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EXPLORING THE LEGAL NATURE OF THE STATES' OBLIGATION TO PROVIDE INFORMATION TO THE PUBLIC IN THE CASE OF AN IMMINENT THREAT TO THE ENVIRONMENT: MORE THAN THE B-SIDE OF THE INDIVIDUAL RIGHT TO ACCESS?*

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1. Introduction: The Human Rights-Based Approach to the International Protection of the Environment and the Relevant Legal Paradigms

1.1. The Healthy Environment as a Precondition for the Enjoyment of Basic Human Rights

The relationship between environmental protection and human rights has come along with the development of international environmental law since the UN Stockholm Conference of 1972, even though, at first, the international debate focused basically on the

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** The present paper has been presented to the second Contemporary Challenges of International Environmental Law Conference, held in Ljubljana on June 5-7, 2014, and published in the Conference proceedings, V. SANCIN, M. KOVIČ DINE (eds.), *International Environmental Law: Contemporary Concerns and Challenges in 2014*, Ljubljana, 2014, pp. 173-186.

inclusion of the environmental dimension within the scope of some civil and social fundamental rights. As it is widely known, Principle 1 of the Stockholm Declaration, which declares that «[m]an has a fundamental right of freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations [...]», does not explicitly recognise any individual right to live in a clean and healthy environment,¹ but regards it as an essential prerequisite for the enjoyment of some basic human rights. In this perspective, the quality of the environment was rightly included among the factors which contribute to the achievement of «a standard of living adequate for [human] health and well-being», according to Principle 25 of the Universal Declaration of Human Rights and to Article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights^{2,3}.

The legal paradigm characterizing the human rights-oriented approach to the international protection of the environment has not changed for many years, due both to the resistance of the developed Countries to the recognition of a substantive «human right to a healthy environment», and to the complexity to define its contents and limits and make it concretely justiciable.⁴ It has been argued, too, that such a recognition would fail to constitute a useful legal instrument to *prevent* environmental harms, enabling individuals and

¹ L. B. SOHN, *The Stockholm Declaration on the Human Environment*, in *Harv. Int. Law. Jour.*, 1973, pp. 423-515, argued that, for many aspects, the final text of the Declaration failed to improve the earlier versions (see pp. 451-455). This because «[d]irect references to the right to life itself and the right to a safe, healthy and wholesome environment have been omitted, though the former is at least mentioned in the first paragraph of the Preamble». In the Author's opinion, «[i]t would have been an important step forward if the right to an adequate environment were put in the forefront of the statement of principles, thus removing the lingering doubts about its existence» (p. 455).

² Also in the General Comment No. 14 (2000) of 11 August 2000, UN Doc E/C.12/2000/4, concerning the right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), the UN CESCR explains that «the reference in Article 12.1 of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care. On the contrary, the drafting history and the express wording of Article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment» (paragraph 4).

³ In its final Report 'Human Rights and the Environment' (UN Doc E/CN.4/Sub.2/1994/9 of 6 July 1994), the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities Ms. Fatma Zohra Ksentini stressed that the most important international human rights instruments «should be implemented from an ecological standpoint» (paragraph 39). More recently, two studies promoted by the Office of the High Commissioner on Human Rights, namely the 'Report of the OHCHR on the Relationship Between Climate Change and Human Rights' (UN Doc A/HRC/10/61 of 15 January 2009) and the 'Analytical Study on the Relationship Between Human Rights and the Environment' (UN Doc A/HRC/19/34 of 16 December 2011), while emphasizing «the intrinsic link between the environment and the realization of a range of human rights» (UN Doc A/HRC/10/61, paragraph 18), failed «to set out any new vision» for its development. See A. BOYLE, *Human Rights and the Environment: Where Next?*, 23(3), *Eur. Jour. Int. Law*, 613, 2012, p. 617.

