

# Enforcement of International Law

## From the Authority of Hard Law to the Impact of Flexible Methods

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Abstract	580
I. Introduction	580
II. Law as an Instrument of Protection	582
1. Substantive Rules	584
2. Appropriate Mechanisms	585
III. Enforcement of International Obligations	587
1. The Traditional Answer: Armed Force	587
a) The Commencement of Modern International Law	588
b) The 19 <sup>th</sup> Century up to World War I	589
c) After World War I	592
2. The New Age under the UN Charter	595
IV. The Rules of State Responsibility as Devices for the Protection of the Environment – The Work of the ILC	597
1. The Role of the Special Rapporteurs	598
a) Special Rapporteur <i>García Amador</i>	599
b) Special Rapporteur <i>Roberto Ago</i>	599
c) Special Rapporteur <i>Willem Riphagen</i>	602
d) Special Rapporteur <i>Arangio Ruiz</i>	603
e) Special Rapporteur <i>James Crawford</i>	605
2. The Final Version of the ARS	605
3. A Summary Conclusion	609
V. The Current Regimes of Responsibility in Multilateral Environmental Agreements (MEAs)	610
1. Compliance Strategies in Multilateral Treaty Frameworks	610
a) Convention on Long-Range Transboundary Air Pollution	613
b) Convention for the Protection of the Ozone Layer	616
c) UN Framework Convention on Climate Change	619
d) The Kyoto Protocol	620
e) Convention on Biological Diversity	622
f) Complementary Conventions	624
g) Paris Agreement	624
2. Financial Aspects	627
3. Self-Contained Regimes?	627
VI. Concluding Observations	628

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## Abstract

The article analyzes the methods used to protect common goods of mankind against the negative impact of human activities. In the early stages of international law, publicists deemed it to be an essential feature of their branch of law that ultimately enforcement can only be ensured by resort to reprisals or even war. No thoughts were devoted to the maintenance of the natural foundations of life on earth which seemed to exist in eternal harmony. The law of State responsibility emerged as a set of rules applicable mainly to bilateral disputes between States. Only in connection with the prevention of war did the international community realize in the course of the 20<sup>th</sup> century that collective mechanisms are needed to maintain peace and security among nations. It took a long time to understand that well-planned preventive action is also necessary to preserve the earth as a living space for human and all other forms of biological life. The International Law Commission (ILC) saw it as one of the main objects of its project on State responsibility for internationally wrongful acts to devise a mechanism suited to react to the massive pollution of the atmosphere and the seas. For many years its discussions centered on whether to provide individual States with a role of guardians of the common interest by granting to them the right to take countermeasures against wrong-doing States in such instances. The outcome of those endeavors was modest by granting every State a right of “invocation” *vis-à-vis* the alleged wrongdoer. But this result corresponds exactly to the model that has pragmatically evolved on the basis of multilateral treaties for the protection of the environment in the form of non-compliance procedures. Enforcement is not sought by punitive sanctions but instead by non-confrontational mechanisms where the aims are pursued through dialogue and persuasion. The Paris Agreement of 2015 on climate protection has also followed this route. Currently, it cannot be said with any degree of certainty whether the switch from sanction to dialogue will yield the results which are expected of it.

## I. Introduction

It is not self-evident anymore that human beings live and can continue to live on this globe. Of course, they always had to fight for their existence in order to ensure a life in dignity free from hunger and exposure for themselves and their families. Paradise does not exist on earth. However, during the last century, threats emerged that former generations had never wit-

nessed. Progressively, it appeared that pure air and water are precious assets the presence of which cannot be taken for granted everywhere at any time. Since immemorial times, it had been considered unthinkable that polluted air could imperil the life of entire nations, measures have by now become necessary to control the emissions from innumerable sources of human activity. While during the 19<sup>th</sup> century one could still believe that the primary wealth of the oceans, their fish, was inexhaustible,<sup>1</sup> we are now accustomed to more or less strict fishing regimes in all parts of the world that regulate in detail, in order to keep sustainability, what quantities of fish may be harvested in a specific marine area. In a similar fashion, the natural habitat, the stocks of animals and plants, seemed to constitute unchangeable solid blocks of the human environment, surpassing in their stability infinitely that of human societies.

Currently, at the end of the second decade of the 21<sup>st</sup> century, that imagined reality may be deemed to belong to that “good old time”, that “*aurea aetas*”, which has never existed to the full measure of its glorified vision. It has become commonplace to bemoan the progressive decay of the environment that humans have to share with the other living creatures, plants and animal species. Humans have become the masters of the world. On the one hand, their destructive power is tremendous. The calamitous situation of the world’s ecosystems has recently (May 2019) been amply demonstrated by the Global Assessment Report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES),<sup>2</sup> which for the first time has applied a vast inter-sectoral approach to all the phenomena of humankind’s natural environment. Its worrying findings confirmed the balance sheet established a few years earlier by the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) of 2014.<sup>3</sup> On the other hand, humans also have the capacity to reverse the current deleterious trends provided that they succeed in joining their forces for appropriate common action, and have the courage to do so with energy and determination. In the IPBES report, an effort has been made to indicate that it is not yet too late to rescue humankind and with it all biological resources from extinction and/or disaster.<sup>4</sup> Still, the observer gets the impression that such

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<sup>1</sup> But see the award in the *Bering Sea Fur Seals* case (*United States v. United Kingdom*), 15.8.1893, RIAA 28, 263, where a dispute had broken out about the right to hunt the seals living in the Bering Sea.

<sup>2</sup> Summary for policymakers, <<https://www.ipbes.net>>, 6.5.2019.

<sup>3</sup> Global Assessment Report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, <<https://www.ipcc.ch>>. See also the latest report of October 2018: Global Warming of 1.5 °C, <<https://www.ipcc.ch>>.

<sup>4</sup> IPBES Report (note 3), Key Messages, 7, Section D.

remedial measures are less easily to specify than the analytical findings that confine themselves to registering the manifold harmful effects that have already occurred.

## II. Law as an Instrument of Protection

The law and its procedures, mechanisms and institutions are the indispensable tool for such strategies. Joint action must be organized intelligently in order to achieve agreed objectives. At the international level, where to date no centralized legislative power has taken shape, the main instrument for coordination and cooperation is the international treaty,<sup>5</sup> a legal device that derives its legitimacy from mutual consent.<sup>6</sup> Whenever problems arise that extend beyond the domestic jurisdiction of one State, treaties are indeed the sole suitable instrument to be used wherever simple alignment by political consensus does not seem to provide the requisite degree of stability and durability.

Whereas international law has developed an immense variety of samples for the regulation of bilateral relationships between States, the need to take care of the natural foundations of human life on earth constitutes a challenge for the entire architecture of international law. The “classic” example of international relations is the bilateral interaction between two sovereign States acting in the exercise of their sovereign powers. It was the dramatic discovery of the last century that peace must be – and can be – organized institutionally through comprehensive collective mechanisms going beyond alliances of like-minded countries in order to prevent and possibly eliminate war as the most serious threat to human life and well-being. Otherwise, however, even at the beginning of the second half of the 20<sup>th</sup> century, no provision was made for the preservation of the natural foundations of life on earth. It is significant that in 1945, the Charter of the United Nations devoted large parts of its text to the regulation of international peace and security (Arts. 2(4) and 25; Chapters VI and VII) but did not lose a single word on the threats looming over the globe’s natural environment. Not even the Treaty on the Establishment of the European Economic Commu-

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<sup>5</sup> See, e.g., *B. Simma*, From Bilateralism to Community Interest in International Law, RdC 250 (1994), 217, 322 et seq.

<sup>6</sup> *L. Oppenheim* and *H. Lauterpacht* state in exemplary clarity: “[c]ommon consent is the basis of all law”, *L. Oppenheim/H. Lauterpacht*, International Law. A Treatise, Vol. I, 8<sup>th</sup> ed. 1955, 15. Yet the question may arise whether official consent, expressed by authorized governmental agents, is truly supported by democratic legitimacy as a guarantee for stability. A normative approach cannot overcome this dilemma.

nity of 1957, although being drafted twelve years later, was foresightful enough to acknowledge the environment as an issue that deserves close attention and care, not at least because of its close interaction with the comprehensive regulation of all economic activities.

How can common goods of human kind be protected effectively? In current legal terminology such goods are termed matters of “common concern”.<sup>7</sup> Climate change illustrates the problems involved in the most drastic fashion. Specifically with regard to air and water, the traditional cycles do not function any longer in a manner that ensures a long-term balance, as convincingly emerges from both the IPCC and the IPBES reports. Accordingly, remedial action appears urgently required to restore sustainable equilibria in the natural environment. In particular, the extinction of species progresses at a rapid and seemingly unstoppable pace. Yet no single State may unilaterally bring about improvement deemed to be necessary. First of all, all States must agree on specific substantive standards; at a second stage, appropriate mechanisms that are able to ensure observance of those standards must be devised. Even without any deep reflection everyone must come to the conclusion that to bring about agreed solutions can never be an easy task even though there may (?) nowadays exist a general awareness that the protection of those common goods constitutes a dire necessity that requires to be tackled without any delay.<sup>8</sup> A major problem is constituted by the traditional architecture of international law that does not seem well-equipped to deal with a challenge of such tremendous dimensions. Within the current normative framework of international relations States, generally acting and speaking through their governmental elites, are generally inclined to follow up on calls for reasonable conduct in accordance with the general interest of the international community. But it is the populations that give rise, just through their existence and their activities, to almost all of the actual losses as well as to the looming threats that have been diagnosed.

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<sup>7</sup> UN Framework Convention on Climate Change (UNFCCC), 9.5.1992, in force: 21.3.1994, 1771 UNTS 107: Preamble, para. 1; Convention on Biological Diversity (CBD), 5.6.1992, in force: 29.12.1993, 1760 UNTS 79: Preamble, para. 3.

<sup>8</sup> In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226 (242), para. 29, the ICJ stated that the “general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”.

## 1. Substantive Rules

It took decades before the international community realized that deliberate efforts must be taken in order to protect the natural environment against destruction from careless negligence. The first United Nations (UN) Conference on the Human Environment, held in Stockholm in June 1972,<sup>9</sup> was still hampered, notwithstanding its ground-breaking new insights, by the absence of the Socialist States.<sup>10</sup> 20 years later genuine international consensus crystallized in the Rio Declaration on Environment and Development<sup>11</sup> where it was acknowledged that a rational environmental policy must at the same time aim to promote the standards of life of all human beings in a challenging balancing act.<sup>12</sup>

The combat against pollution of air and water invariably requires specific expert knowledge. Rarely are remedies easily at hand. Only in some sectors does it not seem difficult to identify the substances that should be banned or the use of which should at least be considerably reduced. The main example in that regard is the use of chlorofluorocarbons (HFCs), (and other ozone-depleting substances [ODSs]) which, as research has incontrovertibly shown, are an agent that depletes the ozone layer of the earth.<sup>13</sup> However, as it emerged fairly quickly during the negotiations for the elaboration of an appropriate international instrument for the banning of those substances,<sup>14</sup> established production and consumption patterns cannot be changed overnight. Transitory periods must be provided for.<sup>15</sup> In other instances, the scope of the protected objects is so wide that no such detailed regulatory schemes can be established. The Convention on Biological Diversity<sup>16</sup> pursues the ambitious aim of protecting the entire gamut of forms of organic

<sup>9</sup> Declaration on the Human Environment, 16.6.1972, ILM 11 (1972), 1416.

<sup>10</sup> See list of participating States in the Report on the Conference, A/CONF.48/14/Rev.1, 43, para. 13.

<sup>11</sup> Rio Declaration on Environment and Development of 13.6.1992, ILM 31 (1992), 876.

<sup>12</sup> See lately GA Res. 72/277, 10.5.2018: Towards a Global Pact for the Environment.

<sup>13</sup> See, for instance, Deutscher Bundestag, Erster Zwischenbericht der Enquête-Kommission Vorsorge zum Schutz der Erdatmosphäre, BT-Drs. 11/3246, 2.11.1988, 52 et seq. (comprehensive presentation of scientific background); European Commission, Policy Statement on Protection of the Ozone Layer, <<https://ec.europa.eu>>, 11; WMO and other IOs, Scientific Assessment of Ozone Depletion, Executive Summary, 2018, 11.

<sup>14</sup> Vienna Convention for the Protection of the Ozone Layer, 22.3.1985, in force: 22.9.1988, 1513 UNTS 293.

<sup>15</sup> Therefore, in the implementing Montreal Protocol on Substances that Deplete the Ozone Layer, 16.9.1987, in force: 1.1.1989, 1522 UNTS 3, a differentiated time schedule was laid down.

<sup>16</sup> Convention on Biological Diversity of 5.6.1992, in force: 29.12.1993, 1760 UNTS 79.

life from deterioration and extinction. In the text of the Convention itself three objectives are highlighted (Art. 1):

“conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”.

It stands to reason that in view of the gigantic extension of this task imaginative solutions had to be found. Not any kind of organic life can be protected completely. Human life and human activity needs to be sustained by the resources of their environment. Interference with plant life and animal life is hence indispensable but must be harmonized in such a way that no permanent irreparable damages occur. Accordingly, the Convention required from the very outset to be drafted in flexible terms – terms that were not designed to undermine its effectiveness but on the contrary to strengthen its acceptability in its diverse areas of operation all over the world and thereby, indirectly, its effectiveness. At the time of the drafting process it was not yet as clear as now brought to public attention by the IPBES report that organic life in wide diversity is more than a separate theater of environmental concern, but an indispensable precondition for the future of humankind. Accordingly, it has become an axiomatic truth that any policy that would confine itself to pursuing anthropocentric objectives would be doomed to failure.

## 2. Appropriate Mechanisms

As already hinted, in the international arena one can never be content with having established and put a conventional instrument into “normative” force. To be sure, it is a basic axiom of international law that its rules are binding.<sup>17</sup> This axiom encapsulates the very essence of international law, distinguishing it from recipes of political expediency and wisdom. Over the centuries nations have maintained a tacit agreement that they need a firm groundwork for their mutual relations in order to overcome the status of

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<sup>17</sup> Vienna Convention on the Law of Treaties (VCLT), 23.5.1969, Art. 26, codifying the venerable proposition: *Pacta sunt servanda*. Only isolated voices call into question the bindingness of international law, including treaties: E. A. Posner/A. O. Sykes, Efficient Breach of International Law: Optimal Remedies, “Legalized Noncompliance” and Related Issues, Mich. L. Rev. 110 (2011) 243 et seq. (246): “we suggest that compliance with international law is justified only if compliance promotes national or global welfare”. Authors from developing countries focus generally their criticism on international customary law, see, e.g., B. S. Chimni, Customary International Law: A Third World Perspective, AJIL 112 (2018), 1 et seq.

anarchy that otherwise might obtain.<sup>18</sup> On the other hand, the wish to live within a reliable structure of firmly established normative precepts suffers more often than not bitter disappointments. Grave breaches even of the most fundamental principle of the legal architecture of our time, the ban on the use of force, constitute more than just extraordinary intermittent occurrences. Indeed, today's formidable arsenal of almost perfect substantive rules is not matched by a similarly impressive machinery for enforcement. The current system of international law is still essentially dominated by the principle of sovereign equality of States, implying sovereign decision-making power, although the concept of international community<sup>19</sup> is continually making strides forward by emphasizing the manifold constraints to which States have increasingly been subjected – or have submitted – in the general interest of all nations and human beings. Yet sovereign States remain ultimately the masters of their conduct.<sup>20</sup> Among them, the general framework of international law remains invariably the normative background, but their relations are more often than just incidentally fought as power games subject to the law of force.

<sup>18</sup> See *H. Bull*, *The Anarchical Society: a Study of Order in World Politics*, 4<sup>th</sup> ed. 2012.

