AFRICAN COURT ON HUMAN AND PEOLES' RIGHTS

The Matter of Ligue Ivoirienne des droits de l'homme (LIDHO) and Others

v.

Côte d'Ivoire

Application 041/2016

Judgment of 5 September 2023

Dissenting Opinion of Judge Blaise Tchikaya

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Introduction

1. Three Non-Governmental Organizations[1], all having observer status before the African Commission on Human and Peoples' Rights,[2] filed an Application with the Court against Côte d'Ivoire[3] in 2016. They alleged violation of human rights following the dumping of toxic waste in the Abidjan district and its suburbs. The Court rendered its decision on 5 September 2023.

2. The case was lodged before the Court on 18 July 2016, almost a decade after the occurrence of the disputed facts. The case was an unfamiliar terrain for the Court. In the main, it concerned collective rather than individual rights and, as an environmental law case, it was a departure from the human rights issues of freedom and individual rights which the Court habitually adjudicated. The case presented a number of particularities.

3. In the instant case, on 19 August 2006, *MV Probo Koala*, a vessel chartered by the multinational company Trafigura,[4] discharged and dumped 528 m^3 of highly toxic waste at several sites in the district of Abidjan (Ivory Coast) and its suburbs. None of these sites had chemical waste treatment facilities. There is no need to revisit the extent of this environmental disaster, which is now well-known. Suffice it to say that it plunged Abidjan into mourning and overwhelmed its hospitals.[5]

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[1] *The Applicants are Ligue Ivoirienne des Droits de l'Homme (LIDHO), Mouvement Ivoirien des Droits Humains (MIDH) and Fédération Internationale pour les Droits Humains (FIDH).*

[2] The Non-Governmental Organizations concerned were granted observer status as follows: LIDHO (9 October 1991); MIDH (13 October 2001); and FIDH (12 October 1990).

[3] The Respondent State became a party to the African Charter on Human and Peoples' Rights on 31 March 1992 and to the Protocol on the Establishment of an African Court on Human and Peoples' Rights on 25 January 2004. It deposited, on 23 July 2013, the Declaration under Article 34(6) of the Protocol by virtue of which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 29 April 2020, the Respondent State deposited with the Chairperson of the African Union Commission the instrument of withdrawal of its Declaration. The Court has however held that the withdrawal has no bearing on pending cases and on new cases filed before the withdrawal came into effect one year after the said instrument was deposited.

[4] *Established in 1993, the privately owned TRAFIGURA is the world's third largest independent trader of oil and oil products.* It has 81 offices in 54 countries across the world.

[5] It emerges from the records that the waste dumping caused air pollution and a stench spread over the entire district of Abidjan. Thousands of people trooped to health centres, complaining of nausea, headaches, vomiting, rashes and nosebleeds. Seventeen (17) people reportedly died as a result of inhaling toxic gases; acute contamination of underground water was also reported.

4. The Application submitted to the Court raised questions as to its admissibility. Without going into detail, the Court considered the violations alleged by the applicants, namely, violation of:

> "The right to an effective remedy and the right to seek redress for harm suffered, protected by Article 7(1)(a) of the Charter ... the right to the Ban of the Import into Africa of Hazardous Wastes and the Control of Transboundary Movements of Hazardous Wastes within Africa [..], the right to respect for life and physical and moral integrity of the person [...,] the right to enjoy the best attainable state of physical and mental health, protected under Articles 16 of the Charter [...], the right of peoples to a general satisfactory environment favourable to their development, protected under Article 24 of the Charter; the right to information, protected by Articles 9(1) of the Charter [...]".[6]

5. In the present case, the Court's position on the question of admissibility already contained the seeds of our dissent, which diverges from the majority opinion of the Honourable Judges. Two elements could be discussed, namely, a) this case has been the subject of several court cases, some of which are ongoing.[7] It would appear that the application of the *non bis in idem* principle should be discussed further; this well-known principle[8] holds that a State cannot be sued more than once for the same facts[9]; b) liability in the present case has already been judicially pronounced against Trafigura. In the present proceedings, the plaintiffs make claims which, on the whole, the Respondent State has already met or is beginning to meet.

[6] Judgment, *Lidho and others*, § 16.
[7]The Court was informed of court cases in the Netherlands, France and Côte d'Ivoire.
[8]Article 56 § 7 excludes the Court's jurisdiction over applications that: "Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter" This principle is known to the Court and other human rights jurisdictions: ACtHPR, *Dexter Eddie Johnson v. Ghana*, 28 March 2019; ECHR, *Engel v. Netherlands*, 8 June 1976.
[9]

This state of the case should give food for thought. This is particularly true of the main reliefs sought in the Application:

> “Publicly acknowledge its liability for the violations referred to in the Application and publicly apologise, in particular to the victims of the toxic waste dumping and the consequences thereof; Open an independent and impartial investigation in order to establish liability for the waste and prosecute persons involved for their criminal liability [...] ensure the provision of medical assistance to victims”.[10]

6. The scale of the Trafigura disaster raises a number of legal issues, including liability. In present case, the Respondent State’s liability could be discussed in terms of the origin and unfolding of the event giving rise to liability. Although several decisions on the toxic waste dumping have found the State liable,[11] it is not impossible to investigate the extent to which the conduct of the private entity at the origin of this flagrant breach of the law escapes the main liability.