⁴ According to G. HANDL, *Human Rights and Protection of the Environment: a Mildly “Revisionist” View*, in AA. CANÇADO TRINDADE (ed.), *Human Rights and Environmental Protection*, San José, 1992, pp. 117-142, the non-justiciable character of the right to a healthy environment would not constitute an obstacle for its recognition, since «[a]fter all, in international law in general, and human rights law in particular, formal justiciability cannot be equated with “international enforceability” or, for that matter, with international normativity» (p. 130). That is certainly true for human rights of economical, social and cultural nature. Nevertheless, the impossibility to claim a right because of its inherent indeterminacy is likely to affect its enforceability, too.

groups only to ask for a compensation for the damages suffered, without granting any actual advantage to the environment.⁵ In short, it is fully sharable the prevailing opinion according to which «human rights law does not protect the environment *per se*».⁶

1.2. *The Rights of Nature and the Emerging Principles of «Environmental Democracy»*

The «ecocentric» approach followed in the World Charter for Nature of 1982 tried to innovate the aforementioned paradigm.⁷ Respect to the Stockholm Declaration conception of «human environment», the WCN had the merit to open a new perspective on environmental protection, based on the idea that mankind is «a part of nature», so that all natural areas and habitats, as well as every form of life, should be preserved «regardless of its worth to man». However, it left unsolved the problem of the representation of interests – included the legal standing – of natural sites and environmental goods in judicial proceedings.

Furthermore, in the same WCN it can be read that «[a]ll persons [...] shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation» (Principle 23). This kind of formulation anticipated the recognition of a new «procedural approach» to environmental protection, according to which both individuals and groups should be increasingly involved in every decision affecting the exploitation of the environment. Even though the right to access to (environmental) information was not formally included in the WCN,⁸ it goes without saying that public's information constitutes an essential requirement to promote the participation and access to justice in the field of the environment.⁹ Thus, Principle 15 affirms that «[k]nowledge of nature shall be broadly disseminated by all possible means, particularly by ecological education as an integral part of general education».

The consideration of individuals as «environmental stakeholders» led to broaden the number of the subjects interested in the implementation of legal instruments concerning the conservation of the environment: apart from national and local institutions and international organizations, also individuals and NGOs started to be involved in sharing information, as well as in participating in decision-making processes on environmental management. This contributed both to increase the democratic participation of the public in the decisions affecting the environment and to strengthen the collective dimension of the human right to a healthy and sound environment, on the assumption that the more

⁵ M. CASTELLANETA, *L'individuo e la protezione dell'ambiente nel diritto internazionale*, in *Riv. dir. int.*, 2000, pp. 913-964, at 921.

⁶ A. BOYLE, *Human Rights and the Environment: Where Next?*, *cit.*, at 615.

⁷ World Charter for Nature, UN Doc A/RES/37/7 of October 28, 1982.

⁸ The only reference included in the WCN is that of Principle 15, which states that «[k]nowledge of nature shall be broadly disseminated by all possible means, particularly by ecological education as an integral part of general education».

⁹ The importance of environmental information, both «for changing individual environmental attitudes» and «to develop a solid – natural science – basis for environmental policies and reform», was highlighted by A. P. J. MOL, *Environmental Reform in the Information Age. The Contours of Informational Governance*, Cambridge, 2008, p. 8. In the latter perspective, «[e]nvironmental governance is [...] seen as solidly based on expert knowledge and information, strongly in line with the conventional rationalist policy theories and pluralist state theories».

people are informed and acknowledged, the more they are able to claim for the protection of their goods and social rights.¹⁰

1.3. *From the «Freedom to Access» to the «Right to Access» to Environmental Information*

In 1990, the EEC directive no. 90/313 imposed to member States «to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available» (Article 1). Although it did not establish any full individual right to access, it created a specific obligation for member States, in order to make environmental information available by the public.¹¹ Two years later, the famous Principle 10 of the Rio Declaration on Environment and Development put definitely together the individual rights to access to information, to participation in decision-making processes and to access to judicial and administrative proceedings, launching the era of environmental human rights.¹²

At the same time, States began to introduce individual rights related to environment within their own legislation, even at a constitutional level.¹³ The great majority of the constitutions proclaimed or revised during the last quarter of the XX century formally embedded such rights among the fundamental rights of the individuals. Alternatively, the original constitutional norms have been interpreted in the light of this emerging rights. In Italy, the process of «humanization» of environmental legislation has led the constitutional Court to infer the State responsibility to protect the environment – which has not been included in the original text of the Constitution – from that of ensuring the safeguard of

¹⁰ In its judgement on the *Pulp Mills on the River Uruguay Case (Argentina v Uruguay)*, Merits, ICJ Rep 1 (2010) p. 83, the ICJ stated that the procedure of environmental impact assessment (EIA) «has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource». Notwithstanding, it inconsistently refused to consider that, within the scope of such a procedure, the obligation of public consultation, provided by various agreements, has become a general customary rule.

¹¹ Article 3, paragraph 1 of the directive established that «[...] Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest». As is known, the directive 90/313 was later replaced by the directive 2003/4/EC, which implemented the regulations of the Aarhus Convention in the EC legislation.

