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## **Towards social environmental justice ?**

Marie-Claude Desjardins, Antoine Duval, Francesco Francioni, Sophie Lavallée, Marie-Ange Moreau, Emanuela Orlando, Dominic Roux, Claire Staath, Benedict S. Wray

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## TOWARDS SOCIAL ENVIRONMENTAL JUSTICE?

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Antoine Duval and Marie-Ange Moreau (eds.)



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**DEPARTMENT OF LAW**

*Towards Social Environmental Justice?*

**MARIE-CLAUDE DESJARDINS, ANTOINE DUVAL, FRANCESCO FRANCONI,  
SOPHIE LAVALLÉE, MARIE-ANGE MOREAU, EMANUELA ORLANDO,  
DOMINIC ROUX, CLAIRE STAATH AND BENEDICT WRAY**

**ANTOINE DUVAL AND MARIE-ANGE MOREAU (EDS.)**

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## **Abstract**

This Working Paper is the result of a workshop held at the European University Institute in November 2010. At the heart of it lies a reflection on the potentialities of a new legal concept: *social environmental justice*. Building on the longstanding tradition of social justice and the more recent trend of environmental (or ecological) justice, our aim was to discuss how these two different dimensions of ‘justice’ overlap and could be reconciled in an all-encompassing notion. Moreover, we discussed the need for such a new concept in the light of the contemporary challenges of climate change and economic globalisation and focused especially on the concept’s added value compared to the already existing notion of sustainable development. In addition to that, we explored the practical value of *social environmental justice* especially in the context of legal practice. This publication is a mirror of the different normative approaches (more social, more environmental, more holistic) one can adopt in dealing with problems such as climate change and globalization. Finally, it suggests different legal paths (Human rights, Private International Law, European Law) that could be taken in order to address these issues.

## **Keywords**

Sustainable Development, Social Justice, Environmental Justice, Ecological Justice, Social Environmental Justice.

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# Social Environmental Justice: From the Concept to Reality

Antoine Duval and Marie-Ange Moreau

The workshop we organized in November 2010 at the EUI entitled “towards social environmental justice?” lies at the origin of this working paper. Our aim was to bring together scholars from all around the world, with different legal backgrounds (private and public), to discuss *social environmental justice* as a (more abstract) concept and as a practical legal tool. Two main questions were raised: Do we need such a concept of *social environmental justice*? And what legal consequences could it entail?

## Social Environmental Justice: Is This Concept Necessary?

First, and foremost, what does this concept stands for? Building on the separate development of the concepts of Social Justice and Environmental Justice we proposed to link them into an all-encompassing one: *social environmental justice*. Thereafter, it was necessary to clarify how this concept relates to the existing one of sustainable development. How to differentiate one from the other? And what added value can the *social environmental justice* concept provide?

### *From Social Justice and Environmental Justice to Social Environmental Justice*

#### *Social Justice*

As Dominic Roux and Marie-Claude Desjardins thoroughly explained in their contribution, Social Justice has its roots in the Greek philosophical tradition and was later revived by the philosophy of the enlightenment. But its modern form owes much to the legal philosophical appraisal provided by John Rawls. For Rawls social justice, or justice as fairness, ‘requires that any inequalities must benefit all citizens, and particularly must benefit those who will have the least.’<sup>1</sup> Roux and Desjardins also show how the concept has found its way into international legal material, in soft or hard form, especially in the acts of the International Labour Organisation (ILO). Indeed, the latest, non-binding, declaration adopted by the Ninety-Seventh Session of the International Labour Conference concerns ‘Social Justice for a Fair Globalization.’<sup>2</sup> However, the recent trend towards a deepening of social inequalities, especially in the developed world is very worrying<sup>3</sup>. Indeed, even the International Monetary Fund (IMF) has called for the reduction of income inequalities<sup>4</sup>. In this time of ‘crises’, social justice is doubtless a concept that has a widespread political, economic and also legal appeal.

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<sup>1</sup> L. Wenar, "John Rawls", *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Edward N. Zalta (ed.), p. 22. URL = <http://plato.stanford.edu/archives/fall2008/entries/rawls/>.

<sup>2</sup> ILO Declaration on Social Justice for a Fair Globalization, August 2008.

<sup>3</sup> OECD, *Divided we stand: why inequality keep rising*, December, 2011.

<sup>4</sup> B. Milanovic, More or Less, Finance & Development, September 2011, Volume 48, No 3.

### *Environmental Justice*

Environmental Justice, or even Ecological Justice as Sophie Lavallée calls it in this working paper, is mainly a child of the American literature. The term was coined in the 1980s by various authors<sup>5</sup>. Environmental Justice mirrors in the environmental realm the concepts of social Justice developed by Rawls. For Wenz “issues of environmental justice arise when people want more than they can have”<sup>6</sup>. Indeed “under these conditions, in which at least some people must give up at least some of what they want, a measure of agreement upon principles of justice is a practical necessity”<sup>7</sup>. Environmental Justice is therefore also an issue of distributive justice, not of economical wealth but of environmental goods. There is yet another dimension of environmental justice, which is tightly connected to the ‘justice’ aspect of the concept: procedural environmental justice. This is the understanding adopted, amongst others, by the Environmental Protection Agency in the US<sup>8</sup>, calling for the involvement of all affected parties in the regulatory process.

### *Social Environmental Justice*

What then is *social environmental justice*? A bridge between these two conceptions of justice. In fact, as highlighted by Marie-Ange Moreau’s article, an acknowledgement of the intertwined character of social and environmental injustices, exemplified in the various cases mentioned by Claire Staath and Benedict Wray in their paper. Our ambition is to merge into the concept of *social environmental justice* two types of justice which have the tendency to consider themselves in isolation from one another. Indeed, we think that both Social and Environmental Justice should be regarded as two sides of the same coin. Many goals involving social justice considerations: such as improving the bargaining power of workers, reducing wage inequality and offering strong public services, are also linked with better environmental standards: less polluting industries, more public transportation and better energy efficiency. At global level, a redistribution of wealth from the rich to the poor could be implemented, for example, through a worldwide carbon tax to be reinvested into a greening of energy supply and industries in the developing countries. It is our view that both social and environmental justice go hand in hand. Hence, a conceptual hybrid, *social environmental justice*, could be useful to capture, in a descriptive and normative manner, these issues at transnational or national level.

### ***Sustainable Development vs. Social Environmental Justice***

#### *The limits of sustainable development*

Many contributors, Emanuela Orlando in particular, have raised the fact that there is already an all-encompassing concept: sustainable development. Since the Rio Conference of 1992, it is the leading conceptual tool used in the framework of international environmental law. It is supposed to put three dimensions on an equal footing: the economic development, the environmental sustainability and social justice. However successful the concept has been in public discourse, it has reached its limits when being confronted with the dangerously growing threat of climate change as Professor Ben Boer made clear in his contribution to the workshop. It has been criticized as insufficiently protective (or

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<sup>5</sup> Peter. S. Wenz, *Environmental Justice*, 1988, New York state University Press; See on the Environmental Justice movement, D. Schlossberg, (2007) *Defining Environmental Justice: Theories, Movements, and Nature*. Oxford University Press.

<sup>6</sup> P. S. Wenz, p. 5.

<sup>7</sup> Ibid

<sup>8</sup> “Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.” See: <http://www.epa.gov/environmentaljustice/>

corrective) from the point of view of social justice, by Roux, and ecological justice, by Lavallée. The tension between the three poles makes it very difficult to use it as an operational concept in front of courts: Should economic development come first or are environmental sustainability and social justice concerns superior?

### *The normative edge of Social Environmental Justice*

In this regard, the concept of *social environmental justice* is providing some normative clarity. The priority in development should be set on the reduction of social inequality and the achievement of environmental sustainability at a local, as well as a global level. We consider it a necessary and *preable* condition for economic growth, which should stand above it as a normative goal. For, an economic development achieved at the expense of environmental damages or brutal social inequalities would be a mere mirage. With this working paper on the *social environmental justice* concept we hope to emphasize the shortcomings of the notion of sustainable development and to draw the discourse towards the need for a new all-encompassing framework of *social environmental justice*.

## **Environmental Social Justice: Tackling Challenges Ahead**

Globalization is seen as an important factor contributing to the growth of wage inequality and unemployment, but also to rising environmental risks. Climate change is already causing environmental hazards threatening the poorest population all around the world. Relying on the concept of *social environmental justice* has to be part of the new deal necessary to address these challenges.

### **Globalization**

As described by Moreau, Globalization is generally considered as threatening social justice through delocalisation and a convergence towards the lowest common social denominator. Meanwhile it is also the driver of the risk society<sup>9</sup>: a world society where profits are privatized and risks are globalized. There are few doubts that transnational corporations make good use of the ‘globalization blackmail’ to not only force a reduction of social safety nets, but also to impede environmental protections in order to improve their profit margins. This deregulatory dynamic has to be countered, and the vacuum left by the retreat of the state needs to be filled<sup>10</sup>, in order to achieve a balanced globalization driven towards *social environmental justice*. The financial crisis of 2008 will hopefully set an example for the need to control the forces of the market<sup>11</sup>. Faced with a neoliberal globalisation, it is time for social justice and environmental justice advocates to join hands and to come together for corrective, distributive and procedural mechanisms that, at a transnational level, tackle the externalities of globalization<sup>12</sup>. Indeed, globalization is a problem but might also be part of the solution(s). Initiatives like the global compact<sup>13</sup>, which support the adoption of codes of conduct by transnational corporations, are a step in the right direction. Nevertheless, much more is needed at a global and national level to rein the economic forces and create a regulatory framework directed at achieving the

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<sup>9</sup> U. Beck, *World Risk Society*, Polity Press, 1999 and more recently U. Beck, *World at Risk*, Cambridge Polity, 2009.

<sup>10</sup> J. Sachs, *Globalization’s Government*, Project Syndicate, 30 September 2001. Available at: <http://www.project-syndicate.org/commentary/sachs182/English>

<sup>11</sup> J. Stiglitz, *Freefall: America, free markets, and the sinking of the world economy*, W.W. Norton & Co, 2010.

<sup>12</sup> J. Leinen, ‘A Global Approach for sustainable growth’, *Social Europe*, 24 November 2011. Available at: [http://www.social-europe.eu/2011/11/a-global-approach-for-sustainable-growth/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+SEJColumns+%28Social+Europe+Journal+%C2%BB+Columns%29&utm\\_content=FaceBook](http://www.social-europe.eu/2011/11/a-global-approach-for-sustainable-growth/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+SEJColumns+%28Social+Europe+Journal+%C2%BB+Columns%29&utm_content=FaceBook).

<sup>13</sup> <http://www.unglobalcompact.org/>

goals of *environmental social justice*. Staath and Wray are supporting private international law mechanisms and championing the use of the Alien Tort Act as a useful procedural tool to do *social environmental justice* in cases of wrongdoings by a TNC. While, Orlando is advocating the use of human rights, and relying on international and regional human rights courts to ensure *social environmental justice* in global society. Finally, Francesco Francioni takes a close look at the role played by international human rights provisions in an “environmental horizon” and pleads for a collective and environmental understanding of these rights.

### *Climate Change*

Climate change stands out as the main environmental challenge coming ahead for mankind. Two presentations of the workshop, by Professor Ben Boer and Spyrydon Drosos were specifically dedicated to it<sup>14</sup>. The concerns in terms of environmental justice are immense, as the damages caused by climate change might threaten the life (and lifestyle) of many people around the globe. It is also a domain in which environmental justice has materialised into legal acts, especially at the international level (with the Kyoto Protocol). But, it also bears a social dimension; the potential consequences of climate change will most likely fall primarily on the weakest members of the world society. Those with the least means will be the first ones to suffer of drought, of the rise of commodity prices due to disruptions in production, or of flooding as previewed in the New Orleans disaster of 2005. In the end, climate change might threaten the survival of mankind, but in the short run the concerned ones are those who lack the financial means or the social skills to adapt or relocate. Here too the environmental damage implies dramatic social consequences, there is a need to tackle this issue also in terms of social justice, and to guarantee each human being, rich or poor, equal protection. Taking *social environmental justice* seriously would imply that those countries which have achieved a high level of economic development (on the credit of the planet) must be at the forefront of the fight against climate change, and therefore should accept to take responsibility for the major investments necessary, home and abroad, to curb global warming. Hence, there is an urgent need for a clear endorsement of *social environmental justice* by public authorities and especially by the legal institutions.

Guaranteeing *social environmental justice* should be the primary goal or aim, which underlies and guides courts and public officials when being confronted with cases or regulations involving environmental or social repercussions. Eventually, it is our view that the normative confusion, created by the concept of sustainable development through its balance between economic development, social justice and environmental sustainability, should be overcome in favour of *social environmental justice*.

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<sup>14</sup> Unfortunately Professor Ben Boer and Spyridon Drosos were not able to provide a paper for this volume.

# Social Environmental Justice: The Need for a New Concept<sup>1</sup>

Marie-Ange Moreau

## Building the Concept: Some Analytical Starting-Points

It is always presumptuous to propose the creation of a new concept. This presumption, however, arises from the need to respond to the “creative forces of law,”<sup>2</sup> to take up the eloquent expression of Mireille Delmas-Marty, and forms part of a larger appeal “for a new political imagination”,<sup>3</sup> the objective of which is to take the measure of the profound transformations that our societies have lately undergone. Reflecting these changing paradigms, new concepts emerge and correlate. With the multiplication of norms being generated in different contexts and at differing levels come new needs, to which new concepts must respond. In the same vein, the existence of complex interdependencies requires unfettered methods of analysis.

Prior research on the transformation of norms in the social and environmental dimensions presents a number of different interests. However, this is not the time to merely juxtapose research on “social justice” and “environmental justice,” even though such juxtaposition would have the merit of highlighting the idea of justice in both the social and environmental domains within the context of current societal transformations. The aim of this paper is rather to attempt to discern, through an examination of the transformations which have occurred in styles of regulation, a conceptual basis of analysis which could justify the mobilisation of new, innovative, or atypical legal weapons to fight new social inequalities which are linked to the changes in the environment.

This project is based on the hypothesis that due to the transformation of actors, powers and norms, the current conceptual approach should be revisited from the perspective of social environmental justice. In order to move forward step-by-step, it is useful to begin first of all by examining the benefits of pursuing this conceptual approach, before considering its normative consequences.

## The Benefits of a Conceptual Approach Centred on Social Environmental Justice

Developing a concept of “social environmental justice” may not seem particularly necessary since we already have at our disposal another large concept which brings together the social and environmental dimensions: that of sustainable development. Although this remains a key concept in our understanding of environmental issues, it is nonetheless too vague to allow a real translation of its content within social justice *per se*. However, if we examine the links which exist between the social and environmental dimensions, we realise that it is indeed a social justice goal which should be considered further, despite the autonomous development these two areas of law have undergone. This leads us, finally, to define and specify the elements which demonstrate the benefits and pertinence of the proposed idea.

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<sup>1</sup> Translation by Benedict Wray

<sup>2</sup> « *Les forces imaginantes du droit* »

<sup>3</sup> M. Delmas-Marty, E. Morin, R. Passet, R. Petrella, P. Viveret, *Pour un imaginaire politique*, Fayard, 2010

### ***Inadequacies in the Concept of Sustainable Development***

The concept of sustainable development has progressed greatly since the Rio Declaration on Environment and Development, although its origin lies further back with the Commission created by the General Assembly of the United Nations in 1983 and in the Brundtland report of 1987.<sup>4</sup> ‘The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations,’ stated the Rio Declaration in 1992. This single aim is therefore not only to generate economic expansion but to create equilibrium, taking account both the social and environmental dimensions. As J. M. Arbour and S. Lavallée have written, ‘[i]t is a development which must satisfy essential needs, those being housing, food and health. It is a development which attempts to master demographic expansion, which says to the southern countries that it is neither desirable nor even possible to adopt the same method of consumption as the industrialised nations, who must in turn renounce ways of life which outstrip the ecological possibilities of the planet’.