<sup>19</sup> See, e.g., *A. Cassese*, *International Law*, 2<sup>nd</sup> ed. 2005 (who structures his observations around this concept); *P.-M. Dupuy*, *L'unité de l'ordre juridique international – Cours général*, RdC 297 (2000), 9 (245 et seq.); *G. Gaja*, *The Protection of General Interests in the International Community – General Course*, RdC 364 (2014), 9 (26 et seq.). For the “German school” of international community see *B. Fassbender*, *Denkschulen im Völkerrecht*, Ber. d. Dt. Gesell. f. Völkerrecht 45 (2012), 1 (12 et seq.), with references to *H. Mosler*, *The International Society as a Legal Community*, 1980; *C. Tomuschat*, *Obligations Arising for States without or against Their Will*, RdC 241 (1993), 159 et seq.; *A. L. Paulus*, *Die internationale Gemeinschaft im Völkerrecht*, 2001; *M. Payandeh*, *Internationales Gemeinschaftsrecht*, 2010. For a comprehensive assessment of the concept see also *A. von Bogdandy*, *Constitutionalism in International Law: Comment on a Proposal from Germany*, Harv. Int'l. L. J. 47 (2006), 223 (228 et seq.), *A. von Bogdandy*, *The Telos of International Law*, in: *P.-M. Dupuy/B. Fassbender/M. N. Shaw/K. P. Sommermann* (eds.), *Common Values in International Law – Essays in Honour of Christian Tomuschat*, 2006, 703 (713 et seq.). – These days, the words “international community” have become commonplace in the world of international organizations, in particular the UN General Assembly, see, e.g., GA Res. 72/247, 24.12.2017, 20<sup>th</sup> Anniversary and Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedom, para. 15. In the ILC's Articles on State Responsibility (ARS), taken note of by GA Res. 56/83, 12.12.2001, the “international community” stands at the heart of *jus cogens* norms (Art. 48(1)(b)) although the classification scheme chosen by the ILC hides this basic connection.

<sup>20</sup> The 2030 Agenda for Sustainable Development, UNGA Res. 70/1, 25.9.2015, avoids referring to the international community, preferring instead to rely on “people” as the counterpart of the world organization. In fact, the term “international community” might be seen as introducing a third element independent of the States parties and their common organization.



One encounters here the simple truth that neither international treaties nor other rules of international law like, in particular, the rules of customary international law are automatically operative. International law needs an adequate infrastructure for its enforcement according to models that can take the most diverse configurations, adapted to the specificities of the subject-matter concerned. Many treaties operate smoothly on the basis of reciprocity. The performance required of either side stands in some kind of (delicate) equilibrium, according to the simple Roman adage: *quid pro quo*. For *Gerald Fitzmaurice*, the third Special Rapporteur on the Law of Treaties, reciprocity was a condition “normally to be read into all treaties”.<sup>21</sup> This simple mechanism, however, is not available where common goods or values of the international community are at stake. If the violation of one of the commitments under the Montreal Protocol on Substances that Deplete the Ozone Layer<sup>22</sup> entailed as its consequence a right for the other parties to breach their corresponding obligations as well, the path to cataclysmic disaster would be flung open widely.<sup>23</sup> A sound strategy must have recourse to sophisticated devices that appeal last, but not least, to the wisdom and to the sense of civic responsibility of everyone involved in the relevant processes that shape the human environment. This realization opens up new perspectives for international law in its entirety.<sup>24</sup>

### III. Enforcement of International Obligations

#### 1. The Traditional Answer: Armed Force

The traditional answers provided to the question of how the mechanisms of international law ensure the enforceability of its body of rules have always been unsatisfactory. Never could the tension between normative bind-

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<sup>21</sup> Fourth Report on the Law of Treaties, UN Doc. A/CN.4/120, YILC 1959 II, Commentary on Arts. 18, 66, para. 82.

<sup>22</sup> Montreal Protocol on Substances that Deplete the Ozone Layer (note 15).

<sup>23</sup> Thus, although reciprocity contributes to the effectiveness of international humanitarian law, it cannot be viewed as an inbuilt element of the relevant body of rules. According to Rule 140 of the ICRC's Customary International Humanitarian Law, Vol. I, 2005, 498, “[t]he obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity”.

<sup>24</sup> Cogent analysis by *J. Brunnée*, Enforcement Mechanisms in International Law and International Environmental Law, in: U. Beyerlin/P.-T. Stoll/R. Wolfrum (eds.), Ensuring Compliance with Multilateral Environmental Agreements, 2006, 1 et seq.

ingness and factual impotence be synthesized in a magic formula.<sup>25</sup> That tension is inherent in any legal norm that seeks to maintain the established order by imposing its commands on a recalcitrant reality. In international law, however, the gap is particularly wide since the international community still lacks a comprehensive executive branch of government.<sup>26</sup>

### a) The Commencement of Modern International Law

When turning to *Hugo Grotius*, the “father” of international law, the readers may be shocked by the realistic rudeness of the advice they receive. For *Grotius*, notwithstanding his passionate support for the rule of law in international relations, war is the instrument through which States eventually have to assert their rights. Large parts of his treatise “*De Jure Belli ac Pacis*” of 1625 are devoted to issues of war, and indeed he views war as the ultimate remedy if no agreement is reached with an opposing party to settle an emerging dispute by peaceful means. Chapter II of Book I is entirely designed to demonstrating that in any event waging war is not against the law of nature, provided that the rights of others are not infringed.<sup>27</sup> Some of his statements are fairly startling to a reader of our time.<sup>28</sup> For *Grotius*, war is not only a fact of life, he contends even that war “is undertaken for the sake of peace” and that “war itself will lead us to peace, as to its end and purpose”.<sup>29</sup> On the other hand, *Grotius* cautioned against undertaking war rashly even when a just cause provided reasonable justification.<sup>30</sup> Reprisals are also acknowledged by him as an alternative to war going so far as to the seizure of persons as hostages.<sup>31</sup>

It need not be argued at great length that quite definitely war – or in a wider sense armed force – is inappropriate as a remedy to ensure respect for

<sup>25</sup> P. Weil, *Le droit international en quête de son identité*, Cours général, RdC 237 (1992), 9 (53), speaks of the “lien trompeur entre juridicité et effectivité”.

<sup>26</sup> Whether international law is truly binding constitutes one of the perennial questions of any reflection on international law, see, e.g., H. L. A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. 1994, 217. For a more recent discussion of the issue see J. Klabbers, *International Law*, 2<sup>nd</sup> ed. 2017, 10 et seq.

<sup>27</sup> H. Grotius, *De Jure Belli ac Pacis*, Book I, Chapter II, I.3. Here, *Grotius* seems to reconcile what is not reconcilable.

<sup>28</sup> Not taken into account by M. E. O’Connell, *Peace and War*, in: B. Fassbender/A. Peters (eds.), *The Oxford Handbook of the History of International Law*, 2012, 272 (276).

<sup>29</sup> H. Grotius (note 27), Chapter I, I. Citations taken from the English translation “*The Rights of War and Peace*”, ed. by R. Tuck, 2005.

<sup>30</sup> H. Grotius (note 27), Book II, Chapter XXIV.

<sup>31</sup> H. Grotius (note 27), Book III, Chapter II.

and observance of treaties aiming to preserve the world's natural environment from degradation or destruction. By combating an alleged evil, the breach of a conventional rule protecting a specific environmental media, the injury already in existence would, by contrast, be increased. Obviously, the writers of later times in the 18<sup>th</sup> and the 19<sup>th</sup> century could not be unaware of the risks inherent in portraying war as the ultimate tool for the restoration of good order. *Emeric de Vattel*, writing in the middle of the 18<sup>th</sup> century, did not make great advances in his thinking in that regard<sup>32</sup> although he extensively commented on alternative methods of retaliation to be resorted to before waging war,<sup>33</sup> making extensive use of the practice of the European States observed by him meticulously. In particular, he stressed that reprisals could be used for the enforcement of pending debts.<sup>34</sup> Yet it would be a mistake to blame him for intellectual blindness. The international society had not yet equipped itself with an institutional framework. A sovereign State was still very much alone in defending its interests if it had not succeeded in surrounding itself with a protective ring of friends and allies. *Kant's "Perpetual Peace"*<sup>35</sup> remained more in the nature of a philosophical reflection than of a realistic political project.<sup>36</sup> Moreover, apart from peace as the indispensable basis for life in human dignity, no other man-made threats to common goods of humankind had emerged as yet.<sup>37</sup>

## b) The 19<sup>th</sup> Century up to World War I

It is well known that the 19<sup>th</sup> century did not yet bring about the great shift of orientation that would have been required for a plea to forego violent means as the ultimate guarantor of the binding force of international law. It has rightly been called the heyday of the sovereign State.<sup>38</sup> Among international lawyers, only few writers stressed the need for organized reactions of the international community to war and aggression. It became commonplace, however, to focus on reprisals as an alternative method for

<sup>32</sup> *E. de Vattel*, *Le droit des gens ou principes de la loi naturelle*, 1758, Book II, Chapter XVIII, § 333.

<sup>33</sup> *E. de Vattel* (note 32), §§ 341-350.

<sup>34</sup> *E. de Vattel* (note 32), § 342.

<sup>35</sup> *I. Kant*, *Zum ewigen Frieden*, 1795.

<sup>36</sup> See *C. Tomuschat*, *Kants Schrift "Zum ewigen Frieden" – Völkerrechtliche Aspekte*, in: *W. Czaplinski* (ed.), *Prawo W XXI Wieku*, 2006, 978 et seq.

<sup>37</sup> Epidemics had to be endured as blows of fate.

<sup>38</sup> *S. Besson*, *Sovereignty*, in: *MPEPIL*, Vol. IX, 2012, 366 (371), paras. 33, 34.

settling bilateral disputes before proceeding to armed action.<sup>39</sup> Eventually, however, violent means were acknowledged as the only available remedy of last resort. *Henry Wheaton*, writing in 1836,<sup>40</sup> still followed the traditional line of thinking. Like his predecessors, he evokes recourse to use of force as the ultimate remedy if no peaceful outcome of a dispute is found by the parties:

“Every state has [...] a right to resort to force as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society.”<sup>41</sup>

In a world that only two decades ago had emerged from the *Napoleonic* wars with their heavy losses of human lives this was a traditional answer, not opening up any perspectives for a better future. To *Wheaton*, going to war was a choice among others, not being characterized by him as fundamentally unjust, to be resorted to only in exceptional circumstances.<sup>42</sup> A more reflective note on the prejudicial effects of war was some years later introduced by *August Wilhelm Heffter*, a German author who at that time enjoyed an outstanding reputation all over Europe.<sup>43</sup> *Heffter* additionally devoted just one sentence to cases of “inhuman, absolutely wrongful conduct” where he pleaded for the admissibility of third-party reprisals, following the general theory of intervention.<sup>44</sup> Eventually, Swiss author *Johann Caspar Bluntschli*<sup>45</sup> brought a new note into the discourse on remedies against disruptive violations of international law. In his treatise of 1868<sup>46</sup> he introduced a distinction between ordinary offences and violations “causing public danger” (“*gemeingefährlich*”) like, *inter alia*, piracy, aggression against other nations and introduction of slavery.<sup>47</sup> According to his opinion, in such instances all States were entitled to make diplomatic representations, urging the wrongdoer to cease its unlawful conduct or even uniting against it in order to enforce the recognized principles of international law

<sup>39</sup> See, e.g., *G. F. de Martens*, Précis du droit des gens moderne de l'Europe, 1801, 377 et seq., §§ 255-262; *J. L. Klüber*, Europäisches Völkerrecht, Vol. II, 1821, 380, § 234; *A. W. Heffter*, Das europäische Völkerrecht der Gegenwart, 1844, 196.

<sup>40</sup> *H. Wheaton*, Elements of International Law, 1836.

<sup>41</sup> *H. Wheaton* (note 40), 209, § 1.

<sup>42</sup> For a condensed description of the purely political appraisal of war at that time see *S. C. Neff*, War and the Law of Nations, 2005, 159 et seq.

<sup>43</sup> *A. W. Heffter* (note 39), 185, 195.

<sup>44</sup> *A. W. Heffter* (note 39), 191.

<sup>45</sup> On *Bluntschli* see *M. Koskeniemi*, The Gentle Civilizer of Nations, 2001, 42 et seq.

<sup>46</sup> *C. Bluntschli*, Das moderne Völkerrecht der civilisirten Staten, 1868.

<sup>47</sup> *C. Bluntschli* (note 46), 264.

and human rights law.<sup>48</sup> Nowhere else could one hear, at that time, voices that advocated such kind of guardianship of the international community for the protection of the essential signposts of peaceful co-existence of nations.<sup>49</sup> *De facto*, the leading European Powers had established a kind of directorate over Europe under which they felt entitled to regulate the great crisis situations like, in particular, the controversies over border delimitations in Africa.<sup>50</sup> Yet decisions like those of the Berlin Conference in 1885<sup>51</sup> amounted to no more than pinpointed interventions driven by the necessities of the current political agenda, where colonialism uncontestedly took center-stage.

Progressive voices like that of *Bluntschli* were rarely heard among international lawyers in the last decades of the 19<sup>th</sup> century or during the years before the outbreak of World War I.<sup>52</sup> One of those few international lawyers who pleaded for the integrity of the international legal order was *William Edward Hall*:

“When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, so hinder the wrong-doing from being accomplished, or to punish the wrong-doer.”<sup>53</sup>

*Ludwig Oppenheim*, the author of the classic authoritative treaty on international law, went back to the traditional model of bilateral relationships under international law. For him it was still self-evident that for the enforcement of its claims a State had at its disposal the use of reprisals or even recourse to war.<sup>54</sup> The concept of “international crimes” was mentioned but only with regard to deviant private individuals like slave traders or pirates.<sup>55</sup> All breaches of rules of international law were classified as “delinquencies”

<sup>48</sup> *C. Bluntschli* (note 46), 265.

<sup>49</sup> *Bluntschli's* exceptional farsightedness was emphasized by *R. Ago*, 5<sup>th</sup> Report on State Responsibility, UN Doc. A/CN.4/291, ILCYB 1976 II.1, 42, para. 125. *Bluntschli's* progressive stand is also stressed by *L.-A. Sicilianos*, *Les réactions décentralisées à l'illicite*, 1990, 143.

<sup>50</sup> *M. Schulz*, *Normen und Praxis. Das Europäische Konzert der Großmächte als Sicherheitsrat 1815-1860*, 2009.

<sup>51</sup> See the General Act of the Congo Conference, Berlin, reproduced in: *W. G. Grewe* (ed.), *Sources Relating to the History of the Law of Nations*, Vol. 3/1, 1992, 297, and the comments by *M. Craven*, *Colonialism and Domination*, in: *B. Fassbender/A. Peters* (note 28), 862 (880).

<sup>52</sup> Open incitement to annexation through war by *P. Heilborn*, *Grundbegriffe des Völkerrechts*, 1912, 24.

<sup>53</sup> *W. E. Hall*, *International Law*, 1880, 46, § 12. The wording remained unchanged until the eighth edition of 1924, 65. *Hall* did not exclude war as punishment.

<sup>54</sup> *L. Oppenheim*, *International Law. A Treatise*, Vol. I, 1905, 205.

<sup>55</sup> *L. Oppenheim* (note 54), 201 et seq.

entailing consequences only within the bilateral relationship between the author State and the wronged State.<sup>56</sup>

The two Hague Peace Conferences of 1899 and 1907 were only partly successful by establishing rules for the conduct of armed hostilities, the Hague Regulations concerning the Laws and Customs of War on Land<sup>57</sup> as an Annex to Hague Convention (IV) Respecting the Laws and Customs of War. From the very outset, it had been clear that governments were not prepared to negotiate a treaty for the prevention of war. Finally, it even proved impossible to elaborate an agreement on compulsory settlement of disputes.<sup>58</sup> Thus, war had not been outlawed as an instrument of policy.<sup>59</sup> Only in one small sector could agreement be reached on the exclusion of war, viz. regarding the use of force for the enforcement of contract debts.<sup>60</sup> Viewed in isolation the *Drago-Porter* Convention of 1907 could be considered marginal. Yet it opened the way for further measures to restrict the use of military power in international relations and, at the same time, it embodied a victory of the new States in Latin America over the old colonial powers.<sup>61</sup>

### c) After World War I

After the shock of World War I, the voices maintaining that in case of a violation of international obligations barbarian retaliation by war was the most appropriate and only effective means of enforcement fell progressively silent. It was increasingly realized that the world needed collective institutions to stand up against the threat of aggression that was tantamount to death and destruction.<sup>62</sup> And indeed the Covenant of the League of Nations established a collective mechanism for the prevention and elimination of war (Arts. 11-17). Some years later, by virtue of the *Kellogg-Briand* Pact,<sup>63</sup>

<sup>56</sup> L. Oppenheim (note 54), 204.