¹² However, according to D. A. WIRTH, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa*, in *Georgia Law Rev.*, 1995, pp. 599-653, at 614, the Rio Declaration failed to push further the human rights-oriented approach to environmental protection: «[a]lthough Principle 1 of the Rio Declaration obliquely addresses a substantive standard requiring a minimally acceptable environment, that provision stops well short of enunciating such a right [to a healthy environment]. Instead, the Rio Declaration as a whole rejects what can be regarded as a balance in the Stockholm Declaration between a nascent right to environment on the one hand and attention to development imperatives on the other [...]. The first sentence of Rio Principle 1, stating that “[h]uman beings are at the centre of concerns for sustainable development,” implies that people's needs drive environmental policies, such as the preservation of natural resources».

¹³ The *Analytical Study on the Relationship Between Human Rights and the Environment* (see note 3), at paragraph 30, reported that «[i]n 2010, the number of constitutions including explicit references to environmental rights and/or responsibilities had increased to 140, meaning that more than 70 per cent of the world's national constitutions include such provisions».

the human health and the natural landscape.¹⁴ Likewise, the recognition of the right to access to environmental information as a full right came first from the administrative case-law and then was codified into national law. Before that, it had been treated as a mere «legitimate interest», that is to say that its legal protection depended by a discretionary decision of the public authorities, which could ascertain whether such a private interest could prevail on the general interest of the State.¹⁵

Finally, it can be pointed out that the development of the «environmental democracy» contributed to significantly increase the amount of subjects who are likely to be entitled to claim «environmental rights»: individuals and organized groups (such as associations and NGOs), but also local communities, minorities and indigenous peoples¹⁶. The main legal outcome related to this development is the current consideration of the right to environment as ultimately «a procedural right».¹⁷ Such a claim is based on the assumption that «procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration», so that «any attempt to codify the law on human rights and the environment would necessarily have to take this development into account».¹⁸

In short, it could be argued that the procedural dimension of the right to a healthy environment overlapped with the original scope of the human rights-based approach to the international protection of the environment, being the only way to enable individuals and groups to participate in relevant decision-making processes and to access to judicial proceedings, considered that the recognition of the sustainable development as a general principle of international law had only a limited influence on the promotion of environmental rights.¹⁹ Accordingly, the legal paradigm which currently characterizes the relationship between human rights and environment has shifted from considering the healthy environment as a mere prerequisite for the enjoyment of basic human rights to being the final objective of the recognition of some instrumental guarantees.

¹⁴ See the famous judgments no. 210/1987 and no. 641/1987 of the Italian Constitutional Court, in which the environment is described as an «immaterial unitary good» of «a primary and absolute worth», whose legal nature can be inferred from the fact that it is recognised and protected by legal provisions.

¹⁵ The relevant case-law of the Italian Council of State is very accurate. In particular, in the judgement no. 5795 of 7 September 2004 the administrative Court stated that, within the Italian legislation, the right to access to environmental information does not constitute a legal position which plays an instrumental role respect to the right to a healthy environment. Unlike the general regulation of the right to access to documents, indeed, it does not presume any underlying interest by the applicant, so that everyone is fully entitled to ask for information. Conversely, any subjective limitation to its enjoyment must be considered illegitimate.

¹⁶ As known, the United Nations Declaration on the Rights of Indigenous Peoples (adopted by the UN General Assembly on September 13, 2007, UN Doc A/RES/61/295) recognized that indigenous peoples «shall not be forcibly removed from their lands or territories», nor the relocation of such lands shall take place without their «free, prior and informed consent» (Principle 10). Some interesting case studies dealing with the claim of environmental rights by the indigenous peoples are collected in L. ZARSKY (ed.), *Human Rights and the Environment. Conflicts and Norms in a Globalizing World*, London, 2002.

¹⁷ A. C. KISS, *Environmental Information and Public Participation in Decision-making*, in A. C. KISS, D. SHELTON and K. ISHIBASHI (eds.), *Economic Globalization and Compliance with International Environmental Agreements*, The Hague, 2003, p. 194.

¹⁸ A. BOYLE, *Human Rights and the Environment: Where Next?*, *cit.*, p. 616.

¹⁹ Notwithstanding, it is widely recognised as the «third approach» to the human rights-based environmental protection: see the Analytical Study on the Relationship Between Human Rights and the Environment, *cit.*, at paragraph 9.