Sustainable development was inserted into the Treaty of Amsterdam in 1997 as a general objective, then in the European Strategy for Sustainable Development in 2001. It is also mentioned several times in international treaties, including even the preamble of the Marrakesh Accord which gave birth to the WTO. Above all, it was invoked by the International Court of Justice in 1997 in the *Gabcikovo-Nagymaros project* case. The vice-president of the Court, in his separate opinion, considered that sustainable development was more than a mere idea, it was rather a normative principle forming part of modern international law,<sup>5</sup> thereby opening the door to future developments. Finally, sustainable development was the object of an international agreement in 2002 following the Johannesburg summit.

This international recognition enables us to draw together the social, environmental and economic dimensions. The issues at stake in the struggle against poverty and the protection of social groups and communities must, from a long term perspective, be taken into account on the same level as economic efficiency and protection of the environment. In this way, the concept allows us to reconcile economic development, protection of the environment and social justice. ‘The substitutability of these aspects will depend, in a large part, upon the conditions prevailing in each case,’ writes the OECD in its Program for Sustainable Development 1998 – 2001, amply demonstrating that the overarching idea is reconciliation, albeit for the present lacking a defined method. In addition, one might question what constitutes the actual content of this concept, which was founded upon a momentary compromise that can give no guarantee of respect for the values of social justice. ‘The concept of sustainable development is a complex and rather vague category which serves in part as an ideology and in part as an operational concept, but in a manner lacking in rigour for a large number of actors who represent divergent interests,’ wrote one author.<sup>6</sup> A large part of the scholarship therefore criticises the vagueness of the concept of sustainable development and the difficulty, by reason of its lack of clarity, in identifying its real legal implications.

This task is made even more difficult due to its relative success in having integrated itself into several different legal domains. For example, sustainable development was inserted in the Treaty of Lisbon as an objective of the European Union in article 3-III. The Nice Charter had already included sustainable development as one of the Union’s overriding principles in article 37 which proclaimed ‘a high level of protection of the environment and the improvement in its quality must form part of Union policy-making’.<sup>7</sup> However, at the European level, the place of the ‘three pillars’ is rather less clear,<sup>8</sup> nor does

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<sup>4</sup> K. Barkenstein, « Les origines du concept de développement durable », 2005, vol. 3, *Revue juridique de l’environnement*, 289

<sup>5</sup> J-M Arbour et S. Lavallée, *Droit international de l’environnement*, Y. Blais et Bruylant, 2006

<sup>6</sup> J-G Vaillancourt, « Penser et concrétiser le développement durable » *Ecodécision*, vol. 15 2005, p. 24-éc

<sup>7</sup> M. Prieur, « Protection de l’environnement » , in L. Burguorgue Larsen (ed.) *Traité établissant une Constitution pour l’Europe, La charte des droits fondamentaux*, T. II, 2005 Bruylant , p. 484-493

<sup>8</sup> J. Scott, *Environmental Protection, European Law and Governance* , O.P.U. 2009

it seem that the new methods of governance currently in vogue offer a clear method for integrating the social and environmental dimensions, and even less the possibility of incorporating social justice within efficiency based environmental protection mechanisms.

In the context of designing the new EU Strategy for Sustainable Development for 2005 – 2010, seven objectives were identified. Two were general (climate change and the preservation of natural resources) but essentially oriented towards questions of energy policy, agriculture and fishing. Another two were highly specific (transport and consumption), and the remaining three concerned the social sphere: public health, social inclusion and the fight against poverty. The inclusion of these last three objectives has not, however, made the concept of sustainable development any clearer. This is because the Community method relies on a number of different instruments, and leaves a large amount of discretion to Member States without specifying, apart from producing indicators, how choices should be made. Priority objectives are laid out, but the means of attaining them remain, at best, sundry and vague,<sup>9</sup> Degryse and Pochet consider that the inauguration and use of the three pillars rests on the presumption of a virtuous cycle initiated by economic expansion. It has been shown, however, that this expansion does not naturally entail either a social or environmental improvement,<sup>10</sup> a conclusion supported in the most brutal way by the cause and effect of the present economic and financial crisis. According to Degryse and Pochet, the requirements of social justice should therefore be placed at the heart of long-term normative developments, something which presupposes a change of paradigm.

**It is therefore possible to state that, if the concept of sustainable development has the great advantage of having created the necessity, in the long-term, of building methods of reconciliation between the three pillars, it does not allow room for the active promotion of social justice in the current societal debate surrounding the environment. It does not enable the establishment of a strong resistance to short-term financial imperatives which remain the current driving forces. It may therefore be necessary to find another conceptual route which draws together the social and environmental dimensions.**

### ***The Social and Environmental Dimensions: Common Issues in the Search for Justice and Differing Normative Frameworks***

The reconciliation of the social and environmental dimensions around a common concept cannot take place without ensuring that this concept is properly delimited. Social and environmental law were historically constructed on different bases. Environmental law appears particularly young when compared with the development that has taken place, firstly, within the social sphere, especially since the end of the 19<sup>th</sup> Century and the creation of the ILO in 1919, and secondly, within Human Rights, since the Universal Declaration of Human Rights in 1948. It has, however, borrowed from the strong development of international law in order to evolve<sup>11</sup> thanks largely to the action of the United Nations.

The rapidity of this development, as well as that of its foundational principles such as the precautionary principle or sustainable development, is intimately linked to the specificity of environmental questions of which only some have a social impact. If the questions relating to risks are largely shared, others (biodiversity, for example) retain their uniqueness. It is not necessary here to go into the reasons for this: as much as for historical, institutional and substantial reasons, normative autonomy subsists as regards the human rights movement, fundamental social rights and

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<sup>9</sup> C. Degryse, P. Pochet, *Paradigm Shift: Social Justice as a Prerequisite for Sustainable Development*, White Paper European Trade Union Institute, 2009.

<sup>10</sup> M. Aglietta et A. Reberoux, *Les dérives du capitalisme financier*, Paris, Albin Michel, 2004

<sup>11</sup> J-M Arbour et S. Lavallée, *Droit international de l'environnement*, Y. Blais et Bruylant, 2006



environmental law. This does not prevent us from questioning the place that social justice could occupy in the articulation of these areas of law.

This idea, of building a concept which brings together the social and environmental dimensions, should hardly come as a surprise, as it is clear that at present numerous bridges are already being, or have been, built between the two areas.

- Evidently the social and environmental dimensions require that we introduce non-economic values into the legal order.<sup>12</sup> In all cases, and in particular in the European Union where the so-called economic freedoms constitute the heart of the 'economic constitution of the Union',<sup>13</sup> non-economic values are difficult to impose because they imply that regulatory methods be not exclusively structured around market analysis and market values. Taking into account non-economic values has consequences which are ideological, methodological and normative. The struggle for the preservation of non-economic values includes, of course, the protection of human and fundamental rights.
- The inclusion of non-economic values is in part advocated by an abundant literature which has grown up in the framework of the GATT / WTO to encourage respect for the latter in the worldwide economic order. The debates and jurisprudence surrounding article 20 GATT<sup>14</sup> concern mainly environmental law but also deal with respect for social fundamental rights. In each case, the resistance of the WTO translates into the need to show a risk to health, due to the self-evident refusal at the global level, by reason of the divergent economic interests of states, to accept any limitation on global commerce that results directly from the protection of social or environmental rights.
- The methods of protection in the area of international trade, due to the lack of an accepted social or environmental clause at the global level,<sup>15</sup> have therefore developed through bilateral and multilateral treaties. Social clauses generally contain protections of certain human rights, social rights laid down by the 1998 Declaration of the ILO and some environmental rights. At present, there are over 400 treaties which have made use of such clauses,<sup>16</sup> which raises difficult questions as to their control and effectiveness.
- Multinational Corporations have also attempted to improve their social and environmental image by putting in place the huge edifice which today constitutes Corporate Social Responsibility ('CSR'). Here as well, common questions relating to the effectiveness of the legal instruments developed in the framework of CSR, and to its control and regulation, have given rise to a large scholarship. The major problem with which we are presently confronted is not whether to oppose or not the instruments themselves, even if they enable a "normative self-service," but to how to control them in a manner coherent with existing law, particularly at the national and regional level.<sup>17</sup>

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<sup>12</sup> M. Rainelli, L. Boy et alii, *L'ordre concurrentiel*, Mélanges en l'honneur d'A. Pirovano, édition Frison-Roche, 2004

<sup>13</sup> C. Joerges, 'A Renaissance of the European Economic Constitution?' in *Integrating Welfare Functions into EU Law*, U. Neergaard, R. Nielsen & L. Roseberry (eds.), DJOF Publishing, 2009, p. 29-52

<sup>14</sup> J. Burda, *Le droit international économique et les droits sociaux fondamentaux : pour une dimension sociale de la libéralisation des échanges*, Thèse Paris II-IHEI Genève, 2009

<sup>15</sup> MA Moreau, *Normes sociale, droit du travail et mondialisation*, Dalloz, 2006

<sup>16</sup> ILO, ILS, *The Global Job Crisis and Beyond*, [www.ilo.org/wcms5:groups:public:report](http://www.ilo.org/wcms5/groups/public/report)

<sup>17</sup> F. Francioni & M-A Moreau, La dimension pluridisciplinaire de la responsabilité sociale, PUAM, 2007 ; M.A. Moreau, « Les droits de l'homme au travail en 2008 : au-delà la logique des droits de l'homme et des droits sociaux fondamentaux », dans *Droit économique et droits de l'homme*, Larcier, 2009, p. 509-534 ; E. Morgera, *Corporate*

- All the questions which are currently pressing, concerning fundamental protections in the environmental, and, in a hardly less evident way, social spheres, have a global or planetary dimension. As regards the environment, it is not only questions which relate to the activities of multinationals which are important but also those which concern “natural” factors. We know, however, that for the protection of the environment, as for human rights and social protection, the central questions concern identifying the relevant actors and international coordination.

At the real heart of these common problems though, lie questions related to the decentralisation of power, the transformation of the role of the state and the place of civil society. Taking as a starting point for analysis of these issues the overlapping of questions of social and environmental concern has the distinct advantage of a direct link to the current realities. These questions can be seen plainly in cases of large-scale human rights violations, and were particularly present in *Bhopal* and similar cases. Systematic analysis of the latter<sup>18</sup> clearly shows the advantage of a common conceptual and normative approach which goes beyond seeing the issue as merely “social justice” or “environmental justice”, both in order to properly articulate a coherent position concerning access to courts for victims (notably questions relating to universal jurisdiction and *forum non conveniens*), organization of the defence of victims rights (fundamental rights, class actions, and questions of proof in international litigation), as well as reparations and damages.<sup>19</sup>

The central point however is to research the social justice dimension in all of these common questions. **It could therefore be said that such a conceptual re-centring around the ideal of Social Environmental Justice would enable not only to capture the necessity for a new paradigm but to anchor the transformations required by the rise in inequality, and social and environmental risks, in an already existing methodological approach.**

### ***The Relevance of the Concept of Social Environmental Justice***

It might be said that there is, at present, a resurgence of interest in social justice, not only among those who adhere to or refute the ideas of John Rawls but also those who align themselves with the thinking of Amartya Sen.<sup>20</sup> Although Hayek considered it ‘absurd’ to introduce fairness as a basis for social justice, precisely because the idea enables resistance against ultraliberalism, Sen founded his interpretation of the idea of justice upon the necessity for providing, collectively, each person with the freedom necessary for their own development, in particular through education, protection of health and environment and, more generally, through what may be identified as common public goods.

Social justice is a central resource in countering the effects of liberalism and ultraliberalism because it requires a rethinking of the choices made by various legal systems, and a re-orientation of the latter towards solidarity and international liability in all its forms.<sup>21</sup> In effect, Supiot appeals for the “spirit of Philadelphia,” as it was expressed in 1944, to fight against totalitarianism and for peace, to be invoked

(Contd.) \_\_\_\_\_

*Accountability in International Environmental Law*, OPU, 2009 ; O. De Schutter, ‘Corporate Social Responsibility, European Style’, vol. 14, n°2, *ELJ* 2008, p. 203-236

<sup>18</sup> K. Sontag, « La justiciabilité des droits de l’homme à l’égard des sociétés transnationales », dans *Droit économique et droits de l’homme*, Larcier, 2009, p. 569-670.

<sup>19</sup> F. Francioni, ‘Exporting Environmental Hazard through Multinational Enterprises: Can the State of Origin be Held Responsible?’, in Francioni & Scovazzi, *International Responsibility for Environmental Harm*, Graham & Trotman, London, 2006

<sup>20</sup> A. Sen, et P. Chemla, *L’idée de Justice*, Paris, 2010, éd. Flammarion

<sup>21</sup> A. Supiot, *L’esprit de Philadelphie, la justice sociale face au marché total*, Le seuil, 2010-03-15

in order that the idea of social justice (as adopted by the ILO in its Declaration) may enable a reemphasizing of material and spiritual development as well as human dignity.

Current analyses which have developed around social risks show that they are feeding growing reports of increasing inequality. Social and environmental inequalities are symbiotic; the poorest are affected first by degradations in the environment and suffer their effects in a heightened fashion, just as with the effects of environmental disasters. This conjunction of social and environmental inequality occurs at the level of individuals, groups and countries. Thus, environmental crises and archetypal “mass disasters” may cause difficulties in accessing basic resources, a situation which the poorest countries often cannot respond due to insufficient infrastructures.<sup>22</sup> Empirical research has grown up in the United States under the moniker ‘environmental justice’ (or ‘climate justice’), which deals with the need of developing forms of protection which are adapted to the most deprived social groups who do not have access to other means. It is based on an approach which places social inequality and discrimination in juxtaposition with environmental risks.

**To generalise, the concept of social environmental justice clearly implies a new approach to inequality, as it supposes that analysis will take place in the arena of social vulnerability which goes beyond the usual sociological and legal categories which are invoked.<sup>23</sup> It also requires taking the step to free oneself from national borders, something which has important legal consequences, both institutionally and in terms of identifying the relevant actors.**

#### *Approaching the Issue in Terms of Vulnerable Groups*

The social vulnerability perspective is essential for understanding the complexity of the threats to social fundamental rights and the consequences of harmful environmental transformations, particularly those which are the result of climate change. In addition, it has in recent years become central to the structural analysis of global social risks. As Ulrich Beck has put it, ‘social processes and conditions produce an unequal exposure to hardly definable risk, and the resulting inequalities must largely be seen as an expression and product of power relations in the national and global contexts. Social vulnerability is a sum concept, encompassing the means and possibilities which individuals, communities or whole populations have at their disposal to cope – or not – with the threats of climate change [and] financial risk’<sup>24</sup>.

Adopting a vulnerable groups approach also allows taking into account the effect of a number of factors which, in complementing or combining with each other, may lead to a high degree of complexity in the situations and responses under examination. The area of equality and non-discrimination provides numerous examples. Equality policies are limited in cases of discrimination against women if the victims are also, for instance, black or Muslim, or to take another example, which concern minorities such as the Roma who are itinerant and who present various specific cultural aspects which may affect the way in which they suffer discrimination. In taking into account such factors, social environmental justice allows us to move from an individual to a collective<sup>25</sup> and systematic approach. This is particularly important as in the framework of environmental law development has thus far focused on individual rights (see later discussion of the ECHR).