<sup>57</sup> Reproduced in A. Roberts/R. Guelf (eds.), Documents on the Laws of War, 3<sup>rd</sup> ed. 2000, 73.

<sup>58</sup> See B. Baker, Hague Peace Conferences (1899 and 1907), in: MPEPIL, Vol. IV (2012), 689 (696), para. 28.

<sup>59</sup> For the general debate on the lawfulness of war during the 19<sup>th</sup> century see W. G. Grewe, The Epochs of International Law, 2000, 530 et seq.

<sup>60</sup> Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 18.10.1907 (*Drago-Porter* Convention), AJIL 2 (1908), 81.

<sup>61</sup> See letter of Argentinian Minister of Foreign Affairs L. M. Drago of 29.12.1902 to the Argentinian Ambassador to the United States, AJIL 1 (1907), 1 et seq.

<sup>62</sup> See C. Neff (note 42), 279.

<sup>63</sup> *Kellogg-Briand* Pact of 27.8.1928, 94 LNTS 57.

the participating nations solemnly “condemn[ed] recourse to war for the solution of international controversies and renounced it as an instrument of national policy”. Notwithstanding the clear message of these instruments, as is generally known, the catastrophe of World War II could not be averted. In any event, however, armed force had by then lost its character as a regular tool of action in international relations. Consensus had emerged to the effect that no State had a right unilaterally to enforce its presumed rights by military force. Obviously, for the international community this normative marginalization of violence in international relations constituted a great step forward towards a more peaceful world although in practice the new tendencies suffered many setbacks. The military occupation of the German Ruhr area in 1923 by Belgian and French troops after the German Reich had failed to make deliveries to the two countries for the compensation of war damages as agreed in the Treaty of Versailles epitomized the remaining attractiveness of a doctrine that essentially relies on military force. The operation, eliciting vivid protests on the part of the German Government,<sup>64</sup> was based on an imprecise provision of the Treaty of Versailles (Part VIII, Annex II, paras. 17 and 18) which the legal advisor of the Foreign Office had characterized as not supporting recourse to military means.<sup>65</sup> From a larger viewpoint, *Jochen von Bernstorff* has shown that in particular in the extra-European periphery the leading powers continued to invent numerous justifications for recourse to military means in order to secure their interests.<sup>66</sup> During the first half of the 20<sup>th</sup> century, American foreign policy, too, was largely influenced by this strand of thinking.<sup>67</sup>

Could the law of State responsibility fill in the gaps left by the disappearance of armed action as a legitimate means for the enforcement of lawful claims under international law? Already at the turn from the 19<sup>th</sup> to the 20<sup>th</sup> century one finds in the relevant textbooks extensive chapters explaining in a detailed fashion that, and how, States had to shoulder responsibility in case of a violation of their obligations. Yet authors focused almost exclu-

<sup>64</sup> Note to the French government of 12.1.1923, reprinted in *H. Michaelis/E. Schraepler* (eds.), *Ursachen und Folgen. Vom deutschen Zusammenbruch 1918 und 1945 bis zur staatlichen Neuordnung Deutschlands in der Gegenwart*, Vol. V: Die Weimarer Republik. Die kritischen Jahre, 1960, 26.

<sup>65</sup> See *H. J. Rupieper*, *The Cuno Government and Reparations 1922-1923. Politics and Economics*, 1979, 78.

<sup>66</sup> *The Use of Force in International Law before World War I. On Imperial Ordering and the Ontology of the Nation-State*, *EJIL* 29 (2018), 233 et seq. Similar conclusions had earlier on already been reached by *I. Brownlie*, *International Law and the Use of Force by States*, 1963, 49 (“vener of legality and morality”).

<sup>67</sup> *B. M. Blechman/T. Cofman Wittes*, *Defining Moment: The Threat and Use of Force in American Foreign Policy*, *PSQ* 114 (1999), 1 et seq.

sively on the specific configuration of bilateral relationships. Almost no thoughts were spent on how to ensure the essential foundations of human existence. At the same time, the focus shifted from the post-violation stage to the origins of responsibility with its manifold variables, which is an issue susceptible of being dealt with according to the finest legal dogmatic, making use of private law analogies,<sup>68</sup> whereas a study of the substantive consequences of international wrongdoing exposes any author to a confrontation with issues of political might and power. Typical examples of that narrow juristic approach that dominated the scholarly discourse were in Germany the studies by *Heinrich Triepel* (1899),<sup>69</sup> *Paul Schoen* (1917),<sup>70</sup> and *Karl Strupp* (1920).<sup>71</sup> They provided superbly detailed considerations about the elements underlying international responsibility while shying away from the broader and more obscure issues of implementation or enforcement of the rights arising from unlawful conduct.<sup>72</sup> It was obviously tempting to take that avenue that could be considered in narrow legal terms by a lawyer reluctant to leave the province of his professional experience. Only a few authors opened up new avenues. Taking up the ideas that *Hall* had articulated in 1880 and maintained until the last edition of his treatise in 1924, *Clyde Eagleton* in a similar fashion spoke out in favor of collective action in such instances of gross misconduct of a state.<sup>73</sup> This was not, however, the prevailing opinion among international lawyers.

Great was the influence of arbitration bodies, many of which under the official title “Conciliation Commission”, which had sprung up during the second half of the 19<sup>th</sup> century and continued far into the 20<sup>th</sup> century. Generally, the object matter of such awards were violations of aliens’ law where European nations sought relief for losses and injuries caused to their nationals in countries with unstable internal conditions.<sup>74</sup> However, no useful general doctrine of international responsibility could emerge from this narrow approach in respect of the consequences entailed by an infringement of

<sup>68</sup> In many sectors of international law private law analogies are indeed a rich source of enlightenment; famous in this regard is *H. Lauterpacht’s* treatise *Private Law Sources and Analogies in International Law*, 1927.

<sup>69</sup> *H. Triepel*, *Völkerrecht und Landesrecht*, 1899, 324 et seq.

<sup>70</sup> *P. Schoen*, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen*, *Zeitschrift für Völkerrecht* 10 (1917), 1 et seq.

<sup>71</sup> *K. Strupp*, *Das völkerrechtliche Delikt*, 1920. In his impressive monograph of 223 pages about the internationally wrongful act, *Strupp* devotes less than a page (222 et seq.) to the substantive implementation of responsibility.

<sup>72</sup> In the same vein *P. Fiore*, *Diritto internazionale codificato*, 4<sup>th</sup> ed. 1909, 279 et seq.

<sup>73</sup> *C. Eagleton*, *The Responsibility of States in International Law*, 1928, 224.

<sup>74</sup> Entire volumes of RIAA are filled with awards of the relevant claims commissions: Mexican matters, Vol. IV and V, Venezuelan matters Vol. 10.



obligations under international law although the scholarly community largely equated international responsibility with aliens' law. The judgment of the Permanent Court of International Justice in the *Chorzów* case<sup>75</sup> became the beacon of the doctrine of State responsibility. Its core proposition that a wrongdoing State is obligated to bring about full reparation for the damage caused satisfies all the needs that may arise in a bilateral relationship but leaves open what solutions to suggest in more complex relationships where the general interest of the international community has been affected. The famous *Trail Smelter* case,<sup>76</sup> covering occurrences between 1932 and 1936 that led to a dispute between Canada and the USA related to trans-boundary toxic fumes, showed for the first time in an inter-State proceeding the harmful potential of modern industries but could still be handled in accordance with the traditional bilateral mechanisms.

## 2. The New Age under the UN Charter

As is well-known, after the coming into existence of the UN as a result of World War II the world received a new physiognomy. The World Organization was built on the cornerstone of peace. Art. 2(4) UN Charter banned any kind of violence in inter-State relations. The States that gave shape to the constitutional document of the world community wished to establish a normative system where, in the absence of military power, all conflicts would be settled by peaceful methods (Art. 2(3) UN Charter). Accordingly, war could not any longer assume the enforcement function that had been assigned to it until the outbreak of World War I. That was a *Copernican* shift of the paradigm of international relations. It was now definitively settled that what was left as instruments of pressure were measures of retortion and reprisals, lacking any element of military force, that would not carry the stigma of unlawfulness if justified – in the case of reprisals – by a prior unlawful act of the target State. This reduction of the retaliatory power of individual States did not raise any major concern within the international community as an assault on the efficiency of international law. On the one hand, the loss of individual remedies was largely compensated for by the new potential of the World Organization with its comprehensive jurisdiction for any kind of inter-State disputes. By contrast, the continued acceptance of reprisals – or in modern terminology: countermeasures – was even regarded suspiciously by many of the new UN members who from

<sup>75</sup> PCIJ, *Factory at Chorzów*, Jurisdiction, 26.7.1927, Series A, No. 9, 21.

<sup>76</sup> *Trail Smelter* case, Award of 11.3.1941, RIAA 3, 1938 (1965).

their very first days on had continually argued that reprisals were weapons useful only for strong States but rarely usable by a State of modest dimensions. This negative appraisal of countermeasures was also shared by prominent members of the ILC.<sup>77</sup>

How then does the Charter take care of threats to vital interests of the international community? On the one hand, the UN General Assembly is entitled to take up all matters of international concern, a class of instances that by definition do not come within the scope of the prohibition under Art. 2(7): to deal with issues that transcend national boundaries cannot be properly classified as interference with exclusive domestic jurisdiction. Although the powers of the General Assembly are fairly limited as to possible outcomes, being confined to discussing and pronouncing recommendations, the “world parliament” has since many years been actively engaged in highlighting the dangers flowing for the peace of the world from unresolved environmental problems, in particular climate change.<sup>78</sup>

On the other hand, the jurisdiction of the Security Council, which takes center-stage with regard to the enforcement of international law, is more vigorous, but significantly narrower *ratione materiae*. The most powerful institution of the world organization has been tasked by Art. 24 with “maintenance of international peace and security”. Originally, issues of international peace and security were understood as issues relating to interstate armed conflict.<sup>79</sup> Through the practice of the Security Council itself the contours of breach of peace as trigger for recourse to Chapter VII have lost their rigidity. In particular, since many years the Security Council has taken the position that in the exercise of its powers under that Chapter it is not debarred from taking action for the protection of human rights.<sup>80</sup> It

<sup>77</sup> Chinese Member *J. Shi*, ILCYB 1992 I, 2267<sup>th</sup> Meeting, 29.5.1992, 88-89, paras. 32-36; 2273<sup>rd</sup> Meeting, 16.6.1992, paras. 73-74; Indian Member *P. S. Rao*, ILCYB 1992 I, 2275<sup>th</sup> Meeting, 18.6.1992, 137, para. 20; Member *A. G. Koroma* from Sierra Leone, ILCYB 1992 I, 2283<sup>rd</sup> Meeting, 10.7.1992, 190, para. 44.

<sup>78</sup> See, e.g., GA Res. 72/219, 20.12.2017, and 73/232, 20.12.2018: Protection of Global Climate for Present and Future Generations of Humankind.

<sup>79</sup> See *A. Randelzhofer/O. Dörr*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), *The Charter of the United Nations*, Vol. I, 2012, 208, margin number 16.

<sup>80</sup> Explicitly approved by UNGA Res. 60/1, 16.9.2005, World Summit Outcome, paras. 138-139. One of the most prominent examples is SC Res. 1973, 17.3.2011, on Libya. From the more recent past see SC Res. 2242 (2015), 13.10.2015, Women and Peace and Security, Preamble, paras. 5, 11-12; SC Res. 2380 (2017), 5.10.2017, Maintenance of International Peace and Security, Preamble, paras. 9, 10; SC Res. 2399 (2018), 30.1.2018, The Situation in the Central African Republic, Preamble, para. 14; SC Res. 2419 (2018), 6.6.2018, Maintenance of International Peace and Security; 2457 (2019), SC Res. 27.2.2019, Cooperation between the United Nations and Regional and Subregional Organizations in Maintaining International Peace and Security in Africa, para. 19.

would be extremely helpful from a perspective of world order if any serious breach of *jus cogens* or of obligations *erga omnes*, the rules that protect the core values of the international community, triggered automatically the competence of the Security Council. Art. VIII of the International Convention on the Suppression and Punishment of the Crime of Apartheid<sup>81</sup> has taken this route while the legal literature is in disagreement about this issue.<sup>82</sup> As far as threats to the environment are concerned, a debate has started but has not yet attained conclusive results.<sup>83</sup> In any event, however, the competence of the Security Council for a specific subject-matter is no panacea. The Security Council is generally reluctant to charge itself with unusual tasks.<sup>84</sup> Additionally, the veto power of the permanent members more often than not operates as a brake that cannot be eluded. It is certainly highly important to be able to bring a specific problem before the Security Council. But the Security Council, because of its composition, will never operate like an administrative agency entrusted with current routine matters.<sup>85</sup> The conclusion is disillusioning: the UN system does not have at its disposal an efficient and workable system for the protection of humankind's natural environment.

#### IV. The Rules of State Responsibility as Devices for the Protection of the Environment – The Work of the ILC

Given the urgency of many of the problems caused by human activity for the stability of air and water cycles and consequently for all ecosystems, it must of course be tempting to look for remedies through the general rules of international responsibility. This subject-matter was selected by the ILC

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<sup>81</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid of 30.11.1973, in force 18.7.1976, 1015 UNTS 242.

<sup>82</sup> See, e.g., discussion by *P. Klein*, Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law, EJIL 13 (2002), 1241 (1244 et seq.).

<sup>83</sup> Recently, on 11.7.2018, the Security Council conducted a debate on climate-related security risks, S/PV.8307. While most speakers welcomed engagement of the Council in climate policies, a cautious tone was voiced by the Russian Federation (15-16) and Bolivia (17). See also *K. Davies/T. Riddell*, The Warming War: How Climate Change is Creating Threats to International Peace and Security, Georgetown Environmental Law Review 30 (2018), 47 (60 et seq.); *P.-M. Dupuy/J. E. Viñuales*, International Environmental Law, 2<sup>nd</sup> ed. 2018, 437.

<sup>84</sup> But see SC Res. 687 (1991), Section E, on environmental damage caused during the war against Kuwait.

<sup>85</sup> Reservations in this sense by Kuwait in the Security Council debate on 11.7.2018 (note 83), 24, and Sudan on behalf of the Group of Arab States (note 83), 28.

at its first session in 1949 as one of the topics for codification.<sup>86</sup> When the ILC actually started its work in 1955 it did not perceive immediately that the project it was going to tackle could not remain confined to the classic pattern of diplomatic protection where a State claims compensation for damage suffered by one of its nationals. In fact, it was plausible to argue that under the *aegis* of the United Nations the crucial issues of international peace and security were committed to the hands of the Security Council and that any attempt to formulate rules on State responsibility for such serious occurrences as well as occurrences of a similar type would amount to interference with the powers of that main guarantor of peaceful relations among States. Over the years it turned out that the admissibility of reprisals/countermeasures for the protection of the common interest of humankind by non-injured third parties<sup>87</sup> was not only one of the main difficulties, but indeed the key problem of the project.<sup>88</sup> Eventually, a *non-lieu* had to be noted.<sup>89</sup>

## 1. The Role of the Special Rapporteurs

The work on State responsibility was an undertaking that, unforeseen at its commencement, extended over more than four decades. The Special Rapporteurs on the topic who succeeded one another during that long period played each one a leading role in conceptualizing the legal framework. But they did not share the same philosophy so that continuity was not ensured.<sup>90</sup> At the end of the journey, in the quinquennium from 1997 to 2001, the members of the ILC were ostensibly relieved to see the work efficiently driven forward by a pragmatic Special Rapporteur, *James Crawford*, who succeeded in providing viable solutions for most of the open problems.

<sup>86</sup> See United Nations (ed.), *The Work of the International Law Commission*, Vol. I, 2007, 204.

<sup>87</sup> See in particular the studies by *J. A. Frowein*, *Reactions by not Directly Affected States to Breaches of Public International Law*, RdC 248 (1994-IV), 345 et seq.; *B. Simma* (note 5) 308 et seq.

<sup>88</sup> See *M. Spinedi*, *International Crimes of State*, in: *J. H. H. Weiler/A. Cassese/M. Spinedi* (eds.), *International Crimes of State. A Critical Analysis of the ILC's Draft Art. 19 on State Responsibility*, 1989, 7 et seq.