2. *Individual Rights and States' Obligations Related to Environmental Information in the Aarhus Convention*

2.1. *The Environmental Rights Recognised by the Aarhus Convention*

As widely known, in 1998, the United Nations Economic Commission for Europe (UNECE) gave implementation to Principle 10 of the Rio Declaration, promoting the adoption of a convention recognising the rights of access to information, participation in decision-making and access to justice in environmental matters. The Convention was opened for signature on June 25, 1998 in Aarhus and entered into force on October 30, 2001. Also the European Community has become party of the agreement.

Article 1, while mentioning – albeit incidentally – «the right of every person of present and future generations to live in an environment adequate to his or her health and well-being» (whose protection should be considered the ultimate purpose of the convention), suggests that the procedural rights of access and participation are strictly functional to its achievement. Thus, the Aarhus convention entitles individuals to request information on the state of the environment to the public authorities of the country of residence without having to provide evidence of any specific interest (Article 4), to participate in decision-making processes concerning «specific activities» (Article 6), as well as the preparation of «plans and programmes» (Article 7) or «executive regulations and other generally applicable legally binding rules» (Article 8) related to the environment, and, finally, to have access to review procedures before national courts «or another independent and impartial body established by law» (Article 9, paragraph 1) for the violation of both the aforementioned rights. A compliance committee was established in order to review complaints on possible breaches of the Convention.²⁰

It seems to be remarkable that, by improving the public awareness of environmental concerns, the Aarhus convention is generally oriented to enhance the quality and the transparency of the public regulations and decisions affecting the environment. To this end, it is certainly true that it «n'est pas une nouvelle convention sur l'environnement, mais une convention qui introduit la démocratie dans le processus de décision publique»²¹, since the States' obligations deriving from it are mostly focused on the «vertical» relationship between public authorities and administrations, on one hand, and individuals and groups, on the other.

2.2. *The Right to Access to Environmental Information: Scope and Contents*

However, as far as the specific regulation of the right to information is concerned, it must be pointed out that the convention encompasses provisions which have a different legal rationale, thus broadening the range of States' duties on this specific issue. More

²⁰ See C. PITEA, *Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, in T. TREVES, L. PINESCHI, A. TANZI, C. PITEA, C. RAGNI and F. ROMANIN JACUR (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, The Hague, 2009, p. 221.

²¹ M. PRIEUR, *La Convention d'Aarhus, instrument universel de la démocratie environnementale*, (numéro spéciale) *Rev. Jur. Env.*, 1999, pp. 9-29, at 9.

precisely, it is going to demonstrate that the obligation to actively disseminate information for preventing harms to human health or environment, recognised by Article 5.1(c) of the convention, cannot be included among the principles of environmental democracy, but has to be considered from a different perspective.

For the purposes of the Aarhus convention, the legal definition of environmental information is extremely wide. Indeed, it include any information dealing with: (a) the state of the elements that constitute the environment (both material, as air or water, and immaterial, as landscape or biological diversity) and their interaction; (b) natural or human factors (including international agreements, national legislation and administrative measures) likely to affect such elements; and (c) the state of human condition (including health and safety, life and culture), inasmuch as it may be affected by the state of the above mentioned factors (Article 2, paragraph 3).

According to the following Article 4, such information must be made fully available to the public «in response to a request» (paragraph 1), except in some specific cases, indicated in paragraph 3. It goes without saying that the accomplishment of this duty entails no discretionary assessment by the public authorities of the State. In other words, the State's obligation to comply with Article 4 of Aarhus convention has mostly a «negative» nature, since it consists in abstaining from any behaviour which could prevent unreasonably the exercise of the right to access by the public concerned. In this perspective, it can be highlighted that the core of the right to information is a freedom, as it had been originally established by the Directive 90/313/EEC. The States parties have also a positive obligation, that is to supply the information requested within a given time limit. The same structure of the obligations provided by Article 4 can be found even in Articles from 6 to 9, as far both the right to participation in decision-making processes and access to justice are concerned.

2.3. States' Obligations to Collect and Disseminate Environmental Information According to Article 5 of the Convention

Article 5, however, entitled «Collection and dissemination of environmental information», presents a different arrangement. In fact, in addition to some accessory obligations, aimed at giving full implementation to the individual right to access (such as those of paragraphs 1(a) and 1(b), which requires States to provide that «public authorities possess and update environmental information» and to establish «mandatory systems» in order to secure «an adequate flow of information [...] about proposed and existing activities which may significantly affect the environment», but also those of paragraph 2 and 3, which guarantee that environmental information is «transparent» and «effectively accessible» as well as «progressively [...] available in electronic databases»), it establishes also «purely positive» obligations to actively disseminate information, by periodically publishing national reports on the state of the environment (paragraph 4) and other relevant information (paragraph 7), and by taking appropriate measures within the legislative framework (paragraph 5), included the establishment of «a coherent, nationwide system of pollution inventories or registers» (paragraph 9).