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<sup>22</sup> U. Baxi, *Mass torts, Multinational Enterprise Liability and Private International Law*, Collected Courses of the Hague Academy of International Law, vol. 276, 2002

<sup>23</sup> U. Beck, *World as risk*, Cambridge, Polity, 2009

<sup>24</sup> U. Beck, *World as risk*, Cambridge, Polity, 2009; U. Beck, “Remapping social Inequalities in an age of climate change : for a cosmopolitan renewal of sociology”, 10 (2) *Global networks*, 2010, p. 165-181

<sup>25</sup> F. Francioni, ‘International Human Rights in the Environmental Horizon’, in *The Human Dimension of International Law*, dir. A. Cassese, 2008 OPU

The worldwide reports issued by the ILO on the four fundamental social rights, taken from the 1998 Declaration,<sup>26</sup> clearly show that it is indeed the sum of factors contributing to a social situation in terms of non-respect or violation of fundamental rights which generates the complexity in the responses which should be brought in terms of social justice, in the current context of societal and economic transformation. Recent empirical analyses which go further than the global reports also confirm that vulnerable groups may be identified as such by reason of the accumulation of vulnerability-generating factors, something which may explain the amplitude of the harm caused to the group. Nowhere is this more evident than in situations of modern slavery, child labour, and complex discrimination targeting migrants. Such an analysis could also be applied to the consequences of ecological or climate harm (particularly in cases of 'climate migration'). **The concept of social environmental justice therefore supposes that policy and law making must result from an analysis based upon social vulnerability.**

### *Going Beyond National Structures*

It should, by now, be superfluous to insist upon the need for escaping national forms of reasoning in order to envisage all the questions which are raised by global or transnational issues, be they social or environmental. The extent of capital mobility and the planetary reach of multinational corporations policies have largely shown that: the vast majority of environmental disasters are by nature trans-frontier, whether we are speaking of industrial accidents, or the pollution of the air, rivers and sea; and the vast majority of cases of mass harm find their cause in activities linked to multinational enterprise<sup>27</sup> and in investment policies which intrinsically link states and corporations together.<sup>28</sup> What is more, the transformation of the role of the state as a regulator,<sup>29</sup> coupled with the extension of multilateral trade rules and the rise of private regulation reveal a 'decentralisation' of power and modes of regulation.

Nonetheless we may observe a great difficulty in moving to forms of reasoning or legal instruments which are adapted to this situation. From a sociological point of view, there still persists what Ulrich Beck has called 'methodological nationalism,' perpetuating the analysis of inequality from a classical, national, standpoint, relying on national presuppositions. It is for this reason that we find discussion of the 'de-territorialisation' of risk, due to the wilful avoidance of attacking the question directly on the transnational plane, something which would not require a specific reference to the state as regulator and would necessitate framing the question of regulatory authority outside of national frameworks.

In the legal field, national law often has trouble in finding a rule which is adequate for coping with transnational situations. It is clear that international law is far better adapted to dealing with those questions which have a transnational or international dimension in the social and environmental spheres. This reveals, however, a large hurdle in the path to apprehending multinational corporations in order to impose upon them positive obligations or liability for the violations which they commit. Public international law binds only states and has difficulty extending itself to multinationals, despite doctrinal efforts and the creation of soft law norms such as the Global Compact, the OECD norms, or the Tripartite Declaration of the ILO. There is therefore a self-evident interest in constructing a transversal concept which could bring normative coherency; we may think, therefore, that the concept

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<sup>26</sup> M.A. Moreau, « Autour de la Justice sociale : perspectives internationales et communautaires », *Droit social* 2010, p.324-333 and M.A. Moreau, « Les droits de l'homme au travail en 2008 : au-delà la logique des droits de l'homme et des droits sociaux fondamentaux », dans *Droit économique et droits de l'homme*, Larcier, 2009, p. 509-534

<sup>27</sup> P. M Dupuy, « L'Etat et la réparation des dommages catastrophiques », in F. Francionni & T. Scovazzi, *International Responsibility for Environmental Harm*, p. 125-147

<sup>28</sup> O. De Schutter, *The Challenging of Imposing Human Rights Norms on Corporate Actors*, in *Transnational Corporations and Human Rights*, Oxford, 2006

<sup>29</sup> J. Chevallier, *L'Etat post-moderne*, LGDJ, 2008

of social environmental justice could contribute to bridging the gulfs which exist in the distinctions between national/international and public/private approaches.

The concept of transnational social justice thus supposes an approach which integrates the global dimensions of emerging inequalities, without meanwhile denying the necessity for local responses in the dwelling places of vulnerable persons and groups. It is for precisely this reason that the current method put in place by the ILO in the field of social justice is of interest. It results from lessons learned from the last decade of corporate action in applying the 1998 Declaration on social fundamental rights and the decent work programme, both of which are now integrated into the Declaration adopted in 2008 which aims at a more equitable globalisation.<sup>30</sup>

It follows, on the one hand, that the complexity of fundamental rights violations demands responses which are based on norms which are accepted by the international community *and* on action plans/programmes. The latter occupy both a *vertical* dimension (linked to law's pyramidal hierarchy), incorporating international normative instruments as well as regional and national ones, and a *horizontal* one, involving the coordination of the relevant actors, whether these are international or national institutions, professional associations, NGOs, or trade unions.

Thus, we may conclude that the concept of social environmental justice implies:

- 1) **A systematic recentralisation of questions which touch on sustainable development, around the notion of social justice, through an analysis which bases itself upon social vulnerability and the development of new synergies common to both the social and environmental dimensions.**
- 2) **Putting into place responses which articulate norms and action plans, through a method which is both horizontal and vertical.**
- 3) **Integrating the idea of social justice through the developments which have occurred in human rights, labour law and environmental law.**

## **The Legal Implications of the Concept of Social Environmental Justice**

The concept of social environmental justice inherently contains, as has already been mentioned, a need for coordination of the relevant actors at both the national and international level. This, in turn, implies a need for representation of vulnerable groups, as much by trade unions as by NGOs, and highlights the need for close cooperation between the two. However, this cooperation is developing slowly; the integration of NGOs as interlocutors for civil society in the forums of international or regional regulation is limited due to the structure of international law and its exclusively state-oriented nature. A change of paradigm based on the requirements of social justice would justify a considerable widening of the diversity of actors present on the global stage, which leads of course to the question of their recognition by, and integration in, decision-making bodies.<sup>31</sup>

In addition, social environmental justice also implies necessarily refusing regulatory analyses which are exclusively founded upon market equilibrium. The 'capabilities approach' proposed by A. Sen must be applied systematically in the common area which relates to the promotion of human dignity,

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<sup>30</sup> F. Maupain, « Nouvelle fondation ou nouvelle façade ? La Déclaration de l'OIT sur la justice sociale. Pour une mondialisation équitable », EUI Working paper Law 2009/1 , [www.eui.eu/Law/WP](http://www.eui.eu/Law/WP) ; M.A. Moreau, « Les droits de l'homme au travail en 2008 : au-delà la logique des droits de l'homme et des droits sociaux fondamentaux », dans *Droit économique et droits de l'homme* , Larcier, 2009, p. 509-534.

<sup>31</sup> C. Kaufman, *Globalization and Labour Rights*, Hart Publishing, 2007

to its development and well-being, within the context of a healthy planetary environment. It also implies attempting to reduce the conflicts which arise between environmental law and short-term social protection (in particular in the area of labour rights).

This has several immediate advantages: of giving coherence to the jurisprudence which has grown up in the field of human and fundamental rights whilst at the same time reinforcing it; of providing a new conceptual framework in order to enable the creation, on the international level, of a right to access to justice for the most vulnerable victims of harm which has a direct or indirect trans-frontier element ; of proposing a reinforced regulatory framework oriented towards multinational corporations and their social responsibility; and of opening up the table to alternative approaches.

### ***Reinforcing the Human and Fundamental Rights Approach in the Area of the Environment***

The links between social fundamental rights and the right to a healthy environment are eminently complex since they bring into conflict two different doctrinal positions. The first of these advocates that environmental law protection should result from adaptation of existing human rights, while the second holds that it is more appropriate to create a third generation of 'rights to the environment'.<sup>32</sup>

This is not the place to enter into the detail of the debate surrounding these analyses and controversies, but it should be noted that the concept of social environmental justice is consistent with the current developments in fundamental rights which are based upon the logic of human rights and enhancement of social rights.<sup>33</sup> It also rests on the development drawn out of the link between human rights and the environment, through the principles of the 1992 Rio Declaration, the principles developed within the framework of the Council of Europe (Manual on Human Rights and Environment, 2005), and the jurisprudence which has sprung up at the regional level (namely the NAFTA, ECHR, Inter-American Convention and African Charter of Human Rights).<sup>34</sup> For a large part, it is in the domain of social rights that jurisprudence has developed which enables environmental protection. The case law of the European Court of Human Rights is particularly remarkable in this respect since it has given protection to environmental concerns through interpretation of the right to life, the right to health, the right to private and family life, and the right to property.<sup>35</sup> In the field of constitutional protection, the right to health has also been mobilized to provide environmental protection.

This jurisprudence, which results from the need for an efficient mobilization of rights which currently exist in the European Convention of Human Rights, reveals a certain similarity in the issues which affect social protection and the protection of the environment in terms of justiciability. Beyond the possibilities offered by the ECHR, the aims pursued by the scholarship, in view of an efficient use of international norms, are identical: the acknowledgement of social rights<sup>36</sup> and the rights to a healthy environment and to a high-quality environment<sup>37</sup> require not only their proclamation but also recognition of their justiciability. In both domains, the question arises as to the identification of positive obligations for the state.

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<sup>32</sup> S. Lavallée, « Le droit à l'environnement : pour l'équilibre des intérêts, pour un développement durable ? » dans *Droit économiques et droits de l'Homme*, Larcier, 2009, p. 363-404

<sup>33</sup> M. Langford et al, *Social Rights Jurisprudence, Emerging trends in International and Comparative Law*, Cambridge 2009

<sup>34</sup> F. Francioni, 'International Human Rights in the Environmental Horizon', in *The Human Dimension of International Law*, dir. A. Cassese, 2008 OPU

<sup>35</sup> P. Steichen, « Entreprises et droit à l'environnement : les obligations de l'entreprise liées au droit à l'environnement », dans *Droit économique et droits de l'homme*, Larcier, 2009, p. 405-438 ; J. Callewaert, 'The European Convention of Human Rights and the European Union Law: a Long Way to Harmony', *European Human Rights Law Review*, n°6, 2009 p. 768-783

<sup>36</sup> M. Langford et al, *Social Rights Jurisprudence, Emerging trends in International and Comparative Law*, Cambridge 2009

<sup>37</sup> F. Francioni & T. Scovazzi, *International Responsibility for Environmental Harm*, Graham & Trotman, London, 2006; J-M Arbour et S. Lavallée, *Droit international de l'environnement*, Y. Blais et Bruylant, 2006.

Does not an approach in terms of social environmental justice generate new synergies? **This evidently involves a research design which bases itself on the idea that there is a circular causality between social justice and environmental justice, and that the protection of vulnerable persons justifies a reinforcement of fundamental protections through human rights.** This also implies that approaches which are based upon the protection of vulnerable persons through human rights integrate the environment as an essential aim of the protection of human health, life and dignity, without awaiting the international recognition of a third generation of human rights.

### *Access to Justice*

The concept of social environmental justice requires the coherent development, at the international level, of access to justice in the areas of catastrophic harm and the violation of social rights. Numerous studies have emphasized the difficulties which exist in pursuing the multinational corporations which are at the origin of these violations. Again, this implies an analysis which bases itself on social vulnerability and which should help public and private international law to evolve and progress, as has been suggested by U. Baxi in the field of access to the courts,<sup>38</sup> in particular by the use of universal jurisdiction,<sup>39</sup> procedures which prevent denial of justice for victims in fact, as in the Bhopal case, and rights to class or group actions and specific procedural guarantees.<sup>40</sup>

In this area social environmental justice clearly compels a radical change of perspective, as it necessitates recognition of a right of access to justice which integrates the particularities of catastrophic social and environmental harm, and which goes beyond the present national understandings of the right, including those which, happily, already permit actions against multinational corporations (see in particular the United States case law based upon the Alien Tort Claims Act).

### *The Liability of Multinational Corporations under International Law*

The international law scholarship has deployed the most extraordinary efforts in an attempt to develop the liability of multinational corporations. These have been particularly marked in the field of human rights<sup>41</sup> and environmental law,<sup>42</sup> but equally in investment law.<sup>43</sup> In the field of international social rights, however, the doctrine has come up against the obstacle posed by the concept of employer which hides behind the legal personality that shelters it. Here again, the transnational approach required by social environmental justice as well as that which proceeds from an analysis of vulnerable groups not necessarily restricted to a single country necessitates researching and proposing a theoretical framework which enables us to apprehend the multinational corporation in legal terms through its social and environmental responsibility.

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<sup>38</sup> U. Baxi, *Mass torts, Multinational Enterprise Liability and Private International Law*, Collected Courses of the Hague Academy of International Law, vol. 276, 2002

<sup>39</sup> H. Muir-watt, *Aspects Economiques du droit international privé*, Cours de L'Académie Internationale de la Haye, 2005, p. 293 et s.

<sup>40</sup> K. Sontag, « La justiciabilité des droits de l'homme à l'égard des sociétés transnationales », dans *Droit économique et droits de l'homme*, Larcier, 2009, p. 569-670.

<sup>41</sup> F. Francioni, 'International Human Rights in the Environmental Horizon', in *The Human Dimension of International Law*, dir. A. Cassese, 2008 OPU

<sup>42</sup> F. Francioni & T. Scovazzi, *International Responsibility for Environmental Harm*, Graham & Trotman, London, 2006

<sup>43</sup> O. De Schutter, *The Challenging of Imposing Human Rights Norms on Corporate Actors*, in *Transnational Corporations and Human Rights*, Oxford, 2006

### ***The Demands Placed on the Control of Corporate Social Responsibility***

Ever since multinational corporations have begun to adopt corporate social responsibility instruments, the central theoretical questions in the social and environmental fields have converged and are well-identified by the scholarship (see the works of the Bellefeuille Chair, C. Gendron, Montréal). The signature of the most recent framework agreements further attest to this fact, since they explicitly link social and environmental issues together.<sup>44</sup> The studies currently at the forefront show, furthermore, that the respect of social and environmental protection, once properly articulated, necessarily leads to profound transformations in behaviour and means of action within the corporation, something which obliges a rethink of management styles (compare the experiences of the food sector) and therefore of integrated multidisciplinary approaches.

One might think that if the development of CSR instruments continues to be indispensable, the central question which arises is that of the control of these instruments, by the actors themselves via the principles of 'democratic governance'<sup>45</sup> or paritarism,<sup>46</sup> and/or by an international or regional regulator, and if necessary by the courts. Indeed, the concept of social environmental justice urges a development which maintains coherency between the principles laid down in the national or regional legal order in the field of fundamental rights and CSR instruments (see the Esther project, 2009). The example of the European Union nicely demonstrates, besides, that the policy of non-intervention by the Union in the control of CSR is a choice made largely in favour of the employer.<sup>47</sup>

Finally, the question arises at the level of international organizations of who should regulate CSR. One might think that if the concept of social environmental justice manages to develop, it will encourage the ILO to invest in controlling the rights at play, due to the impossibility of cooperating with an international institution charged with the protection of the environment. Naturally, the concept of social environmental justice should also lead to a revisiting of indicator regimes,<sup>48</sup> in order that the latter take into account the complexities linked to social vulnerability, structure the social and environmental dimensions, and refrain from reducing CSR to quantifications which exclude any social justice content.

One of the most pressing issues for the concept is thus to generate a coherent control over the relevant legal instruments and norms in order to facilitate the punishment at the international level of abuses which are occasioned, permitted or perpetrated by multinational corporations, so that victims are both protected and indemnified. An important part of the scholarship has already begun to open up in this direction. It is therefore possible to think that the concept of social environmental justice would enable mutual enrichment of the literature in both the area of social rights and that of environmental law, and thus make plain the need for a paradigm change.

### ***Alternative Perspectives***

The acceptance of this new concept may also open the way to new approaches and structures. We should therefore consider the consequences of the social environmental justice approach (in its double dimension) on the European Strategy for sustainable development, its impact on the restructurings occurring within the EU, and the mobilization of the terms of the Lisbon Treaty which relate to the environment and to the horizontal social clause. We might also ask whether the 'combination' of

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<sup>44</sup> R-C Drouin, « Les accords-cadres internationaux : enjeux et portée d'une négociation collective internationale » *Les cahiers de droit*, 2006 vol ;47, n°4, p. 707 et s.

