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PUBLIC INTEREST AND LITIGATION

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Les avis consultatifs de la Cour internationale de Justice et l'intérêt public

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L'intérêt public, notion indéterminée et bien souvent corrélée aux notions d'intérêt commun, d'intérêt général, de bien public ou encore de volonté générale - sans qu'il soit toujours possible de les distinguer - tient dans les sociétés nationales à l'idée de mise en commun d'intérêts. Les organes représentant une communauté interviennent pour les promouvoir et protéger.

Au sein de la société internationale, la défense de l'intérêt public ou d'intérêts communs repose en grande partie sur les États, tout en sachant que d'autres acteurs sont associés à cette tâche. Les organisations internationales, en offrant un cadre institutionnel de même que des outils et moyens d'action, sont souvent sollicitées pour promouvoir et protéger ces intérêts. La demande d'avis consultatifs à une juridiction internationale relève de la panoplie des instruments mis à disposition par certaines organisations internationales.

L'exercice de la fonction consultative par une juridiction internationale lui permet, en réponse à une question qui lui a été adressée par un organe, d'identifier une ou plusieurs normes susceptibles de trouver application, de même que les conséquences qui pourraient découler de

leur non-respect.¹ Tant la Cour permanente de Justice internationale (CPJI) que la Cour internationale de Justice (CIJ), selon des régimes juridiques différents,² ont contribué - et pour la Cour, continue de le faire - à donner des éclairages juridiques sur nombre de questions juridiques. Constituée en tant qu'organe judiciaire principal de l'Organisation des Nations Unies, l'exercice par la Cour de sa fonction consultative est d'autant plus saillant à l'aune de l'édification du système des Nations Unies et de l'entrelacement d'organisations et institutions qui y sont rattachées.

Les propos subséquents seront centrés sur la contribution de la CIJ. Il est important de souligner dès le départ qu'une grande partie des avis consultatifs demandés à la Cour ont porté sur des questions de nature institutionnelle, à savoir celles relatives à l'existence et aux pouvoirs d'une institution, à la répartition des compétences et au partage des responsabilités entre les organes de l'Organisation internationale ou encore à l'étendue des priviléges et immunités accordés aux agents d'une organisation internationale.³ Ces avis consultatifs ont permis d'éclaircir le droit applicable aux organisations internationales.

Aux côtés de ces avis, d'autres demandes ont pu porter sur des questions ayant trait à la protection d'intérêts communs pour la communauté internationale, ou selon l'expression adoptée dans le cadre du présent colloque, à la défense de l'intérêt public de la communauté internationale. Il est intéressant de remarquer que, dans la pratique judiciaire, la première formule est préférée à la seconde. Ainsi la Cour, dans son avis relatif aux *Réserves à la convention pour la prévention et la répression du crime de génocide* du 28 mai 1951, affirme que : « [d]ans une telle convention, les États contractants n'ont pas d'intérêts propres ; ils ont seulement tous et chacun, un intérêt commun, celui de préserver les fins supérieures qui sont la

¹ J. SALMON (dir.), *Dictionnaire de droit international public*, Bruylant : Bruxelles, 2001, p. 116.

² Voir S. M. SCHWEBEL "Was the Capacity to Request an Advisory Opinion Wider in the Permanent International Court of Justice than it is in the International Court of Justice?", LXII BYIL (1991), pp. 78-81.

³ Voir les avis consultatifs sur demande de l'Assemblée générale, tels que : CIJ, *Réparation des dommages subis au service des Nations Unies*, Avis consultatif, C.I.J. Recueil 1949, p. 174 ; CIJ, *Compétence de l'Assemblée générale pour l'admission d'un État aux Nations Unies*, Avis consultatif, C.I.J. Recueil 1950, p. 4 ; CIJ, *Effets des indemnités accordées par le Tribunal administratif des Nations Unies*, Avis consultatif, C.I.J. Recueil 1954, p. 47. On peut noter les demandes de l'ECOSOC : CIJ, *Applicabilité de l'article VI, section 22. de la Convention ou des priviléges et immunités des Nations Unies*, Avis consultatif, C.I.J. Recueil 1989, p. 177 ; CIJ, *Différence relative à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'homme (1998-1999)*, Avis consultatif, C.I.J. Recueil 1999, p. 62. Pour l'UNESCO : CIJ, *Jugements du Tribunal administratif de l'OIT sur des plaintes déposées contre l'UNESCO*, Avis consultatif C.I.J. Recueil 1956, p. 77. Pour l'Organisation mondiale de la santé : CIJ, *Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Égypte*, avis consultatif, C.I.J. Recueil 1980, p. 73.

raison d'être de la convention »⁴. Il en va de même dans l'arrêt *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)* du 20 juillet 2012, lorsque la Cour affirme que : « [e]n raison des valeurs qu'ils partagent, les États parties à cet instrument ont un intérêt commun à assurer la prévention des actes de torture et, si de tels actes sont commis, à veiller à ce que leurs auteurs ne bénéficient pas de l'impunité »⁵. Dans son arrêt relatif au *Projet Gabčíkovo-Nagymaros*, la Cour reconnaît l'intérêt commun à préserver les écosystèmes lorsqu'elle relève l'existence d'une « conscience croissante des risques [...] pour l'humanité »⁶ suite à l'intervention de l'homme dans la nature.

1. La promotion de l'intérêt public dans les avis consultatifs de la Cour internationale de Justice

Il existe de nombreux domaines dans lesquels des questions d'intérêt public sont en jeu. Comme le notait Jonathan Charney, "... the international community ... is increasingly interdependent. It faces an expanding need to develop norms to address global concerns, e.g. global environment problems, weapons of mass destruction, international drug trafficking, international terrorism and human rights abuses".⁷ Les différentes composantes de la communauté internationale sont bien souvent à la recherche de positions politiques concertées dans ces domaines et dans d'autres. Dans ce contexte, il est important d'identifier les principes juridiques qui peuvent ou pourraient fonder de tels développements et promouvoir ainsi l'intérêt commun de l'humanité.

Ainsi, par exemple, les questions d'auto-détermination ont été au cœur de demandes d'avis consultatifs. À ces occasions, la Cour a rappelé certaines considérations fondamentales.⁸ Ainsi

⁴ CIJ, *Réserves à la convention pour la prévention et la répression du crime de génocide*, Avis consultatif C.I.J. Recueil 1951, p. 12.

⁵ CIJ, *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, arrêt, C.I.J. Recueil 2012, p. 422, 449, para. 68.

⁶ CIJ, *Affaire relative au projet Gabčíkovo-Nagymaros (Hongrie c. Slovaquie)*, arrêt, C.I.J. Recueil 1997, p. 7, 77-78, para. 140.

⁷ J. CHARNET, « International Law-Making – Article 38 of the ICJ Statute Reconsidered » in J. DELBRÜCK, ed. *New Trends in International Lawmaking – International "Legislation" in the Public Interest*, Duncker & Humboldt, Berlin, 1997, pp. 183-184.

⁸ CIJ, *Consequences juridiques pour les États de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*, avis consultatif, C.I.J. Recueil 1971, p. 10 ; CIJ, *Sahara Occidental*, avis consultatif, C.I.J. Recueil 1975, p. 12 ; CIJ, *Conformité au droit international de la déclaration unilatérale d'indépendance relative au Kosovo*, avis consultatif, C.I.J. Recueil 2010, p. 403 ; CIJ, *Consequences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif, C.I.J. Recueil 2004, p. 136 ; CIJ, *Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965*, avis consultatif, C.I.J. Recueil 2019, p. 95.

dans l’Avis sur les effets juridiques de la séparation de l’archipel des Chagos, elle a souligné que « Le respect du droit à l’autodétermination étant une obligation *erga omnes*, tous les États ont un intérêt juridique à ce que ce droit soit protégé (voir Timor oriental (Portugal c. Australie), arrêt, C.I.J. Recueil 1995, p. 102, par. 29 ; voir aussi, Barcelona Traction, Light and Power Company, Limited (nouvelle requête : 1962) (Belgique c. Espagne), deuxième phase, arrêt, C.I.J. Recueil 1970, p. 32, par. 33). L’organe judiciaire précisa alors qu’ «qu’il appartient à l’Assemblée générale de se prononcer sur les modalités nécessaires au parachèvement de la décolonisation de Maurice, tous les États Membres doivent coopérer avec l’Organisation des Nations Unies pour la mise en œuvre de ces modalités. [...] »⁹