<sup>89</sup> A truly amazing outcome, see *D. Alland*, *Countermeasures of General Interest*, EJIL 13 (2002), 1221, (1227 et seq.).

<sup>90</sup> Accurate description by *M. Spinedi*, *From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*, EJIL 13 (2002), 1099 et seq.

### a) Special Rapporteur *García Amador*

Without being too explicit about his choice, the first member entrusted with the difficult topic, Special Rapporteur *F. V. García Amador*, took the position that “civil” international responsibility<sup>91</sup> – as opposed to criminal responsibility – and violation of the rules of aliens’ law or human rights law were more or less congruent terms.<sup>92</sup> In agreement with the majority of the members of the ILC, he pursued his work along that line for no less than six years.

### b) Special Rapporteur *Roberto Ago*

In 1976 the ILC made a decisive turn by resolving that the rules to be codified should have a broad scope, providing the basis for a system covering any breach of a norm of international law, irrespective of the content of the substantive rule concerned. That shift did not come over night. It required lengthy discussions within the Sixth Committee of the UN General Assembly and concomitantly heated debates within the ILC where many members still clung to the classical pattern of State responsibility.<sup>93</sup> In the General Assembly it was in particular the group of Socialist States, supported by some developing countries, that requested an extension of the regime of international responsibility to all sectors of international law. A Special Subcommittee of the ILC was instrumental in bringing about the new orientation of the project for which eventually the Italian member *Roberto Ago* was appointed Special Rapporteur.<sup>94</sup> Essentially, in hindsight one may say that the path to a broader understanding of State responsibility had already been predetermined particularly by two leading international instru-

<sup>91</sup> Deliberately, *G. Amador* refrained from touching on penal responsibility of States and their agents.

<sup>92</sup> See his First Report, UN Doc. A/CN.4/96, ILCYB 1956 II, 173, 182, para. 45.

<sup>93</sup> For an account of those controversies not only within the ILC but also the Sixth Committee of the UN General Assembly see *R. Ago*, First Report on State responsibility, UN Doc. A/CN.4/217, ILCYB 1969 II, 125 (137 et seq.), paras. 75-94. The most illuminating debate took place in 1957 from the 413<sup>th</sup> Meeting, 7.6.1957, to the 416<sup>th</sup> Meeting, 13.6.1957. Advocates of a radical shift to broadening the scope of the topic were Members *L. Padilla-Nervo*, ILCYB 1957 I, 155, para. 51; 156, paras. 55, 57, 59; *A. El-Erian*, ILCYB 1957 I, 161, paras. 35, 37; *R. Ago*, ILCYB 1957 I, 157, para. 62; 167, paras. 39, 40; *R. Pal*, ILCYB 1957 I, 158, para. 4; *G. I. Tunkin*, ILCYB 1957 I, 166, para. 32. Opponents were *J. P. A. François*, ILCYB 1957 I, 162, para. 4; *Sir G. Fitzmaurice*, ILCYB 1957 I, 163, paras. 8, 11, 13.

<sup>94</sup> ILCYB 1963 II, 224, approved by GA Res. 1902 (XVIII), 18.11.1963, para. 4(b).

ments, on the one hand Art. 3 of Hague Convention No. 4 of 1907,<sup>95</sup> on the other hand the clause of the Treaty of Versailles (Art. 231) that had declared Germany responsible

“for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequences of the war imposed upon them by the aggression of Germany and her allies”.

Those conventional stipulations had made clear that State responsibility was a legal concept constituting a complement expressing the logical continuity of any legal rule notwithstanding its breach. This was not a sudden and unexpected discovery; the novelty was that the elementary plausibility of tort law was injected into the law of armed conflict where beforehand the view had prevailed that apart from war crimes, armed conflict was an issue whose detrimental consequences were mainly located outside the province of law.

The new Special Rapporteur, the intellectual promoter of the new course to be steered by the ILC, did not have to shoulder the main burden of his “invention”. First of all, his task was to elaborate a draft on the origins of international responsibility where the consequences flowing from any relevant breach, in particular the identification of the appropriate remedies, did not matter.<sup>96</sup> Implicitly, however, he touched upon that issue by introducing a distinction between “ordinary” offences (“delicts”) and a separate category of offences, breaches of international law of the most serious character, called “international crimes”.<sup>97</sup> This was a deliberate departure from his principled position that in general the regime of breaches of international law should be the same for all kinds of obligations, whatever their substantive nature is. Yet Ago rightly pointed out that in the international community, in particular through the recognition of the special class of *jus cogens* norms<sup>98</sup> and of obligations *erga omnes*,<sup>99</sup> a hierarchization had taken place that should also find its reflection in the law of responsibility. With great circumspection he addressed the issue as to whether in such instances third parties should be allowed, for the defense of the common interest, to take

<sup>95</sup> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

<sup>96</sup> But see questions raised in this regard by Special Rapporteur *J. Crawford*, First Report on State Responsibility, UN Doc. A/CN.4/490, ILCYB 1998 II.1, 1 (20), para. 77.

<sup>97</sup> *R. Ago*, Fifth Report on State Responsibility, UN Doc. A/CN.4/291, Add. 1 and Add. 2, ILCYB 1976 II.1, 3 (54): Draft Art. 18.

<sup>98</sup> Art. 53, 64 VCLT.

<sup>99</sup> ICJ, *Barcelona Traction (Belgium v. Spain)*, Judgment, Reports 1970, 3 (32), para. 32.

action against a wrongdoing State,<sup>100</sup> recognizing at the same time that he went into uncharted territory.

Ago's suggestion to introduce the concept of "international crime" into the project was accepted by the ILC in 1976. The notion of international crime was defined as follows (Art. 19(2)):

"An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime."<sup>101</sup>

Among those offences of the most serious character the draft included (Art. 19(3)(d)):

"A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere and of the seas."<sup>102</sup>

Through the enlargement of the scope of the codification exercise, the route was now open for reflection on rules providing for enforcement measures in reaction to injury harming common goods of humanity, outside the traditional bilateral relationships that had served as the model for the normative configuration of State responsibility. It was no mystery that in particular the use and testing of nuclear devices by some of the great powers had facilitated the approval of Ago's proposals by the full ILC.<sup>103</sup> Primarily, such intentional interference with natural cycles was envisioned. At the same time, however, the ILC showed a high degree of farsightedness by underlining the issue of creeping pollution and destruction, through industrial activities, not only of the atmosphere and the seas but also of vast stretches of land.<sup>104</sup>

A heated discussion on the concept of international crime followed both in diplomatic circles<sup>105</sup> as well as in the legal literature.<sup>106</sup> Whether the new

<sup>100</sup> R. Ago (note 97) 38, para. 114.

<sup>101</sup> See comments on Art. 19, ILCYB 1976 II.2, 95 et seq.

<sup>102</sup> ILCYB 1976 II.2, 95. The text remained unchanged until the first part of the draft articles was approved on first reading in 1980, ILCYB 1980 II.2, 32.

<sup>103</sup> *Nuclear Tests cases, Australia and New Zealand v. France*, Orders, 22.6.1973, ICJ Reports 1973, 99 and 135; Judgments, 20.12.1974, ICJ Reports 1974, 253, and 457.

<sup>104</sup> Commentary on Art. 19, ILCYB 1976 II.2, 108 et seq., paras. 31-32.

<sup>105</sup> See, e.g., the collection of observations and comments of governments in UN Doc. A/CN.4/328 and Add. 1-4, ILCYB 1980 II.1, 87. In favor of Art. 19 were Byelorussia, 93, para. 3; Chile, 99, para. 24; Mali, 101, para. 2; Ukraine, 103, para. 3; USSR, 104; Yugoslavia, 106, paras. 19, 20. Reserving their attitude until the consequences of the new classification had been clarified were: Austria, 90, para. 21; Canada, 94, para. 5; Netherlands, 103, para. 10.

perspective would lead to the recognition of a tutorial right of all States to take retaliatory measures against a State committing an international crime became the decisive test for the assumption that indeed a quantum leap had occurred, transforming the juxtaposition of sovereign States into an international community with an overarching rooftop of inviolable common rules. Apparently, on the basis of the new concept every State would have been entitled to take countermeasures against a wrongdoing State if the threshold of seriousness determined in Art. 19 had been reached.

### c) Special Rapporteur *Willem Riphagen*

In the following years, the issue of appropriate consequences to be attached to international crimes, in particular of the entitlement to take countermeasures, became the focal point of the discussions on the codification of the general rules on State responsibility. After the election of *Roberto Ago* to the ICJ in 1979 the new rapporteur for the topic of international responsibility had to confront the crucial issue head-on when preparing proposals for the second part of the project on State responsibility, the consequences entailed by the commission of an internationally wrongful act. The ILC's Dutch member *Willem Riphagen* took up the challenge in his third report in 1982<sup>107</sup> where he attempted to define the implications of the concept of international crime for third States, carefully weighing the pros and cons of such "vigilantism". He acknowledged in principle that that concept would make no sense if it did not imply a specific form of responsibility as compared to other "ordinary" forms of responsibility, in particular in respect of enforcement. On the other hand, he cautioned against unilateral actionism, arguing that enforcement would have to be fitted into a collective structure within the framework of an international organization.<sup>108</sup> Therefore, in a Draft Art. 6 submitted by him to the ILC<sup>109</sup> in 1982 he confined the rights and duties of third States *vis-à-vis* an author State to measures and conduct

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<sup>106</sup> For a full reflection of that debate see *F. Rigaux*, *Le crime d'état. Réflexions sur l'article 19 du projet d'articles sur la responsabilité des Etats*, in: *International Law at the Time of Its Codification. Essays in Honour of Roberto Ago*, Vol. III, 1987, 300 et seq.; *M. Spinedi* (note 90); for a later synthesis see *A. de Hoogh*, *Obligations Erga Omnes and International Crimes*, 1996, 56 et seq.

<sup>107</sup> UN Doc. A/CN.4/354, ILCYB 1982 II.1, 22 et seq.

<sup>108</sup> UN Doc. A/CN.4/354, 39, para. 101; 44, para. 132.

<sup>109</sup> Third Report, UN Doc. A/CN.4/354, ILCYB 1982 II.1, 48. In his 5<sup>th</sup> Report, UN Doc. A/CN.4/380, ILCYB 1984 II.1, 1, the Special Rapporteur changed the numbering, lifting Draft Art. 6 to Draft 14 (without any substantive change). For the commentary to this provision see 6<sup>th</sup> Report, UN Doc. 2A/CN.4/389, ILCYB 1985 II.1, 3 (13).



that do not, as such, infringe the sovereign rights of that State, making instead proposals that predetermined what is today found in Art. 41 Articles on State Responsibility (ARS): a mechanism involving States not directly injured that assigns to them a crucial function as agents for the restoration of the lawful situation by peaceful means.<sup>110</sup> Thus he refrained from postulating for such States an individual right to take countermeasures, although he recognized them as “injured States”,<sup>111</sup> suggesting instead that in such instances the application of the procedures embodied in the UN Charter should be sought by analogy.<sup>112</sup>

#### d) Special Rapporteur *Arangio Ruiz*

Special Rapporteur *Riphagen* could not terminate his work on State responsibility since at the elections for the ILC held in 1986 he was not reelected. The new Special Rapporteur on the topic, Italian lawyer *Gaetano Arangio-Ruiz*, had again to make up his mind as to the central issue of the undertaking, viz. the enforcement power to be granted to States that have not suffered any concrete injury at the hands of a wrongdoer. His seventh<sup>113</sup> and eighth<sup>114</sup> (last) report were mainly devoted to the consequences to be attached to the commission of an international crime. Opposing the idea that countermeasures had to be enshrined in some kind of collective UN mechanism,<sup>115</sup> he argued that the two main UN bodies, the General Assembly and the Security Council, were not endowed with appropriate competences for that purpose. Furthermore, he opined that the two top institutions of the world organization were intrinsically political and could not be

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<sup>110</sup> Art. 6(1), stating that an international crime entails an obligation for every other State  
“(a) not to recognize as legal the situation created by the act;  
(b) not to render aid or assistance to the author State in maintaining the situation created by such act;  
(c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b)”.

<sup>111</sup> Draft Art. 5(e), Fourth Report, UN Doc. A/CN.4/380, ILCYB 1984 II.1, 1.

<sup>112</sup> See commentary on Draft Art. 14, ILCYB 1985 II.1, 14, para. 10: “[...] it should be recognized that an individual State which is considered to be an injured State only by virtue of article 5, subpara. (e) [“For the purposes of the present articles, ‘injured State’ means [...] (e) if the internationally wrongful acts constitutes an international crime, all other States.] enjoys this status as a member of the international community as a whole and should exercise its new rights and perform its new obligations within the framework of the organized community of States.”

<sup>113</sup> UN Doc. A/CN.4/469 and Add. 1 and 2, ILCYB 1995 II.1, 4.

<sup>114</sup> UN Doc. A/CN.4/476, ILCYB 1996 II.1, 1.

<sup>115</sup> On the difficulties of establishing such a mechanism see also *P. Klein* (note 82).

expected to discharge an objective assessment in conformity with the law in force.<sup>116</sup> Finally, he rejected quite vehemently the notion that the traditional mechanism of State responsibility should be subordinated to the system of collective security of the United Nations.<sup>117</sup> In order to preclude any kind of abuse or arbitrariness, he emphasized that in the case of international crimes, where in principle every other State was entitled to resort to enforcement measures, some kind of objective assessment by a legitimate international institution would have to precede any taking of countermeasures.<sup>118</sup> However, his proposal to combine the political element with proceedings before the ICJ<sup>119</sup> was not able to demonstrate how the possible intervention of the ICJ could be appropriately institutionalized under its jurisdiction.<sup>120</sup> On the other hand, regarding the duties of third States to assist the victim State and not to recognize the unlawful situation created by the crime, he continued the line of his predecessor.<sup>121</sup> Eventually, the ILC adopted a sophisticated draft under which the proposition was maintained that in the case of an international crime every other State was to be considered as an injured State (Art. 40), entitled to take countermeasures. However, this right was made subject to the provision that beforehand, apart from “interim measures of protection”, all available dispute settlement procedures had to be exhausted. This conceptual vision<sup>122</sup> was finally abandoned by the ILC after *Arangio-Ruiz* had renounced his mandate as Special Rapporteur on 5.6.1996.

<sup>116</sup> ILCYB 1995 II.1, 22, para. 98; 2436<sup>th</sup> Meeting, 5.6.1996, ILCYB 1996 I, 23 et seq., paras. 4-15.

<sup>117</sup> ILCYB 1996 II.1, 7, paras. 42-46.

<sup>118</sup> ILCYB 1995 II.1, 12, para. 41. At the same time, *G. Arangio-Ruiz* advocated a remedy of urgent, temporary measures, ILCYB 1995 II.1, 16, para. 42.

<sup>119</sup> ILCYB 1995 II.1, 23.

<sup>120</sup> The central element of the proposals for the regulation of countermeasures in reaction to international crimes was Draft Art. 18(1)(f) providing that States shall: “Take part, jointly or individually, in any lawful measures decided or recommended by any international organization of which they are members against the State which has committed or is committing the international crime”, ILCYB 1995 II.1, 30. For the criticism among ILC members see 1995 Report, ILCYB 1995 I.2, 56, paras. 308-311.

<sup>121</sup> Fifth Report, UN Doc. A/CN.4/453, ILCYB 1993 II.1, 53 et seq., paras. 241-249. Consolidated in the 1996 draft adopted on first reading, Art. 53, ILCYB 1996 II.2, 58, 64.

<sup>122</sup> ILCYB 1995 II.1, 29-30. See criticism by *C. Tomuschat*, *Are Counter-Measures Subject to Prior Recourse to Dispute Settlement Procedures?*, EJIL 5 (1994), 77 et seq.

### e) Special Rapporteur *James Crawford*

Special Rapporteur *James Crawford*, who eventually succeeded in steering the project of State responsibility safely into harbor, opposed essentially the concept of international crime, in particular because he felt that the term was too heavily fraught with penal associations. The plenary of the ILC followed him, realizing that a draft containing that concept would probably forever remain controversial so that no formal end of the deliberative process could be expected.<sup>123</sup> Agreement existed also to the effect that to tackle major crisis situations in international relations should remain essentially within the hands of the UN system and that, in that regard, the general law of State responsibility could only play an “ancillary role”.<sup>124</sup>

*Ago*’s distinction between two types of legal rules according to their substantive significance was maintained in modalities that fit into the general pattern of general international law inasmuch as specific rights of a wrongdoing State are not affected.