<sup>45</sup> M. Barenberg, 'Toward a Democratic Model of Transnational Labour Monitoring?' in *Regulating Labour in the wake of Globalization*, B. Bercusson & C. Estlund (eds.), 2008, Hart Publishing, p. 37-66

<sup>46</sup> M. A Moreau, « Négociation collective transnationale : réflexions à partir des accords -cadre internationaux du groupe Arcelor Mittal », *Droit social* 2009, p. 93-102

<sup>47</sup> O. De Schutter, 'Corporate Social Responsibility, European Style', vol. 14, n°2, *ELJ* 2008, p. 203-236

<sup>48</sup> A. Supiot, *L'esprit de Philadelphie, la justice sociale face au marché total*, Le seuil, 2010-03-15



different protections could profit vulnerable groups affected by threats to the environment which would also seem to lead to discrimination. What is clear is that it is essential, in order to come to terms with the consequences which result from climate change, to recognise the changed paradigm,<sup>49</sup> and to suggest that a method which reconciles norms and action plans could be the guiding principle for considering the potential responses which might be brought in the face of mass climate migration.

If the importance of the concept of social environmental justice seems particularly high at the international and transnational levels, it is also relevant to justifying the integration of environmental perspectives within the corporation, and for identifying legal transformations in national law which it implies.<sup>50</sup> The transformations in constitutional review, which came into force in France in March 2010, provide that the precautionary principle, as laid down in the Charter on the Environment, may be invoked in cases which involve vulnerable groups, particularly migrants. The jurisprudence of the Constitutional Court could therefore be in future a source of concretisation of the concept of social environmental justice.

This brief tour of the horizon of normative implications which flow from the concept of social environmental justice gives a tantalising glimpse of its potential. To sum up, social environmental justice serves:

1. For providing (or giving back) a central place to the idea of justice in facing up to the so-called “postmodern” issues of our societies, and equally to the idea of “at-risk” societies in which environmental and social risks become entangled in and can even lead on to one another. The approach in terms of social justice rests on the support which comes from the Universal Declaration of Human Rights, not only in its own area of human rights, but also in the framework of international social law, and, in a more indirect way, in the development of environmental law. It refers back, of course, to the ideal proposed by the ILO and proclaimed in the Declaration of Philadelphia of 1944 which has been universally recognised and accepted. In short, it supposes a systematic re-centring around the human being and human dignity as its primary, fundamental premise.
2. For considering, given the profound transformations in inequality which sit at the conjunction of social and environmental inequality, a change of paradigm in order to adopt a position going beyond the national frame of analysis (including the political, as well as legal and sociological, points of view) and for choosing an approach in terms of social vulnerability which transcends the classic categories.
3. For adopting a methodology which articulates both the vertical structure of the various norms and institutions, whether organized at the national, regional or international level around states/countries, and the horizontal dimension of those actors who can operate transnationally. This methodology will enable the structuring of fundamental norms and actor coordination in both the vertical and horizontal dimensions. In fact, it is precisely such an approach which is currently being proposed by the ILO in its 2009 Declaration concerning Fairer Globalisation, and which results from an experimental deciphering of cases brought in last decade in the struggle for the promotion and protection of fundamental rights of workers.

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<sup>49</sup> C. Degryse, P. Pochet, *Paradigm Shift: Social Justice as a Prerequisite for Sustainable Development*, Working Paper 02, European Trade Union Institute, 2009.

<sup>50</sup> Regarding France see the work of I. Desbarrat, A. Bugada and more recently F. Heas.

The global evolution which has occurred in the four areas covered by the 1998 Declaration on Fundamental Workers' Rights confirms that only an approach which structures the various norms from a transnational perspective, coupled with actor coordination at both the local and global level, can respond to the new issues arising from social and environmental inequality.

4. *Mutatis mutandis* this sophisticated methodological approach provides a translation of the questions posed by the increasing entanglement of social and environmental issues, something which may justify new normative research:
  - linking social and environmental questions and justifying them through having recourse to the common concept of social environmental justice;
  - which seeks, through the 'combination' of existing norms in labour law and environmental law, to generate a new dynamic. This orientation rests on pre-existing structures, particularly within the framework of the ECHR which can be generalised thanks to an adequate conceptual framework; or
  - which proposes new normative and institutional methods, naturally following new routes and concepts.
5. The concept of social environmental justice has therefore the interest of leading to a de-centring from the concept of sustainable development, whilst respecting the autonomy of human rights, labour law and environmental law, in order to impose a new paradigm.



# Sustainable Development without Social Justice?

Dominic Roux and Marie-Claude Desjardins<sup>1</sup>

This multidisciplinary seminar has been the occasion to get to know an inspiring new concept, "social environmental justice", which is proposed as an alternative to the often criticized concept of sustainable development. Obviously, the objective of the proposal is not to question the aim of sustainable development (at least we do not think so), but the concept itself (the distinction is important).

At this stage of our reflection, although the new concept of "social environmental justice" seems interesting, it is difficult to assert firmly that it should replace completely the one of sustainable development. The reason for this difficulty lies in the fact that sustainable development has become, since 1992, a unifying theme mobilizing the political forces and public opinion. Admittedly, sustainable development is a concept one could consider as hackneyed, but it should be taken into account that it has become a key issue in political and legal discussions in many States as well as in the international community. Adopting this new concept could constitute, in a certain way, a step forward in strengthening social and environmental justice. Nevertheless, putting away the economic dimension when dealing with social and environmental questions could be risky. Indeed, considering social development and environmental protection without taking into account the economy or vice versa could increase the partitioning that now exists between the different spheres of law (social, economic and environmental law).

Thus, abandoning completely the unifying concept of sustainable development for the one of environmental and social justice is, for now, difficult to imagine but the proposed concept leads us to look into the place given to social justice in the actual conceptualization and implementation of sustainable development. Even if sustainable development has been designed to give a role as important to the social dimension as the ones given to the economy and the environment, we have to admit that it is often neglected by States when implementing the concept<sup>2</sup>. In the light of this, questions should be addressed: Is it possible to conceive sustainable development without taking account of social justice? Most importantly, is it possible to do so without violating international law? These questions form the basis of our paper.

Although sustainable development has its roots in international legal instruments, paradoxically its implementation into law appears particularly difficult for States. Admittedly some efforts have been done to integrate the concept as a principle in new laws<sup>3</sup> or to use it in the law making process. As it is used now, sustainable development serves to conciliate social, environmental and economic considerations when adopting or implementing law but few States have been using the concept in order to shed new light on the pre-existing legal instruments pursuing common objectives. In other

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<sup>2</sup> L. SEBASTIEN and C. BRODHAG « A la recherche de la dimension sociale du développement durable », *Développement durable & territoires*, Dossier 'Dimensions humaine et sociale du développement durable', March 2004, [<http://developpementdurable.revues.org/1133>] (Access date : August 18th 2011)

<sup>3</sup> For example, *Loi sur le développement durable*, L.R.Q. 2006, c. D-8.1.1; *Loi canadienne sur la protection de l'environnement*, L.R.C. 1999, c. 33.

words, very few have made use of sustainable development concept to conciliate social, environmental and economic legal obligations.

In our view, sustainable development should be considered as a hinge between the various fields of law. However, we have to admit that in reality they remain highly partitioned<sup>4</sup>, especially at an international level. Some efforts have been made by Inter-State organisations, such as the International Labour Organisation (ILO), in order to make connections between social and environmental legal principles but not much has been done in order to conciliate economic law with the two other spheres of law. Indeed, economic law, more often than not, prevails over environmental and social law.

Sustainable development should be considered not only as a tool, as it is mainly used now, to create new law conciliating economy, environment and social development, but also as a new way to interpret existing legislation. Putting forward sustainable development in a legal context does not mean to deny legislation existing before its creation. Contrariwise, it underlines the necessity for States to stop considering each legal field as existing in a vacuum. They have to be considered as a whole, in a holistic perspective. It seems totally logical to do so because States taking economic decisions at the World Trade Organization (WTO)<sup>5</sup> are generally the same that those who engage themselves to pursue social objectives at the ILO<sup>6</sup> and to protect the environment under the aegis of United Nations Environment Program (UNEP)<sup>7</sup>. In that sense, sustainable development could be used as a way to bring more *coherence* into the international arena<sup>8</sup>. Following this logic, pre-existing recognised legal principles, such as social justice, should be considered as part of the sustainable development three spheres' content. We can even go further and assert that any interpretation of sustainable development that does not include social justice goes against the obligations imposed by international law to States and Intergovernmental Organizations since, as we will demonstrate in this paper, it is a recognised principle of international law.

This paper, which is also addressed to academics who are not lawyers, or lawyers who are less familiar with international human rights law, is divided into two parts. First, we will address the following questions: What is social justice? And what does it mean in international law? Second, we will identify links between social justice and sustainable development. In other words, we will ask the following questions: In terms of international law, what is the current function of social justice in sustainable development? And what should States do to take into account social justice when they enact bills or measures in order to achieve sustainable development? Our approach is based on human rights, and that is why we will give the example of the eight "core" ILO conventions, widely ratified by the ILO member States, and the *International Covenant on Economic, Social and Cultural Rights*, a treaty ratified by 160 countries.

## Social justice as preeminent legal principle

Origins of the social justice principle can be traced back to the Antiquity. It has been developed throughout history, particularly in the philosophical literature, but also in political action. In Book 5 of

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<sup>4</sup> S. ROUSSEAU, « Dimensions humaine et sociale du développement durable : une problématique séparée du volet environnemental? » *Développement durable & territoires*, Dossier 'Dimensions humaine et sociale du développement durable', November 2004, [<http://developpementdurable.revues.org/1214>] (Access date : August 18th 2011)

<sup>5</sup> WORLD TRADE ORGANIZATION, *Members and Observers*, [[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)] (Access date : August 17th 2011).

<sup>6</sup> INTERNATIONAL LABOUR ORGANIZATION, *Alphabetical list of ILO member countries*, [<http://www.ilo.org/public/english/standards/reln/country.htm>] (Access date : August 17th 2011).

<sup>7</sup> UNEP, *About UNEP*, [<http://www.unep.org/Documents/Multilingual/Default.asp?DocumentID=43>] (Access date : August 20th 2011).

<sup>8</sup> J. BRODEUR, B. COLAS, C. DEL CONT, S. DOUMBIA, M. JACQUOT, G. PARENT, G. REGIMBALD, D. ROUX, M. VICTOR, D. WILSON, *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights*, Cowansville, Yvon Blais, Bruxelles, Bruylant, 2010

*Nicomachean Ethics*, Aristotle devised the concept of "proportional reciprocity," which is a sort of forerunner for social justice, and he justified his rationale: "For it is by proportionate requital that the city holds together"<sup>9</sup>. In the sixteenth century, we find the early writings on the need to provide work for the poor, especially a law adopted by Parliament of Paris in February 1515<sup>10</sup>. In 1525, the Spanish Juan Luis Vives published what could be considered the first book devoted to public assistance (*De Subventionem pauperum* - Assistance to the poor). Organization of work by government was then, in his view, the main measure against poverty<sup>11</sup>. In France, the French Revolution put an end to the corporatist system in 1791. A law was adopted to enable all citizens to exercise the profession of their choice so they could meet their needs and those of their families<sup>12</sup>. The same year, another law, called "Loi Le Chapelier", stated in its preamble that "it is to the Nation and Public officers to provide work to those who need it for their existence and provide assistance to disabled person". The French have explicitly reiterated this "right to work" in the Constitution of 1793, adding that "public assistance is a sacred debt", because "the society must give subsistence to poor citizens "(art. 21)<sup>13</sup>.

The idea of social justice also appeared in *Rerum Novarum*, the encyclical issued by Pope Leo XIII in 1891 and entitled "Rights and Duties of Capital and Labour". This influential text is the official *Catholic social teaching*. Besides the rights and obligations of employers and employees described therein (which among others aim to provide respectable working conditions for workers), we find this:

Whoever has received from the divine bounty a large share of temporal blessings, has received them for the purpose of using them for the perfecting of his own nature, and, at the same time, that he may employ them, as the steward of God's providence, for the benefit of others.<sup>14</sup>

Eighty years later, in his book called "A Theory of Justice" published in 1971, John Rawls speaks of social justice as a principle whose goal is to provide a way to determine the rights and duties in society and define the appropriate distribution of benefits and burdens of social cooperation. In fact, for Rawls, there are two fundamental principles of justice: the first is a sort of "right of each person [...] to have an equal right to liberties"; the second principle, which he calls "difference principle", aims at reducing the social and economic inequalities. Those will be acceptable only insofar as they provide the greatest benefit to the most disadvantaged members of society<sup>15</sup>. This principle can be achieved, according to Rawls, if the most disadvantaged people get their fair share and actually see their situation improve. In short, there must be a *reduction of inequality*, and this can only be achieved if the basic needs of the poor are met and if the wealth is distributed more evenly.

Rawls's theory was criticized in particular by Amartya Sen, recipient of the Nobel Prize in Economics Sciences (1998). Through his many writings, Sen proposed to define social justice in terms of "capabilities", which are the concrete and real opportunities available to each individual to achieve freely (the "freedom") the things that are important to him<sup>16</sup>. The factors that hinder the "capabilities"

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<sup>9</sup> A. SUPIOT, *L'esprit de Philadelphie – La justice sociale face au marché total*, Paris, Seuil, 2010, p. 43.

<sup>10</sup> D. ROUX, *Le principe du droit au travail : juridicité, signification et normativité*, Montréal, Wilson & Lafleur, 2005, p. 76.

<sup>11</sup> J. L. VIVÈS, *De subventionem pauperum (1525)*, Nouvelle édition, Bruxelles, 1943, p. 203, quoted by P. ROSANVALLON, *La nouvelle question sociale*, Seuil, 1995, p. 138.

<sup>12</sup> T. REVET, "La liberté du travail", in R. CABRILLAC et al., ed, *Droits et libertés fondamentaux*, Paris, Dalloz, 1996, p. 435.

<sup>13</sup> D. ROUX, *Le principe du droit au travail : juridicité, signification et normativité*, Montréal, Wilson & Lafleur, 2005, p. 79.

<sup>14</sup> The full text of *Rerum Novarum* is available on Vatican's official Website. [[http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html)] (Access date: August 14th 2011).

<sup>15</sup> J. RAWLS, *A Theory of Justice*, Cambridge, Mass., The Belknap Press of Harvard University Press, 1971.

<sup>16</sup> A. SEN, *L'idée de justice*, Paris, Flammarion, 2009, chapter 11 "Vies, libertés et capacités", and more part. at p. 283 ff.; A. SEN, *Development as Freedom*, Oxford and New York, Oxford University Press, 1999. See also: R-C. DROUIN, "Capacitas and Capabilities in International Labour Law", in S. Deakin and A. Supiot, *Revisiting the Legal Notion of Capacity*, Oxford, Hart Publishing, p. 141.

come from personal considerations, such as physical disabilities, but they may also result from poverty broadly understood, not only deprivation of resources such as decent work<sup>17</sup>. For Sen, the government has the obligation and responsibility to help those in need: it must take ethical decisions guided by the ideal of justice, that is to say improve the "capabilities" of each individual<sup>18</sup>. Sen's writings have had a great influence on the policies of international development assistance. His work is also one of the founders of the Human Development Index adopted in 1990 by the United Nations Development Program (UNDP), index that takes into account three criteria: life expectancy at birth (depending on access to adequate food, drinking water, adequate housing and adequate health care), education level and living standards (measured on the basis of economic indicators)<sup>19</sup>. These criteria correspond essentially to the social dimension of sustainable development which will be described in the second section of this text.

These few non exhaustive examples give a good idea of the origin and the content of social justice in a general context. This concept has not only interested philosophers but it has also been integrated into international law. Indeed, social justice is an established "legal principle" that expresses itself through concrete international obligations binding on States, either because of their membership in international organizations, such as ILO or UN, or because these States have ratified or acceded to international treaties that aim to respect, protect and promote human rights.