À une époque d’interdépendance et de complexité accrues dans la gestion des affaires publiques, la fonction consultative de la Cour internationale est de plus en plus sollicitée dans la promotion de l’intérêt commun de l’humanité. La légalisation du discours international participe de cette aspiration. Les avis rendus par la Cour internationale de justice à la suite des demandes de l’Organisation mondiale de la santé et de l’Assemblée générale des Nations Unies sur la légalité du recours aux armes nucléaires soulignent cette tendance. Dans son avis, la Cour est allée au-delà d’une approche casuistique typique, bien qu’importante, en énonçant les *règles* à prendre en considération lors de l’examen d’une question de sécurité relevant à la fois du *jus ad bellum* et du *jus in bello* et couverte par d’autres corpus de normes de droit international. De manière significative, dans cet avis consultatif, la Cour a rappelé aux États qu’ils devaient « poursuivre de bonne foi et [...] mener à terme des négociations conduisant au désarmement nucléaire dans tous ses aspects ».¹⁰ De manière plus générale, l’approche de la Cour a mis en lumière la nécessité d’une approche intégrée de l’ordre juridique international, en soulignant les liens à établir entre les différents domaines du droit.

La promotion des intérêts communs fait apparaître une dynamique nouvelle, impliquant des juges de diverses juridictions. Il y a en effet une perméabilité croissante entre les fora d’action et les litiges. Les questions d’intérêt public tendent de plus en plus à être portées devant les juridictions nationales, tandis que les autorités nationales et les particuliers voient dans la scène internationale un moyen de promouvoir ces intérêts, que ce soit devant des instances de règlement des différends ou dans des arènes de négociation. Les demandes d’avis consultatif sur

⁹ CIJ, *Effets juridiques de la séparation de l’archipel des Chagos de Maurice en 1965, avis consultatif*, C.I.J. Recueil 2019, p. 95, 139, para. 180.

¹⁰ CIJ, *Licéité de la menace ou de l’emploi d’armes nucléaires, avis consultatif*, C.I.J. Recueil 1996, p. 226, 267.

les changements climatiques illustrent cette dynamique. La Cour interaméricaine des droits de l'homme, le Tribunal international du droit de la mer et la Cour internationale de Justice ont tout trois étaient saisis de demandes d'avis consultatifs, alors que des affaires contentieuses sur cette question ont été portées devant la Cour européenne des droits de l'homme et nombre de juridictions nationales.

De nombreuses questions de politique mondiale sont objet de discussion et la question qui se pose de manière pregnante est celle de savoir quelles normes et règles juridiques doivent être appliquées à ces questions. En d'autres termes, on cherche une réponse juridique à des préoccupations d'intérêt commun. Le rendu d'avis consultatifs sur demande d'une institution permet à la Cour d'apporter sa contribution. S'intéresser aux conditions d'accès à la fonction consultative permettra de mettre en relief qui sont les agents institutionnels susceptibles de promouvoir l'intérêt public. Les conditions de participation à la procédure consultative revêtent aussi de l'importance car elles permettent de saisir quelles sont les voix qui peuvent se faire entendre au cours d'une procédure en demande d'avis consultatif.

2. L'accès et la participation à la procédure consultative et la promotion de l'intérêt public

La promotion de l'intérêt public par l'accès à la procédure consultative

Hormis l'Assemblée générale et le Conseil de sécurité, d'autres organes onusiens ont été dotés du privilège de demander un avis consultatif à la Cour, qu'il s'agisse du Conseil économique et social, du Conseil de tutelle et du Comité intérimaire de l'Assemblée générale. Toutes les institutions spécialisées à l'exception de l'Union postale universelle se sont vues conférer ce droit. L'Agence internationale de l'énergie atomique peut également demander un avis consultatif.¹¹

D'un point de vue institutionnel, il convient également de noter que les demandes émanent le plus souvent de l'Assemblée générale ou des organes pléniers d'institutions spécialisées qui comprennent les États de la communauté internationale dans leur plus grand nombre. Cela

¹¹ L. BOISSON DE CHAZOURNES, "La procédure consultative de la Cour internationale de Justice et la promotion de la règle de droit : remarques sur les conditions d'accès et de participation », in PM DUPUY et al. (eds), *Völkerrecht als Wertordnung : Festschrift für Christian Tomuschat – Common Values in international law : essays in honour of Christian Tomuschat*, Kehl, NP Engel, 2006, p. 482.

confère à ces avis une assise et une légitimité politique étayée. Cette situation favorise l'existence d'une « general presumption that the request reflects a profound concern of the international community requiring a juridical answer ».¹²

L'on peut se demander si cette faculté devrait être reconnue à d'autres institutions universelles. Il est intéressant à cet effet de noter que lors de la négociation de la convention-cadre sur les changements climatiques, la possibilité de demander un avis consultatif à la CIJ avait été envisagée.¹³ Prévoyant que de nombreuses questions porteraient sur l'interprétation ou l'application de la convention, il avait été suggéré que la Conférence des parties ou un groupe *ad hoc* composé de ses membres pourrait demander un avis consultatif à un groupe d'experts juridiques. Il avait également été proposé que la Conférence des Parties puisse demander un avis consultatif à la CIJ. Cette possibilité n'a finalement pas été retenue au cours des négociations.

La possibilité de permettre à des institutions internationales, autres que celles auxquelles le droit de demander des avis consultatifs est déjà accordé, de pouvoir le faire a son importance. Cela renforcerait la promotion du respect de l'État de droit au sein de chacune d'elles et augmenterait la possibilité pour tous les acteurs concernés de participer au processus de prise de décision. C'est en ce sens qu'il faut comprendre l'article XIV de la Convention sur les armes chimiques qui prévoit que la Conférence ou le Conseil exécutif établis en appui de cet instrument sont habilités, sous réserve d'une autorisation donnée par l'Assemblée générale des Nations Unies, à demander un avis consultatif à la CIJ « sur tout point de droit entrant dans le cadre des activités de l'Organisation ». Il faudrait au préalable que l'Organisation pour l'interdiction des armes chimiques ai conclu un accord avec les Nations Unies.¹⁴

¹² C. TOMUSCHAT, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law*, RCADI, 1999, vol. 281, p. 425.

¹³ Voir Texte unique révisé sur les éléments relatifs aux mécanismes, A/AC.237/Msc. 13, 30 octobre 1991, pp.31-32.

¹⁴ L'Organisation pour l'Interdiction des Armes Chimiques (OIAC) et les Nations Unies ont signé un accord de relations en 2001 qui définit les modalités de leur coopération future et les mécanismes de consultation sur les questions d'intérêt et de préoccupation mutuels. La Conférence des États parties de l'OIAC a approuvé l'accord un an plus tard. L'article VII « Cour internationale de Justice » de la Résolution de l'Assemblée générale des Nations Unies du 24 septembre 2001 (A/RES/55/283) précise : « 1. L'Organisation des Nations Unies prend note du paragraphe 5 de l'article XIV de la Convention qui, sous réserve de l'autorisation de l'Assemblée générale de l'Organisation des Nations Unies, habilite la Conférence des États parties ou le Conseil exécutif de l'OIAC à demander à la Cour internationale de Justice de donner un avis consultatif sur tout point de droit entrant dans le cadre des activités de l'OIAC, à l'exclusion de toute question concernant les relations mutuelles entre l'OIAC et l'Organisation des Nations Unies ».

2. L'Organisation des Nations Unies et l'OIAC sont convenues que toute demande d'avis consultatif de la sorte doit d'abord être soumise à l'Assemblée générale, qui en décide conformément à l'Article 96 de la Charte ».

La participation à la procédure consultative à fin de promotion de l'intérêt public

Les possibilités de participation à la procédure consultative de la CIJ doivent elles aussi être prises en compte. Elles révèlent d'autres vertus de la procédure consultative permettant de promouvoir l'intérêt public. A l'heure actuelle, le déroulement de celle-ci permet qu'États et institutions internationales puissent exprimer leurs points de vue.¹⁵

Ce sont en règle générale les États membres de l'organisation internationale qui a sollicité un avis consultatif qui sont invités à présenter un exposé écrit et oral au cas où la Cour décide d'organiser une phase orale. Les États font usage de cette prérogative. Dans les avis touchant à des questions d'intérêt commun, ils l'ont fait en nombre, représentant les différentes régions du monde.