7. The two levels of law applicable to liability for human rights violations must be taken into account. As soon as the dispute arises from the internal order within which international rules apply, it becomes a truly international dispute. It comes as no surprise that the systematics of the law of nations in matters of liability should come into play in the present case.[12] In essence, it must be recognized that:

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[10]ACtHPR, Judgment, *Lidho and Others*, §§ 21 et seq.

[11] In its Chamber judgment handed down in the case of *Di Sarno and others v. Italy*, the ECHR concluded that there had been: A violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights; Non-violation of Article 8 of the Convention, as regards the authorities’ obligation to inform people of the potential risks incurred by the applicants; and, Violation of Article 13 (right to an effective remedy). The case concerned the state of emergency proclaimed from 11 February 1994 to 31 December 2009 in relation to waste collection, treatment and disposal - including a five-month period during which tons of waste piled up in the streets - which affected the Campania region of Italy, where the applicants lived and/or worked.

[12]At the very least, the issue involves international damage to the environment through unlawful acts. This raises obvious questions about the liability of the international players involved. See in particular : Pellet (A.), Liability of States in Cases of Human-rights or Humanitarian Law Violations", J. Crawford *et al.*(dirs.), The International Legal Order: *Current Needs and Possible Responses - Essays in Honour of Djamchid Momtaz*, Brill/Nijhoff, Leiden/Boston, 2017, pp. 230-251; The Work of the International Law

> "The international law of international liability in the new conception - but now translated into positive law - which has resulted from what I have called the selfish revolution fully responds to the needs - the particularities - relating to serious violations of human rights".[13]

8. We note that the liability of the Respondent State in the present case is insufficiently established (I.) Essentially, this is the reason we pen this dissenting opinion. Secondly, this 2023 judgment does not seem to arrive at a conclusion that attributes sufficient damage to Trafigura (II.).

I. The Respondent State's liability not well established

9. It would have been more appropriate to establish the liability of the Respondent State, or that of its officials or organs,[14] by first establishing the event giving rise to such liability and the link between it and its attributability. The principles governing liability and the obligation to make reparation, even in the field of human rights, are strict, and liability is not automatic.[15] This is true even when the European Court of Human Rights (ECHR) states in one of its decisions:

Commission, *International Law at the Dawn of the XXI Century*, United Nations, New York, 1997, Sales No. E/F 97.V.4, p. 32; Yves Daudet (Y.) and Tomuschat (C.), S.F.D.I., colloque d'Aix-en-Provence, *La codification du droit international*, Pédone, Paris, 1999, pp. 171-174 and 189-190 respectively. 7; Crawford (J.), *The International Law Commission's Articles on State Liability - Introduction, Text and Commentaries*, Cambridge U.P., 2002, pp. 58-60. 9. See the summary presentation of the procedure since 1955. See also Pellet (A.), La codification du droit de la responsabilité internationale : Tâtonnements et affrontements, *L'ordre juridique international, un système en quête d'équité et d'universalité - Liber amicorum Georges Abi-Saab*, Kluwer, The Hague, 2001, pp. 285-304.

[13]Pellet (A.), "D'un crime à l'autre - La responsabilité de l'État pour violation de ses obligations en matière de droits humains", *Études en l'honneur du professeur Rafâa Ben Achour - Mouvances du droit*, Konrad-Adenauer-Stiftung, 2015, pp. 318 et seq.

[14] ECHR*, Anguelova v. Bulgaria*, 21 October 2010, § 137: "The main purpose of such an inquiry is to ensure the effective application of domestic laws protecting the right to life and, in cases where agents or organs of the State are involved, to ensure that they are held accountable for deaths occurring under their liability".

ICJ, Corfu Channel, *United Kingdom of Great Britain and Northern Ireland v. Albania*, 10 April 1949, Rec 4, p. 24; Military and Paramilitary *Activities in and against Nicaragua*, *Nicaragua v. United States of America*, 27 June 1986, 14 at para 283; ICJ, Gabčikovo-Nagymaros Project, Hungary v. Slovakia, 25 November 1997, Rec 7, para 47.

> "That it is a question (...) of ensuring the effective application of domestic laws which protect the right to life and, in cases where agents or organs of the State are involved, of guaranteeing that they are held accountable for deaths occurring under their liability".