The formal consecration of social justice as a legal principle in international law occurred in 1919 when the ILO was founded<sup>20</sup> at the end of World War I. Although almost a century has passed since then and although the international context has changed, the objectives pursued by its founders remain highly relevant in the current era of economic globalization and domination of neoliberal and free-market ideologies. Some of them are explicitly mentioned in the ILO Constitution's preamble. The first sentence of this founding treaty of the organisation, which binds all Member States, is revealing in this regard:

Whereas universal and lasting peace can be established only if it is based upon social justice.

For the ILO and its 183 current members, there is no possible doubt: The world peace is impossible without social justice. That is what the second statement of ILO Constitution's preamble asserts:

Whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required.

Finally, social justice cannot be achieved without strong cooperation between States and, mainly, without international standards in order to ensure fair international trade. In other words, social justice requires that ILO norms protect States, and therefore workers, against "a race to the bottom"<sup>21</sup>. That is what the third statement of ILO Constitution's preamble stipulates:

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries

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<sup>17</sup> A. SEN, *L'idée de justice*, Paris, Flammarion, 2009, chapter 12 "Capabilités et ressources", p. 309 ff.

<sup>18</sup> *Id.*, p. 292.

<sup>19</sup> <http://hdr.undp.org/en/>

<sup>20</sup> It should be noted that since 1946, the ILO is a specialized agency of the United Nations. It meets annually at the International Labour Conference (ILC). Each of the 183 member States is represented by four delegates: two for government and one delegate for each of the most representative organizations of employers and employees present in the country.

<sup>21</sup> B. HEPPLER, *Labour Laws and Global Trade*, Oxford and Portland (Oregon), Hart Publishing, 2005, chapter 1, "Does transnational labour regulation matters?", p. 1-24; R. J. FLANAGAN, "Labor Standards and International Competitive Advantage", in R. J. FLANAGAN et al., ed., *International Labor Standards: Globalization, trade and public policy*, Stanford, Stanford Law and Politics, 2003, p. 17; S. H. CLEVELAND, "Why International Labor Standard?", *Id.*, p. 129.

In 1944, the ILO and its member States took a step further in the legal recognition of social justice principle by adopting a text we can consider as the precursor of the universal recognition of human rights by the UN, a few years later. This is the *Declaration of Philadelphia*, which was annexed to the ILO Constitution and therefore binds the organisation and all the member States. In this powerful text, the ILO “reaffirms” the structural principles which founded the creation of the ILO, including the fact that “Labor is not a commodity”, that “poverty anywhere constitutes a danger to prosperity everywhere”, and that “the war against want requires to be carried on with unrelenting vigour within each nation”. Although adopted nearly 50 years before, these principles are very close to the one proposed by the international community in 1992 through the sustainable development concept: “war against want and poverty” (we will come back in part two on that issue).

That being said, one of the most striking provision of the *Declaration of Philadelphia* is the one stating the prerequisite for the realization of social justice principle:

All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.

This fundamental right, which in itself expresses social justice and furthermore implies equality for all people, should be, according to the text of the Declaration, the *main objective of all national and international policies*. Indeed, economic and social aspects cannot be separated, and it is clear that ILO and its member States have a formal obligation to put social justice at the heart of their international and national decisions. These two excerpts of the Declaration confirm that idea:

the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;

...

all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;

In other words, the economy is not an end in itself but should rather be at the service of human being! For the ILO, acting for social justice has always meant adopting international legal standards in order to establish working conditions that respect the dignity of workers, protect their health, their physical safety and their mental health (especially for women and children), and restore fairness in international trade relations. These are the common structural bases that have always guided the normative and institutional activity of the ILO. In short, the 189 conventions and 201 recommendations adopted so far by the ILO *implement social justice principle*<sup>22</sup>.

To a lesser extent, the same conclusions can be made from the two major declarations recently adopted by the ILO. In 2008, the ILO adopted a text which is not a treaty and has not been incorporated into the Constitution, unlike the *Declaration of Philadelphia*. It is a mere instrument of “soft law”<sup>23</sup>. However, the title of this instrument, and the fact that it was adopted unanimously by 183

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<sup>22</sup> These ILO Conventions and Recommendations are all available at the following address: [http://www.ilo.org/ilolex/english/index\\_frame.htm](http://www.ilo.org/ilolex/english/index_frame.htm).

<sup>23</sup> I. DUPLESSIS, “Le vertige et la soft law. Réactions doctrinales en droit international”, 2007 (Hors –série) *Revue québécoise de droit international* 245; I. DUPLESSIS, “La mollesse et le droit international du travail : mode de régulation privilégié pour société décentralisée”, document de travail Gouvernance, droit international et responsabilité sociétale des entreprises, DP/182/2007, ISBN 978-92-9014-836-4, Institut international d’études sociales (IIES) de l’OIT, Genève, 2007, pp. 1-23.



countries, deserves some attention here<sup>24</sup>. This is the *ILO Declaration on Social Justice for a Fair Globalization*. The long preamble recognizes that “achieving an improved and fair outcome for all has become even more necessary in these circumstances to meet the universal aspiration for social justice”. In this text, the ILO and its member States undertake “to place full and productive employment and decent work at the centre of economic and social policies”. In order to do this, these policies “should be based on the four equally important strategic objectives of the ILO” which have to be considered as “inseparable, interrelated and mutually supportive”. What are they? i) Promoting employment by creating a sustainable institutional and economic environment; ii) Developing and enhancing measures of social protection (social security and labour protection); iii) Promoting social dialogue and tripartism; iv) Respecting, promoting and realizing the fundamental principles and rights at work.

Several jurists have expressed skepticism about this “soft” statement, written in a highly technical style, and devoid of any binding monitoring mechanism<sup>25</sup>. Admittedly, it is stipulated that member States “have a key responsibility to contribute, through their social and economic policy, to the realization of a global and integrated strategy for the implementation of the strategic [and decent work] objectives” (Section II-B), but critics were quite right. The debates preceding its adoption confirm the extreme difficulty of reaching consensus, except for this: the new instrument should not impose any new international obligation that goes beyond those already existing under the relevant ILO conventions. In short, it was clear that the member States, and therefore the vast majority of the delegates attending the International Labour Conference, did not want any binding instrument whose violation could be legally punished<sup>26</sup>.

However, perhaps there is one really positive or innovative aspect in that 2008 Declaration: eventually broadening the “core” fundamental labor rights recognized as such by the international community<sup>27</sup>. We must recall that the ILO only acknowledged four of these in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*<sup>28</sup>, a text which was a response to the failure of the attempt to include a social clause in the binding WTO agreements. The 1998 Declaration recalled that “economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions”; also, it stated that:

in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.

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<sup>24</sup> F. MAUPAIN, “New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalisation”, (2009) 20/3 *European Journal of International Law* 823.

<sup>25</sup> R-C. DROUIN et I. DUPLESSIS, “La régulation internationale du travail de 1998 à 2008 : un Eldorado normatif ou un désert interprétatif?”, (2009) 14 (no 2) *Lex Electronica* 1.

<sup>26</sup> International Labour Conference, *Provisional Record 13 A/B*, 97th Session, Geneva, 2008, [[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_094042.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_094042.pdf)] (Access date : August 21st 2011), International Labour Office, *Strengthening the ILO's capacity to assist its Members' efforts to reach its objective in the context of globalization : Continuation of the discussion on strengthening the ILO's capacity and possible consideration of an authoritative document, possibly in the form of a Declaration or any other suitable instrument, together with any appropriate follow-up, and the form they may take*, International Labour Conference, Report VI, 97th session, Geneva, 2008, [[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_091586.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_091586.pdf)] (Access date : August 21st 2011).

<sup>27</sup> Marie-Claude DESJARDINS et Dominic ROUX, “Développement durable et travail décent : à la recherche d’une interface en droit international” (2009) 5.2 *McGill International Journal of Sustainable Development Law and Policy* 199, p. 209.

<sup>28</sup> ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010) [<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>] (Access date: August 21st 2011).

This 1998 Declaration is of course strictly promotional—it's not a treaty—but it devotes the mandatory status of fundamental rights for all member States simply because of their membership in the ILO. These four rights are freedom of association and effective recognition of right to collective bargaining, elimination of all forms of forced or compulsory labor, effective abolition of child labor and elimination of discrimination at work<sup>29</sup>. This Declaration reflects the international consensus that already exists with regard to these principles, but the exclusion of health and safety and minimum wage is difficult to justify<sup>30</sup>. Although the Declaration was subject of much criticism<sup>31</sup>, it has a positive impact<sup>32</sup>. First, several regional or bilateral trade agreements explicitly refer to it<sup>33</sup>, as do many transnational corporations in their codes of conduct<sup>34</sup>. Second, ratifications of the eight core Conventions increased significantly<sup>35</sup>. To make it clear, the average rate of ratification for these eight conventions is 90% (165 out of 183 member States, on average), which is excellent. This is a very important fact, because ratification or accession to a treaty indicates if an international standard is “healthy” or not. Indeed, in monist countries, a ratified treaty automatically becomes law, which means it can be invoked directly in court. In dualistic countries, a specific legislation is required to achieve the same result. But in several dualistic countries, like Canada, legislation to ensure compliance of domestic law under the obligations provided by the treaty will be adopted prior to ratification: in any case, the ratification will occur only if government considers that its domestic law *already* complies with the treaty<sup>36</sup>. Obviously, in any system, State should take various legislative, financial, governmental and administrative measures to ensure the full implementation of the obligations imposed by the treaty<sup>37</sup>. Ultimately, ratification guarantees neither compliance with international standard nor its effectiveness. The main problem, especially in developing countries, is that existing legislation is not, in fact, implemented by the authorities, and that there are still serious labor rights violations, committed both by States and private actors. The following reasons are mentioned by the ILO and some experts to explain this situation: Lack or insufficiency of the labor inspectorate and effective sanctions, legal system lacking financial resources and expertise, non-

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<sup>29</sup> Claire LA HOVARY, *Les droits fondamentaux au travail. Origine, statut et impact en droit international*, Paris, PUF, 2009.

<sup>30</sup> Alan HYDE, “The International Labor Organization in the Stag Hunt for Global Labor Rights”, (2009) 3 *Law & Ethics of Human Rights* 153.

<sup>31</sup> Philip ALSTON, James HEENAN, “Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?”, (2004) 36 *International Law and Politics* 101; Philip ALSTON, “ ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime”, (2004) 15 *European Journal of International Law* 457; Philip ALSTON, “Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda”, (2005) 16 *European Journal of International Law* 467.

<sup>32</sup> Francis MAUPAIN, “Revitalization Not Retreat : The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights”, (2005) 16 *European Journal of International Law* 439

<sup>33</sup> Cleopatra DOUMBIA-HENRY and Éric GRAVEL, “Free trade agreements and labour rights: Recent developments”, (2006) 145/3 *International Labour Review* 185; Pierre VERGE, “Les accords de coopération dans le domaine du travail liant le Canada”, in Pierre Verge (dir.), *Droit international du travail – Perspectives canadiennes*, Cowansville, Éditions Yvon Blais, 2010, p. 261.

<sup>34</sup> Renée-Claude DROUIN, “Responsabiliser l’entreprise transnationale : portrait d’une normativité du travail en évolution”, in Pierre Verge, ed., *Droit international du travail – Perspectives canadiennes*, Cowansville, Éditions Yvon Blais, 2010, p.

<sup>35</sup> Here are the 8 core labour conventions: C87 - Freedom of Association and Protection of the Right to Organise Convention, 1948; C98 - Right to Organise and Collective Bargaining Convention, 1949; C29 - Forced Labour Convention, 1930; C105 - Abolition of Forced Labour Convention, 1957; C138 - Minimum Age Convention, 1973; C182 - Worst Forms of Child Labour Convention, 1999; C100 - Equal Remuneration Convention, 1951; C111 - Discrimination (Employment and Occupation) Convention, 1958.

<sup>36</sup> C-E COTE, “La réception du droit international en droit canadien”, (2010) 52 *Supreme Court Law Review (2nd)* 483. P. VERGE et D. ROUX, “L’affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien : deux solitudes?”, dans P. Verge, ed., *Droit international du travail – Perspectives canadiennes*, Cowansville, Éditions Yvon Blais, 2010, p. 446.

<sup>37</sup> ILO Constitution, art. 19 (5) d); Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties’ obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003),

compliance with the principle of rule of law, incompetence of the judiciary, predominance of the informal economy, etc.<sup>38</sup>

That being said, social justice cannot be separated from another structuring principle recognized by the international legal order since 1945: *respect for human dignity*. In the preamble of the *Charter of the United Nations*, member States resolved to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person” and to “promote social progress and better standards of life in larger freedom”. This commitment was reiterated in 1948 in the preamble of the *Universal Declaration of Human Rights*. Fundamental human rights, which find their legal basis in social justice principle and its mirror, human dignity, are enshrined not only in the *Universal Declaration*, but in a considerable number of UN treaties opened for ratification. In fact, once again, these treaties are widely ratified (90%)<sup>39</sup> except for one of them (the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990), ratified by only 44 countries),:

- International Convention on the Elimination of All Forms of Racial Discrimination (1965) (174 countries)
- International Covenant on Civil and Political Rights (1966) (167 Countries)
- International Covenant on Economic, Social and Cultural Rights (1966) (160 countries)
- Convention on the Elimination of All Forms of Discrimination against Women (1979) (186 countries)
- Convention on the Rights of the Child (1989) (193 countries)
- Convention on the Rights of Persons with Disabilities (2006) (103 countries)

All these instruments of international law adopted under the aegis of the ILO and the UN provide that the economy must serve social justice and not vice versa. It means that the whole organization of economic life is subject to compliance with the social justice principle. Yet, even if the States commit to this rule when ratifying these social and human rights conventions, it seems often forgotten and even reversed when these same States meet at the WTO’s lounge. As noted recently by Professor Alain Supiot, the economy (quantifiable gains for people and corporations) has become the primary purpose of international law developed by the WTO, while free trade is the mean to achieve it. If social justice is formally absent from WTO agreements, the welfare of human beings, Supiot said, appears only indirectly in that Preamble<sup>40</sup>. Evidence is given by these first words of the Agreement Establishing the WTO in 1994:

[The WTO members recognize] that their relations in the field of trade and economic endeavour should be conducted with a view to *raising standards of living, ensuring full employment* and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services... (italics added)

Moreover, it seems that negotiations which currently take place under the aegis of WTO almost exclusively focus on the second objective, namely “increased production and trade”. Sometimes, there

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<sup>38</sup> See for exemple, B. HEPPLÉ, *Labour Laws and Global Trade*, Oxford and Portland (Oregon), Hart Publishing, 2005, p. 39 ff.

<sup>39</sup> 193 countries are members of the UN. For detailed analysis of these treaties, see: D. ROUX, “Le « droit à un travail décent » affirmé dans les normes internationales de l’ONU et l’OÉA. Ou la longue marche d’un vieux couple : le droit du travail et les droits de la personne”, in Pierre Verge, ed, *Droit international du travail – Perspectives canadiennes*, Cowansville, Éditions Yvon Blais, 2010, p. 147.

<sup>40</sup> A. SUPIOT, “A legal perspective on the economic crisis of 2008”, (2010) 149 *International Labour Review* 151, p. 154.

even seems to be only one objective for some countries: expanding trade<sup>41</sup>. This problem becomes even more significant if we remind us that the WTO system has a mechanism for resolving disputes which aims to ensure full implementation of the legal obligations created and even allows the proportional suspension of trade benefits in case of non-compliance of WTO decision<sup>42</sup>.