La Cour a également la possibilité de demander et de recevoir des renseignements émanant d'organisations internationales lorsque celles-ci « sont susceptibles de fournir des informations complémentaires sur les problèmes soulevés ». Ainsi, en plus de l'organisation qui a demandé un avis à la Cour, d'autres organisations ou institutions internationales qui sont compétentes dans les domaines afférents à une demande d'avis consultatif peuvent être invitées à transmettre des exposés écrits et à faire des exposés oraux devant la Cour. Le critère est celui de leur contribution à la procédure initiée par une demande d'avis. Peu importe leurs attributs, elles peuvent être des organisations universelles ou régionales, spécialisées ou non spécialisées.

Le problème de savoir ce qu'il faut entendre par le vocable d'« organisation internationale » dans le cadre d'une demande d'avis consultatif a été soulevé. La Cour a jusqu'à maintenant limité la portée de l'article 66(2) du Statut de la CIJ en interprétant la notion d'« organisation internationale » par référence aux « organisations intergouvernementales ». Il faut toutefois noter la différence de formulation entre les termes de l'article 66(2) et ceux de l'article 34(2) du Statut de la CIJ. L'article 34(2) se réfère aux « organisations internationales publiques » tandis que l'article 66(2) de ce même Statut ne contient pas, pour sa part, l'adjectif « public ». De surcroît, dans l'article 66(4) qui autorise les États et les organisations, le terme « organisation » est utilisé sans autre qualification qui le limiterait aux seules « organisations internationales ».¹⁶

¹⁵ Voir art. 66(2) du Statut de la Cour.

¹⁶ C. CHINKIN and R. MACKENZIE, “Intergovernmental Organizations as “Friends of the Court” ”, in L.BOISSON DE CHAZOURNES, C. ROMANO, R. MACKENZIE (eds), *International Organizations and International Dispute Settlement*, Ardsley, New York, Transnational Publishers, 2002, p. 139.

Si l'on devait considérer que la procédure consultative est seulement ouverte aux organisations internationales telle que définies de manière classique au sens d'organisations intergouvernementales, des difficultés peuvent surgir dans la mesure où certaines institutions internationales ne répondent pas à la définition basée sur le critère de la participation des États dans la création de l'organisation au moyen d'un instrument constitutif de nature conventionnelle.¹⁷ Elles sont pourtant dotées de certaines prérogatives qui établissent leur subjectivité internationale.

L'on peut par exemple penser aux institutions créées par les accords environnementaux multilatéraux (AEM), telles que les « Conférences des Parties » ou les « Réunions des Parties ».¹⁸ Elles ont pu être assimilées à des organisations internationales alors que ce statut ne leur était pas conféré par les parties à l'AEM.¹⁹ Il y a également des cas de coopération institutionnelle dans lesquels des organisations internationales, des États ainsi que des organisations non gouvernementales travaillent en partenariat comme l'illustre l'Alliance Mondiale pour les vaccins et l'immunisation (GAVI). Que dire du Comité International de la Croix-Rouge (CICR) dont le statut au sein de l'ordre international en fait un sujet de droit international ? Est-ce que l'ouverture de la procédure consultative ne devrait pas être renforcée de telle sorte à assurer la participation de toutes ces institutions internationales lorsqu'elles peuvent contribuer à une procédure de demande d'avis dont est saisie la Cour ?

S'agissant des organisations non gouvernementales (ONG), hormis le cas de l'avis consultatif sur le *Sud-Ouest Africain*,²⁰ la Cour et son Greffier ont clairement considéré que le droit de fournir des informations dans le cadre des procédures consultatives²¹ - et contentieuses – en vertu des articles 34 ou 66 du Statut de la CIJ est limité aux seules organisations intergouvernementales. La seule possibilité pour que les communications d'ONG ou d'autres

¹⁷ Sur les problèmes contemporains relatifs à la définition d'une organisation internationale, voir *Premier Rapport sur la responsabilité des organisations internationales* par Giorgio GAJA, Rapporteur Spécial. Doc.A/CN.4/532, par. 12-34.

¹⁸ R.R. CHURCHILL and G. ULFSTEIN, “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law”, (2000) 94 *American Journal of International Law*, p. 623.

¹⁹ Voir Mémorandum du 23 août 1994 adressé au Secrétaire Exécutif par M. Hans Corell, Secrétaire général adjoint aux Affaires juridiques, Conseiller juridique, A/AC.237/74, 1994.

²⁰ CIJ, *Statut international du Sud-Ouest africain, avis consultatif, C.I.J. Recueil 1950*, p. 128.

²¹ Les demandes ultérieures d'organisations non gouvernementales visant à participer à la procédure consultative ont été rejetées par la Cour. Voir CIJ, *Effet de jugements du Tribunal administratif des Nations Unies accordant immunité, avis consultatif, C.I.J. Recueil 1954*, p. 47 ; voir également CIJ, *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 16.

acteurs de la société civile internationale fassent partie du dossier de l'affaire consiste à ce qu'elles soient jointes à l'exposé d'un Etat.

Dans ses Instructions de procédure datant du 30 juillet 2004, la Cour a clairement indiqué qu'autrement, « lorsqu'une organisation non gouvernementale présente, de sa propre initiative, un exposé écrit et/ou un document dans le cadre d'une procédure consultative, cet exposé et/ou ce document ne doivent pas être considérés comme faisant partie du dossier de l'affaire [...] Pareils exposés écrits et/ou documents sont traités comme des publications facilement accessibles, et les États et les organisations intergouvernementales présentant des exposés écrits ou oraux en l'affaire concernée peuvent s'y référer au même titre qu'aux publications relevant du domaine public ».²² Est-il temps de modifier cette instruction de procédure ou celle-ci suffit-elle à la prise en compte de l'opinion publique internationale, quand la question d'intérêt public demandée à la Cour suscite un très grand intérêt des acteurs de la société civile ?

3. Conclusions

En guise de conclusion, on peut se demander si la protection de l'intérêt public n'est pas intrinsèquement liée à la fonction consultative. L'ONU est ce qui se rapproche le plus d'un administrateur de l'intérêt commun de l'humanité et la Charte des Nations Unies est porteuse de valeurs communes, telles la liberté, l'égalité, la solidarité et le respect de l'environnement. La fonction consultative permet à la Cour, en tant qu'organe judiciaire principal, d'apporter sa contribution à l'Organisation et ses organes pour la promotion d'intérêts communs porteurs de ces valeurs.

Dans ce contexte, il est intéressant de rappeler la pratique des demandes d'avis consultatifs qui a précédé la création de la Cour internationale de justice. Le Conseil de la Société des Nations comprenait son rôle dans la demande d'avis consultatifs comme un moyen de promouvoir le respect de l'État de droit au profit d'un large éventail d'acteurs intéressés. L'intérêt pourrait être à nouveau porté sur ce rôle à un moment où il est nécessaire que tous les acteurs respectent les "règles du jeu juridiques", notamment s'agissant de la promotion d'intérêts communs.

²² Voir Instruction de procedure XII, disponible sur <https://www.icj-cij.org/fr/instructions-de-procedure>.

Intervention In Judicial Proceedings Concerning Compliance With Obligations *Erga Omnes Partes*

Prof. Giorgio Gaja

The entitlement of a State party to a multilateral treaty to bring a claim against another State party concerning compliance with an obligation under the treaty depends on the interests that the contracting States seek to protect through the treaty. Under certain multilateral treaties a claim concerning compliance may be brought only by a State which is specially affected by the breach. Under other treaties the interest in compliance is vested with a larger number of States parties or even with all the States parties. These are treaties from which obligations *erga omnes partes* are said to flow.

So far, the International Court of Justice has applied this definition with regard to the Convention against Torture in *Belgium v. Senegal* and to the Genocide Convention in *The Gambia v. Myanmar*. However, the same phenomenon characterizes other treaties that have been examined by the Court, for example the International Convention for the Regulation of Whaling. Also from those treaties stem obligations with regard to which there is what the Court calls a “common interest” in compliance, to the effect that any State party may bring a claim in the case of the alleged breach of such an obligation under the treaty.