## 2. The Final Version of the ARS

The originality of the final version of the draft lies in the fact that in case of the commission of an internationally wrongful act of particular gravity the other States members of the international community are entrusted with some non-aggressive supervisory functions. They are called upon to act as custodians of the legal order. On the one hand, Art. 41(1) provides that in case of a serious breach of a *jus cogens* rule (peremptory norm of general international law)<sup>125</sup> States are bound to cooperate to bring to an end the consequences of such breach; additionally, para. 2 of the same article prohibits States from recognizing a situation as lawful brought about by such a breach or to render aid or assistance for the maintenance of that situation.<sup>126</sup> None of these two strategies requires a specific justification. States are free

<sup>123</sup> See ILCYB 1998 II.2, 77, para. 331.

<sup>124</sup> See Special Rapporteur *J. Crawford*, Third Report, UN Doc. A/CN.4/507, ILCYB 2000 II.1, 3 (98), para. 372.

<sup>125</sup> Preference was given to *jus cogens* over obligation *erga omnes* because *jus cogens* refers to the substance of the rule while the latter concept denotes rather the process of invocation, see ILC Report, ILCYB 2001 II.2, 22, para. 49, ILCYB 2001 I, 2677<sup>th</sup> Meeting, 20.5.2001, 73, para. 46.

<sup>126</sup> See Special Rapporteur *J. Crawford* (note 124), 107, para. 410.

to take such action at their own discretion.<sup>127</sup> In its Advisory Opinion in the *Wall* case the ICJ applied the legal proposition codified in Art. 41 without making explicit reference to this provision.<sup>128</sup>

On the other hand, Art. 48(1)(b) entitles any State to “invoke” the responsibility of a wrongdoer if the obligation breached “is owed to the international community as a whole”. Such obligations derive primarily from a *jus cogens* norm. Lengthy battles have been fought about the distinction between *jus cogens* and obligations *erga omnes*.<sup>129</sup> These debates need not be taken up here again inasmuch as consensus exists in the sense that the term *jus cogens* identifies the substantive foundations of that class of legal rules while, as noted by the ILC in drafting the ARS, the concept of obligations *erga omnes* focuses on the modalities of enforcement by specific right-holders. Accordingly, in many respects the two concepts can be used interchangeably.<sup>130</sup> The concept of “invocation”, the substance of which the ARS explain more in detail in Art. 48(2), constitutes a rule to be characterized as progressive development.<sup>131</sup> It is not self-evident that any *res publica*, irrespective of whether it has suffered any actual injury, may formally call on the wrongdoer to cease its unlawful conduct and to make reparation to the injured party and to the beneficiaries of the obligations breached. No international lawyer has any difficulty in realizing that Art. 48 has as its backdrop the well-known judgment of the ICJ in the *Barcelona Traction* case,<sup>132</sup> as explicitly pointed out in the commentary to that provision.<sup>133</sup> Thus, Art. 48 strengthens a legal proposition that for many decades had existed only as a judicial pronouncement in an individual case.

<sup>127</sup> See commentary by A. Gattini, A Return Ticket to “Communitarisme”, *Peace, EJIL* 13 (2001), 1181 (1185 et seq.).

<sup>128</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136 (199 at seq.), paras. 158-599. The commentary to Art. 41, ILCYB 2001.II.2, 113 (115), paras. 8, 10, mentions in particular the Advisory Opinion of the ICJ in the *Namibia case*, ICJ Reports 1971, 15 (56), para. 126.

<sup>129</sup> See, e.g., G. Gaja, *Obligations and Rights Erga Omnes in International Law*, AIDI 71-I (2005), 117 (127 et seq.); C. Tomuschat, *Reconceptualizing the Debate on Jus Cogens and Obligations Erga omnes*, in: C. Tomuschat/J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, 2006, 425 (436).

<sup>130</sup> International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3.2.2015, ICJ Reports 2015, 3, (47), para. 87.

<sup>131</sup> See ILC member B. Simma, 2683<sup>rd</sup> Meeting, 31.5.2001, ILCYB 2001-I, 116, para. 8. See also commentary by I. Scobbie, *The Invocation of Responsibility for the Breach of “Obligations under Peremptory Norms of General International Law”*, *EJIL* 13 (2001) 1201 (1205 et seq.).

<sup>132</sup> *Barcelona Traction (Belgium v. Spain)* (note 99), 32, para. 32.

<sup>133</sup> J. Crawford, *The International Law Commission’s Articles on State Responsibility*, 2002, 276, para. 2, 278, para. 8.

Nonetheless, the concept of “invocation” remains somewhat mysterious, being conceived of as going beyond the mere fact of a reminder or diplomatic representations.<sup>134</sup> The commentary does not elaborate on the meaning of “invocation”. Yet some clarification has emerged after the adoption of the ARS in 2001. In the case of *Questions Relating to the Obligations to Prosecute or Extradite (Belgium v. Senegal)* the ICJ stated quite categorically:

“The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.”<sup>135</sup>

The International Tribunal for the Law of the Sea went even one step further by considering – in cautious terms – that Art. 48 ARS “may” entitle every State Party to the United Nations Convention on the Law of the Sea (UNCLOS) to claim compensation in case of harm caused to the high seas or to the Area.<sup>136</sup> In the *Whaling* dispute between Australia and New Zealand on the one hand and Japan on the other the ICJ tacitly accepted the claimants’ right to sue the alleged violator of the International Whaling Regulation Convention (IWRC) without even mentioning the issue of admissibility.<sup>137</sup> This line of reasoning may entail far-reaching consequences in the entire field of environmental protection as it seems to open up for every State party to a relevant treaty the faculty to take a case to the ICJ, provided that the ICJ’s jurisdiction is duly established. The obstacle of admissibility seems to have been removed. In any event, the right of “invocation” is a gentle non-aggressive device fully suited to set into motion a process of reparation although lacking any element of coercion although it raises new

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<sup>134</sup> See explanations by Chairman of the Drafting Committee *P. Tomka*, 2682<sup>nd</sup> Meeting, 30.5.2001, ILCYB 2001 I, 108, para. 35. ILC Member *A. Pellet*, ILCYB 2001 I, 113, para. 68, views the concept of invocation as a procedural standing clause.

<sup>135</sup> ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, 422 (450), para. 69. For a supportive comment see *G. Gaja* (note 19), 97 et seq.

<sup>136</sup> ITLOS, Case No. 17, Advisory Opinion of 1.2.2011, ITLOS Reports 2011, 10, para. 180.

<sup>137</sup> See *A. Marie*, L’arrêt du 31 mars 2014 de la CIJ dans l’affaire de la chasse à la baleine dans l’antarctique (Australie c. Japon, Nouvelle Zélande intervenant), A.F.D.I. 60 (2014), 469 et seq.; *J. Crawford*, Responsibility for Breaches of Communitarian Norms: An Appraisal of Art. 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, in: U. Fastenrath/R. Geiger/D.-E. Khan/A. Paulus/S. von Schorlemer/C. Vedder (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, 2011 224, 235 et seq. In her book “Whaling and International Law”, 2015, 38, *Malgosia Fitzmaurice* lamented the lack of an “enforcement mechanism”.

questions as to how action initiated by individual States should be coordinated.<sup>138</sup>

The picture of gentle pressure is completed by Art. 54 by virtue of which any State may take “lawful measures” against the State author of the breach in issue. Deliberately, the ARS leave it open whether an *actio popularis* is permissible, implicitly making the answer to this question dependent on the relevant circumstances and showing a tacit preference for a collective approach.

Until the very last minute, a provisional text of Art. 54<sup>139</sup> had indeed been discussed according to which for the defense of the general interest of the international community individual States, acting together in a coordinated fashion, should be entitled to take countermeasures against an alleged offender (“collective countermeasures”). Because of resolute resistance against this proposal,<sup>140</sup> which would have introduced a parallel system for the maintenance of international peace and security, the final compromise solution of Art. 54 (“lawful measures”) was eventually preferred as a “saving clause”.<sup>141</sup> Thus, the construction suggested by the ARS differs significantly from the traditional model of State responsibility which essentially relies on countermeasures for purposes of enforcement. Learned comments have been devoted to the escapist strategy of the ILC.<sup>142</sup> The fact is, however, that practice had not yet brought about a consensually accepted foundation for a right of non-injured States to take countermeasures in instances where grave violations of *jus cogens* norms have been committed. Thus it was wise to take note of this state of affairs instead of pushing forward a deep-going reform on fragmentary pieces of evidence.

<sup>138</sup> See commentary by A. Gattini (note 127), 1195 et seq. G. Gaja (note 19), 100, denies any such obligation.

<sup>139</sup> ILCYB 2000 II.2, 70.

<sup>140</sup> See, in particular, ILC member I. Brownlie, 2672<sup>nd</sup> Meeting, 3.5.2001, ILCYB 2001 I, 35, para. 2.

<sup>141</sup> ILCYB 2001 I, 2677<sup>th</sup> Meeting, 20.5.2001, 73, para. 47; 2682<sup>nd</sup> Meeting, 30.5.2001, 112, para. 64.

<sup>142</sup> See, in particular, D. Alland (note 89), 1230 et seq.; P. Hamilton, Counter(measure)ing Climate Change: The ILC, Third State Countermeasures and Climate Change, McGill International Journal of Sustainable Development and Policy Law 4 (2008), 83 et seq.; M. Koskeniemi, Solidarity Measures: State Responsibility as a New International Order?, BYIL 72 (2001), 337 (340 et seq.); K.-J. Ni, Third-State Countermeasures for Enforcing International Common Environmental Interests: The Implication and Inspirations of the ILC’s Articles on State Responsibility, Chin. (Taiwan) Yb. Int’l L. & Aff. 22 (2004), 1 et seq. (10 et seq.); A. Nissel, The ILC Articles on State Responsibility: Between Self-Help and Solidarity, N. Y. U. J. Int’l L. & Pol. 38 (2008), 355 et seq.

### 3. A Summary Conclusion

From the perspective of a world order that has its moral center in the values protected by the concept of *jus cogens*, the outcome of decades of work on the regime of international responsibility under current circumstances constitutes a sorrowful disillusionment. The existence of agreement on those basic values, that include in particular fundamental human rights, is undeniable. Yet a majority found it too hazardous to participate in forging an instrument that would have established every nation as a *custos* of the core substance of international legality. The observer easily understands the reasons that have militated against such a rush for the enforceability of the rules of international law outside and beyond of the mechanisms of the United Nations. Unilateral countermeasures in the hands of each and every State for the promotion of the common interest of humankind are a dangerous weapon. Some kind of scrutiny by an objective body should precede any resort to such humanitarian steps. Otherwise, abuses and manipulations on political grounds could hardly be averted. It remains true that only powerful States have the necessary political clout to step forward as protectors of the general interest of the international community.

However, the final outcome is not without merit. The ILC Articles provide subtle means to strive for the attainment of public order objectives in a non-spectacular way. They may pave the way, on the basis of Art. 48 ARS, for more extensive recourse to public interest litigation.<sup>143</sup> Moreover, without pursuing abstract programmatic concepts, the treaty regimes that have arisen for the protection of the environment have empirically developed methods and mechanisms that are based on the realization that in any event environmental protection requires the voluntary, honest cooperation of all States. Sanctions and punishment are replaced by common cooperative efforts. Details of this shift of emphasis will be demonstrated in the next section.

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<sup>143</sup> See A. Boyle/J. Harrison, *Judicial Settlement of International Environment Disputes: Current Problems*, *Journal of International Dispute Settlement* 4 (2013), 245 (256 et seq.); T. Stephens, *International Environmental Disputes: to Sue or Not to Sue?*, in: N. Klein (ed.), *Litigating International Law Disputes*, 2014, 284 (303 et seq.).

## V. The Current Regimes of Responsibility in Multilateral Environmental Agreements (MEAs)

At the end of a long debate, lasting for no less than a quarter of a century on a mechanism suited to promote environmental stability, one has to note that the initiative to strengthen the available legal arsenal by activating the law of State responsibility has failed in respect of the classic answers of retaliation by countermeasures and of reparation by financial compensation. On the other hand, by introducing a system that imposes – light – obligations on third States not directly involved (Art. 41) and by establishing them as entities entitled to discharge a warning function by “invocation” of breaches (Art. 48), the ARS follow a line that has already been extensively developed in the multilateral systems for the protection of the environment. Instead of focusing on breaches of the respective treaty provisions, the systems seek to iron out any arising difficulties under a sample of non-compliance procedures (NCPs) that to the greatest extent possible avoid adversarial features, preferring generally a non-confrontational cooperative approach.<sup>144</sup>

### 1. Compliance Strategies in Multilateral Treaty Frameworks

Not all of the treaties that might provide interesting parallels can be, or should be, examined in the present context. The research shall be confined to the most elaborated conventional systems for the protection of air and the atmosphere as well as to the arrangements for the protection of biodiversity that directly relate to the natural foundations of organic life on earth.<sup>145</sup> A comparison of the different mechanisms that have emerged will

<sup>144</sup> See generally on non-compliance procedures *P. Birnie/A. Boyle/C. Redgwell*, *International Law and the Environment*, 2009, 237 et seq.; *P.-M. Dupuy/J. E. Viñuales* (note 83), 343 et seq.; *A. Fodella*, *Structural and Institutional Aspects of Non-Compliance Mechanisms*, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, 2009, 355 et seq.; *L. Pineschi*, *Non-Compliance Procedures and the Law of State Responsibility*, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (note 144), 483 et seq.; *A. Tanzi/C. Pitea*, *Non-Compliance Mechanisms: Lessons Learned and the Way Forward*, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (note 144), 569 et seq.; *T. Treves*, *The Settlement of Disputes and Non-Compliance Procedures*, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (note 144), 499 et seq.; *B. Mayer*, *Constructing International Climate Change Law as a Compliance Regime*, *Transnational Environmental Law* 7 (2014), 115 et seq.; *T. Stephens* (note 143), 292.

<sup>145</sup> The law of the sea must be left aside.



permit to conclude that a pattern has emerged which, negatively, one might call a result of resignation because of the absence of elements of coercion, or, positively, a construction that places its trust in the civic sense of responsibility present in all societies and supposedly also in the international community. That this pattern does not follow the well-established rules of State responsibility is not a new discovery. In particular, *Tullio Treves* has published, together with a group of young international lawyers, a voluminous treaty on non-compliance procedures and mechanisms in environmental law that deals comprehensively with the various mechanisms which, notwithstanding their dissimilarities in detail, show many concordant features.<sup>146</sup> The specific institutional structure introduced by the relevant MEAs has also found a lively interest in the legal literature<sup>147</sup> but cannot be examined in the present context notwithstanding its importance for success or failure in tackling the perceived threats. Because ten years have elapsed since the publication of *Treves'* impressive compendium, it seems worthwhile to take a fresh look at the procedures examined by him: a decade of actual practice must have left its impact on his assumptions. In particular, the Paris Agreement of 2015<sup>148</sup> requires closer analysis inasmuch as it constitutes the crowning stone of the architecture for the defense of the world climate.

It is not the intent of the present article to look into the mechanisms providing for the reparation of environmental damage caused specifically to individual States where, in parallel to the *Trail Smelter* case,<sup>149</sup> a clear chain of causation links the initial act to that damage.<sup>150</sup> It needs no explanation that in such instances – called “local” transboundary air pollution<sup>151</sup> – the

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<sup>146</sup> *T. Treves* (note 144). See also UNEP, Compliance Mechanisms under Selected Multilateral Environmental Agreements, 2007, commented upon by *E. Maruma Mrema*, Cross-Cutting Issues Related to Ensuring Compliance with MEAs', in: U. Beyerlin/P.-T. Stoll/R. Wolfrum (note 24), 201 (211 et seq.). In 2006 the Guidelines were replaced by the UNEP Manual on Compliance with and Enforcement of MEAs, <<https://www.ipcc.int>>.