However, there is no similar mechanism for protecting human rights in international law. This situation seems to place ILO and UN systems in an inferiority position compared to WTO system, especially as the WTO system gives a marginal place to legitimate non-trade factors. These factors are *exceptions* to free trade regulations, even if States can ultimately temporarily set aside their application without penalty for breach of agreements. Exceptions adopted by WTO member States based on these non-trade factors (such as protecting workers' rights, local agriculture and the environment) are eligible only if they are (1) "necessary to protect public morals" or "necessary to protect human, animal or plant life or health, and (2) if they are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"<sup>43</sup>. These exemptions allowed by the WTO agreements raise several questions still left unanswered. For example, would a restrictive measure adopted by a State (ban the import of carpets made by children in Bangladesh) be considered as really necessary to protect the "morality" on its territory? Might there be other less restrictive measures to achieve the same result, such as temporary restriction or labeling? When they are adopted for protecting the health and safety, what should we target? People living on the territory of the exporting country that violates the rights of workers, or people located in the importing country that adopts the restrictive measure? And are these measures necessary? Do they effectively contribute to reduce risks to people's health and lives? Are other effective options available?<sup>44</sup> Ultimately, as Professor Hepple said, "the general exceptions and safeguards provisions of GATT do not appear to be apt to allow trade measure for breach of labour standards. An explicit amendment to the GATT would be required, but there is no political consensus to bring this about"<sup>45</sup>.

In the light of this, it seems that there is an obvious inconsistency in law! States should (or even *must*) show a minimum of (or more) coherence with respect to the various obligations they have undertaken internationally<sup>46</sup>. First, as we already saw, the 1944 *Declaration of Philadelphia*, which binds every ILO member State, imposes to "accept" all national and international economic and financial policies and measures "only if they respect and not restrain or hinder the achievement" of this "fundamental objective" of the ILO: social justice (which means the right of each human being to pursue his material well-being and his spiritual development with freedom, dignity and economic security). Second, Article 1 of the *UN Charter* provides that one of the most important goals of this organization is "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". But what is really interesting is reading Article 103 of the same Charter which provides that:

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<sup>41</sup> J. BRODEUR, B. COLAS, C. DEL CONT, S. DOUMBIA, M. JACQUOT, G. PARENT, G. REGIMBALD, D. ROUX, M. VICTOR, D. WILSON, *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights*, Cowansville, Yvon Blais, Bruxelles, Bruylant, 2010, p. 12-20 and 34-35.

<sup>42</sup> Dispute Settlement Understanding, art. 22-23 ([http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm)).

<sup>43</sup> GATT, art. XX, [[http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm)] (Access date: August 21st 2011).

<sup>44</sup> WTO, United States – Import Prohibition of Certain Shrimp and Shrimp Products, Appellate Body Report, 12 October 1998, WT/DS58/AB/R ; European Communities – Measures Affecting Asbestos and Products Containing Asbestos, Appellate Body Report, 12 March 2001, WT/DS135/R. Those issues have been addressed largely by lawyers and academics. We shall only quote two texts: A. BLACKETT, "Commerce international et travail : définir le rôle réglementaire de l'État dans la nouvelle économie", in P. Verge, ed, *Droit international du travail – Perspectives canadiennes*, Cowansville, Éditions Yvon Blais, 2010, p.227; B. HEPPLÉ, *Labour Laws and Global Trade*, Oxford and Portland (Oregon), Hart Publishing, 2005, chapter 6 "The WTO and Social Clauses", p. 129-150.

<sup>45</sup> *Id.*, p. 130.

<sup>46</sup> J. BRODEUR, B. COLAS, C. DEL CONT, S. DOUMBIA, M. JACQUOT, G. PARENT, G. REGIMBALD, D. ROUX, M. VICTOR, D. WILSON, *Legal analysis: Improving the coherence of international standards. Recognizing agricultural and food specificity to respect human rights*, Cowansville, Yvon Blais, Bruxelles, Bruylant, 2010

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail*. (emphasis added)

Third, it can be argued that the fundamental rights related to social justice, as discussed above, should benefit from a preeminent status in international law. Some of them, such as the prohibition of forced or compulsory labor and the prohibition of racial discrimination<sup>47</sup>, or discrimination in employment and occupation<sup>48</sup>, may even be peremptory norms of general international law (*jus cogens*). Therefore, for example, no express or implied derogation of those rights, provided in a free trade treaty (multilateral, plurilateral or bilateral), would be allowed. In fact, “a treaty is void if, at the time of its conclusion, it conflicts with this norm”<sup>49</sup>. Also, because their legal recognition is based on common values to all States and on a general concern for their compliance, these fundamental rights could impose *erga omnes* obligations. So, when a State violates these obligations, all States, without exception, have a legal interest to claim the termination of this wrongful act<sup>50</sup>. In other words, obligations *erga omnes* are universal rules that specify the obligations of any State to the international community.

Obviously, this question of human rights and hierarchy of norms in international law is definitely not settled yet and many authors have already studied it<sup>51</sup>. Only time will tell what will happen. But in view of the foregoing, it is difficult to argue that social justice is a utopia, or is merely a philosophical or moral principle. It is clearly a principle which explicitly belongs to international legal order. It is necessarily recognized in international law not only because it is explicitly “affirmed”, but also because it is implemented by rules contained in treaties or customary law<sup>52</sup>. Indeed, as we have shown in this first part of the paper, each of those widely ratified treaties, adopted by member States of the ILO or the UN -which are roughly the same countries- implement social justice principle. Moreover, their legal content corresponds to the essence of the concept of sustainable development, as we will demonstrate in the second part of this paper.

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<sup>47</sup> Barcelona Traction, Light and Power Company, Limited (Belgique c. Espagne) (second phase), C.I.J. Rec. 1970, par. 34

<sup>48</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS, *Advisory Opinion OC-18, Legal Status and Rights of Undocumented Workers*, September 17 2003, par. 101, [<http://www.cidh.oas.org/Migrantes/migrants.caselaw.htm>] (Access date : August 21st 2011).

<sup>49</sup> Vienna Convention on the Law of Treaties of 1969, (1980) 1155 R.T.N.U. 331, art. 53.

<sup>50</sup> Barcelona Traction, Light and Power Company, Limited (Belgique v. Espagne) (second phase), C.I.J. Rec. 1970, par. 33-34; See also: East Timor (Portugal v. Australia), C.I.J. Rec. 1995, p. 102, par. 29; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), C.I.J. Rec. 1996, par. 31 et 32; Institute of International Law, “Obligations and rights erga omnes in international law”, Cracow Session, (2005) Institute of International Law Yearbook, art. 1-2 [[http://www.idi-iil.org/idiE/resolutionsE/2005\\_kra\\_01\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf)] (Access date: August 20th 2011).

<sup>51</sup> C. TOMUSCHAT, J-M THOUVENIN, ed., *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, Martinus Nijhoff Publishers, Leiden/Boston, 2006; K. TERAYA, “Emerging Hierarchy in International Human Rights and Beyond : From the Perspective of Non-derogable Rights”, (2001) 12 *European Journal of International Law* 917; Hon. R. SILBERMAN ABELLA, *International Law and Human Rights: The power and the Pity*, (2010) 55 *McGill Law Journal* 871; A. TOUBLANC, “L’article 103 et la valeur juridique de la Charte des Nations Unies”, (2004) 108(2) *Revue générale de droit international public* 439-462; R. KOLB, “Observation sur l’évolution du concept de jus cogens”, (2009) 113(4) *Revue générale de droit international public* 837-850; V. MARLEAU, “Réflexion sur l’idée d’un droit international coutumier du travail”, dans J-C. JAVILLIER et B. GERNIGON, eds., *Les normes internationales du travail : un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos*, Genève, BIT, 2004, p. 363.

<sup>52</sup> See D. ROUX, *Le principe du droit au travail : juridicité, signification et normativité*, Montréal, Wilson & Lafleur, 2005, p. 69; G. RIPERT, *Les forces créatrices du droit*, Paris, L.G.D.J., 1955, p. 325 ss; C. PERELMAN, *Logique juridique – Nouvelle rhétorique*, 2e éd., Paris, Dalloz, 1979, pp. 105-133; R. DWORKIN, *Prendre les droits au sérieux*, Paris, P.U.F., 1995; R. DWORKIN, *L’empire du droit*, Paris, P.U.F., 1994, p. 56 ss.; N. MACCORMICK, *Raisonnement juridique et théorie du droit*, (trad. 1978), coll. : “Les voies du droit”, Paris, P.U.F, 1996, pp. 181-230 (chapter VII) and pp. 271-305 (chapter IX).

## **Implementation of Social Justice through Sustainable Development: A Matter of Human Rights**

What connections can be made between social justice and sustainable development, as it is currently formulated, defined and implemented by the international community? Let's begin with a brief reminder of what sustainable development is. Although it is difficult to ascertain the exact origin of this ancient concept<sup>53</sup>, we might first remind the consensus that already existed in 1972 between United Nations Members when they adopted, at Stockholm, the *Declaration of the United Nations Conference on the Human Environment*:

Principle 1 - Man has the fundamental right to freedom, equality and *adequate conditions of life*, in an environment of a quality that *permits a life of dignity and well-being*, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Principle 8 - Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life. (emphasis added)

Fifteen years later, the *Brundtland Report* adopted in 1987 by the World Commission on Environment and Development exposed and clarified the idea of sustainable development with this well-known definition, at least one that seems to reach a broad consensus among authors and within the international community:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.<sup>54</sup>

A modelling made from this definition resulted in a widely recognized three interconnecting spheres (economic growth, social development and environmental protection) diagram. These three spheres were designed to be of equal importance but the environmental dimension has received much more attention<sup>55</sup>. However, in spite of this lack of interest in the social dimension of sustainable development, it makes no doubt that it should be considered as important as the other spheres. The *Rio Declaration*, adopted in 1992 by 182 States attending the United Nations Conference on Environment and Development in Rio, is clear on this point:

All States and all people shall cooperate in the essential task of *eradicating poverty as an indispensable requirement* for Sustainable development, in order to decrease the disparities in *standards of living and better meet the needs* of the majority of the people of the world.<sup>56</sup> (emphasis added)

If we do not find any specific reference to the expression "social justice", we have to recognize that the principle is clearly present in the instruments and texts adopted by States at the Rio Summit. *Action 21*, a guide to implementation of sustainable development for the 21st Century, adopted at the

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<sup>53</sup> K. BARTENSTEIN, "Les origines du concept de développement durable", (2005) 3 *Revue juridique de l'environnement* 289.

<sup>54</sup> *Report of the World Commission on Environment and Development : Our Common*, United Nations, General Assembly, 4 August 1987, Part. 1, chapter 2 [[http://en.wikisource.org/wiki/Brundtland\\_Report](http://en.wikisource.org/wiki/Brundtland_Report)] (Access date: August 21st 2011).

<sup>55</sup> M-C. DESJARDINS et D. ROUX, "Développement durable et travail décent : à la recherche d'une interface en droit international" (2009) 5.2 *McGill International Journal of Sustainable Development Law and Policy* 199; J. BALLEST, J-L DUBOIS and F-R. MAHIEU, "A la recherche du développement socialement durable : concepts fondamentaux et principes de base", *Développement durable & territoires*, Dossier 3 : Les dimensions humain et sociale du Développement Durable, June 22nd 2004, [<http://developpementdurable.revues.org/1165>] (Access date : August 18th 2011).

<sup>56</sup> Principle 5 of the *Rio Declaration on Environment and Development*

1992 Earth Summit as a complement to the Rio Declaration, gives us plenty of good examples in this respect. The idea of social justice is clearly expressed in this excerpt of *Action 21*: “the long-term objective of enabling all people to achieve sustainable livelihoods should provide an integrating factor that allows policies to address issues of development, sustainable resource management and poverty eradication simultaneously” (art. 3.4).

The principle of social justice could also be found in Chapter 29 of *Action 21* which is entirely dedicated to the role of workers and unions in the implementation of sustainable development. Several provisions of this chapter clearly show that decent work, which is an important element of social justice, has to be part of sustainable development. For example, article 29.2 states that “the overall objective is poverty alleviation and full and sustainable employment, which contribute to safe, clean and healthy environments - the working environment, the community and the physical environment.” Other provisions specifying the social objectives that States should seek to achieve by year 2000 also speak for themselves: “ratification of ILO conventions of subject and the enactment of legislation in support of those agreements”, “increasing the number of environmental collective agreements aimed at achieving sustainable development”, “reducing occupational accidents, injuries and diseases according to recognized statistical reporting procedures”, and “increasing the provision of workers’ education, training and retraining, particularly in the area of occupational health and safety and environment” (art. 29.3). Also according to *Action 21*, workers, unions and promotion of rights at work have a role to play in facilitating the implementation of sustainable development (art. 29.4 and ff.).

Ten years later, in 2002, one hundred Heads of States attending the World Summit on Sustainable Development in Johannesburg reiterated, even more clearly, their willingness to integrate the issue of social justice into sustainable development. Indeed, one of the main commitments of the Summit is the following:

[W]e assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of Sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels<sup>57</sup>.

In the same Declaration, the States declared that the elimination of poverty is a primary objective and a precondition of sustainable development (par. 11):

We recognize that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development are overarching objectives of, and essential requirements for sustainable development.

Achieving social justice through sustainable development implies, in particular, according to the Declaration, “to provide assistance to increase income generating employment opportunities, taking into account the *International Labour Organization (ILO) Declaration of Fundamental Principles and Rights at Work*.” (par. 28).

Speaking of the ILO, we have to mention that efforts have not only been deployed to link sustainable development to social justice in international instruments specifically dedicated to sustainable development, but also in other international forums such as the ILO. Indeed, at the 2007 ILC, the ILO made clear connections between its flagship objective, “Decent Work”, and sustainable development. Let us recall that Decent Work is this unifying concept that embodies, since 1999, the fundamental purpose of the ILO: “promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.”<sup>58</sup>. The aspiration to put Decent Work as

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<sup>57</sup> WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, *Johannesburg Declaration on Sustainable Development*, Doc. UN A/CONF.199/L.6/Rev.2 (2002), par. 5.

<sup>58</sup> ILO, *Decent Work*, Report of the Director-General to the International Labour Conference, International Labour Conference, 87th Session, International Labour Office, Geneva, 1999.

an essential component of sustainable development has been vigorously defended not only by the Director General of the ILO, but also by several States and representatives of workers and employers attending the 2007 ILC<sup>59</sup>. The title of the Director General's report is eloquent on that matter: *Decent work for sustainable development*. The report states that the ILO "needs to anchor the vision of sustainable development as the overriding policy paradigm within which the Decent Work Agenda can make its key contribution to development"<sup>60</sup>.

If this session of the ILC is the first attempt of the ILO to integrate Decent Work as a corollary to the achievement of sustainable development, it must be admitted that a rapprochement between the two concepts had been already made by the organization in 1998. The preamble of the *ILO Declaration on Fundamental Principles and Rights at Work* confirms this :

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-base sustainable development;

Ten years later, the *ILO Declaration on Social Justice for a Fair Globalization* also proves that social justice should be seen as an integral part of the concept of sustainable development: "in a world of growing interdependence and complexity and the internationalization of production, the fundamental values of freedom, human dignity, social justice, security and non-discrimination are essential for sustainable economic and social development and efficiency" (preamble).

Connections may also be made between the principle of social justice as developed in international human rights law treaties and sustainable development.

The *International Covenant on Economic, Social and Cultural Rights* (with, as a backdrop, the 8 core ILO conventions) is a good example. This is one of the two major treaties adopted by the UN in the field of human rights. It was adopted in 1966 and it is in force since 1976. The preamble recalls that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights". It is true that for historical, political and ideological reasons<sup>61</sup>, the two Covenants were split. Without reopening the old recurring and semantics debate on "justiciability" of first and second generation human rights<sup>62</sup>, it may be useful to recall one of the essential premises of international law, declared in 1968 and repeated in 1993 at two World Conferences on Human Rights held respectively in Tehran<sup>63</sup> and Vienna:

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<sup>59</sup> ILO, Provisional Record 24, International Labour Conference, 96th session, Geneva 2007, *Reply by the Director-General to the discussion of his Report*, [<http://www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/pr-24.pdf>] (Access date : August 20th 2011).

<sup>60</sup> ILO, *Director-General's introduction to the International Labour Conference Decent work for sustainable development*, ILC 96-2007/Report I (A), Geneva, June 2007 [[http://www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/meetingdocument/wcms\\_085092.pdf](http://www.ilo.org/wcmsp5/groups/public/@dgreports/@cabinet/documents/meetingdocument/wcms_085092.pdf)] (Access date : August 21st 2011).