While in 2001 the International Law Commission had expressed some doubts about the entitlement of a State to bring to the Court a claim reflecting a common interest in compliance (ILC Yearbook 2001, vol. II, Part Two, p. 117), the Court found no reason for distinguishing, as a matter of standing, a claim relating to international responsibility for the breach of an obligation *erga omnes partes* from an application to the Court by a specially affected State for the same purpose. In its 2022 judgment on preliminary objections in the case *The Gambia v. Myanmar*, the Court concluded that “any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, with a view to determining the alleged failure to comply with its obligations *erga omnes partes* under the Convention and to bringing that failure to an end” (para. 112).

The common interest in compliance that the States parties to the multilateral treaty have with regard to obligations *erga omnes partes* implies their interest that a breach of these obligations is correctly assessed in the judicial proceedings that another State party may have initiated

before the Court. Since a judgment rendered by the Court, even if not formally binding on third States, would lead to an authoritative pronouncement, a State that is not a party to the proceedings may wish to submit arguments to the Court before a decision is taken.

A State party to a multilateral treaty may thus seek to intervene in the proceedings. When the alleged breach concerns an obligation *erga omnes partes*, a third State that is a party to the treaty may intervene according to Article 62 and/or Article 63 of the ICJ Statute.

For an intervention to be admissible under Article 62 “an interest of a legal nature which may be affected by the decision of the case” is required. As one of the *omnes* the third State has an interest of a legal nature that would be affected by the decision of the case concerning the breach of the obligation *erga omnes*. Since the third State would have standing to make an application to the Court leading to a separate case, that State possesses a *a fortiori* an interest justifying an intervention under Article 62. While interventions generally deal with a specific and possibly accessory aspect of the principal case, there is no requirement that they should be so limited in proceedings before the Court. Within the scope of the admitted intervention the third State may then contribute, like a party to the proceedings, to the establishment of the law and the facts of the case.

According to Article 63 of the ICJ Statute, the other type of intervention applies “whenever the construction of a convention to which States other than those concerned in the case are parties is in question”. The intervener will be bound by the construction of the convention given in the judgment, and the same arguably applies to the States parties to the proceedings in their relations to the intervener. The intervener is required to make “a statement of the construction of those provisions for which it contends” (Article 82, para. 2 (c) of the Rules of Court). Nothing prevents an intervener, if it so wishes, to agree with the interpretation given by one of the parties to the proceedings. It may also address questions concerning the interpretation of the treaty that have not been raised by the parties so long as they may be relevant to the Court’s decision on interpretation. The intervener may provide evidence only in so far it is relevant to the contended construction of the treaty.

The recent surge in interventions under Article 63 of the ICJ Statute in the cases between The Gambia and Myanmar and between Ukraine and Russia may be viewed as an attempt to put pressure on the Court with regard to the questions of interpretation of the Genocide Convention

raised in the proceedings. However, these interventions appear to be explained more by a wish to show solidarity with the applicant States than by a conviction to contribute significantly to the interpretation in issue. The contribution that a State intervening under Article 63 could make is any way likely to be limited, considering the extensive arguments that the parties are expected to develop.

The incidental procedure entailed by a request to intervene under Article 63 of the ICJ Statute seems unnecessarily complicated, time-consuming and expensive. According to Article 84, para. 1, of the Rules of Court, irrespective of whether an objection has been raised by one of the parties, the Court “shall decide [...] whether an intervention under Article 63 of the Statute is admissible”. In practice, the Court takes this decision by a judgment or an order, which, in case of an objection by one of the parties to the proceedings, is rendered after hearing the parties and the State seeking to intervene. If an intervention is admitted, the intervening State is entitled to submit its observations with respect to the subject-matter of the intervention in the course of the oral proceedings (Article 86 of the Rules of Court).

This incidental procedure could be to some extent simplified. Moreover, in order to facilitate the expression of views by third States, while avoiding the disruption of the principal proceedings, the Court could introduce a mechanism for third States to submit “brief views on ‘the development of the law’”, in other words *amicus curiae* briefs. This was recently suggested by the International Law Association in its final report on procedure of international courts and tribunals. The ILA proposal intends to provide an adequate mechanism for States to express their views prior to the Court making an authoritative statement on the law. When taking a position on the applicable law a third State would cause only a limited interference with the running of the judicial proceedings.

I had made a similar proposal in my contribution to the *Festschrift Simma* in 2011 and tried in vain to persuade the Court to adopt such a mechanism when I was a member. The recent flow of requests for intervention may prompt the Court to consider offering third States what could be an attractive alternative to intervention.

**Public interest and litigation through the lens of private international law:
An ecological critique and an epistemological proposal.**

Horatia Muir Watt

We live in a world of depleting (cultural and social) diversity and limited (biological and geophysical) resources. The conventional understanding of ‘public interest litigation’ as furtherance of collective, national policy considerations (whether social, economic, environmental etc) through the courts, needs to be discarded, or superceded, to make room for the idea of a collective planetary imperative to maintain, cherish and cultivate alterity in both nature and society. No doubt, courts dealing in cross-border cases are the most likely to be able, or called upon, to take a global view of the collective needs of the earth. However, it is difficult to pin down the ‘public interest’ involved in the terms of the ‘old settlement’²³, that is, through the distinct categories of ‘public’ or ‘private’ international law. The new climatic regime calls for a rethinking of this divide, just as it mandates a revisiting of the deeper modern distinction between nature and culture of which it is one of the many avatars - along with some of the foundational concepts further nested inside modern private international law itself.

Indeed, the ways in which we perceive, *in legal terms*, the exteriority of nature (our ‘environment’; non-human entities) reflect law’s reactions towards the unfamiliarity of alien societies and cultural practices (foreign law; sub-legal norms and customs). In both cases, a distortion has taken place deep in our modern schemes of intelligibility of the world. Relegating nature to the status of object or extractable resource outside our (anthropocentric) selves is a move that is analogous on many levels (political-economic, ethical, epistemological, psycho-analytical...), to the rejection or exclusion of foreign cultural forms. In other words, behind the threat of irreversible natural disaster is radical social dislocation and loss of meaning; epistemic injustice is the companion or forerunner of environmental disaster.

This imperative to seek and protect alterity in nature and society on a planetary level has been implemented (in albeit rare cases) through recent litigation, in the wake of political-ecological resistance to both environmental devastation and cultural denial on a world scale. In this respect, legal disputes involving crucial ethical, social, political controversies have also been key to two significant, parallel contemporary moves. Both challenge the dominant legal framework of

²³ Bruno Latour, *Enquête sur les modes d'existence*, 2012.

humanity's relationship to the earth in the shadow of growing awareness of the limited scale of human time. The first is the progressive recognition, in secular or settler courts, of land rights of indigenous populations in terms that do not correspond to formal legal title²⁴. The second is the emergence of natural entities such as rivers, who claim legal standing or personhood in the courts of the global South²⁵, once again in terms untranslatable into existing modern legal structures. Both instances embody a crossing of the divide between nature (now a legal person) and culture (ancestral relation to the earth becomes legal title). These are being tracked extensively, by anthropologists and ethnographers, as well as by lawyers who (rightly) celebrate the role of courts.

These spectacular but still peripheral developments can be seen as the surfacing - at the earth's crust and in our collective consciousness - of hitherto subterranean claims for the acknowledgement of the world's 'splendid alterity'²⁶. However, while the tip of the iceberg is visible, we know that icebergs themselves are fragile and rapidly melting. The advantages of legal personhood as granted to a river may not survive the insertion of the new juridical entity into a wider system²⁷. How then to change the deeper settings of legal modernity in order to strengthen this still 'minor jurisprudence'²⁸ and reconnect with the multiple, rapidly diminishing, forms of (cultural and natural) life that inhabit our planet and on which humanity depends for its own survival? As such, what is needed is a labour of reconnection (or mending or *ligature*), unearthing forgotten subterranean or shadow terms of the law itself. Only then might litigation (whether before national or international courts) be said to be the proper or most appropriate forum for pursuing the public interest.

²⁴ See Inter-American Court of Human Rights (2001). *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the first ruling to protect the traditional occupation of lands by indigenous peoples (against a concession to log within the Community's traditional lands : see L Alvarado, "Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua," *Arizona Journal of International and Comparative Law* 24, no. 3 (Fall 2007): 609-644. This change in modern conceptions of title to (immovable) property has - in cases of "cultural objects" - also affected "moveables", so as to account in legal terms for the quasi-agency of sacred artefacts, although the movement is very slow (see on the legal saga of the Hopi masks, M. Cornu, "About Sacred Cultural Property: The Hopi Masks Case." *International Journal of Cultural Property* 20 (2013): 451-466).