10. Even in matters of human rights, state liability can only be accepted if the two conditions recognized by general international law are met. As Alain Pellet sums it up:

> "Whatever the consequences of a violation of international law, it must relate to any breach which engages the liability of its author, the consequences of which vary according to whether or not the internationally wrongful act has caused damage, and according to the nature of the norm violated".[16]

11. It follows that, essentially, the two major conditions enshrined in Article 2 of the draft should be discussed and verified for the liability the State to be held liable. It is necessary that: a) an internationally wrongful act be committed; and b) that the act be attributed to a State; the existence of damage comes into play only in the determination of the obligation to make reparation and the modalities thereof. It reads:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission: a) is attributable to the State under international law;

[16]v. Pellet (A.), Les articles de la CDI sur la responsabilité de l'État pour fait internationalement illicite. Suite - et fin?, AFDI, 2002. p. 3. The text adopted by the ILC, 53rd Session, in 2001, submitted to UNGA as part of the Commission's Report. This report, which also contains comments on the draft articles, is reproduced in Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10). Annex to UNGA Resolution 56/83 of 12 December 2001, and amended by document A/56/49 (Vol. I)/Corr.3.

and b) Constitutes a breach of an international obligation of the State".[17]

12. The conduct of the Respondent State will be examined in light of these two conditions, before asserting international liability, as in the decision.

i) An internationally wrongful act is a violation

13. The question of an internationally wrongful act constituting a violation arises in the Trafigura case. In one of the latest works on environmental law supervised by Professor Stéphane Ndoumbé Bille's,[18] the same violations are discussed. It is noted that:

> "For environmental disputes, the ICJ applies the traditional rules of liability, namely the existence of a breach of an international obligation permitting the State to incur liability (...) vigilance and prevention are required because of the often-irreversible nature of damage caused to the environment and the limits inherent in the very mechanism of reparation for this type of damage."[19]

14. How can the internationally wrongful act in the *Trafigura* case be established? There are different versions of the case, including those concerning the company's relations with the Respondent State. Beyond this complexity[20], the Court must identify the legal and factual particulars that could lead to possible liability on the part of the Respondent State.

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[17] *Idem.* Article 2. See Wooters (J.) and Brems (B.), *Accountability for Human Rights Violations by International Organisations*, Publisher, Intersentia Ltd, 2010, 650 p.; Orakhelashvili (Alex.), *International Law and International politics*, Ed. Edward Elgar Publishing, 2020, p. 320.

[18] Paccaud (F.), *Le contentieux de l'environnement devant la Cour internationale de Justice*, PhD thesis, Université Lyon 3, 2018, p. 225 - Thesis supervisor: Pr. Stéphane Doumbé-Billé), 2018, 624 p.

[19] *Idem.*, § 225.

[20] Nasser (Abd.), *Responsabilité des États et protection de l'environnement*: *La responsabilité internationale à l'épreuve de la protection de l'environnement,* Ed. Universités Européennes, 2012, 476 p. In particular, we note that: "(...) The international liability of States is extremely delicate. Their implementation in the field of environmental protection is all the more uncertain as the discipline is reputed to be iconoclastic and fraught with new challenges for international law".

15. The Court was right to consider the Algiers Convention, the terms of which, although they might appear general for the case in point, nonetheless contains provision that protect rights. Article 2 of the Algiers Convention rightly states that States (...):

> "The Contracting States shall undertake to adopt the measures necessary to ensure conservation, utilization and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interests of the people".

16. It would have been more persuasive to take Article 4 of the Bamako Convention[21] as a starting point, and to detail any failings on the part of the Respondent State as a means of establishing liability entailing an obligation to make reparation. The said Article 4 states:

> "Hazardous Waste Import Ban- All Parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction *to prohibit the import of all hazardous wastes*, for any reason, into Africa from non-Contracting Parties. Such import shall be deemed illegal and a criminal act".[22]

17. This liability could arise from the application of the above-mentioned Convention on the prohibition of imports into Africa of all hazardous wastes.[23] This would establish that the Respondent State violated its

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[21]Ouguergouz (Fatsah), La convention de Bamako sur l'interdiction d'importer en Afrique des déchets dangereux et sur le contrôle des mouvements transfrontaliers et la question des déchets dangereux produits en Afrique, AFDI, 1992, pp. 871 *et seq*.

[22]Bamako Convention, Article 4, cited above.

[23]See. The Bamako Convention on the Ban of the Import into Africa of Hazardous Wastes and on the Control of Transboundary Movements and Management of Hazardous Wastes within Africa came into force in 1998, Article 4. The Convention was adopted on 30 January 1991, following the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which was adopted on 22 March 1989, under the auspices of the United Nations Environment Programme. Hence the importance of this text, which was included in the application and adopted by the Court. Several other texts reinforce the state of the law in this area. As long ago as 1968, the African Convention on the Conservation of Nature and Natural Resources was approved. There is the Phytosanitary Convention for Africa, adopted in Kinshasa (DRC) on 13 September 1967; the Convention

obligations. The Court recognizes this, but does not draw all the consequences:

> "The facts show that the Respondent State has not done so, even though many provisions of the Bamako Convention prescribe specific measures to which States are committed in this regard. It is also clear from the case file that the Respondent State attempted to limit the damage, but its efforts have proved insufficient in view of the growing number of victims".

