Cartagena Protocol
<p>- One or more Parties to the Convention have concerns about another Party's compliance with its obligations.</p>	<p>- One or more Parties have reserves about another Party's method of complying with its obligations under the Convention.</p>	<p>- One or more Parties have reserves about another Party's method of complying with its obligations.</p>

**NG OF THE PARTIES**

<b>Montreal Protocol</b>	<b>Kyoto Protocol</b>
<p>While awaiting the Committee's report, it may make provisional requests and/or recommendations. It can also request recommendations from the Committee to facilitate the review of possible non-compliance by the Meeting of the Parties. After receiving the Committee's report, the Parties can decide on the method to follow for ensuring full compliance with the Protocol's provisions.</p>	<p>A Party, against which the enforcement branch has made a decision, may appeal it before the COP if it believes there were irregularities in the decision process. The appeal must be lodged with the Secretariat within 45 days after the date on which the Party was informed of the enforcement branch's decision. The COP can decide by a majority vote of three-quarters of the voting Parties present to revoke the decision of the enforcement branch. In such a case, the appealed issue is referred back to the enforcement branch. The enforcement branch's decision remains effective during the appeal proceedings. It becomes final where no appeal has been lodged within the 45-day limit.</p>

**HE COMMITTEES**

<b>Montreal Protocol</b>	<b>Kyoto Protocol</b>
<p>- One or more Parties have reserves about another Party's compliance with its obligations.</p>	<p>The Committee can receive, through the Secretariat, questions of implementation indicated in reports of expert review teams under Article 8 of the Protocol, as well as any other written statements from the Party concerned in the report, or any questions of implementation submitted by:</p>

REFERRALS TO T		
Espoo Convention	Aarhus Convention	Cartagena Protocol
<ul style="list-style-type: none"> <li>- A Party concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligations.</li> <li>- Where the Committee becomes aware of possible non-compliance by a Party with its obligations, it may request the Party concerned to furnish necessary information about the matter.</li> </ul>	<ul style="list-style-type: none"> <li>- A Party concludes that, despite its best endeavours, it is or will be unable to comply fully with its obligations.</li> <li>- The Secretariat.</li> <li>- <b><u>The public.</u></b></li> </ul>	<p>In this case, the Secretariat makes the complaint available to the accused Party. It then sends the complaint, response and other information to the Committee. The Committee can then decide not to investigate this complaint if it is minor or unjustified. The complaining Party and the accused Party can participate in the debates of the Committee. However, such Parties cannot participate in the formulation and adoption of the Committee's recommendation.</p> <ul style="list-style-type: none"> <li>- A Party concludes that it is or will be unable to comply fully with its obligations.</li> </ul>

THE COMMITTEES	
Montreal Protocol	Kyoto Protocol
<ul style="list-style-type: none"> <li>- A Party that is unable to comply fully with its obligations.</li> <li>- The Secretariat.</li> </ul>	<ul style="list-style-type: none"> <li>- Any Party with respect to itself.</li> <li>- Any Party with respect to another Party, supported by corroborating information.</li> </ul> <p><u>Allocation and preliminary examination of questions:</u></p> <p>The bureau of the Committee allocates the questions of implementation to the appropriate branch, in accordance with their separate mandates.</p> <p>The relevant branch undertakes a preliminary examination of questions of implementation, within three weeks, to ensure that:</p> <ul style="list-style-type: none"> <li>- The corroborating information provided is sufficient;</li> <li>- The question is not insignificant or ill-founded;</li> <li>- The question is based on the stipulations of the Protocol.</li> </ul> <p>After this examination, the Party concerned, through the Secretariat, is notified in writing of the decision.</p>