²⁵ See on the rights of the Columbian River *Atrata*, S Revet, "Les droits du fleuve – Polyphonie autour du fleuve Atrato en Colombie et de ses gardiens", *Revue européenne d'analyse des sociétés politiques, Sociétés politiques comparées*, 52, September-December 2020.

²⁶ **Buffon**,

²⁷ See A. Rawson & B.Mansfield, 'Producing juridical knowledge: "Rights of Nature" or the naturalization of rights?' (2018) 1:1&2 *Environment and Planning E: Nature and Space* 99-119, at p 100.

²⁸ (Goodrich)

Below, I sketch out these two dimensions of the problem. The first is that the model of national litigation as we know it is not adapted to the radical need to move beyond the framework of the old settlement (I). The second is an investigation of the role that private international law might play, if only we unearth its shadow jurisprudence and explore its subterranean epistemologies (II).

I. Why litigation as we know it is not enough.

The cunning of modern, neoliberal legality has always been to enfold exclusion within an assertion of equality²⁹. If this ruse extends to liberal rights, then there may also be reasons to be wary of the contemporary trend to confer rights on nature³⁰. The question here then is whether the latter - in the holistic constitutional and gendered form of Mother Earth, or perhaps in the terrifying guise of Latour/Lovelock's Gaia, or as embodied in individualised trees, animals or rivers - has legal (fundamental or "human") rights in the eyes of modern legal systems, and correlative, standing in court so as to be able to invoke them.³¹ The strategy is of course to find legal grounds for instituting correlative duties to protect on the part of humanity and hard liability on those (individuals or collectives) that cause damage to the

²⁹ (Harvey)

³⁰ As Ratna Kapur suggests (*op cit*). On the idea of natural personhood or Nature as subject of rights, the available legal and philosophical literature is now very abundant. For some forerunners, see M. Serres, *Le contrat naturel* (1990), Flammarion Poche, re-ed 2020, making a plea for a new pact enacting a vital symbiosis and involving the duties of humanity towards Nature; MA Hermite. "La Nature, sujet de droit ?" *Annales. Histoire, Sciences Sociales*, vol. 66, no. 1, 2011; on the deep ecological renewal of Spinoza's relational subject, see A. Naess, *op cit*. For a very critical view of natural personhood from an indigenous, feminist perspective : V. Marshall, "Removing the veil from the 'Rights of Nature': The dichotomy between First Nations customary rights and environmental legal personhood." *Australian Feminist Law Journal* 45.2 (2019): 233-248. On the dark sides of the rights of nature, see A. Pottage, "Why Nature has no Rights", forthcoming, arguing (p.2) that "the effect of recognizing 'Nature' as a person is not to protect it from corporate globalization. On the contrary, the function of the signifier 'Nature' is at once to intensify and obfuscate the subjection of natural entities to those forces. The sense of vitality that allows the signifier to perform this function is generated by the episteme of twentieth-century fossil capital, which, ironically, turns out to be genealogically associated with the theoretical impulse that generates images of a possible posthuman Earthly legality" (and more anecdotally, pointing to the fact that Lovelock's Gaia actually originated in a study commissioned by Royal Dutch Shell). For a radical critique of rights discourse from the perspective of critical legal studies, as a form of alienation of existential feelings or aspirations that requires their transformation into a (legal) framework which participates in turn in the very consciousness that such discourse is designed to challenge, P. Gabel and D. Kennedy,, "Roll Over Beethoven", *op cit*, p.27.

³¹ On the legal standing of natural entities, the pioneer is C. Stone. "Should Trees Have Standing?—Towards Legal Rights for Natural Objects." *Southern California Law Review* 45. (1972): 450-501. For a recent and severe critique of the way in which the "rights of nature" have served, on the contrary, the cause of epistemic extractivism, see A. Pottage, "Why nature has no rights", *op cit*. Contrary to what is often claimed, conferring rights on animals and future generations is not a new idea, at least in the civilian legal tradition: see J.P. Marguénaud. "L'animal sujet de droit ou la modernité d'une vieille idée de René Demogue". RTDCiv. : *Revue trimestrielle de droit civil*, Dalloz, 2021, pp.591.

planetary commons³². In the path of recent anthropological moves to “think like a mountain”³³, several legal systems of the Global South have ventured down this path in various ways³⁴. Spectacularly, Pachamama has been given legal (constitutional) status and considered “a living being, a subject entitled to rights” in Ecuador and Bolivia³⁵. More frequently, specific rivers or lakes have been endowed with personhood³⁶. These moves accompany the slow recognition of indigenous “property rights” over land inhabited by spiritual beings³⁷.

While still rare today, these examples of ecological judicial activism bear witness to highly creative legal strategies. Indubitably, the “rights of nature” are a powerful discourse, a striking imagery with visible political-ecological effects³⁸. They have put the spotlight on the plight of various species or biosystems, underlined the links between traditional cultural practices and environmental husbandry, and signalled a space of struggle to the attention of civil society worldwide (alias the “international community”) under the new climatic regime³⁹. For instance,

³² The legal and philosophical literature on the global commons is at least as abundant as on nature’s personhood and usually goes together.

³³ See above XX

³⁴ These are countries with large indigenous populations or multi-religious communities that have nevertheless in the course of “development” and their integration in the concert of nations adopted a court system following the Western institutional model.

³⁵ See A. Escobar, “Transition Discourses and the Politics of relationality. Towards Designs for the Pluriverse”, in B. Reiter, *Constructing the Pluriverse*, op cit, 63, p.71 on *buen vivir* and the rights of nature. For an example, see Corte Constitucional Del Ecuador. Sentencia *Camaronera Reserva Cayapas*, no. 166-15-SEP- CC, 20 May 2015, pp. 9-10. Judge Wendy Molina Andrade, points to the change of paradigm under which Nature, as a living being, is considered a subject entitled to rights (...) as opposed to the classic anthropocentric conception in which Nature is considered as a mere supplier of resources.” However, the figure of Pachamama is not perceived in the same way among the different indigenous peoples present in these countries.

³⁶ See on the rights of the Colombian River *Atrata*, S Revet, “Les droits du fleuve – Polyphonie autour du fleuve Atrato en Colombie et de ses gardiens”, *Revue européenne d’analyse des sociétés politiques, Sociétés politiques comparées*, 52, September-December 2020.

³⁷ See Inter-American Court of Human Rights (2001). *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the first ruling to protect the traditional occupation of lands by indigenous peoples (against a concession to log within the Community’s traditional lands : see L Alvarado, "Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua," *Arizona Journal of International and Comparative Law* 24, no. 3 (Fall 2007): 609-644. This change in modern conceptions of title to (immovable) property has - in cases of “cultural objects” - also affected “moveables”, so as to account in legal terms for the quasi-agency of sacred artefacts, although the movement is very slow (see on the legal saga of the Hopi masks, M. Cornu, “About Sacred Cultural Property: The Hopi Masks Case.” *International Journal of Cultural Property* 20 (2013): 451-466).

³⁸ To the extent that the project has become the rights of nature project has evolved into what is described no less as ‘an intersectionalist politics of plurinational communities, interdisciplinary actors and interspecies agents, forged in centuries of dispossession and struggles for justice, and directed currently against corporate globalization and its ongoing colonization of nature’.# TJ Demos, ‘Rights of nature: the art and politics of Earth jurisprudence’ (2015). At: <https://cpb-us-e1.wpmucdn.com/sites.ucsc.edu/dist/0/196/files/2015/10/Demos-Rights-of-Nature-2015.compressed.pdf>.