18. In addition to the Bamako Convention, this prohibition was already included in the Stockholm Declaration,[24] and the World Charter for Nature,[25] of which Principles 6 and 7 and Point 12, respectively, affirm the need to avoid the discharge of pollutants into natural systems.

19. Did the Respondent State really fail to meet this obligation? There is no evidence to that effect. Neither were details or the evidence of the waste disposal authorization mentioned in paragraph 139 provided. These points, if supported, would have made it possible to establish whether the damage thus caused resulted from coaction or supervision.

ii) Weaknesses in the link of attributability to the Respondent State

20. We know that Trafigura tried unsuccessfully to discharge the waste in five countries, namely Malta, Italy, Gibraltar, the Netherlands, and Nigeria. Its attempt to discharge it in Amsterdam triggered an environmental incident, after residents complained of the dizzying smell and experienced nausea, dizziness, and headaches. Trafigura rejected a proposal from a specialized

for the Protection of the Mediterranean Sea against Pollution, adopted in Barcelona on 16 February 1976 and entered into force on 12 February 1979; the five African riparian states (Morocco, Algeria, Tunisia, Libya, Egypt) are parties to it. See also the Convention establishing the Niger Basin Authority, adopted on 21 November 1980; the overall aim of these texts is to institute strict, healthy environmental preservation in Africa.

[24]The Stockholm Declaration, United Nations Conference on the Human Environment, 16 June 1972.

[25]See. UNGA Resolution 37/7, 28 October 1982.

company to treat the waste safely in the Netherlands, which would have cost the equivalent of US$620,000.[26] The grounds for the judgment do not clearly bring out these preliminary particulars.

21. At the very least, it would have been desirable for the link of attributability to be established without ambiguity. It is not enough to establish that the violations occurred in the territory of the Respondent State. In addition to stating that the facts occurred on the territory of the Respondent State,[27] the State or its officials must have contributed to them, beyond any reasonable doubt. In this case, the link of attribution is considered to be one of the decisive and constitutive elements of liability and the obligation to make reparation.[28] A causal relationship must be established between the active subject and the damage.

22. Article III of the Marpol Convention immediately considers such convoys to constitute an offence:

> "Art. III: (1) Subject to the provisions of Articles IV and V, the discharge from any tanker, being a ship to which the Convention applies, within any of the prohibited zones referred to in Annex A I to the Convention in relation to tankers of (a) oil; (o) any oily mixture the oil in which fouls the surface of the sea, shall be prohibited. For the purposes of this paragraph the oil in an oily mixture of less than 100 parts of oil in 1,000,000 parts of the mixture shall not be deemed to foul the surface of the sea. (...)".[29]

[26] *Amnesty International Report*, 2010.
[27] ACtHPR, Judgment, *Lidho and Others, Op. cit.*, § 62. i.
[28] See. § 202 of the Judgment, the Court recalled that: "in line with its jurisprudence, to examine and assess Applications for reparation of prejudice resulting from human rights violations, it takes into account the principle that the State found liable for an internationally wrongful act is required to make full reparation for the damage caused to the victim".
[29] International Convention for the Prevention of Pollution of the Sea by Oil, 1954; It was concluded in London on 12 May 1954.

23. The question arises as to whether the Respondent State had any particular connection with the origin of the damage. The Court considered the issue of the Respondent State's prior authorization of entry into the port of Abidjan. The provisions of the Montego-Bay Convention (10 December 1982) are explicit as to the powers of the coastal State:

> "1. The coastal State may take the necessary steps in its territorial sea. To prevent passage which is not innocent 2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject...". (Article 25).

24. The Court did not expand on this question. It did not rule on the substance of this authorization. It merely stated that:

> "In the present case, (...) the Tommy company was responsible for discharging the waste on board the Probo Koala and was aware of the toxic nature of the waste and its impact on human life. The Court considers that such an authorisation is in itself a violation of the obligation to respect the right to life. This authorisation is also in violation of the duty to protect since, instead of preventing it, it has allowed the right to life to be infringed by the companies responsible for importing and dumping the waste".

25. If this authorization had been identified, it would have shed sufficient light on the question of liability for damage. It would have answered one of the fundamental questions, namely, who allowed the toxic waste to be dumped? This question is linked to the sovereign control that the coastal

country - the Respondent State - exercised over its port.[30] So many studies have shown the difficulties coastal states face in asserting their sovereign attributes in the face of the threats posed by international product trafficking.[31]

26. In 1979, the United Nations initiated another Convention which, though not yet in force, contains elements to prevent:

> "the problems created by existing uncertainties as to the legal regime applicable to goods in international transport when they are not in the custody of carriers or shippers but in that of transport terminal operators".