<sup>147</sup> See *R. R. Churchill/G. Ulfstein*, Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, *AJIL* 94 (2000), 623 et seq.; *K. N. Scott*, Non-Compliance Procedures and Dispute Resolution Mechanisms under International Environmental Agreements, in: D. French/M. Saul/N. D. White (eds.), *International Law and Dispute Settlement. New Problems and Techniques*, 2010, 225 et seq.

<sup>148</sup> Paris Agreement of 2015, <<https://unfccc.int>>.

<sup>149</sup> See note 76.

<sup>150</sup> Therefore, the Nogoya Kuala Lumpur Supplementary Protocol on Liability and Redress, 7.3.2011, entry into force: 5.3.2018, will not be analyzed.

<sup>151</sup> *P.-M. Dupuy/J. E. Viñuales* (note 83), 148.

general rules of State responsibility apply to their full extent.<sup>152</sup> On the other hand, the specific characteristic of the *problématique* here under review is that all States are at the same time actors and victims, no clear causal connection being susceptible of being established between actions that are generally considered lawful and the eventual effects that do not occur at a given moment, but build up over months, years and decades.<sup>153</sup>

Before engaging in a short review of some of the NCPs relevant within the framework of this article, it should be mentioned that in 2013 the ILC started a project on the protection of the atmosphere for which Japanese member *Murase* was appointed as Special Rapporteur. Strangely enough, the ILC excluded from the topic quite a number of the most important legal issues, in particular the problem of sanctions (liability).<sup>154</sup> Accordingly, the *Murase* project cannot be directly relied upon in studying the extant NCPs.<sup>155</sup>

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<sup>152</sup> See ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, 7 (67 et seq.), paras. 111-113; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Reports 2010, 14 (78 et seq.), paras. 193-206; *Certain Activities Carried out by Nicaragua in the Border Area – Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica (Costa Rica v. Nicaragua)*, 2.2.2018, paras. 41-43, 52-53. For a broader analysis see *J. Brunnée, Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection*, ICLQ 53 (2004), 351 et seq.; *P. G. G. Davies, Non-Compliance – A Pivotal or Secondary Function of CoP Government?*, International Community Law Review 15 (2013), 77 et seq.

<sup>153</sup> On the issue of causality see *P.-M. Dupuy/J. E. Viñuales* (note 83), 316. The case of *Urgenda v. Netherlands*, 24.6.2015, <<https://uitspraken.rechtspraak.nl>>, where the District Court of The Hague ordered the Dutch Government to reduce the national GHG emissions by at least 25 % by the end of 2020, was believed by the present author to remain a deviant exception. But it was confirmed by a judgment of the Court of Appeal of The Hague, 9.10.2018, 200.178.245/01 (an appeal to the Dutch Supreme Court is pending). For a comprehensive review of attempts to establish responsibility in such complex constellations see *S. Cassella, Responsabilité(s) de l'Etat pour le risqué global lié aux changements climatiques*, RGDIP 123 (2019), 363 et seq.

<sup>154</sup> “(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights”, <<http://legal.un.org>>. Specifically noted by *B. Mayer* (note 144), 123.

<sup>155</sup> But see his Fifth Report, A/CN.4/711, 8.2.2018. The draft guideline 11(2)(b) on the topic, adopted by the ILC's drafting committee in 2018, <<http://legal.un.org>>, refers exclusively to the existing agreements without attempting to suggest propositions under general international law.

### a) Convention on Long-Range Transboundary Air Pollution

The 1979 Convention on Long-Range Transboundary Air Pollution (CLRTAP)<sup>156</sup> is the oldest one of a series of international agreements providing for the elimination of substances polluting the air.<sup>157</sup> It has become the pivot of a series of additional protocols that have considerably strengthened its impact. The Convention itself, an instrument confined *ratione territorii* to Europe, which has by now reached the venerable age of 40 years, does not provide the reader with many clues as to its intended enforcement. Essentially, it confines itself to establishing a system of mutual information among the parties and the Executive Body, the representation of the States parties (Arts. 8 and 9), stating furthermore that the Executive Body shall review its implementation. By introducing a system of regular reporting incumbent on States Parties, the CLRTAP set a standard model that was later followed, in identical or similar terms, by all the other MEAs.<sup>158</sup> Such reports, although not qualified as exclusive documentary sources of information, constitute the groundwork for the assessment of a State's performance by the responsible bodies.<sup>159</sup>

It was obvious from the very outset that the Convention, drafted in fairly abstract terms, needed to be complemented by ancillary instruments that would focus on specific substances, setting forth precise criteria as to thresholds, time-schedules, quantities and other relevant factors. In fact, in the subsequent years that challenge was soon taken up. In 1985, the Helsinki Protocol on the Reduction of Sulphur Emissions<sup>160</sup> was adopted as the first one of those additional instruments. It provided that the States parties had to reduce their emissions by at least 30 % "as soon as possible", but at the latest by 1993 (Arts. 2, 6). This was a clear benchmark, susceptible of

<sup>156</sup> 1979 Convention on Long-Range Transboundary Air Pollution of 13.11.1979, in force: 16.3.1983, 1302 UNTS 217, comprising 51 parties, among them Russia and the USA.

<sup>157</sup> See also *T. Kuokkanen*, Practice of the Implementation Committee under the Convention on Long-Range Transboundary Air Pollution, in: U. Beyerlin/P.-T. Stoll/R. Wolfrum (note 24), 39 et seq.; *E. Milano*, Procedures and Mechanisms for Review of Compliance under the 1979 Long-Range Transboundary Air Pollution Convention and Its Protocols, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (note 144), 169 et seq.

<sup>158</sup> See overview given by *P.-M. Dupuy/J. E. Viñuales* (note 83), 296 et seq.; *A. Kiss*, Reporting Obligations and Assessment of Reports, in: U. Beyerlin/P.-T. Stoll/R. Wolfrum (note 24), 229 et seq.

<sup>159</sup> See *J. Brummée*, Compliance Control, in: G. Ulfstein/T. Marauhn/A. Zimmerman (eds.), Making Treaties Work: Human Rights, Environment and Arms Control, 2009, 373 et seq. (374 et seq.).

<sup>160</sup> Helsinki Protocol on the Reduction of Sulphur Emissions or Their Transboundary Fluxes, 8.7.1985, in force: 2.9.1987, 1480 UNTS 215.

being reviewed in an objective manner. In order to facilitate that control, the Helsinki Protocol stated additionally that the States parties had to report annually to the Executive Body their levels of Sulphur emissions (Art. 4). The Parties were furthermore requested to develop national strategies, policies and programmes for that purpose. Cooperation was organized under the auspices of the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants (EMEP), established as a special unit of the UN Economic Commission for Europe.<sup>161</sup> Thus, the ground was laid for a meaningful scrutiny of the general balance sheet.

This tool box for effective implementation<sup>162</sup> was progressively extended and strengthened in the following years. The next step was achieved with the adoption of a protocol for the prevention and reduction of emissions of nitrogen oxides where States were enjoined not to exceed the level of emissions registered in 1987: for new installations, specific targets were established. In a similar fashion the 1991 Geneva Protocol on Persistent Organic Pollutants (POPs) imposed a reduction obligation of 30 % by 1999 in respect of the emission levels obtaining in 1988.<sup>163</sup> It even went beyond rules only for potentially injurious emissions by providing that additionally the production and use of specific particularly substances should be eliminated (Art. 3). A decisive push was given in 1994 to the enforcement machinery by the Oslo Protocol on Further Reduction of Sulphur Emissions.<sup>164</sup> According to Art. 7 of this Protocol, a special Implementation Committee was to be set up that would examine all the information provided by the Parties before the review process conducted by the Executive Body would start (Art. 8). The substantive obligations were considerably increased by the introduction of new emission ceilings and reductions according to a precise scheme (Annex II). It had indeed emerged that the 1985 Helsinki Protocol was not able considerably to reverse the negative impact of the continuing process of burning of fossil fuels containing Sulphur as one of its components. The subsequent protocols all followed this route by specifying the details of compliance in a separate provision.<sup>165</sup>

<sup>161</sup> Based on a Protocol of 28.9.1984, in force 28.1.1988, 1491 UNTS 167.

<sup>162</sup> Protocol on the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes of 31.10.1988, in force: 14.2.1991, 1593 UNTS 287.

<sup>163</sup> Protocol Concerning the Control of Volatile Organic Compounds or Their Transboundary Fluxes, 18.11.1991, in force: 29.9.1997, 2001 UNTS 187.

<sup>164</sup> Oslo Protocol on Further Reduction of Sulphur Emissions of 14.6.1994, in force: 5.8.1998, 2030 UNTS 122.

<sup>165</sup> See the provisions on compliance in: Protocol on Heavy Metals, 24.6.1998, in force: 29.12.2003, 2237 UNTS 4, Art. 9; Aarhus Protocol on Persistent Organic Pollutants, 24.6.1998, in force: 23.10.2003, 2230 UNTS 79, Art. 11; Protocol to Abate Acidification, Eu-

The Implementation Committee was accordingly entrusted with responsibilities for all of the additional protocols to the CLRTAP.<sup>166</sup> The Terms of Reference provide a carefully drafted procedural framework for the review process by the Committee. The Committee is entitled to address recommendations to Parties with a view to furthering compliance with the relevant standards. The Executive Body, to which the Implementation Committee is accountable, may also formulate recommendations where a situation requires a heightened degree of attention. The language of the Terms of Reference is fairly cautious in that regard. No Party is “condemned” because of its failings, no authoritative determinations are made.<sup>167</sup> According to the text of para. 11, the Executive Body may

“decide upon measures of a non-discriminatory nature to bring about full compliance with the protocol in question, including measures to assist a Party’s compliance. Any such decision shall be taken by consensus”.

It is remarkable that the Terms of Reference have introduced a kind of inter-State complaint under which a State may charge another one (in diplomatic terms: has “reservations”) with not fulfilling its obligations (para. 4(a)).<sup>168</sup> A State may also indicate that it is or will be unable to comply with its obligations under a Protocol (para. 4(b)). In the great majority of cases, however, referrals to the Implementation Committee are made by the Secretariat which, through this competence (para. 5), has been entrusted with an intensely political function.<sup>169</sup>

The Implementation Committee has shown a great deal of active engagement. Its most recent report (No. 20) provides a complete oversight of all relevant cases.<sup>170</sup> No country is granted privileged treatment.<sup>171</sup> In open

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trophication and Ground-Level Ozone, 30.11.1999, in force: 17.5.2005, 2319 UNTS 81, Art. 9.

<sup>166</sup> For the current terms of reference see Executive Body Decision 2012/25, ECE/EB.Air/113/Add.1.

<sup>167</sup> *E. Milano* (note 157), 172.

<sup>168</sup> The inter-State complaint had first been introduced by Art. 7(2) of the Sulphur Protocol of 14.6.1994 (note 164). Particular attention has been devoted by *K. N. Scott* (note 146), 241 et seq., to the rules on initiation of proceedings, the trigger system.

<sup>169</sup> It appears that to date not a single case has been brought to the knowledge of the Implementation Committee by another State. On the trigger system see *J. Brunnée* (note 159), 383 et seq.; *F. Romanin Jacur*, Triggering Non-Compliance Procedures, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (note 144), 373 et seq.; *G. Ulfstein*, Dispute Resolution, Compliance Control and Enforcement in International Environmental Law, in: G. Ulfstein/T. Maruhn/A. Zimmerman (note 159), 115 (126 et seq.).

<sup>170</sup> ECE/EB.AIR/2017/3.

ZaöRV 79 (2019)

words the governments concerned are informed about their situation of non-compliance and advised to engage their best efforts with a view to achieving the applicable standards. In other words, there is an open exchange of views where the institutions of the CLRTAP do not shy away from denouncing the deficits they have found to exist. According to the information accessible via the internet, this procedure seems to be fairly effective.<sup>172</sup> Two elements of the traditional system of State responsibility as it is embodied in the ARS are manifestly lacking: no sanctions or countermeasures are provided for, nor is there any question of financial compensation or penalties.

One of the grounds for this positive assessment may be the fact that the territorial scope of application is limited to Europe (in the wider sense). Obviously, the Implementation Committee and the Governing Body are compelled to rely on the good will of the Parties concerned. One cannot exclude that in rare instances the information provided is not perfectly accurate. On the other hand, one cannot see any alternative. If the Governing Body had been entrusted with decision-making power, things could hardly be managed any better. The implementation on the ground lies inevitably in the hands of the government of the country where the relevant emissions have their origin. Constructive dialogue seems to be the best available device.<sup>173</sup> In fact, regarding terminology, the CLRTAP deliberately avoids speaking of State responsibility.

## b) Convention for the Protection of the Ozone Layer

One of the worst threats to the survival of any life on earth was tackled through the 1985 Vienna Convention for the Protection of the Ozone Layer.<sup>174</sup> At world level, it is the first one of the treaties that aim to protect the atmosphere of the globe against the impact of deleterious substances.<sup>175</sup> Af-

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<sup>171</sup> Germany is one of the countries with excessive NH<sub>3</sub> emissions, see ECE/EB.AIR/2017/3, paras. 81-84. In the case of Norway, the Implementation Committee speaks of “long-standing non-compliance” regarding the same substance, ECE/EB.AIR/2017/3, para. 77.

<sup>172</sup> Only specialists in the relevant fields have full knowledge.

<sup>173</sup> See the considerations about the prevailing consensus principle by P. Széll/V. Keizer/T. Kuokkanen, Compliance and Consensus, in: J. Sliggers/W. Kakebeeke (eds.), *Clearing the Air. 25 Years of the Convention on Long-Range Transboundary Air Pollution*, 2004, 119 et seq. (130).

<sup>174</sup> 1985 Vienna Convention for the Protection of the Ozone Layer of 22.3.1985, in force: 22.9.1988, 1513 UNTS 293.

<sup>175</sup> For a comprehensive study see *F. Romanin Jacur*, *The Non-Compliance Procedure of the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the*

ter its launch in 1985, the Convention was quickly ratified by a considerable number of States on all continents so that it could enter into force on 22.9.1988.<sup>176</sup> It was conceived essentially as a framework convention that would later be supplemented and particularized through one or more specific instruments suited to deal with the diversity of substances that are known as prejudicing the ozone layer. The major ground for the swift success story was the alarm caused by reliable serious scientific research to the effect that indeed the ozone layer could soon disappear completely, exposing the populations of the earth and their living plant and animal environment to the direct radiance of ultraviolet light with tremendously harmful consequences.

The Montreal Protocol on Substances that Deplete the Ozone Layer<sup>177</sup> continued and completed the strategy pursued by the Vienna Convention.<sup>178</sup> It established detailed lists of potentially harmful substances, providing for interdictions of production and prohibitions on import and export, each time with specific time schedules.<sup>179</sup> Pursuant to Art. 5, developing nations were not subjected to the same strict conditions (Art. 5), being bound, however, gradually to reduce and eliminate the use of the controlled substances. In order to alleviate their economic losses, a Multilateral Fund has been established (Art. 10).

The system of monitoring is simple as far as its basic architecture is concerned. States parties are obligated to submit an annually report on the relevant activities (Art. 7), having to provide their answers in the form of standardized questionnaires. An article on non-compliance (Art. 8) refers to the States parties for the elaboration of an appropriate mechanism for that purpose. It took little time to complete that mechanism.<sup>180</sup> The final version is in force since 1998.<sup>181</sup> Obviously, it falls to the organization to review the reports submitted by the States parties. The decision establishing the non-compliance procedure provides again additionally for some kind of inter-State complaint: a written submission may be made to the Secretariat if a State has “reservations” concerning another State’s compliance with its obli-

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Ozone Layer, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (note 144), 11 et seq.

<sup>176</sup> On 16.5.2019 it had 198 States parties: <<https://treaties.un.org>>.

<sup>177</sup> Montreal Protocol on Substances that Deplete the Ozone Layer of 16.9.1987, in force: 1.1.1989, 1522 UNTS 3.

<sup>178</sup> It also had 198 parties on 16.5.2019.

<sup>179</sup> For the satisfaction of essential uses, in particular for medical reasons, special exemptions have been introduced.

<sup>180</sup> First version: Annex III to the Report on the 2<sup>nd</sup> Meeting of the Parties, 1990.