<sup>61</sup> L. LAMARCHE, *Perspectives occidentales du droit international des droits économiques de la personne*, Bruxelles, Bruylant, 1995, p. 59 ff.

<sup>62</sup> In this regard, read the debates of 2004 and 2005 published in *Human Rights Quarterly*, launched by K. ROTH "Defending Economic, Social and Cultural Rights : Practical Issues Faced by an International Human Rights Organisation", (2004) 26 *Human Rights Quarterly* 63. See also: D. ROUX, *Le principe du droit au travail: juridicité, signification et normativité*, Montréal, Wilson & Lafleur, 2005, p. 131 ff; P. Harvey, "Human Rights and Economic Policy Discourses : Taking Economic and Social Rights Seriously", (2002) 33 *Columbia Human Rights Law Review* 363.

<sup>63</sup> Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968).



All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.<sup>64</sup>

There is an inexorable logic in this premise<sup>65</sup>. The death of a person who has been tortured by state agents is dramatic, but is it worse than the death of a person who did not receive adequate care because of a lack of resources or who died because he or she had not enough to eat? In all these cases, we should consider that there are internationally recognized human rights violations. Besides, what does the right to life or to liberty effectively mean without the right to health, the right to education or the right to an adequate standard of living? What does freedom of expression and right to vote really mean without a good education?<sup>66</sup> Even if there is no explicit reference to the Covenant neither in the Rio Declaration nor in Action 21, many of the economic, social and cultural rights they enshrine are clearly essential components of a sustainable development.

The main element that interconnects them is their common objective of poverty eradication. Indeed, it is considered to be an indispensable requirement for sustainable development but also a major component of the social justice principle as “it is now widely accepted that [...] poverty should not be seen only as a lack of income, but also as a deprivation of human rights”<sup>67</sup>.

The first right mentioned in the Covenant, the *right to work* (art. 6), is a good example of a right pursuing this poverty elimination objective. Gainful employment is in fact often the first step for an individual to get out of poverty. Moreover, as the *Brundtland Report* says: “The most basic of all needs is for a livelihood: that is, employment”. What does this right include concretely? Labor must be free, which means that everyone can earn a living and have a job freely chosen and accepted, without being discriminated<sup>68</sup>. It also implies the right not to be unfairly deprived of employment<sup>69</sup>. The right to work minimally presupposes the abolition of forced labor and slavery<sup>70</sup>, but also the obligation for all States to take measures aiming at achieving full employment<sup>71</sup>. This right is related to a host of “core” ILO conventions and other UN treaties<sup>72</sup>, and its normative components are guaranteed in those instruments. But the right to work implies a “Decent Work”, and that is why it is also related to Article 7 of the Covenant: It is the *right of everyone to the enjoyment of just and favourable conditions of work* which ensure, in particular, remuneration which provides all workers, as a minimum, with a decent living for themselves and their families, which also ensure safe and healthy working conditions,

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<sup>64</sup> CONFÉRENCE MONDIALE SUR LES DROITS DE L'HOMME, Déclaration et programme d'action de Vienne, 14-25 juin 1993, A/CONF.157/23

<sup>65</sup> D. ROUX, “Le “droit à un travail décent” affirmé dans les normes internationales de l'ONU et l'OÉA. Ou la longue marche d'un vieux couple : le droit du travail et les droits de la personne”, in Pierre Verge, ed., *Droit international du travail – Perspectives canadiennes*, Cowansville, Éditions Yvon Blais, 2010, p. 155.

<sup>66</sup> M. SSENYONJO, *Economic, Social and Cultural Rights in International Law*, Oxford and Portland, Oregon, Hart Publishing, 2009, p. 13.

<sup>67</sup> The OFFICE OF HIGH COMMISSIONER FOR HUMAN RIGHTS, *Human Rights, Poverty Reduction and Sustainable Development : Health, Food and Water, A Background Paper*, World Summit on Sustainable Development, Johannesburg, 26 August-4 September 2002, [<http://www.ohchr.org/Documents/Publications/HRPovertyReductionen.pdf>] (Access date : August 19th 2011)

<sup>68</sup> C111 - Discrimination (Employment and Occupation) Convention, 1958.

<sup>69</sup> Committee on Economic, Social and Cultural Rights, *General Comments 18 – The right to work*, doc. E/C.12/GC/18/, UN, par. 1 et 4 [<http://www2.ohchr.org/english/bodies/cescr/comments.htm>] (Access date : August 18th 2011).

<sup>70</sup> C29 - Forced Labour Convention, 1930; C105 - Abolition of Forced Labour Convention, 1957; C138 - Minimum Age Convention, 1973; C182 - Worst Forms of Child Labour Convention, 1999.

<sup>71</sup> C122 - Employment Policy Convention, 1964.

<sup>72</sup> International Convention on the Elimination of All Forms of Racial Discrimination (1965), art. 5; International Covenant on Civil and Political Rights (1966), art. 8 and 26; Convention on the Elimination of All Forms of Discrimination against Women (1979), art. 11; Convention on the Rights of the Child (1989), art. 32-34; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); Convention on the Rights of Persons with Disabilities (2006), art. 2, 5 and 27.

rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays<sup>73</sup>.

In connection with those rights, the Covenant enshrines other Labor Rights: Trade union rights (art. 8), which are also recognized in two ILO “core” conventions<sup>74</sup>, the right to strike (art. 8), the right to social security (art. 9) and the right to family protection, especially for mothers and children, particularly with regard to working conditions (art. 10); once again, this last right is part of other UN treaties<sup>75</sup> and many ILO Conventions<sup>76</sup>.

Besides labor related rights, the Covenant also includes other important rights that States must seek to fill through the lens of sustainable development: the right of everyone to an adequate standard of living for himself and his family, which includes the right to adequate food (since the States recognize the “fundamental right of everyone to be free from hunger”)<sup>77</sup>, the right to have enough clothes and the right to live in adequate housing (art. 11) (this right might also include right to water<sup>78</sup>); the right to health, that is to say the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (art. 12)<sup>79</sup> and the right to education, which particularly means that “primary education shall be compulsory and available free to all” (art. 13 and 14)<sup>80</sup>. The *Brundtland Report* mentions several of them: right to food, housing, drinking water, sanitation, health care, energy, etc. *Action 21*, adopted at Rio in 1992, also explicitly mentions the eradication of poverty, civil society participation in decision-making on social and environmental issues and the improvement of living conditions and health protection as issues of high importance with regard to the implementation of sustainable development. The *Plan of Implementation*<sup>81</sup> adopted in 2002 at the World Summit on Sustainable Development in Johannesburg is even clearer on this point. Chapter II of this *Plan*, entitled “Poverty Eradication”, qualified as “the greatest global challenge facing the world today and an indispensable requirement for sustainable development, particularly for developing countries”, provides a range of needs for every human being and correlative measures that have to be taken by States and international organizations. It includes health services for all and reducing environmental health threats; real access to primary schooling and all levels of education for every children; access to agricultural resources for people living in poverty, including transfer basic sustainable agricultural techniques and knowledge; food availability and affordability; access to sanitation to improve human

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<sup>73</sup> S. BERNSTEIN, “Le droit à des conditions de travail justes et favorables : un retour aux fondements de la “décence” au travail”, in L. LAMARCHE et L. BOSSET, eds., *Donner droit de cité aux droits économiques, sociaux et culturels – La Charte des droits et libertés du Québec en chantier*, Cowansville, Éditions Yvon Blais, 2011, p. 93.

<sup>74</sup> C87 - Freedom of Association and Protection of the Right to Organise Convention, 1948 and C98 - Right to Organise and Collective Bargaining Convention, 1949.

<sup>75</sup> Convention on the Elimination of All Forms of Discrimination against Women (1979), art. 11; Convention on the Rights of the Child (1989), art. 32-34.

<sup>76</sup> C138 - Minimum Age Convention, 1973; C182 - Worst Forms of Child Labour Convention, 1999. See also: C183 - Maternity Protection Convention, 2000.

<sup>77</sup> COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment 12 - Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003).

<sup>78</sup> COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment 15, The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003).

<sup>79</sup> COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003).

<sup>80</sup> COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment 13, The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 70 (2003).

<sup>81</sup> WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, *Plan of Implementation of the World Summit on Sustainable Development*, Johannesburg, 2002, [[http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf)] (Access date : August 19th 2011).

health and reduce infant and child mortality, and prioritizing water and sanitation. In the light of this comparison, we can assert that economic and social rights and sustainable development clearly pursue the same objective: the satisfaction of all “basic needs” of human beings.

What should we conclude from all of the above? First, it provides us with two main ideas that characterize sustainable development and are related to social justice principle as developed in international law:

- i) States and intergovernmental organizations they belong to *must absolutely put priority* on meeting the basic needs of the poorest people.
- ii) The *respect of equity* is a primarily condition for achieving sustainable development<sup>82</sup>: Intragenerational equity, on the one hand, since it is necessary to *share* the wealth between the richest and poorest people of the world; intergenerational equity, on the other hand, since the planet's resources are not unlimited and that their use must be controlled so that future generations can enjoy it, too, when the time comes<sup>83</sup>.

Sustainable development therefore accords perfectly with social justice principle in international law. Both concepts share a common and central basis which is *welfare of human beings*. That means respect for human dignity through satisfaction of basic needs and collective wealth sharing. In other words: “Sustainable development requires a change in the content of growth, to make it less material- and energy-intensive and more equitable in its impact”, says the *Brundtland Report*<sup>84</sup>.

Even if the ILO conventions, the international human rights treaties and the concept of sustainable development share common objective of social justice, it has to be underlined that they do not have the same legal effects. Indeed, the concept of sustainable development (which was taken by so many actors and sometimes used in a way remote from its original design), has its own areas of ambiguity. In other words, even though several national and international instruments expressly referred to sustainable development, it is very difficult at present to say that this notion corresponds to a formally and universally accepted definition in international law neither that it is a well established general principle or customary law binding all States. In the light of this, international human rights treaties and ILO Conventions, which have been widely ratified by States and thus constitutes legally binding instruments for the majority of the countries, should not only be used as a guidance for States on how to implement the social dimension of sustainable development – because they are much more explicit about social justice content -, but also as a way to give sustainable development more legal force.

The Covenant, for example, already provides explicit and specific legal obligations to States parties. Indeed, Article 2 of the Covenant sets out legal obligations of States parties. Obviously, there is a *general obligation of progressive realization of all rights* guaranteed in that treaty. But for the Committee on Economic, Social and Cultural Rights, a body composed of 18 independent experts which is responsible for ensuring compliance with the obligations of States parties, the Covenant's provisions include three basic duties for States: (1) obligation to respect the enjoyment of rights guaranteed in the Covenant, which requires them not to obstruct, by their acts or omissions, the enjoyment of those rights; (2) obligation to protect, which requires preventing violations that may be committed by third parties, including companies, in the territory under their jurisdiction; (3) obligation to fulfill or provide the full realization of rights, which involves taking the necessary legislative,

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<sup>82</sup> J-G VAILLANCOURT, “Penser et concrétiser le développement durable” (Hiver 2005) 15 *Écodécision* 24, 28-29

<sup>83</sup> Edith BROWN WEISS, *In Fairness to Future Generations*, Dobbs Ferry N.Y., Transnational Publishers, Tokyo, United Nations University, 1989; Axel GOSSERIES, “Theories of intergenerational justice : a synopsis” (2008) 1(1) *Surveys And Perspectives Integrating Environment & Society (SAPIENS)*, [<http://sapiens.revues.org/165>] (Access date : August 19th 2011).

<sup>84</sup> *Report of the World Commission on Environment and Development : Our Common*, United Nations, General Assembly, 4 August 1987, Part. 1, chapter 2 [[http://en.wikisource.org/wiki/Brundtland\\_Report](http://en.wikisource.org/wiki/Brundtland_Report)] (Access date: August 21st 2011).

administrative, budgetary and judicial measures. Although this Committee is not a supranational court as Inter-American Court of Human Rights, the European Court of Human Rights or the International Criminal Court, its general conclusions and decisions are recognized as authorities when there are violations of rights committed by the States parties.

Moreover, Article 2 of the Covenant recognizes the constraints due to limited available resources. But the fact remains that States must guarantee that all these rights will be exercised without discrimination of any kind. And States have a fundamental duty to act immediately in order to ensure the full enjoyment of all those rights, regardless of their national resources or level of economic and social development. The expression “maximum of its available resources” in this case can not excuse the State unable to achieve the implementation of guaranteed rights<sup>85</sup>. This means first and foremost, the adoption of legislative measures necessary to prohibit and eliminate discrimination, forced labor and child labor, for example. Moreover, many of the rights enshrined in the Covenant have to be implemented “immediately” by States parties: prohibition of discrimination, equality between men and women, right to fair wages and equal pay for equal work without discrimination based on sex, trade union rights, right of children to be protected against exploitation and work harmful to their development and right to free and accessible primary education<sup>86</sup>. Therefore, according to the interpretation of the Committee, Article 2 entails the fundamental obligation of the State parties to ensure, whatever their level of economic or social situation, rights of all to a minimum level of subsistence and, especially, protect adequately the poor and vulnerable people<sup>87</sup>.

It is not mundane to recall that no fewer than 160 countries are bound by its provisions. This is the vast majority of 183 ILO member countries and WTO members (which counts 153). Of these, over 110 countries bound by that instrument are neither European nor North American States but developing countries or countries largely underdeveloped! Therefore, the Covenant is a crucial vector for social justice and sustainable development, as well as the ILO Conventions. In other-words, ratifying the Covenant is equivalent to legally endorsing social targets of sustainable development.

Ultimately, it is our opinion that legally speaking, the concept of sustainable development put forward in 1987 and universally recognized at the 1992 Rio Conference and reiterated at the 2002 Johannesburg Summit brings nothing new in terms of content regarding to the notion of social justice. Things are quite different regarding the protection of the environment<sup>88</sup>. Nevertheless, we have to admit that sustainable development has been useful to clearly remind to States, international organizations and private actors (such as transnational corporations) that conditions and limits *must legally be* imposed to economic development: these are respect of human rights, in the name of social justice!

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As a legal principle, social justice means (*purpose*) that all human beings should be treated with dignity and equality, and that all human beings have the right to meet their basic needs without discrimination. This social justice principle implies three conditions (*means*) so that it can be achieved: a sharing of wealth, respect of basic human rights and an economy that serves human

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<sup>85</sup> COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment 3, The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003), par. 1, 9 and 10.

<sup>86</sup> *Id.*, par. 5; COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003), par. 8 and 10.

<sup>87</sup> COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *General Comment 3, The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003), par. 12.

<sup>88</sup> See S. Lavallée contribution in this working paper.

beings. At least, this is what asserts the *Declaration of Philadelphia* of 1944, a text that binds the 183 ILO member States. Therefore, in a concrete way and as a legal principle, social justice is the foundation of many legal rules derived from international treaties or international custom. It should then control the interpretation and application of international law linked with them or the creation of a new rule in case of silence or obscurity of the existing ones<sup>89</sup>. And this sense of social justice binds all to whom it is addressed, that is to say, the States and intergovernmental organizations.

Given to the above, we think it is through international law that social justice could likely go from utopia to reality. And it is through international law that sustainable development will not be reduced to the mere status of “popular slogan”. However, in order to do so, we need common political will. It is clear that social justice, even as a preeminent legal principle, and the concept of sustainable development in itself, will not acquire more legal binding significance until the time they get, both politically and economically, sufficient interest from the international community. If, for now, social justice is only “promoted” in International Law (that is to say that violations of ILO conventions and UN Human Rights Treaties cannot be sanctioned as are violations of multilateral or bilateral free trade agreements) it is for a specific reason: the States have decided so. Actually, States still do not want to adopt truly binding mechanisms in the framework of the ILO or the UN. After watching the excellent (but still shocking) documentary by Charles Ferguson, *Inside Job*, we would say that it is also the will of powerful bankers on Wall Street...