27. This Convention limits the liability of maritime terminal operators. This liability, says the Convention, can only be incurred by the operator:

> "Where a failure on the part of the operator, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services to take the measures referred to in paragraph (1) combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto".[32]

28. These provisions reflect a quest to limit state liability, since liability cannot be general, absolute and unlimited. Liability is always a function of the attributable loss. The first liability proceedings in this case may thus be mentioned. Paragraph 6 of the judgment reads:

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[30]African ports: reform and the role of the private sector. Report by the secretariat of UNCTAD, 2003, p.31.

[31]Scerni (M.), Les eaux internationales sous la souveraineté des Etats, Les espaces maritimes et le pouvoir des Etats, RCADI, 1967, p.131; Le principe de la souveraineté maritime à l'épreuve des menaces internationales

[32] United Nations, United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, April 19, 1991; UNCITRAL Yearbook, vol. XVI 1985

> "On 13 February 2007, a Memorandum of Understanding … was signed between the Respondent State and subsidiaries of the multinational company TRAFIGURA (TRAFIGURA Beaver B Corporation, TRAFIGURA Limited, Puma Energy and West African International Service Business (WAISB)). Under the terms of the Memorandum of Understanding,TRAFIGURA undertook to pay the Respondent State the sum of Ninety-Five Billion (95,000,000,000) CFA francs as reparation for the damage caused to the State of Côte d'Ivoire and to the victims; which breaks down as follows: Seventy-Three Billion CFA francs (73,000,000,000 CFA francs) as reparation for the damage caused to the State of Côte d'Ivoire and to the victims; and Twenty-Two Billion CFA francs (22,000,000,000 CFA francs) for clean-up operations".[33]

29. One cannot say "everything and its opposite": This decision establishes a recognition of Trafigura's full liability, by the very fact that the company pays "reparation for the damage caused to the Respondent State". If the Court thinks it is establishing one of the specific and marginal obligations of the Respondent State, emanating from the law of liability in human rights, the said liability is not general. Trafigura agreed to pay substantial sums to the victims, including the State, as reparation for the damage suffered.

30. There is another category of international rules[34] which, in these circumstances, can establish liability where it exists. Did the State fail in its duty of due diligence? Did it fail to provide assistance to its population? The obligation of due diligence is no more than a broad standard for

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[33] ACtHPR, Judgment, *Lidho and others*, §§ 6 and 209.

[34] See The ICJ encapsulates this principle as follows: "A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State". ICJ, Pulp Mills on the River Uruguay, *Argentina v. Uruguay*, 20 April 2010, § 101; see also ICJ, *American Diplomatic and Consular Staff in Teheran*, Order for Provisional Measures and Merits, 15 December 1979 and 24 May 1980.

assessing the attitude of the State in its disaster-prevention role in relation to the people on its territory.[35] The Respondent State, through its officials, must undertake many acts to demonstrate a fairly clear involvement in preventing and dealing with disasters, thereby taking liability for the constraints arising from such situations.

31. In the present case, many of the actions were of a judicial nature: a) On 19 March 2008, 12 people were indicted before the Abidjan Assize Court for poisoning caused by toxic waste dumping. The trial commenced on 2 September 2008 with the Association of Victims of Toxic Waste of the District of Abidjan as civil party. This reflected the judicial handling of the case; b) The Abidjan Assize Court condemned the criminal act of poisoning caused by the toxic dump. In its judgment of 22 October 2008, the Assize Court found the CEO of Tommy Company[36] and an employee of *West Africa International Service Business* (WAISB),[37] who provided information about Tommy to Puma Energy, guilty of poisoning and abetment of poisoning.[38]

32. The record shows numerous initiatives and preventive actions taken by the Respondent State. These actions suggest that it is difficult to hold the Respondent State responsible for any unreasonable breaches that might give rise to international liability. Some of the points made in the judgment are as follows[39]: a) On 13 February 2007, a Memorandum of Understanding was signed between the Respondent State and subsidiaries of the multinational company Trafigura, the aim of which was to source funds to meet the financial obligations of the damage caused. The situation created lasted over time; b) In November 2015, the authorities of the Respondent State issued a communiqué announcing that

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[36] *Tommy was founded for the sole purpose of disposing of the waste on board the vessel PROBO KOALA.*

[37] WAISB is a company working with TRAFIGURA Ltd in Abidjan for the purposes of dumping toxic waste.

[38] They were sentenced to twenty (20) years' and five (5) years' imprisonment respectively. However, no charges were brought against the Respondent State and its officials.

[39] ACtHPR, Judgment, *Lidho and others, Op. cit*, §§ 3 to 15.

remediation of the contaminated sites had been completed[40]; c) The Respondent State rolled out a compensation program for the victims and the families of the deceased. However, a large number of victims were not taken into account and did not receive compensation.

33. Are the damages in question the result of actions organized and supported by Trafigura, which would clearly make the company fully liable? Such an approach would require a departure from the classic structure of international liability in human rights. This would be a new option for the Court.