<sup>181</sup> Non-compliance procedure, Report on the 10<sup>th</sup> Meeting of the Parties, Cairo 1998, Annex II, <<http://ozone.unep.org>>.

gations. Self-incrimination is also provided for. The general objective is to remove the supposed irregularities in an exchange of views with the Implementation Committee and possibly the Meeting of the States Parties itself. Hard-hitting sanctions are not provided for. An “Indicative List”<sup>182</sup> enumerates the measures that may eventually be taken if the State concerned does not heed the recommendations addressed to it. The measures of last resort are defined as follows (C.):

“Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.”

As it appears according to available information, such a drastic step has not yet been taken in a single case. The Meeting of the Parties attempts invariably to persuade the State party concerned to take swift remedial action. However, the reports usually indicate in clear terms the gravity of the violations found. In the case of Israel, e.g., a decision of the Meeting of the Parties highlights the “repeated failure to respond to the requests for information”.<sup>183</sup> In the case of Kazakhstan, a decision of 2017 cautioned the country that, unless it returns to compliance, measures such as “ensuring that the supply of hydrochlorofluorocarbons [from other countries] is ceased” might be taken.<sup>184185</sup> In fact, by controlling imports and exports the organization disposes of an instrument that may put an effective end to any infringement found. Yet no other reparation measures are provided for. In particular, the “Indicative list” does not mention any financial compensation although such harder sanctions do not seem to be excluded on principle.

In conclusion, it appears that a well-functioning system of monitoring has been established.<sup>186</sup> Like in the case of the CLRTAP it operates totally

<sup>182</sup> Annex V of the Report of the 4<sup>th</sup> Meeting of the Parties, Copenhagen, November 1992.

<sup>183</sup> Decision XXVIII/10, 28<sup>th</sup> Meeting, Kigali, October 2016.

<sup>184</sup> Decision XXIX/14, Report of the 29<sup>th</sup> Meeting of the Parties, November 2017.

<sup>185</sup> Ukraine was found to return to full compliance according to an approved plan of action, see UNEP/OzL.Pro/ImpCom/61/4, 21.11.2018, paras. 28-33.

<sup>186</sup> See also the Beijing Declaration on Renewing Commitment to the Protection of the Ozone Layer, Annex I to the Report on the 11<sup>th</sup> Meeting of the Parties, 1999. For 2017 the Secretariat reported that all the parties that had provided data were in compliance with their obligations for the consumption and production of ozone-depleting substances, UNEP/OzL.Pro/ImpCom/61/4, 21.11.2018, para. 12. See also the positive assessment by ILC Special Rapporteur Murase, 5<sup>th</sup> report on the protection of the atmosphere, A/CN.4/711, 8.2.2018, paras. 37-38.



outside the classic framework of State responsibility. This is a highly technicized process since decisions on exemptions are continually necessary, as revealed by any look into the reports of the Contracting Parties evinces.<sup>187</sup> Although the obligations under the Montreal Protocol are hard obligations, not only as far as reporting is concerned, the framers of the Protocol have refrained from having recourse to the usual devices of State responsibility.<sup>188</sup> No sanctions are provided for. The emphasis is put on transparency, dialogue and cooperation. Since the review process is based on data provided by the States themselves, they are not in a position plausibly to contest the recommendations addressed to them. Obviously, however, there remains inevitably some room for manipulation. The organization under the Montreal Protocol has not been entrusted with powers to carry out research on the spot. Such powers would amount to an almost revolutionary enhancement of the position of the Organization. It is well-known that within the framework of the international instruments for the protection of human rights such intensification of the monitoring bodies has only been brought about by virtue of additional optional instruments or declarations that States are free to accept or to reject.<sup>189</sup>

### c) UN Framework Convention on Climate Change

The 1992 UN Framework Convention on Climate Change (UNFCCC)<sup>190</sup> follows the same route by establishing first and foremost an organizational framework to be particularized at a later stage by additional protocols focused on specific substances deemed particularly harmful. A vivid controversy broke out in respect of the binding nature of the key provision of the Convention, Art. 4, which contains a long list of obligations of a general

<sup>187</sup> See Report of the 30<sup>th</sup> Meeting of the Parties, UNEP/OzL.Pro.30/11, 15.11.2018.

<sup>188</sup> This lacuna led *Martti Koskenniemi* a quarter of a century ago to asking whether the Montreal Protocol is still situated within the purview of positive law, see *M. Koskenniemi*, Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol, *Yb. Int'l Env. L.* 3 (1992), 123, 162.

<sup>189</sup> In the field of environmental law, the device of *in loco* inspection is generally absent; see *M. Bothe*, Ensuring Compliance with MEAs – Systems of Inspection and External Monitoring, in: U. Beyerlin/P.-T. Stoll/R. Wolfrum (note 24), 247 (252 et seq.); *J. Brunnée* (note 159), 378.

<sup>190</sup> UN Framework Convention on Climate Change of 9.5.1992, in force: 21.3.1994, 1771 UNTS 107. An overview is given by *P. Merkouris/M.-A. Perreaut*, UN Framework Convention on Climate Change 1992, in: M. Fitzmaurice/A. Tanzi (eds.), *Multilateral Environmental Treaties*, 2017, 375 et seq.; *R. Wolfrum/J. Friedrich*, The Framework Convention on Climate Change and the Kyoto Protocol, in: U. Beyerlin/P.-T. Stoll/R. Wolfrum (note 24), 53 et seq.

nature. Some authors have drawn the conclusion that these obligations are so detailed and specific that non-compliance might lead to reparation claims against the States found to be in violation of their obligations.<sup>191</sup> In legal practice, those observations have not found a positive echo. Almost unanimously, the States parties have taken the position that the settlement of any disputes deriving from non-compliance should be handled within the specific procedural framework established by the Convention as some kind of *lex specialis*.<sup>192</sup>

Reports by developed country Parties are to be submitted every two years.<sup>193</sup> One of the main results of the efforts undertaken under the UNFCCC is the establishment of the Warsaw international mechanism for loss and damage associated with climate change impacts, a kind of solidarity institution entrusted with providing guidance and assistance to countries particularly seriously affected by climate change.<sup>194</sup> The States parties are continuously engaged in a broad spectrum of activities engaged in reducing the emission of GHG, mitigating their deleterious effect or adapting to the prevailing circumstances.

#### d) The Kyoto Protocol

The Kyoto Protocol<sup>195</sup> aims to implement the objectives of the UNFCCC by setting internationally binding emission reduction targets for greenhouse gases (GHG). In view of the fact that developed countries were considered

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<sup>191</sup> For the discussion see *P. Hamilton* (note 142), 104 et seq.; *L. Rajamani*, The UN Framework Convention on Climate Change: A Framework Approach to Climate Change, in: D. A. Farber/M. Peters (eds.), *Climate Change Law*, 2016, 205 (207); *C. Voigt*, The Potential Roles of the ICJ in Climate Change-Related Claims, in: D. A. Farber/M. Peters (note 191), 152 (157); *P. Sands/J. Peel*, *Principles of International Environmental Law*, 4<sup>th</sup> ed. 2018, 304 (“soft targets and timetables with many loopholes”); *C. Tomuschat*, Global Warming and State Responsibility, in: H. Hestermeyer/N. Matz-Lück/A. Seibert-Föhr/S. Vöneky (eds.), *Law of the Sea in Dialogue*, 2011, 3 (19). After the decision of the Paris Conference in 2015 not to permit any liability or reparation claims based on the PA the discussion has become moot.

<sup>192</sup> On this issue see *K. Schmalenbach*, *Verantwortlichkeit und Haftung*, in: A. Proelss (ed.), *Internationales Umweltrecht*, 2017, 233.

<sup>193</sup> Decision 2/CP.17, December 2011, <<http://unfccc.int>>.

<sup>194</sup> Decision 2/COP.19, November 2013, <<http://unfccc.int>>.

<sup>195</sup> Kyoto Protocol of 11.12.1997, in force: 16.2.2005, 2303 UNTS 162, 192 parties (not the USA). For a general overview of its mechanisms see *S. Urbinati*, Procedures and Mechanisms Relating to Compliance under the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (note 144), 63 et seq.

principally responsible for the high levels of GHG in the atmosphere as a result of more than 150 years of industrial activity, the Protocol placed a heavier burden on them under the principle of “common but differentiated responsibilities”. They were listed in Annex I. During a first commitment period (2008-2012), they had to reduce the relevant emissions by 5 % against 1990 levels (Art. 3). Much higher reduction rates were determined for the second commitment period (2013-2020).<sup>196</sup> The targets could be reached by different methods, either by the reduction of emissions, through a compensatory mechanism by creating sinks (Art. 6: afforestation or reforestation) or through a trading system for emissions (Art. 17).

Again the monitoring mechanisms are essentially based on a reporting system. States are obligated to submit annual reports (Art. 7) that will be carefully examined by the institutions under the Kyoto Protocol, in the first place by an Expert Review Team, thereafter the Compliance Committee, whereas the Enforcement Committee deliberates on how to come to a conclusive assessment. A fairly detailed procedural regime<sup>197</sup> ensures that any findings are made on unchallengeable bases. A State party found to be in excess of its allowed quantities may lodge an appeal with the Conference of the UNFCCC Parties acting as meeting of the parties to the Kyoto Protocol. The outcome of any proceedings may go into different directions. On the one hand, the Facilitative Branch of the Compliance Committee may offer assistance to the failing party; on the other hand, the Enforcement Branch may make a finding of non-compliance that will deprive the non-compliant State of the rights to benefit from the special advantages available as alternatives to the reduction obligation, in particular access to the carbon market.<sup>198</sup> Hence, the system provides for true sanctions. Failing States shall normally be ordered to submit a plan indicating how the specific targets should be reached again in the future. Findings of the Enforcement Branch are also subject to appeal to the Conference of the Parties.

As can be learned from the data published on the internet, the system works continually as provided for in the rules. Quite a number of States

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<sup>196</sup> The relevant amendment to the Kyoto Protocol (Doha Amendment) has not yet entered into force, only 128 of the 144 required ratifications having been received (May 2019). Many States, however, apply the Doha Amendment on a provisional basis, <<https://unfccc.int>>.

<sup>197</sup> Procedures and mechanisms relating to compliance under the Kyoto Protocol, Decision 27/CMP.1, Annex 5, 2005.

<sup>198</sup> See sections XIV and XV of the procedural rules.

have been found not to be in compliance<sup>199</sup> – the term “breach” is generally left aside in accordance with the language used in Art. 18. Deliberately, the impression is avoided that the system of monitoring could operate under the auspices of the general rules on State responsibility. No proper financial sanctions are provided for. Generally, the system is based on the assumption that appeals by the other States parties constitute incentives strong enough to impel the respondent State to return to the pre-determined order. It should be noted, however, that the presence of punitive elements in the mechanisms of monitoring has led Canada to withdraw from the Protocol.<sup>200</sup>

### e) Convention on Biological Diversity

In the case of the Convention on Biological Diversity (CBD)<sup>201</sup> the definition of the relevant criteria proved infinitely more difficulty inasmuch as the Convention concerns the entire living environment of the human race. A deliberate choice was made to refrain from setting general targets or thresholds applicable to every State party. Instead, a bottom-up approach was chosen in that States parties are enjoined to establish their own strategies, plans and programs for the conservation and sustainable use of those forms of organic life which they deem to merit special protection.<sup>202</sup> Additionally, States are required to monitor the development of those components of biological diversity, in particular by identifying the relevant factors likely to harm the existing state of affairs (Arts. 6 and 7). Like in the case of the agreements for the prevention of contamination by air-borne particles, the States parties are required to submit reports to the institutions of the CBD (Art. 26). The text of the Convention does not contain a provision on non-compliance but includes a somewhat vague provision on measures suited to make good harm done (Art. 14(2)):

<sup>199</sup> For an example from the more recent time see the decision of non-compliance against Slovakia of 17.8.2012, <<http://unfccc.int>>. By a decision of 4.7.2013 the proceedings were closed, <<http://unfccc.int>>.

<sup>200</sup> Notification of 15.12.2011, effective 20.12.2012, <<https://treaties.un.org>>.

<sup>201</sup> Convention on Biological Diversity of 5.6.1992, in force: 29.12.1993, 1760 UNTS 79.

<sup>202</sup> For a comprehensive overview of the mechanisms of the CBD see C. Ragni, Procedures and Mechanisms on Compliance under the 2000 Cartagena Protocol on Biosafety, in: T. Treves/A. Tanzi/L. Pineschi/C. Pitea/C. Ragni/F. Romanin Jacur (note 144), 101 et seq.; M. Yzquierdo, The 1992 Convention on Biological Diversity, in: M. Fitzmaurice/A. Tanzi (note 190), 9 et seq.

“2. The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.”<sup>203</sup>

Indeed, reporting is the only hard legal obligation within the framework of the Convention, liability thus being alien to it although attempts were made to introduce such a regime,<sup>204</sup> coming to a provisional close in 2005 on the basis of the report of a group of experts.<sup>205</sup> Accordingly, a monitoring system had to be developed pragmatically by the Conference of the Parties. After a first period of experimentation,<sup>206</sup> in October 2010, the States parties adopted a revised and updated Strategic Plan for Biodiversity, including the so-called “Aichi Biodiversity Targets”, for the 2011-2020 period.<sup>207</sup> This Plan provides an overarching framework on biodiversity, not only for the biodiversity-related conventions, but for the entire United Nations system and all other partners engaged in biodiversity management and policy development. Parties agreed to translate this overarching international framework into revised and updated national biodiversity strategies and action plans within two years. The Plan pursues (over-)ambitious objectives. Given its extremely wide scope, it is difficult to come to a general conclusion as to its effectiveness. At the same time, at their meeting in December 2016 where they attempted to assess their endeavors within the framework of the CBD, the States parties confined themselves to noting that:

“while there has been significant progress towards the achievement of some elements of the Aichi Biodiversity Targets, for most targets the progress to date is insufficient to achieve them by 2020”.<sup>208</sup>

No matter how unsatisfactory this statement may sound, the observer should note that the Convention has raised awareness for the relevant issues

<sup>203</sup> Obviously, the general rules on State responsibility must apply where on a bilateral basis one State inflicts harm on the biological assets of another State.

<sup>204</sup> See COP 5 Decision V/18, May 2000, on liability and redress, <<https://www.cbd.int>>; COP 6 Decision VI/11, April 2002, on liability and redress, <<https://www.cbd.int>>; COP 8 Decision VIII/29, March 2006, <<https://www.cbd.int>>.

<sup>205</sup> Report of the Group of Legal and Technical Experts, UNEP/CBD/COP/8/27/Add.3, 18.8.2005, paras. 48 and 50.

<sup>206</sup> See, in particular, COP 6 Decision VI/7, April 2002, on Identification, Monitoring, Indicators and Assessments, <<https://www.cbd.int>>.

<sup>207</sup> COP 10 Decision X/2, Strategic Plan for Biodiversity 2011-2020, Annex, October 2010.

<sup>208</sup> COP 13 Decision XIII/1, December 2016, Progress in the Implementation of the Convention, Doc. CBD/COP/DEC/XIII/1, para. 19.

to a degree never attained before. Through its flexible methods and its appeal to voluntary cooperation, it has activated a potential that in earlier years had never been stimulated to the same extent. On the other hand, the recent IPBES report<sup>209</sup> has made it abundantly clear that renewed efforts are urgently required to prevent a widespread collapse of the globe's ecosystems with unfathomable consequences.

#### f) Complementary Conventions

Without going into the details of the subsequent two conventions, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Extreme Hazardous Chemicals and Pesticides in International Trade<sup>210</sup> and the 2001 Stockholm Convention on Persistent Organic Pollutants<sup>211</sup> it should simply be noted that, although they provide both for the development of a regime of non-compliance (Art. 17 of both conventions), the institutions of these two treaty regimes have not found it advisable or necessary to set up such a regime. One may assume that concordantly they have come to the conclusion that such a formal regime does not really contribute to making the conventional system more effective. In both cases, contacts are mainly established with specially designated national authorities (national focal points). Extreme flexibility is preferred to a rules-based regime, favored by the general assumption that in the field covered by the relevant convention all parties have consonant parallel interests. Implicitly, thus, the standard regime of State responsibility has been rejected.

#### g) Paris Agreement

The Paris Agreement (PA) of 12.12.2015,<sup>212</sup> concluded for the further implementation of the UNFCCC, aims to strengthen the global response to the threat of climate change by keeping a global temperature rise this century well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.