³⁹ On the possible new political assemblages, D. Matthews, "From Global To Anthropocenic Assemblages: Re-Thinking Territory, Authority And Rights In The New Climatic Regime", *The Modern Law Review*, 82. 4, 2019.

conferring legal personhood on a river from which communities draw their livelihood is a means to ensure a rallying point for political resistance to the terrible destruction of biocultural diversity or the needless suffering inflicted on non-human lives. At first sight, then, conferring rights and legal standing on beings devoid of (human) agency may be the best means that modern law can provide in order to make audible the call (indeed, legally, the appeal) of the other. Furthermore, interesting precedents in the field of cultural property might seem to make transnational litigation the most propitious starting point from which to diffuse such ideas in Western legal systems. There are some (rare) instances of “cultural” entities appearing in court in conflict of laws cases and requiring their own restitution to their homeland. Thus in a case before the English courts involving the fate of a *Sivalingam* or sacred statue that had been looted from an Indian temple, the legal issue was “whether a foreign legal person, which would not be recognised as such under English law and which has an essentially inanimate content, can sue in the English courts”⁴⁰. That the court ordered the deity to be returned shows that the concept of a legal person or subject endowed with rights can be enlarged to accommodate new figures, with particularly promising elasticity in international settings that raise conflicts of laws⁴¹. And after all, if purely fictitious persons (corporations, classes, future generations) are endowed with legal agency, there does not seem to be any reason why other nonhuman entities should not. Such beings seem to be an emblematic illustration of Latour’s “quasi-subjects” in the terms of the law⁴².

However, the attribution of rights can also be a more ambivalent move, and one that requires a singular vigilance towards an epistemological pitfall analogous to the cunning of difference

⁴⁰ See *Bumper Development Corp Ltd v Commissioner of Police of the Metropolis* ([1991] 4 All ER 638.), in which the court held that the sculpture *Nataraja* belonged to the god Shiva himself as 'localised' in a stone emblem at the site of a ruined temple in India, and had to be returned. The court had to consider the legal capacity in India of a temple and/or *Sivalingam* to hold title to property and pursue an action in the UK. It found that the temple had a valid title to the *Nataraja* superior to that enjoyed by the private buyer/developer. More broadly, then, the conflict of laws hypothesis arises when an entity endowed with legal personhood, agency or standing in its country of origin claims to act before a Western court that does not recognize these forms of subjectivities in its own domestic system. The difficulty is not new: historically it arose with the rise of the corporate form and continues today in the case of class actions, groups acting in the name of future generations etc. From the perspective of a conflict of laws analysis, there is a delicate distribution to operate between the law of the forum governing the procedural aspects of legal standing (who or what is qualified to act? say, corporations) and the law governing the legal personhood or constitution of the agent (that “fills up” the legal categories allowed by the forum, say, by determining what a corporation is under its own rules). In *Bumper*, the court referred to the title of the temple under Hindu law -judging too that the state of Tamil Nadu would have title to the *Nataraja* under the provisions of Indian law, including the Indian Treasure Trove Act of 1878). This overture contrasts however with many cases in which a similar move is stifled by devices of uniformisation: on the Hopi mask case, for instance, see above XXX

⁴¹ Or conflicts of cosmologies: see S. Brachotte, *op cit.*

⁴² *Enquête* p.357 et s. Quasi-subjects and quasi-objects are (non) categories that show up the artificiality of modernity's distinction between subject and object.

described above⁴³. First of all, rights beget counter rights⁴⁴. Then, the broader danger is that the repertoire of rights exposes such advances to a reappropriation by the rationalities of neoliberal legality. This is also valid for related (and increasingly popular) legal concepts such as the idea of “stewardship” or “trust” in respect of natural entities⁴⁵: they all come with a more or less perceptible risk of misrecognition, depoliticization and abstraction⁴⁶. There is hardly any need to recall (as seen above) that social corporate responsibility, now including an environmental component, has actually done little to save the planet through “green” trade, investment and finance (or “ESG” standards). What Fraser and Jaeggi have termed a “tragedy-cum-farce” points to the reasons for which it is certainly more interesting to understand the constitutional status of Pachamama as a mandatory blind against neoliberalism, rather than as the institution of yet a new bearer of rights⁴⁷.

⁴³ See V. Marshall, *op cit.* characterising natural personhood as a “veil” in respect of indigenous epistemologies. See too on the operation of the fiction of legal personhood as a means not just of masking (nature) but of hard-wiring the underlying reality of life beneath the mask, A. Pottage, “Why Nature Has No Rights”, *op cit.* As seen above, the emergence of human rights (under diverse names and in various geopolitical settings) as a contemporary avatar of natural law - the “last utopia” (S. Moyn, *op cit.*), to which we cling in the absence of alternative ideological (political, religious) horizons - has given rise to the controversial claim that they are actually “part of the problem” (David Kennedy, *op cit.*). This claim acknowledges that it is difficult to be against human rights as such, just as it is hard to be against equality, justice, autonomy, freedom or other liberal ideals embodied in the rule of law. These values played an important emancipatory role in the history of Western modernity at various points, sparking revolutionary change. Undoubtedly, many conquests in terms of the place of minorities in society, or the visibility of marginal groups within the formal world order, are indebted to litigation strategies or activist movements that appeal in one way or the other to human rights. Arguably, these still constitute the most disruptive common repertoire currently in effective use within legal systems with which to challenge existing structures and institutions. They continue to give legal form - that is, to help formulate - aspirations for the pursuit of social justice. However, as H. Barbuzon points out (*op cit.*), rights (their content, binding force, scope, etc) remain “contested territory” and may actively distract from any more radical critique of the modes of operation of the neoliberal economy and its associated schemes of thought. On the one hand, the multiplication of autonomous individuals (including emancipated slaves, colonised populations, women) as economic actors is a factor of capitalist expansion. On the other, contrary to what is widely believed, rights do not represent a radical critique of existing structural injustice, but are enrolled by neoliberal legality in order to exclude its further destabilisation.

⁴⁴ Notoriously, in the form of intellectual property, for instance; see, with immediate ecological implications, *Monsanto Canada Inc v Schmeiser* [2004] 1 S.C.R. 902, 2004 SCC 34 a Supreme Court of Canada case on patent rights for biotechnology. Monsanto (successfully) sued a farmer for patent infringement (for the “use” of patented genetically modified plant cells), that the latter claimed to have strayed accidentally into his fields.

⁴⁵ Although these are of course legal concepts, they are usually used in a managerial setting, often associated with (the intrinsically laudable) call for “sustainable development”, to mean making humanity or different nation-states or communities trustees or stewards of nature, as a way of overcoming the lack of legal agency of the latter. See for an overview, J. Bennett *et al* ‘Environmental Stewardship: A Conceptual Review and Analytical Framework’, *Environmental Management* volume 61, pages 597–614 (2018).

⁴⁶ Or indeed dis-placement, in Hans Lindahl’s terms: see on the example of “penguins’ rights, see his “Place-Holding the Future”, *op cit.*: “It is tempting to assume that justice is done to the penguins’ claim when they are granted a place and time of their own within the Australian legal order. But would these really be their own place and time? Have ‘we’ not already taken possession of the penguins by recognizing that they “belong to ‘us’”? Has not a certain assimilation already come about—an unjust appropriation of place—when referring to the *Manly* (the name of a place in Australia) colony of penguins?”.

⁴⁷ Her constitutional status ensures the primacy of the protection of the natural commons over concessions, sales and other moves by the state in favour of private investment that would destroy the forests and pollute the rivers. The

As there are no (as yet) concrete examples of transnational moves by natural entities to gain standing and claim rights in foreign domestic courts, two analogies may be helpful. A first example concerns the space conceded to alien cosmologies through rights conferred on indigenous groups in international law or within (multicultural) Western legal systems. Such collective cultural rights, granted as compensatory measures to disadvantaged groups, have undoubtedly led (albeit unevenly) to an acknowledgement within the international community that indigenous people were exploited, discriminated against and assimilated during the colonial era, and in some cases, have given rise to state-funded reparations and governmental apologies for past injustices. This means that the emancipation of indigenous people is framed as a moral project. However, the problem of framing emancipation as a moral issue is that the underlying moral philosophy is “too thin”. This is a point made by Fraser and Jaeggi in their “conversation” on the definition of critical theory and what distinguishes it from moral philosophy: if moral wrongs are merely accidental, then it makes sense to pursue reforms to correct them. But if they are systemic, that is, arising from the deep structures of society, structural change is needed (or an epistemology “beyond the fishbowl”); morality merely “blackboxes the processes⁴⁸. Here, it may well be that very recent eruptions of alternative grammars (new utopias or more radical forms of critique) such as the political ecology, various radical eco-feminisms⁴⁹, or the recentering of focus on bare, or phenomenological, life (that “matters”)⁵⁰, announces new lawfare - a new boundary struggle - at the structural limits of neoliberal legality. In that case, the creation of new non human subjectivities would then reinforce this move⁵¹.

need for such a move is amply illustrated within the ambit of private international law by the *Chevron* saga in Ecuador (above XXX).