II. Trafigura and damage attribution

34. The aim of this point is to show that Trafigura became fully liable the moment it loaded toxic and hazardous waste that was dangerous to human life and the ecosystem onto a vessel. The Respondent State's resultant obligations are those which it assumes, *mutatis mutandis*, in the event of a risk caused by a third party. It is therefore necessary to (i) clarify the attribution of the damage to Trafigura and (ii) the residual obligations of the Respondent State emanating from the horizontal effect of human rights protection.

i) Elements for attributing damage to Trafigura for reparation

35. It is impossible to repeat too often the common law principle which states in the terms of Article 1240 of the new French Civil Code (formerly Article 1382) that:

> "Any act of a person which causes damage to another obliges him by whose fault the damage occurred to make reparation for it".

36. An entity subject to international law has caused damage. In the present case, it was recalled that the toxic and polluting vessel, *Probo Koala*, was

[40] *Idem*, § 14

chartered by the multinational company Trafigura.[41] The ship dumped highly toxic waste at several sites in the district of Abidjan (Côte d'Ivoire) and its suburbs, none of which had chemical waste treatment facilities.

37. The dramatic events in Abidjan caused by Trafigura gave rise to various investigations and court rulings in Côte d'Ivoire, the UK, and the Netherlands. Trafigura paid $198 million to the State of Côte d'Ivoire for the complete remediation of the Abidjan site and for compensation. It emerges from the record that Trafigura paid One Million euros to the Netherlands; and £30 million to settle the claims of 29,614 claimants represented by the UK law firm Leigh Day & Co.

38. There is something of an admission of guilt here. The phrase "polluter pays" would be meaningless without attaching to it the concept of liability. It is undoubtedly for this simple conceptual reason that we have to accept that for serious crises and damage under international law, or even those that call into question environmental balance, there should be an updated approach,[42] so as to establish the liability of private individuals who infringe environmental law or life. In this respect, the notion of liability, insofar as it normally and traditionally falls to States,[43] could be reviewed. This idea requires a strong judicial contribution.

39. It is indeed surprising that § 132 of the judgment under discussion retains what it considers to be a breach of a fourfold obligation against the Respondent State. It reads as follows:

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[41] The privately owned TRAFIGURA is the third largest independent trader of oil and oil products in the world. It has 81 offices in 54 countries around the world.

[42]On the issues of sovereignty, damages and reparation due individuals, Wengler (V. W.), "Les accords passés entre Etats et entreprises privées étrangères sont-ils des traités de droit international?", R.G.D.I.P., 1972, p. 313; Weil (P.), Problèmes relatifs aux contrats passés entre un Etat et un particulier, R.C.A.D.I., 1969, pp. 95 et seq.; P. Weil, Droit international et contrats d'Etat, Mélanges offerts à Paul Reuter, Paris, Pédone, 1982, pp. 549 et seq.

[43]Numerous studies recognize this development, see in particular: Mc Cain Institute studies, "The liability to protect and defend human rights does not belong to a single entity. While governments have a mandate to adopt and enforce laws that protect human rights, other entities, including business, civil society, the media and academia, play a role".

"international human rights law imposes a fourfold obligation on States, being, to respect, protect, promote and implement the rights guaranteed by the conventions to which they subscribe.[44] While the obligation to respect requires the State party to refrain from committing violations, the obligation to protect requires the State party to protect rights-holders from violation by third parties".

40. Similarly, it may come as a surprise to read in the operative part that:

"The Respondent State violated the right to life protected under Article 4 of the Charter" and that "the Respondent State violated the Applicants' right to enjoy the best attainable state of physical and mental health, protected by Article 16 of the Charter" and that "the Respondent State violated the Applicants' right to a general satisfactory environment conducive to development, protected under Article 24 of the Charter".[45]

41. As early as 2011, the United Nations Human Rights Committee[46] made it clear that this liability exists in addition to that of States. On this subject, we note that:

"The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. And it

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ACHPR, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Federal Republic of Nigeria, ACHPR, Communication *155/96* (2001) *AHRC* 60 (ACHPR 2001), § 44; *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic*of Nigeria, Preliminary ruling No. ECW/CCJ/APP/07/10, 10 December 2010, § 10.

ACtHPR, *Lidho and others*, cited above, § 265.

[46]United Nations, Human Rights Committee in its Guiding Principles on Business and Human Rights pointed out that: "enterprises are also subject to the corporate liability to respect human rights", p. 7.

exists over and above compliance with national laws and regulations protecting human rights".[47]

42. It follows that there is a horizontal effect in the preservation of human rights flowing from damage to private persons.[48] This is a remarkable advance in the application of human rights. Human rights are now protected against violations by private individuals. Since human rights courts cannot rule on interpersonal disputes, the horizontal effect is based on the original attributability mechanism derived from general international law. However, the international human rights judge is entitled to apply it, especially in the case of large-scale damage.

ii) Residual State obligations linked to the horizontal effect

43. The horizontal propagation of human rights is no longer merely theoretical. It now extends to environmental law. The consequences of the application of horizontal effect for the State are not yet clear-cut, but the application can be firmly implemented, especially in the field of environmental protection.[49] It is true that the European Court of Human Rights has not yet established a settled doctrine. It states that:

"It is not desirable, still less necessary, to elaborate a general theory concerning the extent to which the

[47] *Idem.*, § commentary on principle 11.