ACTIONS TAKEN IN CAS		
Espoo Convention	Aarhus Convention	Cartagena Protocol
	<p><u>Committee:</u> While awaiting action from the Meeting of the Parties, the Committee can:</p> <ul style="list-style-type: none"> <li>- Upon consultation with the Party concerned, provide advice and facilitate assistance;</li> <li>- Subject to agreement by the Party concerned, make recommendations or request the Party to submit the strategy and schedule that it intends to follow in order to comply with the Convention.</li> </ul> <p><u>Meeting of the Parties:</u></p> <ul style="list-style-type: none"> <li>- Give advice/ recommendations and facilitate assistance to a Party;</li> </ul>	<p><u>Committee:</u></p> <ul style="list-style-type: none"> <li>- Offer advice and assistance to the Party concerned;</li> <li>- Make recommendations to the COP regarding the provision of financial and technical assistance, technology transfer and other measures for capacity-building;</li> <li>- Request the participation of the Party concerned for formulating an action plan on fulfilling obligations;</li> <li>- Invite the Party concerned to submit reports on its efforts;</li> <li>- In the framework of the last two measures, prepare a report for the COP on the efforts made by non-compliant Parties.</li> </ul>

**ES OF NON-COMPLIANCE**

<b>Montreal Protocol</b>	<b>Kyoto Protocol</b>
<ul style="list-style-type: none"> <li>- Provision of appropriate assistance, especially for the data gathering and reporting, technical assistance, technology transfer, financial aid, information transfer and training;</li> <li>- Issuance of warnings;</li> <li>- Suspension of particular rights and privileges resulting from the Protocol, for an indefinite or specific period, especially those relating to industrial rationalisation, production, consumption, exchange, technology transfer, financial mechanisms and institutional arrangements.</li> </ul>	<p>1) <u>Consequences applied by the facilitative branch:</u>                      Taking into consideration the principle of common but differentiated responsibilities and respective capacities, the facilitative branch decides on the application of one or more of the following consequences:</p> <ul style="list-style-type: none"> <li>- Provision of advice and facilitation of assistance to individual Parties regarding the implementation of the Protocol.</li> <li>- Facilitation to any Party financial and technical assistance including technology transfer and capacity-building, originating from sources other than those created for developing countries by virtue of the Convention and its protocol.</li> <li>- Facilitation of financial and technical assistance, including technology transfer and capacity-building, taking into account Article 4, paragraphs 3, 4 and 5, of the Convention.</li> <li>- Formulation of recommendations to the Party concerned, taking into account Article 4, paragraph 7, of the Convention.</li> </ul> <p>2) <u>Consequences applied by the enforcement branch:</u></p> <ul style="list-style-type: none"> <li>- Possible sanctions.</li> </ul>

ACTIONS TAKEN IN CASES		
Espoo Convention	Aarhus Convention	Cartagena Protocol
	<ul style="list-style-type: none"> <li>- Request the Party concerned to submit to the Review Committee the strategy and schedule that it intends to follow in order to comply with the Convention;</li> <li>- In the case of complaints from the public, recommend specific measures for resolving the particular problem to the Party;</li> <li>- Publish declarations of non-compliance;</li> <li>- Issue warnings;</li> <li>- Suspend special rights and privileges granted under the Convention to the Party concerned;</li> <li>- Take any non-confrontational, non-legal and collaborative action deemed appropriate.</li> </ul>	<p><u>Factors taken into account in choosing the measures:</u> the Committee must consider the capacity of the Parties, in particular those of developing countries, least developed countries and Parties in economic transition.</p> <p><u>Conference of the Parties:</u> On the recommendations of the Committee and taking into account the capacity of the Parties, the COP can:</p> <ul style="list-style-type: none"> <li>- Provide financial and technical assistance, ensure technology transfer and take other measures for capacity-building;</li> <li>- Issue a warning to the Party concerned;</li> <li>- Request the Secretariat to publish cases of non-compliance.</li> </ul>



<b>ES OF NON-COMPLIANCE</b>	
<b>Montreal Protocol</b>	<b>Kyoto Protocol</b>