Since they do not presume any previous initiative by the public concerned, such duties have a full positive nature, which entails that public authorities must provide

information without being asked. Notwithstanding, they all can be considered directed to the same objective of increasing the amount of environmental information available by the public – together with improving the quality and accessibility of its sources – in order to enhance people’s knowledge and awareness on environmental issues.

Unlike the aforementioned provisions, paragraph 1(c) of Article 5 establishes a different kind of positive obligation, which requires each State Party to ensure that «[i]n the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected». As argued before, indeed, assuming that the general purpose of the Aarhus Convention is to empower individuals and groups to play an active role in the protection and conservation of nature through information, participation and access to means of redress, the specific regulation of Article 5.1(c) cannot be considered closely connected to it.

This seems to be confirmed by two significant clues. Firstly, it can be pointed out that such provision presumes a specific requirement for its implementation that cannot be considered relevant in other cases. In accordance with Article 5.1(c), indeed, the obligation to disseminate information to the public for preventing or reducing the negative effects on human health or environment caused by an environmental harm, arises from an «imminent threat», while it is not so in ordinary conditions. Accordingly, it can be deduced that the whole legal discipline of the right to access to environmental information established by Articles 4 and 5 of the Aarhus convention would probably have been complete, without needing to be integrated or strengthened by providing such a further obligation.

The unrelatedness between the obligation established by Article 5.1(c) and the other provisions regulating rights and duties in the field of environmental information can be inferred also by the fact that the first draft of Aarhus Convention did not contain any reference to it, since it has appeared as a discussing proposal only during the second session of the Working Group. In the session Report, as far as Article 4 of the draft is concerned, it can be read, *inter alia*, that «[i]t was also suggested that a clear statement should be included on the duty of the authorities to inform the public in particular on emergencies and health issues».²²

After that, however, it must be pointed out that the first formal proposal of a new paragraph to be included in such Article, expressly regarding «information in accident situations», did not come from the delegations of the States parties, but from the «environmental NGOs coalition». The NGOs coalition proposed to include a new 4-*bis* paragraph to draft Article 4 which contained the majority of the elements that would have been included in the final text of Article 5.1(c) of the convention: «[e]ach Party shall ensure that in the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and which is held by a public authority shall be disseminated immediately and without delay to members

²² UNECE, Reports of the Ad Hoc Working Group for the Preparation of a Draft Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making, Second Session, Doc CEP/AC.3/4 of November 11, 1996 (Annex I), p. 4.

of the public who may be affected. Parties shall take measures to render failure by officials to comply with this obligation a criminal offence».²³

3. The Legal Nature of the Obligation to Inform the Public Concerned in Case of an Imminent Threat to the Environment or Human Health and its Precedents

3.1. The Special Ratio of the Obligation Established by Article 5.1(c)

Hitherto, it has been assumed that the Aarhus convention is probably the most important international tool (not only for its binding nature) which established a formal link between human rights and environment, to the extent that it has ultimately contributed to the formation of a new legal paradigm for the protection of the environment, based on the recognition of specific procedural rights.

In this perspective, it can be argued that the obligation provided by Article 5.1(c) is not strictly related to the main purpose of the convention – i.e. the development of environmental democracy, even at international level – so that it should be taken into different consideration, compared to the other obligations of collection and dissemination of environmental information. Rather than being referred to the range of States' duties aimed at increasing public knowledge and awareness on environmental issues, indeed, it should be actually included among the obligations falling on States under international law in situations of natural hazard or disaster caused by human activities.