⁴⁸ There is of course a long and important tradition of criticism of the morality of rights, of which the *locus classicus* in Marx's 'On the Jewish Question' ([1843] 1975). As Nancy Fraser points out, in N. Fraser/R. Jaeggi, *op cit*, p122, beyond these moral dilemmas, critical theory must problematize the very processes (structural mechanisms and institutional arrangements) that produce them. It must eschew the “black box” approach that underpins the freestanding moral critique preferred by egalitarian liberalism. On a similar rejection of the “blackboxing” (by standard sociology) of the processes that lead to the outcomes observed, see B. Latour, *Reassembling the Social. An introduction to actor-network-theory*, OUP 2005; comp too in law, K. McGee, “On Devices and Logics of Legal Sense: Towards Socio-technical Analysis” in McGee (ed) *Latour and the Passage of Law*, *op cit*, p.61.

⁴⁹ The term ecofeminism was coined by French feminist Françoise d'Eaubonne in 1974 (see C. Goldblum, *Françoise d'Eaubonne & l'écofeminisme*, ed. Passager clandestin, 2019). Today, its most prominent representative is Donna Haraway, on whose contribution in the context of the return of the (gendered) body in ecological politics, see below XXX.

⁵⁰ “Black lives matter”.

⁵¹ They tend to be the repertoires of social movements or critical scholarship, rather than aspirations to obtain enforceable rights in courts Black lives matter Habeas Corpus in respect of racial violence or the omission to rescue endangered migrants

Conversely, it is also conceivable that instead of serving as instruments of emancipation, indigenous rights can coexist in a perfectly symbiotic relationship with the rationalities of the neoliberal order⁵². On the one hand, such rights are shaped by the latter, on the other, they serve to perpetuate its influence. Thus they are often seen from within indigenous communities as symbiotic with economic moves and expectations of authenticity that are as likely as not to reproduce familiar forms of coloniality along with their underlying imaginaries and projections⁵³. As observed by Kristin Ciupa in her critique of the “promise of rights” in this context, “rights bearers are assimilated into the repertoire of the neoliberal order, and the latter in turn tends to produce new subjectivities that are entirely compatible with the latter, in the sense that they will be incentivized to accept the channels and tools that it makes available”⁵⁴. This will do nothing to improve the structural conditions of indigenous people, blackboxed in such an analysis). In a similar way, Arturo Escobar warns of the colonisation of indigenous life forms through the apparently favourable concept of *buen vivir*, as a ruse of development discourse⁵⁵. To go back to the idiom of jurisdictional jurisprudence, the latter maintains the “peculiar” status of native peoples in a state of exception, stopping far short of the recognition of sovereignty to determine a lifeworld⁵⁶.

⁵² The issue of liberal “autonomy” will be picked up further below. However, here, it is apt to recall that “The mansion of modern freedoms stands on an ever-expanding base of fossil-fuel use” (D. Chakrabarty, “The Climate of History”, *op cit*) of which the most essential was the right to property (A. Pottage, “Why Nature Has No Rights”, *op cit.*, adding that even before the advent of the steam engine, possessive individualism externalized its material engagements with the Earth by pretending that the value of land was produced by the rational industry of European men rather than by the plantation economy of colonial period and by the slaves and resources that were treated as ‘cheap nature’ within that racialized economy).

⁵³ On legal orientalisation, see above XX. A further critique is that international indigenous rights instruments circumscribe the category of indigeneity, incorporating only certain forms of indigeneity that are manageable within the dominant political economy. See C. Kuipa, ‘The Promise of Rights: International Indigenous Rights in the Neoliberal Era’, in H. Brabazon, *op cit*, 140-166. These rights come with the risk of essentialization, that is, of expectation of authenticity and performance. See too, in an effort to conceptualise differences in the ways in which indigenous claims (to cultural property) are shaped and legitimated, V. Tr. Hafstein, M. Skrydstrup, “Heritage vs. property. Contrasting regimes and rationalities in the patrimonial field”, *The Routledge Companion to Cultural Property 1st ed*, 2017, Routledge, p. 38-53 :the argument is that distinct technologies of governmentality (property, heritage) produce distinct set of claims.

⁵⁴ C. Kuipa, *op cit*. The term ‘neoliberal multiculturalism’ to refer to the complementary role that cultural rights play in integrating culturally divergent groups into the neoliberal system (Ch. Hale, (2005). “Neoliberal Multiculturalism: The Remaking of Cultural Rights and Racial Dominance in Central America”. *Political and Legal Anthropology Review*. 10-28.

⁵⁵ *Op cit.*

⁵⁶ M. Rifkin, (2009). Indigenizing Agamben: Rethinking Sovereignty in Light of the "Peculiar" Status of Native Peoples. *Cultural Critique*. 73. 88-124. 10.1353/cul.0.0049. We can add here Alain Pottage’s critique (“Why Nature Has No Rights”, *op cit*) of the rights of nature movement ‘an epistemic community deeply imbricated with juridical authority’ and fashioned or composed in such a way as to naturalize a Euro-American vision of nature as a community of interdependent entities. And this vision is hypothesized to a representation of indigenous peoples as the guardians of this community, a vision that retrenches a production of otherness that was one of the prime effects of colonialism, and which thereby sustains the ideology of property that the rights of nature movement purports to overcome. The charge is that ‘nature becomes something identifiably “natural” by becoming more like colonial conceptions of the human, whose existence can only be legitimized by legal personhood’. The citations in the passage above are to A.

A second, glaring example also intimately related to political ecology is that of animal rights. Abuse of animal life on a massive scale (through intensive farming, slaughterhouses, pharmaceutical and other scientific experiments...) has undoubtedly given rise to various intellectual (anti-species) protest movements, new dietary trends in the West (in its richer societies), and more diffuse (often schizophrenic) empathy. The latter does not exclude either the lures of consumerism, or the ruses of financialization (as seen above). In his account of rights and deep ecology, Tim Benton analyses the ruse of assimilation in the “deontological approach’ that extends the basic principle of equality of consideration as applied to the rest of humanity, to members of other species⁵⁷. As seen above in respect of other human groups, condemning discrimination (or multiplying rights-holders) is unlikely to be radical enough to dislodge neoliberal rationalities, that can quite easily conciliate “thin” moral concerns with reduce other forms of life to the status of commodities (amusements, or disposable resources). This brings us back, then to a more radical critique of a rights-based approach to the protection of non-human nature and the issue of anomic desire⁵⁸. As Tim Benton writes, the question is why we appeal to the (modern invention of) rights in the first place. Rights, as he points out, are only needed to protect individuals from their neighbours because something has gone deeply wrong in society. Here, in other words, is the “Darwinian u-turn” described by Latour⁵⁹. Competitive, egoistic individuals, acting under conditions of scarcity, are impelled to invade one another's basic interests unless restrained by a firmly enforced framework of rights. Warped ethics, notes Benton (to which we might add, warped accounting) undermine all the traditional forms of normative regulation of desire, sweeping away all local or status-bound notions of sufficiency and appropriateness in consumption. Such anomic desire knows no limits. Competitive performance is the incessant demand at work, whilst status seeking and the

Rawson & B. Mansfield, ‘Producing juridical knowledge: “Rights of Nature” or the naturalization of rights?’ (2018) 1:1&2 *Environment and Planning E: Nature and Space* 99-119, at p 100.

⁵⁷ As Tim Benton observed in 1998 (“Rights and justice on a shared planet: More rights or new relations?” *Theoretical Criminology*, 2(2), 149–175 p.158), “it is rather taken for granted by the advocates of animal rights that the key to giving practical protection to the interests of non-human animals is to get them recognized as rights-holders. That this assumption seems uncontroversial is a testimony to the current moral authority of the discourse of human rights, from which the argument for animal rights draws”. Under this (thin moral/deontological) approach, our attitudes to members of other species are a form of prejudice no less objectionable than prejudice about a person's race or sex.