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<sup>209</sup> Above note 3.

<sup>210</sup> 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Extreme Hazardous Chemicals and Pesticides in International Trade of 10.9.1998, in force: 24.2.2004, 2244 UNTS 337.

<sup>211</sup> 2001 Stockholm Convention on Persistent Organic Pollutants of 22.5.2001, in force: 17.5.2004, 2256 UNTS 119.

<sup>212</sup> Contained in UNFCCC decision 1/CP.21, <<https://unfccc.int>>.

It marks another stage in the advance of the strategy to depart from specific criteria imposed from above, preferring instead benchmarks identified by the parties themselves (bottom-up approach). The Agreement owes its origin essentially to the dissatisfaction of developed nations with the concept underlying the Kyoto Protocol according to which, following the principle of common but differentiated responsibilities, developing nations were not held to any specific obligations, having only to pursue in general the objectives of the UNFCCC. Thus, the actual burden of reduction of GHG had to be borne essentially by developed nations, a situation appearing to lack justification at a time when the emissions of many developing nations were growing at a rapid pace. A major effort was required to abandon the Kyoto system, replacing it by a new strategy suited to satisfy all States on a global scale.<sup>213</sup>

The hub of the new system is the concept of “nationally determined contributions” (NDCs) (Art. 4(2)). Every State party indicates independently the targets it wishes to achieve. While the PA does not specify explicitly at what level the initial NDC should be set, para. 3 of Art. 4 states with regard to successive NDCs that they shall represent a “progression” and reflect the Party’s “highest possible ambition”. Indeed, NDCs shall be revised every five years (para. 9). Thus, the first cycle of the new scheme is still running. The review machinery has already been formally established (Art. 15) but is not yet operative. It shall act in a non-adversarial and non-punitive manner (para. 2).<sup>214</sup> Only after the year 2020 will it be possible to assess the chances of the new strategy.

Frightened that the great number of specifications in the PA that invite the States parties to take action for the preservation of the world climate might be taken as binding legal obligations the infringement of which entails international responsibility in the classic sense, the States parties decided, at the same time as they adopted the text of the PA, that its provisions shall not give rise to any kind of reparation claims.<sup>215</sup> It cannot be denied

<sup>213</sup> For a general assessment see *D. Bodansky*, *The Paris Climate Change Agreement: A New Hope?*, *AJIL* 110 (2016), 288 et seq.; *P. Sands/J. Peel* (note 191), 318 et seq. Extremely critical is *S. Salcinas Alcega*, *El Acuerdo de Paris de Diciembre de 2015*, *REDI* 70 (2018), 53 (69 et seq.).

<sup>214</sup> See the note on Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Art. 15.2 of the Paris Agreement, <<http://unfccc.int>>.

<sup>215</sup> Para. 51 of COP Decision 1/CP.21, 12.12.2015: “[...] Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.” Criticism by *S.-J.-T. Manga*, *Post-Paris Climate Agreement UNFCCC COP-21. Perspectives of International Environmental Governance*, *AJICL* 26 (2018), 309 (328). Likewise, *B. Mayer* (note 144), 126 et seq., opines that the resolution cannot bar recourse to general international law.

that the PA constitutes a genuine treaty under the terms of general international law. The decision of the States parties, which is unchallengeable, might be seen as downgrading its provisions almost to the quality of soft law. The better interpretation, however, is to view that decision as a binding characterization of the arrangements under the PA as establishing an autonomous regime not subject to the rules of general international law. The relationships among the States parties and with the institutions of the PA are regulated by international law and not only by rules of political expediency. But the regime of consequences entailed by a breach falls entirely and exclusively under the norms of the PA itself as far as the general consequences of the emission of GHG are concerned.

Many voices see the Paris Agreement not as a last-ditch effort to control the deleterious effects of GHG but as a great step forward on a realistic route that unites all constructive forces in the combat against air pollution. Thus *Lavanya Rajamani*, in agreement with UN Secretary General *Ban Ki-moon*<sup>216</sup> and French Foreign Minister *Laurent Fabius*, the President of COP 21,<sup>217</sup> spoke of “a historic achievement in multilateral diplomacy”.<sup>218</sup> It may well be that the diplomatic battle has produced a great victory. But the hard test of reality is still outstanding. Although the Paris Agreement has hitherto (15.5.2019) attracted 185 ratifications, it will already lose one of its parties by the withdrawal of the United States with effect as from 4.11.2020.<sup>219 220</sup>

It was obvious from the moment of its adoption that the PA needs further elaboration in order to become truly operative. A follow-up meeting held in Katowice (Poland) in December 2018 attempted to take first steps in that direction. At the end of that meeting, a resolution was adopted by acclamation – a formalized adoption appearing impossible because of the still continuing divergences – that provides at least for common parameters for measuring the relevant CO<sub>2</sub> emissions in the interest of greater transparency (“Katowice Climate Package”, encompassing a “rulebook”).<sup>221</sup> Determinative factors of the final consensus were the abolition of the strict divide between developing and developed nations regarding climate policies as well

<sup>216</sup> UN News, 12.12.2015, <<https://www.gouvernement.fr>>.

<sup>217</sup> <<https://www.gouvernement.fr>>.

<sup>218</sup> *L. Rajamani*, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, ICLQ 65 (2016), 493.

<sup>219</sup> The attempts by *F. G. Sourgens*, *Climate Commons Law. The Transformative Force of the Paris Act*, N. Y. U. J. Int'l L. & Pol. 50 (2018), to consider the US bound by custom beyond the date of November 2020 is hardly persuasive.

<sup>220</sup> Among the other non-parties Iran, Iraq, the Russian Federation and Turkey are the most prominent ones.

<sup>221</sup> Decision 1/CP.24, UN Doc. FCCC/CP/2018/10/Add. 1, 15.12.2018.



as further promises of developed nations for the establishment of an Adaptation Fund for developing nations.<sup>222</sup> From a legal viewpoint, the question cannot be answered unequivocally whether and to what extent resolutions of the Conference of the Parties (COP) under Art. 6(4) are capable of establishing binding obligations under international law.<sup>223</sup>

## 2. Financial Aspects

As yet the financial aspects of the different regimes have been mentioned only marginally. It stands to reason, however, that all of the strategies embodied in the multilateral agreements examined above require considerable financial sacrifices in particular from States parties with a low *per capita* income. Generally, therefore, the agreements provide for financial assistance to that group of States according to criteria that must each time be adapted to the regulated subject-matter. While all nations will benefit from a successful implementation of the agreed regimes, the burdens may mostly be comparatively heavier for developing nations because they lack the technological capacities for swift adaptation and change that are available in developed countries. Moreover, it remains true that the developed nations have been able for decades and centuries to use the capacities of the atmosphere available under the diagnosed threshold parameters for the emission of GHG. This finding makes it imperative for developed nations to shoulder a greater part of the financial burden than any newcomers who are just beginning their processes of industrialization.<sup>224</sup>

## 3. Self-Contained Regimes?

Finally the question arises whether the regime of non-compliance procedures constitutes a self-contained regime. As far as reparation for damage suffered is concerned this largely seems to be the case with regard to non-

<sup>222</sup> For a summary of the outcome of the Katowice Climate Summit see IISD Earth Negotiations Bulletin Vol. 12 (No. 747), 18.12.2018, <<http://enb.iisd.org>>.

<sup>223</sup> It is true, though, that the mechanism provided for by Art. 6(4) shall be established “on a voluntary basis”.

<sup>224</sup> *L. Boisson de Chazournes*, Technical and Financial Assistance and Compliance: The Interplay, in: U. Beyerlin/P.-T. Stoll/R. Wolfrum (note 24), 273 et seq.; *P.-M. Dupuy/J. E. Viñuales* (note 83), 330 et seq.; *N. Matz Lück*, Financial and Other Incentives for Complying with MEA Obligations, in: U. Beyerlin/P.-T. Stoll/R. Wolfrum (note 24), 301 et seq. *B. Mayer* (note 144), 131 et seq.

material damage which is not economically assessable in a bilateral relationship, as evidenced by the PA.<sup>225</sup> It is another question whether after the conclusion of a non-compliance procedure the way to formalized dispute settlement may still be open. According to the written rules, non-compliance and dispute settlement by classic methods run generally parallel to one another.<sup>226</sup> On the other hand, not the slightest evidence can be perceived that in fact in such instances where the non-compliance procedure has been employed a party concerned has later attempted to bring a suit at law or other request for the initiation of a formalized dispute settlement proceeding.<sup>227</sup> It may well be argued that the pursuance of communitarian interest by litigation would lack any legitimacy where the interests at stake have been carefully weighed by a competent institution of the MEA concerned.

## VI. Concluding Observations

At the end of this lengthy discussion, it is necessary to return to the Articles on State responsibility adopted by the ILC in 2001 and taken note of by the General Assembly. It was the aim of at least some members of the ILC to make a contribution, through those articles, to the protection of humankind's natural environment. In the text as adopted in 2001, only some of the elements originally promoted as essential elements of such a strategy can be found. This rather meager outcome should not be belittled – and it is perfectly in line with what our empirical research has retrieved.

The ILC Articles on State responsibility fit well into the architecture of bilateral relations between States that are mainly based on reciprocity according to the classic perception of the world as a juxtaposition of sovereign States. Yet their binary nature is not helpful in more complex situations where the alternative between lawful and unlawful does not do justice to the

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<sup>225</sup> But see with respect to the earlier MEA's *L. Pineschi* (note 144), 483, 486 et seq. *B. Mayer* (note 144) also considers that recourse to the remedies under general international law remains open on systemic grounds. When signing the UNFCCC in 1992, Fiji, Kiribati and Nauru stated in identical terms that their signature did not amount to renunciation of the remedies under general international law, <<https://treaties.un.org>>. View also held by *S. Cassella* (note 135), 365.

<sup>226</sup> See, e.g., Vienna Convention on the Ozone Layer, Art. 11(6); Montreal Protocol, Art. 8. The decision of IV/5 of the parties to the Protocol determine that indeed both procedures should apply, see *L. Pineschi* (note 144), 486; see also *F. Romanin Jacur* (note 175), 11 (27 et seq.).

<sup>227</sup> *K. N. Scott* (note 146), 258 observes that non-compliance proceedings tend to replace the classic forms of dispute settlement.

exigencies of the circumstances. Within the regulatory systems of the multi-lateral treaties examined one can observe a general tendency to refrain from laying down strictly binding legal norms.<sup>228</sup> Where, however, such norms are violated, countermeasures, the classic tool of enforcement, are generally discarded, and reparation claims are either not provided for or are *de facto* not resorted to. All the regimes examined rely essentially on processes of dialogue and persuasion.<sup>229</sup>

In sum, it can be said that the classic scheme of State responsibility that seeks to secure the effectiveness of international law by providing for punitive measures has been abandoned to a great extent in cases of departure from the normative framework for environmental protection. Non-compliance procedures equipped with “soft” outcomes are deemed to be more effective in this sector of societal life with regard to communitarian interests. Their objective is to make the installed system truly operative in a non-adversarial way. The American authors *Chayes* and *Handler Chayes*<sup>230</sup> have laid the intellectual groundwork for such “managerial” strategies that aim to settle disputes by way of a constructive dialogue that does not end with a one-time authoritative decision but may extend over fairly lengthy periods of time. In fact, all non-compliance procedures lead eventually to a process where all the knowledge available is activated and where the interests at stake are well represented. To date, no definite assessment can be made if the hopes attached to the non-conventional approach to the phenomenon of non-compliance will eventually materialize.<sup>231</sup> Further detailed studies in specific fields will be required for that purpose.

Explanations for the prevalence of NCPs are not difficult to find. The management of the natural resources of humankind is a matter over which State authorities nowhere have full control. The omnipotent State is a thing of the past. State authorities and societal forces need to work together with a view to discharging the task of conservation and maintenance. International instances cannot dictate from above the course a country should take

<sup>228</sup> Cogent observations by *T. Fajardo del Castillo*, *El Acuerdo de Paris sobre el Cambio Climático*, REDI 70 (2018) 23 (47).

<sup>229</sup> For the peculiar situation of the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) see *P. H. Sand*, *Sanctions in Case of Non-Compliance and State Responsibility: pacta sunt servanda – Or Else?*, in: *U. Beyerlin/P.-T. Stoll/R. Wolfrum* (note 24), 259 et seq.

<sup>230</sup> *A. Chayes/A. Handler Chayes*, *The New Sovereignty. Compliance with International Regulatory Agreements*, 1995. In a similar vein *J. Brunnée* (note 24), 7 et seq.; *J. Brunnée/S. Toope*, *Persuasion and Enforcement: Explaining Compliance with International Law*, FYBIL 13 (2002), 273 et seq.

<sup>231</sup> For an early assessment see *P. Széll*, *Supervising the Observance of MEAs*, *Envtl. Pol’y & L.* 37 (2007), 79 et seq.

in its specific circumstances. Although States are invariably invited to establish the requisite regulatory framework and to launch measures of guidance and orientation, the essential work must be done on the ground. To take care of the environment is a duty in the discharge of which every single individual should be involved. Accordingly, apart from establishing appropriate legislative frameworks, education must be part of any sensible strategy. However, governments are indispensable actors in the quest for a sustainable use of the available ecosystems. In this respect, slogans like “My country first!” as they can nowadays be heard from all regions of the world are less than helpful.

The efforts intended to keep a well-balanced state of nature show convincingly that the traditional vision of a State that is responsible for everything in its territory goes through a process of continuing erosion. More than ever, legal bindingness and effectiveness tend to diverge. In respect of the environment, many times States are unable to keep what they have promised to deliver. This gap is explained to a great extent by the simple fact that in respect of the human environment all human beings are by necessity, just through their consumption patterns, relevant actors. On the other hand, though, State authorities are not in a position comprehensively to control all of the human activities that have a significant bearing on the quality of the common goods conditioning our lives. State and society are not separated by a large divide as normally within the scope of civil and political rights. If any appreciable advances are to be obtained they must act together. Inasmuch as international law addresses only State authorities, as it must do pursuant to the conceptual structure of international law, it partly misses its real target. Imaginative strategies must therefore be sought. The attempt of the MEAs, most recently of the PA, to set its trust mainly in the insight of the human being is bold and risky. But promising alternatives are not easily perceptible. Only in the EU has it been possible to establish, within a close alliance of States, to establish a well-structured institutional scheme for the containment and reduction of greenhouse gas emissions.<sup>232</sup>

This is not a finding that is likely to inspire unbridled confidence. From the international level the ball is played back to the national playing field. In all countries human conscience must awake to the necessity of taking care of the environment by a way of life that adapts to the globe’s capacities. Even after the Paris Climate Conference the level of emissions of GHG has not fallen. For 2018, experts have noted an unprecedented rise of emissions

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<sup>232</sup> See, in particular, the two EU Regulations 2018/241 and 2018/842, 30.5.2018, EU Official Journal L 156/1 and L 156/26.

of CO<sub>2</sub>.<sup>233</sup> Hard battles for the distribution of the inevitable losses are to be expected. There can be no doubt that the developed countries will have to bear a larger share of the indispensable reductions of consumption patterns than developing countries. However, the younger nations cannot escape totally the laws of nature. Human activity is the main source of degradation of the environment. Many consequences are therefore imperative. Developed countries must exercise self-discipline: They cannot claim for their populations all of the world's resources. Developing countries, on the other hand, must see to it that they create and maintain in their territories a sustainable balance between the needs of their peoples to be satisfied and the available life-sustaining elements. Unfettered demographic increase may very soon bring some countries to the brink of collapse, in particular those where the population has quadrupled over 50 years. Therefore, an intelligent population policy must become part and parcel of any climate strategy.<sup>234</sup>

Accordingly, climate policy is not just a specialized sector of international politics. It is located at a crossroads where the paths for international peace and cooperation are preconceived and tested. It is essential for humankind to devise adequate strategies for the passage to a stable equilibrium where the regenerative forces of nature are strong enough to offset all the unavoidable inferences by its members required for the satisfaction of their physical needs.

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<sup>233</sup> <<https://www.scientificamerican.com>>.

<sup>234</sup> The report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services of 6.5.2019 (note 3), Section Key Messages, D.3, emphasizes in particular that humankind needs another concept of good life that does not rely on ever-increasing material consumption and that population growth cannot continue like in the last fifty years.