Therefore, on closer inspection, it can be pointed out that, unlike the above mentioned provisions of Article 5, its intrinsic importance is probably much greater than the simple «b-side» of the right to access to environmental information. Notwithstanding, its collocation within the Aarhus convention is not meaningless. To this respect, what is most worth noting is the «bridging role» played by Article 5.1(c) of the Aarhus convention between, on the one side, the human rights-based approach to environmental protection, on the basis of which individuals should be entitled to receive relevant information in case of any imminent threat to their health or to the environment in which they live, and, on the other side, the so-called «international disaster response law», that is the set of international rules and principles aimed at regulating States' involvement in disaster recovery, a legal framework under continuous development.²⁴

3.2. The Main Precedents

In order to confirm the accuracy of such a legal analysis perspective, it must be first ascertained whether the obligation established by Article 5.1(c) is «brand new» or it has

²³ UNECE, Reports of the Ad Hoc Working Group for the Preparation of a Draft Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making, Fourth Session, Doc 4.CEP/AC.3/8 of March 21, 1997 (Annex X), p. 31. In the following seventh session, the aforementioned provision was included - in its final version - in the draft Article 4, entitled «(Duty with respect to) environmental information». Then draft Article 4 became Article 5, with the current denomination.

²⁴ For an in-depth analysis on this topic, see A. DE GUTTRY, M. GESTRI and G. VENTURINI (eds.), *International Disaster Response Law*, The Hague, 2012.

consistent precedents in international law. After that, it would be necessary to ascertain as well the legal nature and contents of such an obligation.

It goes without saying that in international law, the obligations related to the exchange of information in case of emergency are not unknown. In principle, they can be distinguished in two different categories, although such a classification is merely illustrative: to the first belong those included within bilateral or regional treaties which provide an institutional framework for managing emergency situations.²⁵ In these cases, the specific aim of the exchange of information is to facilitate and support the mutual assistance among the States involved. To the second category belong the international obligations arising from the so-called «duty to warn», generally aimed at preventing the harmful consequences arising from natural events or human activities.²⁶ Such a duty was affirmed for the first time by the ICJ in the *Corfu Channel case* of 1949, by stating that «[t]he obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them».²⁷ Therefore, it consists in the States' obligation to notify to foreign States concerned the existence of an imminent danger likely to occur within their territory (or territorial waters, of course). The same obligation can be also related to the general prohibition of causing transboundary damages or pollution, recognised as a customary obligation by the ICJ in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 1996.²⁸ With respect to it, the duty to communicate without delay relevant information can be seen as an accessory but essential obligation, aimed at reducing the consequences of the damage.

The importance assigned to the obligation of notification as an instrument of risk reduction dates back to the Vienna Convention on Early Notification of a Nuclear Accident of 1986, adopted in the aftermath of the Chernobyl accident, even though similar obligation are provided by some multilateral agreements dealing with the protection of the marine environment, since the Barcelona Convention for the protection of the Mediterranean Sea against pollution of 1976.²⁹ As widely known, the Preamble of the Vienna Convention refers to the «need for States to provide relevant information about nuclear accidents as early as possible in order that transboundary radiological consequences can be minimized». In the event of a nuclear accident, Article 2 requires States to (a) «notify

²⁵ «With regard to modalities regulating *the functioning of the co-operation in an emergency situations*», A. DE GUTTRY, *Surveying the Law*, *ibid.*, p. 12, highlighted that «almost all the treaties under consideration provide an institutional framework for the exchange of information, request of assistance, and mutual assistance».

²⁶ The duty to warn originated in the law of torts: it was recognised in order to establish personal liability for injuries occurred as a consequence of the failure to inform people concerned about imminent dangers likely to affect them. Such a responsibility, for example, falls on property owners failing to warn visitors about the dangers within («*cave canem*»).

²⁷ ICJ, *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ Rep 4 (1949) p. 22.

²⁸ As known, the ICJ, Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* ICJ Rep (1996) 226, pp. 241-242, recognised that «[t]he existence of 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».

²⁹ The formulation of Article 9.2 of the Barcelona Convention can be considered quite innovative for that time: «[a]ny Contracting Party which becomes aware of any pollution emergency in the Mediterranean Sea area shall without delay notify the Organization and, either through the Organization or directly, any Contracting Party likely to be affected by such emergency». The same obligation is provided by Article 198 of the Montego Bay Convention on the Law of the Sea of 1982.

[...] those States which are or may be physically affected [...] its nature, the time of its occurrence and its exact location where appropriate» as well as (b) provide them «with such available information relevant to minimizing the radiological consequences». Following Article 5 specifies the content of the relevant information, which is not purposely related to the protection of the environment.³⁰ Although at the time of Chernobyl accident there was only a little evidence about an «emerging rule of international law requiring States to give notice of information concerning possible environmental harm to potentially affected states»,³¹ such a rule can be nowadays considered generally accepted on a customary basis, inasmuch as it has been widely recognised in several international instruments.³²

3.3. The Customary Core of the Duty to Provide Information to the Public in the Event of an Imminent Threat

However, it is easily remarkable that all the cited regulations establish only interstate obligations. The public concerned, in fact, is not mentioned, so that any violation can be challenged only by the State affected. A slightly different perspective is that of the Convention on Nuclear safety of 1994, whose Article 16.2 establishes that «[e]ach Contracting Party shall take the appropriate steps to ensure that, insofar as they are likely to be affected by a radiological emergency, its own population and the competent authorities of the States in the vicinity of the nuclear installation are provided with appropriate information for emergency planning and response».