[48] The notion of horizontal effect is inspired by the German doctrine of *drittwirkung*, and refers to the effect produced by a norm within relations between private persons, as opposed to the vertical effect. This technique entails only the application of constitutional norms of domestic law, their "radiation effect" in the interpretation of private law statutes; Rigaux (F.), *La protection de la vie privée et des autres biens de la personnalité*, Bruylant, Paris, LGDJ, 1990, n° 601-608; D. capitant, Les effets juridiques des droits fondamentaux en Allemagne, LGDJ, 2001. v. Moutel (B.), Les "effets horizontal" de la Convention européenne des droits de l'homme en droit privé français. *Essai sur la diffusion de la CEDH dans les rapports entre personnes privées*, Thesis, University of Limoges, 2006, pp. 12 et seq.

[49] With regard to the protection of the right to respect for private life and the home, the ECHR's Lopez Ostra v. Spain judgment of December 9, 1994 was a landmark in horizontal case law. It consolidates in a masterly fashion the approach that had already been developed. On the question of interference by a private company, the Court stated that the Spanish authorities "were not in principle directly responsible for the emissions in question". As the Commission argued, the city had allowed the station to be built on land belonging to it, and the State had provided a subsidy for its construction.

guarantees of the Convention should be extended to relations between private persons".[50]

44. These obligations are residual, as they are obligations that the Respondent State must exercise to ensure that the expected reparations are complete, on the penalty of incurring liability. They are complementary. The State also has an obligation, on pain of incurring international liability, to ensure respect for human rights between private individuals and even with other subjects of the law. The domestic judge is the main architect of compliance with this obligation. For the ECHR, the horizontal effect of the Convention is manifest when the Court requires States, in particular, to protect the right to life,[51] or the right to physical integrity.[52]

45. One of the most frequently cited examples is when an individual complains about negligence on the part of his court-appointed Counsel.[53] In this case, is the dispute horizontal or vertical? States, in such cases, respond by saying that the conduct of the defence is the exclusive liability of the defendant. In the exercise of his activity, the lawyer depends solely on the rules governing the legal profession, over which the State has no power. Even if we recognize the State's obligation, in the independence of the bar, to act in such a way as to ensure effective enjoyment of the applicant's rights of defence.

46. In the *Lidho et al.* case, the Court undoubtedly took the positive obligations of the Respondent State to be sufficient elements of international liability. Obligations, moreover, that the Applicants wish to place on the State. The first 7 claims made to the Court are summarized below:

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[50]ECHR, *Vgt Verein Gegen Tierfabriken v. Switzerland*, 28 June 2001, § 46; Sudre (F.), "Les 'obligations positives' dans la jurisprudence européenne des droits de l'Homme", *RTDH* 1995, p. 364.
[51]ECHR, Grand Chamber, *Osman v. United Kingdom* judgment, 28 October 1998.
[52] ECHR, *H.L.R. v. France*, 29 April 1997; RUDRH, 1997, p. 347, note N. Chauvin; JCP 1998, I, 107, No. 9, obs. Sudre (F.); ECHR, judgment in *A. v. United Kingdom*, 23 September 1998.

[53]ECHR, *Artico v. Italy*, 13 May 1980, Series A No. 37: it states that: "A State certainly cannot be held responsible for any failure on the part of a public defender"; *AFDI*, 1981, p. 288, obs. R. Pelloux; CDE 1982, p. 213, obs. G. Cohen-Jonathan; JDI. 1982, p. 202, obs. P. Rolland.

> "1) Publicly acknowledge its liability for the violations referred to in the Application and publicly apologise, in particular to the victims of the toxic waste dumping and the consequences thereof; 2) ii.Open an independent and impartial investigation in order to establish liability for the waste and prosecute persons involved (...); 3) Ensure the provision of medical assistance to victims (...); 4) iv. Immediately roll out an adequate and effective compensation programme for victims of toxic waste, beginning with a national census of victims of waste dumping (...).); and ensure that the result of this census is disseminated to the public (...); 5) Immediately take measures to prepare a comprehensive national study on the health and environmental effects [...]on human health and the environment; 6) Submit a transparent and publicly accessible report on the use of the lump sum allocated to Côte d'Ivoire under the Memorandum of Understanding signed with TRAFIGURA; 7) Implement structural reforms...".[54]

47. All these demands, both those to be implemented now and those to be implemented in the future, fall within the remit of the public authorities. They reflect the regalian obligations that can only fall within the domain of the State, notwithstanding the horizontal order of respect for the rights in question. This is a clear division of responsibilities. No subject is ignored in its status, including the rights and obligations attached thereto.