⁵⁸ The radical ethical case also draws attention to the difficulty - familiar to law, as seen above XXX - that the effects we see can rarely if ever be assigned to any particular individual agency, so they stand outside the scope of rights as they are generally understood in the liberal tradition.

⁵⁹ Far from being “natural” or inherent in the human condition, rights (as shown by Marx in *The Jewish Question*) are the consequences of a historically specific type of civilization—characterised by capitalism and the nuclear family (comp. E. Balibar, *Des Universels, op cit.*).

competitive pursuit of 'positional goods' (or social capital) increasingly shapes and constrains consumption and the use of leisure time. Eric Santner's description of the somatic effects on society of the neoliberal political economy - the incessant agitation of busibodies - serves once again as a cautionary tale.

A more radical turn - beyond the (epistemological) "fishbowl" of lists of liberal rights - is required, then, if we are to respond adequately, in legal form, to the appeal of the other - including the diminishing voices of the birds, animals, insects, or micro-organisms that sustain the inhabitability of the earth. Such calls, as Bruno Latour observes, are appeals "to save ourselves"; they are audible on ethical frequencies emitted by everything (every being and every thing) that surrounds us, depends on us and upon which we depend in turn⁶⁰. These emissions are increasingly acute. We need, in other words, an ethos in the terms of the law that draws from the Maussian analysis of the gift that entangles, a legal version of the entwinements and bonds depicted above, in ways that counter the great economisation driven by neoliberal legality. But what would the move from "thin" ethics to "deep" ecology look like, in legal form? How might law enact the primacy of responsibility over autonomy; the foundational nature of gift, not market, and hence the exclusion of all calculation; a debt that can never be discharged (*n'est jamais quitte*); a non-competitive hospitable relationship to the other: the deactivation of all the centrisms (ethno, anthropo, ego) evoked above? The contention here is that the shadow avatar of the conflict of laws has the potential, once more, to respond in legal terms to the appeal of alterity. The key lies in the mirror effect between the welcome it extends to foreign law and the Levinassian/Derridean imperative to make way for the "law of the other".

II. What private international law can contribute: an epistemological exploration

The need to think beyond (*par-delà*) the nature/culture distinction (Descola, 2005) is now an urgent call in anthropology. However, this foundational divide itself is a 'juridical artefact'⁶¹, meaning that it is both traceable to, and (at least to some extent) remediable by, the operation of law. In other words, in our endeavours to transition towards 'the new climatic regime' and the transformation of modern time and space, law and its categories are a (large) part of 'the

⁶⁰ *Enquête*, p. 454.

⁶¹ (Pottage, 2009)

'trouble' we have to stay, or reckon, with⁶². In this respect, there is a serious under-estimation (by lawyers and non-lawyers alike) of the function of modern legality in the creation, emergence and reinforcement of the nature/culture divide. Such underestimation is the result of an insufficient interdisciplinary dialogue as to the roots of the problem of reduced complexity in our 'world of difference'⁶³.

In terms of the inklings of a response from the perspective of private international law, we need to investigate the epistemological axes of the discipline. Beyond the usual textbook accounts of the methods, categories and values that surface throughout its (long) history, what is required is to uncover the stakes underlying a multisecular struggle between two broad methodological schemes. Each of these provides a set of lenses and tools by means of which the law constructs and organises its own interactions with exogenous forms of legality. These juridical interactions give rise to what might be described as opposing 'meta-theories of linkages' or reconnections (or *rattachements*).

The latter are potentially tight or loose, transformative or coordinatory, hierarchical or lateral, reflexive or static, defensive or open, compromissive or coalitionist. They involve a vast array of technical modes such as translation, transformation, substitution or hybridification, and can also include highly sophisticated metaphorical forms of cross-dressing, ventriloquism, *bricolage* or *métissage*. Moreover, the inner workings of these schemes deploy extraordinary fictions that modify the location of reality in time and space and create mysterious alchemies that transform policies and 'affects' into science⁶⁴. Deep down beneath the technicalities are profound, conflicting belief-systems as to whether we inhabit one normative world or a pluriverse, whether humanity is ontologically separate from or superior to its natural surroundings, and whether what we perceive (and often fear) as other is outside or indeed inside ourselves.

More visibly, such oppositions engage evolving (and still largely unconscious) premises about ecology and culture, law and politics, persons and things, and more. These dichotomies command the structure of our knowledge of reality and all have powerful implications in respect of the ways in which alterity - including the splendour of nature's otherness - finds its place

⁶² (Haraway, 2016)

⁶³ (Jasanoff, 2004)

⁶⁴ (Latour 2012)

within our *nomos* or legal consciousness. The continual combat within the law as to how political communities should relate to the foreign, between deference and rejection, inclusion and exclusion, universalism and pluralism, echoes far wider frays between order and disorder, harmony and chaos, of which the terms hark back to the premodern, Roman origins of Western modernity and its specific, idiosyncratic, legal tradition. That the latter was largely formative, or at least co-productive, of modern scientific and political thought (as seen above), and thereby steeped in implications for the ecology, invites exploration of the deeper underpinnings of the various legal methods that compete for supremacy in framing our relationship to difference.

Overall, then, the current conceptual economy of the conflict of laws comprises two broad modes of reasoning (“methods”) in respect of foreign law. This duality can be correlated to two underlying models of legality: a modern, or monist, scheme, embodied during the nineteenth century, that seeks closure, order, decisiveness, objectivity, and predictability from a purportedly neutral (or archimedean) standpoint; and a further pluralist version, geared to diplomatic negotiation, reflexivity, the perpetual oscillation between poles and the refusal of separation between the observer and the observed, or between application and interpretation. The argument proposed here is that some elements of the second model, eclipsed by the first, may be envisaged as a residual jurisprudence with a premodern pedigree. As such, it resurfaces continually in the chinks of its conventional, more recent and widespread other. This methodological binary is linked in turn to a specific foundational “story of origin” or genealogy, itself the object of borrowings, variations, twists and entwinements between different legal traditions. In other words, the discipline lends itself particularly well to a comparative legal study of the production of knowledge, and provides food for further thought in respect of law’s epistemology more generally.

In the genealogy of Western thought, epistemology emerged as the study of principles that govern the production of scientific knowledge, as understood in the context of modernity. To the extent that its very terms are shaped by a certain vision or cosmology, modern epistemology (an understanding of facts as being distinct from values) is currently under critical fire from many quarters: critique of epistemological neutrality has spread from the study of the social and to the “earth sciences”. While law has remained very much aloof from these movements, multiple strands of critical ecological, historical, anthropological, feminist, queer and decolonial thinking invite us, elsewhere, to reflect on the schemes of intelligibility that have dominated our world, with devastating effects on our relationship with humanity and the planet.

Alternative cosmological schemes challenge the modes of veridiction of modern (social and hard) sciences, that is, the “abstract-universals” and archimedean standpoint through which we accede to, and make sense, of reality. At their core, there is a powerful call to revisit our understandings not only of objectivity and perspective, but also of identity and difference, outside and inside, self and other. Despite the general indifference of legal scholarship towards these alternative (non-modern or postmodern) epistemological strands, many have significant implications for legal thought, notably insofar as they question the separation of the principles that govern knowledge of reality of facts (epistemology) and their interpretation (hermeneutics).

As far as private international law is concerned, the question of alterity (the foreign, the unfamiliar, the outside) along with all the individual and collective relations or attitudes that are expressed in respect of it in legal terms, is evidently central. Moreover, conventionally - and still today, at least in the European continental tradition - , the discipline makes a particularly strong epistemological claim: it puts scientific neutrality at its methodological core; a sort of abstract-universal *par excellence*. Formalised in the nineteenth century concomitantly with its separation from the law of nations, its classical legal pedigree explain its quasi-existential investment in the smooth uniformity of the legal order and its affinities today within neoliberal governance discourse. Notwithstanding the power of this convention, however, alternative, non-modern epistemologies still resonate (faintly) within the discipline, echoing pluralistic or mosaic-like patterns of legal thinking that developed in the course of its premodern history in the multipolarity of mediaeval Europe. While these were repressed progressively by the rationalist project of modern legal thought, they remained in the form of subterranean residue under the surface of the latter, inscribed within what we might think of as its underground or hidden version.

In conclusion, then, if we are to ensure that the litigation furthers the public planetary interest, we need to investigate modern law’s epistemological foundations more broadly, and the ways in which the latter have shaped our relation to otherness.