It is to understand then whether also the obligation to inform the public is currently accepted as a customary rule and what could be the consequences of that. Some indications can be found in the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities,³³ in which the International Law Commission distinguished three different kinds of States' obligations related to information. Two of them deal with the interstate duties to warn (Article 8) and to exchange relevant information while the hazardous activity «is being carried out» (Article 12). The third obligation requires States, «by such means are appropriate», to provide «the public likely to be affected by an activity

³⁰ Only Article 5.1(f) of the Convention mentions «the results of environmental monitoring relevant to the transboundary release of the radioactive materials» among the relevant information to be provided.

³¹ L. A. MALONE, *The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution*, in *Col. Jour. Env. Law*, 1987, pp. 203-241, at 235-236. See also G. GAJA, *Incidente a Chernobyl ed obbligo di informazione*, in *Riv. Dir. Int.*, 1986, pp. 828-829.

³² Principle 19 of the Rio Declaration calls for States to «provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect» and to «consult with those States at an early stage and in good faith». Such a principle was «pre-implemented» through the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, promoted by the UNECE in 1991, which is aimed at «preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context». The final objective of the Convention is the «proceduralisation» of the duty to warn, in order to minimize the risks of environmental hazards, but it deals only with human activities, as well as the Convention on the Transboundary Effects of Industrial Accidents of 1992. Hence, it must be pointed out that the customary scope of the duty to warn is quite wider, as it includes also unpredictable hazards provoked by natural causes.

³³ See Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, in *YB Int. Law Comm.*, 2001, vol. II, Part Two, p. 148.

within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views» (Article 13).³⁴

Even though the relevant legal framework is only partially coincident with that of Aarhus Convention, a common core between Article 13 of the Draft project and Article 5.1(c) can definitely be identified. Both provisions (as well as that of Article 16.2 of the Convention on Nuclear safety), indeed, are aimed at protecting individuals likely to be affected by hazardous activities, although the rule codified by the ILC does not presume the existence of any imminent threat, so that it seems to be focused rather on increasing people awareness on such activities, than warning them in the event of an accident.³⁵ The scope of the obligation provided by Article 5.1(c) is also quite wider than the one codified in the Draft Articles, inasmuch as it deals with harms both triggered by human activities and «due to natural causes» and, what seems to be most important, it requires States to disseminate information not only to protect human health, but also the environment in which they live.

To this end, it can be argued that the customary core of the obligation under consideration is going to be expanded by the recognition of a general duty to warn falling on the States in the event of any natural hazard. A growing international debate developed in the last decade on the question whether the violation of such a duty could even legitimise an humanitarian intervention to assist the population on the basis of the «Responsibility to protect» doctrine.³⁶ However, such a possibility should be currently excluded, due to the absence both of a comprehensive definition of the R2P notion and a consistent international practice.

4. *Concluding Remarks: is the «Right to be Warned» Judicially Enforceable Before the European Court of Human Rights?*

Once ascertained that the obligation to inform the public established by Article 5.1(c) of the Aarhus Convention has its origin in the duty to warn, it remains to ascertain whether it can be considered even judicially (or non-judicially) enforceable.

At the moment, the Compliance Committee of the Aarhus Convention received only one complaint alleging the violation of Article 5.1(c), but it found that «the communicant has not substantiated that the elements set out in article 5, paragraph 1 (c), are met in the circumstances of this case».³⁷ Notwithstanding, the same legal standard has been assessed also under European Convention on Human Rights.

³⁴ *Ibid.*, p. 165.

³⁵ Actually, the commentary of Article 13 is mainly focused on the recognition of the rights to participation and consultation, stressing the importance of involving individuals concerned in decision-making processes: «it is, of course, clear that the purpose of providing information to the public is in order to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated» (*ibid.*).