48. The African Court on Human and Peoples' Rights should also integrate this approach in its handling of cases. In the name of the universality and unity of human rights.[55] These rights cannot be treated differently depending on the judge's office.

[54] *Lidho et al.* judgment, cited above, § 21.
[55] Decaux (E.), Universalité et indivisibilité des droits de l'Homme dans le droit international, in R. Kessous (ed.), L'universel et les droits de l'Homme, *Actes de l'université d'automne 2004 de la Ligue*

49. The Inter-American Court of Human Rights has endorsed this approach in a number of high-profile cases. The *Los Buzos Miskitos (Lemoth Morris et al.) v. Honduras* case gave the Inter-American Court the opportunity to develop the conditions under which States can be held liable for violations of treaty rights committed by private companies. This was particularly the case in social matters. Over and above the obligations incumbent on States under the instruments of the Inter-American human rights protection system, in the context of high-risk activities, while stating that:

> "Corporate liability is applicable regardless of the size or sector of the company; however, their responsibilities may vary in the legislation based on the activity and the risk they pose to human rights".[56]

50. The State's obligations relating to its status as a public authority will therefore remain. The Court seems to refer to these obligations in §32 and §136:

> "The Court recalls its jurisprudence in *APDH v. Republic of Côte d'Ivoire*[57] that a State Party's obligations to perform certain actions aim to implement corresponding subjective rights guaranteed to individuals (...)The Court recalls that States parties must take appropriate measures to protect persons against deprivation of life by other States, international organizations and foreign companies

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des droits de l'Homme; see also Recommendation No. R (93) 1 of the Committee of Ministers to member states on effective access to the law and to justice in situations of extreme poverty. Point 6 of the Preamble to the European Convention states that "the principle of the indivisibility of human rights, which implies the enjoyment of political and civil rights, such as those enshrined in particular in articles 6 paragraph 3 c, and 13 of the European Convention on Human Rights, is not effective unless economic, social and cultural rights are also protected". The Preamble to the African Charter on Human and Peoples' Rights captures the same idea. Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights ia a guarantee for the enjoyment of civil and political rights;

[56] IDH Court, *Los Buzos Miskitos (Lemoth Morris et al.) v. Honduras*, 31 August 2021, § 48. v. Rota (Marie), *Chronique de jurisprudence de la Cour interaméricaine des droits de l'homme* 2021, pp. 139-146.

[57] ACtHPR, *APDH v. Côte d'Ivoire*, 18 November 2016, § 57.

operating on their territory or in other areas under their jurisdiction (...)".

Conclusion

51. The problem could have been tackled and solved using another approach used by a number of specialists, including Guillaume Pambou-Tchivounda, a former member of the United Nations International Law Commission (UN-ILC), on the same subject. In 1988, he wrote in an important study[58] :

> "It is from the moral dimension alone of the problems it raises that the question of the dumping of hazardous industrial waste in Third World countries, and particularly in Africa, enters the world of law".

52. The Court should horizontally extend the positive obligations contained in the African Charter to the powerful multinational companies that mastermind massive human rights violations on the continent. This horizontal application can be implemented by the Court.

53. Given the gravity of the damage suffered, a global vision that takes into account the complexity of the problem and the place of the actors would be more appropriate. The OAU. Council of Ministers made no bones about it, declaring in its Resolution 1153 (XLVIII) that:

> "The dumping of nuclear and industrial waste in Africa is a crime against Africa and the African people".

[58]Pambou Tchivounda (G.), L'interdiction de déverser des déchets toxiques dans le Tiers Monde: le cas de l'Afrique, AFDI, 1988. pp. 710.

54. It is up to international jurisdictions to strike a balance in this matter. International human rights law must punish the State[59] for the suffering of the people for whom it is responsible on its territory. However, it is up to the discretion of judges to introduce the necessary arbitration when this suffering results from the excessive power of another subject of the law.

Judge Blaise Tchikaya

Done at Arusha this Fifth Day of September, in the year, Two Thousand and Twenty Three in English and French, the French text being authoritative.

[59]Professor Dhommeaux had this to say: “This law is ambiguous (...). The various instruments set up require the State to respect a certain number of human rights, some of which are considered to be natural rights (i.e., pre-social rights) that do not depend on the State’s will, and some of which are “resistance” rights, because they aim to limit the scope of activity to a purely individual domain that is beyond its control. In short, the State is called upon to restrain itself. It's easy to see why people are reluctant to accept this extraordinary change. Whereas the State, as the sole subject of international relations, used to be largely in control of its own affairs, in relation to its own people, it is now under pressure to - indeed, is being held to - account”, v. Dhommeaux (J.), De l’universalité du droit international des droits de l'homme : du *pactum ferendum* au *pactum latum*, *AFDI*, 1989. , 401.