³⁶ See L. A. MALONE, *Green Helmets: Eco-Intervention in the Twenty-First Century*, in *Proceedings of the Annual Meeting (American Society of International Law)*, 2009, pp. 19-38; see also, ID., *The Responsibility to Protect Haiti*, in *ASIL Insights*, March 10, 2010, vol. 14, issue 7, available at <http://www.asil.org/insights/volume/14/issue/7/responsibility-protect-haiti>.

³⁷ See the Committee report of February 25, 2011, Doc ECE/MP.PP/C.1/2011/2/Add.10 of August 24, 2011, concerning compliance by the United Kingdom of Great Britain and Northern Ireland, at paragraph 78.

As known, in its report on the case *Guerra* of 1996,³⁸ the European Commission declared the violation of Article 10 of the ECHR (which – as widely known – guarantees the individual right to information), on the assumption that the public authorities failed to inform the public who had been (or might have been) affected by local industrial activities. However, such a decision was later reformed by the Court, which did not admit the existence of such a positive obligation on the basis of the relevant provision of the Convention, and concluded for the violation of Article 8.³⁹

It seems to be interesting to shortly examine the case, dealing with the air pollution caused by a chemical factory in the South of Italy. To this end, what is most important to highlight first are the respective positions of the parties: while the applicants alleged that the local authorities had to disseminate relevant information in order to fully comply with the obligation deriving from Article 10, the Italian government strongly contested such an interpretation, arguing that, on the basis of the relevant national legislation, the applicant could have asked for any relevant information they needed. On that point, the reasoning of the Commission appears to be very accurate. It stated that the right to access to information, granted by the Italian legislation, dealt only with «available information», i.e. already held by the public authorities and not covered by secret in order to protect an economic interest. Conversely, what applicants had asked for was information yet to be collected, so that they could not have any free access to it.⁴⁰ In the same perspective, while affirming the relative nature of the right to access to environmental information, the Commission recognised that «l'information du public représente désormais l'un des instruments essentiels de protection du bien-être et de la santé de la population dans les situations de danger pour l'environnement»⁴¹. It follows that the «freedom to receive information» recognised by Article 10.1 of the ECHR «had to be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment». In other words, «Article 10 imposed on States not just a duty to make available information to the public on environmental matters [...], but also a positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the knowledge of the public».⁴² What seems to be remarkable as much is the Commission's argument of the «protection complémentaire» afforded by Article 10 with respect to potential violations of the Convention in the event of serious damage to the environment. Article 10 then «came into play even before any direct infringement of other fundamental rights, such as the right to life or to respect for private and family life, occurred».⁴³

Such an extremely innovative position, however, has never been supported by the Court, which in the following judgments *Roche* and *Sdrnĕni Jihoĕské Matky* confirmed its previous case-law based on the application of Article 8.⁴⁴ Notwithstanding, the justiciability

³⁸ European Commission of Human Rights, *Guerra and others vs. Italy*, report of June 29, 1996. The reports of the European Commission and the Judgements of the Court are available at <<http://hudoc.echr.coe.int>>.

³⁹ European Court of Human Rights, *Guerra and others vs. Italy*, Judgement of February 19, 1998.

⁴⁰ See the Paragraph 39 of the Commission Report.

⁴¹ *Ibid.*, Paragraph 42.

⁴² See the Paragraph 52 of the Court Judgement, which summarizes the contents of the Commission Report.

⁴³ *Ibid.*, Paragraph 49.

⁴⁴ In the *Guerra* judgment, the European Court stated that «if a positive obligation to provide information existed, it would be “extremely difficult to implement” because of the need to determine how and when the information was to be disclosed, which authorities were responsible for disclosing it and who was to receive

of the States' duty to warn – *rectius*: of the corresponding individual «right to be warned» – should be currently admitted before the ECHR just by considering that its codification within the Aarhus Convention would accordingly allow (and consistently require) an evolutive interpretation of Article 10 of the European Convention. Actually, for the States parties of the Aarhus Convention it is not true anymore that the right to information «ne saurait se comprendre comme imposant à un Etat, dans des circonstances telles que celles de l'espèce, des obligations positives de collecte et de diffusion, *motu proprio*, des informations»,⁴⁵ provided they are formally committed to spread information in order to comply with the obligation provided by Article 5.1(c).

it» (*ibid.*, Paragraph 51). See also, European Court of Human Rights, *Roche v. United Kingdom*, Judgement of October 19, 2005, Paragraphs 172-173 and *Sdruženi Jihočeské Matky v. Czech Republic*, Judgement of July 10, 2006, Paragraph 1.1.

⁴⁵ European Court of Human Rights, *Roche v. United Kingdom*, Paragraph 172.