But ultimately, this seminar has been a good opportunity to recall us where *must* be, at least for us, the place of social justice and fundamental human rights, in the international legal order: at the top of the hierarchy of norms!

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<sup>89</sup> D. ROUX, *Le principe du droit au travail : juridicité, signification et normativité*, Montréal, Wilson & Lafleur, 2005, p. 71

# Sustainable Development ... Without « Ecological » Justice?

Sophie Lavallée

The multiple meanings of the term “sustainable development” are reminiscent of Lewis Carroll’s tale *Through the Looking Glass and What Alice Found There*. One scene in particular clearly illustrates the power of semantics: “When I use a word,” Humpty Dumpty said, “it means just what I choose it to mean – neither more nor less.” “The question is,” said Alice, “whether you *can* make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be Master – that’s all.”<sup>1</sup>

## Introduction

Being cut off from the natural world is a key feature of modern life, so it should come as no surprise to learn that this “disconnection” is reflected not only in the law production process but also in the law actually produced. And the same applies to concepts such as sustainable development.

Modern debate about sustainable development tends to focus on the shift towards sustainability of *development*, rather than sustainability of the *environment*.<sup>2</sup> Regardless of whether it takes place at the international, national or local level, however, the discussion refers to a basic concept that forms part of the sphere of sustainable development, and that is also one of the key concepts linking the social and environmental aspects: *environmental justice*. By using this concept, it is possible to go beyond simple environmental considerations in plans, public policies and decisions concerning economic development, and to focus on the impacts they may have in terms of fairness between the generations of today, and fairness between present and future generations, in accordance with Principle 3 of the *Rio Declaration on Environment and Development*.<sup>3</sup> The concept of environmental justice has attracted a great deal of attention from jurists in the sphere of international environmental law<sup>4</sup>, and

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<sup>1</sup> Lewis Carroll, *Through the looking-glass and what Alice found there*, London, Macmillan and Co., 1927, at p. 125.

<sup>2</sup> Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, Aldershot, Ashgate Publ., 2008, [Bosselmann].

<sup>3</sup> *Rio Declaration on Environment and Development*, Off. Doc. AG NU, 1992, Doc. NU A/CONF.1511/26/REV.1 (Vol. 1) (1993) 3. [Rio Declaration].

<sup>4</sup> See among others: Daniel Barstow Magraw, “Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms”, (1990) 1 *Colo. J. Int’l Envtl. L. & Pol’y* 69; Delphine Borione and Jean Ripert, “Exercising Common but Differentiated Responsibility”, in Irving M. Mintzer and J. Amber Leonard, dir, *Negotiating The Climate Convention: The Inside Story of the Rio Convention*, Cambridge, Cambridge University Press, 1994, p. 77; Anita Magrethe Halvorssen, *Equality among Unequals in International Environmental Law: Differential treatment for Developing Countries*, Boulder, Westview Press, 1999; Duncan French, “Developing States and International Environmental Law: The Importance of Differentiated Responsibilities”, (2000) 49 *The International and Comparative Law Quarterly* 35; Lavanya. Rajamani, *Differential Treatment in International Environmental Law*, Oxford, Oxford University Press, 2006; Ulrich Beyerlin, “Bridging the North-South Divide in International Environmental Law” (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 259; Anita Magrethe Halvorssen, “Common, but Differentiated Commitments in the Future Climate Change Regime – Amending the Kyoto Protocol to include Annex C and the Annex X Mitigation Fund”, (2007) 18 *Colo. J. Int’l Envtl. L. & Pol’y* 247, [Halvorssen]; Chukwumerije Okereke, *Global Justice and Neoliberal Environmental Governance: Ethics, Sustainable Development and International Co-operation*, Londres, Routledge, 2008; Sophie Lavallée, “Le principe des responsabilités communes mais différenciées à Rio, Kyoto et Copenhague. Essai sur la responsabilité de protéger le climat”, *Études internationales*, Vol. XLI, no 1, March 2010, 51; Kristin Bartenstein, “De Stockholm à Copenhague : genèse et évolution des responsabilités communes mais différenciées dans le droit international de l’environnement”, (2011) 56 :1 *RD McGill* 177; Sophie Lavallée et Kristin Bartenstein, “Le principe des responsabilités communes mais différenciées au regard du développement durable», Colloque “Équité et environnement – Quel(s) modèle(s) de justice environnementale?”, *Actes du colloque international annuel de la Société française pour le droit de l’environnement*, December 3 and 4 (forthcoming).

also in domestic environmental law in certain jurisdictions, especially the United States, where the environmental justice movement emerged from the Black civil rights movement in the 1960s, as a means of correcting the unfair distribution of pollutant activities in that country. Academics, the best-known being Professor Robert D. Bullard, have identified a frequent connection between social inequality and environmental inequality.<sup>5</sup> The concept of environmental justice appears to have several different origins, a variety of trends having played a role in its formation.<sup>6</sup> One influence comes from the labour movement in the 1960s, which asked for workplaces to be free of risks, especially those relating to the use of toxic products. The concept of environmental justice therefore includes worker safety as one of its components<sup>7</sup>:

The conceptual innovation consisted in framing the environmental debate in terms of rights and justice and not solely in terms of conservation. The central premise was that all people are equally entitled to a healthy environment, and that, from a socio-economic point of view, any structure or process that deliberately targeted the most disadvantaged populations for environmental risk and degradation was unfair. Such degradation, where unavoidable, should be distributed equally through all sectors of society. In this way, the movement against environmental destruction and degradation evolved and began to be considered an arena for the struggle for democracy and the affirming of universal human rights.<sup>8</sup>

The concept of environmental justice also appeared on the international stage, shortly after the movement for a New International Economic Order.<sup>9</sup> The original theory developed by Edith Brown Weiss<sup>10</sup>, repeated substantially in Principle 3 of the *Rio Declaration on Environment and Development*, is a good illustration of this. According to Principle 3, “The right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations”. Although the concept of fairness has several different meanings, and although its precise nature is not clear, it is often used as a synonym for justice, and has both procedural and substantive aspects. Its procedural aspect refers to the decision-making process, and its substantive aspect to distributive justice. The two aspects are linked, in that a fairer process will lead to fairer results. As for the concept of environmental justice, it is closely tied to the concepts of inter-generational and intra-generational fairness, since it seeks to ensure procedural fairness and distributive justice. From the procedural standpoint, fairness involves the creation of a decision-making process based on appropriate criteria and on a process that requires input from everyone affected by the decision, to

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<sup>5</sup> Robert Doyle Bullard, “Environmental Justice in the Twenty-first Century”, in Robert Doyle Bullard, ed., *The Quest for Environmental Justice: Human Rights and the Politics of Pollution*, San Francisco, Sierra Club Books, 2005, p. 19; Barry E. Hill, *Environmental Justice: Legal Theory and Practice*, Washington, Environmental Law Institute, 2009; Robert Doyle Bullard et al, *Toxic Wastes and Race at Twenty: 1987-2007 Grassroots Struggles to Dismantle Environmental Racism in the United States*, Cleveland, United Church of Christ, 2007, [Bullard]; Luke W. Cole et Sheila R. Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, New York, New York University Press, 2001, [Cole].

<sup>6</sup> Cole, *supra* note 5.

<sup>7</sup> The idea that environmental risks are unfairly distributed in the United States was gradually confirmed by dozens of studies that eventually gave birth to the concept of “environmental racism”: Bullard, *supra* note 5. When President Clinton signed an executive order on environmental justice in 1994, the concept of environmental racism gained implicit recognition and gave considerable impetus to the country’s activists, providing them with an unprecedented focus in their fight for their communities, quality of life, health and “environmental justice”: *Executive Order 12898 of February 16, 1994: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59(32) *Federal Register* 7,629.

<sup>8</sup> Alliance for a Responsible, Plural and United World, Workgroup: Environmental Justice, Ecological Debt and Sustainable Development, November 7, 2003, [online] (page consulted on August 29, 2011). <http://jades.socioeco.org/fr/documents.php> (Consulted on September 2, 2011).

<sup>9</sup> Charles-Emmanuel Côté, “De Genève à Doha : genèse et évolution du traitement spécial et différencié des pays en développement dans le droit de l’OMC”, (2011) 56:1 *RD McGill* 115.

<sup>10</sup> E. Brown-Weiss, (1989) *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*. Dobbs Ferry, NY: Transitional Publishers, Inc., for the United Nations University, Tokyo.

ensure that the outcome is fair for all the groups concerned. From the substantive standpoint, it covers human rights and the right to live in a healthy environment.

Although the literature on environmental justice is plentiful, much still remains to be done to incorporate the concept into international, regional and national law. There are many important environmental issues at stake, such as climate change<sup>11</sup>, and it is therefore important that the thinking process on the contribution of law to the cause of environmental justice should continue, and that the concept of environmental justice should become a conceptual framework for international environmental negotiators and national legislators, to make sure they do not leave aside the question of social fairness.

However, many authors believe such a conceptual framework cannot be developed without some profound reflection on the sustainability of the natural “non-human” environment, and “ecological” justice.<sup>12</sup> *Is sustainable development possible without justice for the natural world – in other words, without “ecological” justice?* To answer this question, we will begin by defining the terms “sustainable development” and “ecological justice” (1). We will then go on to try to imagine how ecological justice could be built into the law, in order to give clearer guidelines to decision-makers than is currently the case with the dominant liberal conception of sustainable development (2).

## **Sustainable Development without Ecological Sustainability**

Although the international community now regards sustainable development as a general framework<sup>13</sup> to improve quality of life throughout the world, and although sustainable development is presented by many as the most promising approach to maintain a healthy planet, there is nevertheless considerable disagreement as to its precise meaning and implications. The debate is between the proponents of weak sustainable development and those who believe strong sustainable development is the only way forward (1.1). This latter group suggests that the principle of sustainability should be regarded as the core element of sustainable development (1.2).

### ***Strong and Weak Sustainable Development***

If we look at the history of sustainable development, we see that what people actually agree upon today is the concept of weak sustainable development, and that the principle of sustainability which used to be its core element has been completely evacuated.

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<sup>11</sup> Lavanya Rajamani, “The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime”, (2000) 9 RECIELL. 120; Benito Müller, *Equity in Climate Change: The Great Divide*, Oxford, Oxford Institute for Energy Studies, 2002; Halvorssen, *supra* note 4; Lavallée, *supra* note 4.

<sup>12</sup> J. Baird Callicott, “The Case Against Moral Pluralism”, (1990) 12:2 *Environmental Ethics* 99; P. Taylor, “From Environmental to Ecological Human Rights: A New Dynamic in International Law?”, (1998) 10:2 *Geo. Int’l Envtl. L. Rev.* 309; Christopher D. Stone, “Should Trees Have Standing?”, (1972) 45 *S. Cal. L. Rev.* 45 [Stone]; Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age*, Chicago, University of Chicago Press, 1984.

<sup>13</sup> In *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7 [*Gabcikovo-Nagymaros Project*], although they acknowledged that sustainable development was indeed a “concept”, most of the judges said it was “of considerable interest” but did not consider its normativeness in detail. The dissident opinion by Judge Weeramantry (pp. 85-86) reflects another view of the concept’s normativeness; he suggested that sustainable development was more than a concept – it was a principle of normative value and was part of modern law. However, he also said this did not mean that it had acquired status as a legal principle of international common law in the international legal order. However, the political consensus around the concept of sustainable development is clear, and was expressed by the countries concerned five years later at the Rio Earth Summit. (pp. 84 and 85: “However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case. The principle is the principle of sustainable development and, in my view, it is an integral part of modern international law.”)



Indeed, the perception of sustainable development has changed since the Saxony region's Chief Forester, Hans Carl Von Carlowitz, in a paper published in *Sylvicultura oeconomic*,<sup>14</sup> suggested that forestry should be based on the concept of "Nachhaltigkeit", which means "sustainability" in German.<sup>15</sup> This shift has been extremely important in the last 30 years, with many attempts to consider concerns relating to economic development, environmental protection and social development. The law itself has not been exempt from this process, with the result that sustainable development – at least in environmental law – has become the dominant approach since the World Commission on Environment and Development (WCED, also known as the Brundtland Commission) pointed out that development should henceforth be regarded as "development that meets the need of the present without compromising the ability of future generations to meet their own needs".<sup>16</sup> In doing this, the Commission (WCED) proposed that the entire world should work towards sustainable development by seeking to achieve fairness among present generations and between present and future generations. This wide-ranging plan was referred to as "environmental justice" in international law. Where it falls down is that the concept of environmental justice is intrinsically anthropocentric, since it seeks to convey, "in" and "through" the law, a state of fairness among living human beings, and between them and the human population of tomorrow, but does not consider the concept of justice towards the natural non-human world.<sup>17</sup>

And yet, sustainability as originally envisioned by Hans Von Carlowitz, and three hundred years later by the authors of the *World Charter for Nature* of 1982, focused primarily on the *sustainability of the natural world*, it being understood that humans were integral to that world.<sup>18</sup> This "strong sustainability" gradually gave way to "weak sustainability" as proposed in the Brundtland Report and agreed upon by the international community through the 27 principles of the *Rio Declaration on Environment and Development* in 1992.<sup>19</sup> However, because the World Commission on Environment and Development was concerned primarily with world poverty, it focused on environmental justice and asked the world to reconcile environmental protection and economic development, in the interests of present and future generations:

The Earth is one but the world is not. We all depend on one biosphere for sustaining our lives. Yet each community, each country, strives for survival and prosperity with little regard for its impact on others. Some consume the Earth's resources at a rate that would leave little for future generations. Others, many more in number, consume far too little and live with the prospect of hunger, squalor, disease, and early death. (...)<sup>20</sup>

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<sup>14</sup> H.C. Von Carlowitz, *Sylvicultura oeconomica, Anweisung zur wilden BaumZucht*, Leipzig, rep. Freiberg, TU Bergakademie Freiberg und Akademische Buchhandlung, 2000), 1713.

<sup>15</sup> Kristin Bartenstein, "Les origines du concept de développement durable", (2005) 3 *Revue juridique de l'environnement* 289; U. Grober, "Tiefe Wurzeln: eine kleine Begriffsgeschichte von "sustainable development" - Nachhaltigkeit", (2002) 3 *Natur und Kultur* 1.

<sup>16</sup> United Nations World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987, [Rapport Brundtland]. The United Nations World Commission on Environment and Development adds this (Chapter 2) : "It contains within it two key concepts : the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs".

<sup>17</sup> Bosselmann, *supra* note 2.

<sup>18</sup> The preamble to the Charter, and its introductory text, clearly and explicitly acknowledge the "crucial importance" of protecting natural systems, "protecting and safeguarding the balance and quality of nature" and "protecting natural systems" "in the interests of present and future generations". In addition, in the Charter, the United Nations, in the preamble, says it is aware that "Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients". *World Charter for the Nature* (1982), Doc off AG NU, Doc NU A/RES/37/7 (1982) [World Charter for the Nature, 1982].

<sup>19</sup> *Rio Declaration*, *supra* note 3.

<sup>20</sup> Brundtland Report, *supra* note 16, Chapter 1 – A Threatened Future.

A world in which poverty and inequity are endemic will always be prone to ecological and other crises. Sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life.<sup>21</sup>

The approach to sustainable development proposed in the Brundtland Report focuses on the concepts of intra- and inter-generational fairness. Rather than ranking the three areas of sustainable development (economic development, social development, environmental protection) in a hierarchy, it proposes a balance between them, with a view to satisfying present and future *human* needs. Based on this, some authors, including sociologist Jean-Guy Vaillancourt, have suggested that sustainable development is:

“(…) a kind of half-scientific, half-ideological blanket that everyone tries to pull to their side of the bed. It is a battle cry for people wanting to work on environmental development and protection, economic harmony and ecology, from the standpoint of justice and social fairness. It is a compromise that gradually emerged between 1970 and 1987, supported on the one hand by the green militants, and on the other by partisans of development in poor countries and elsewhere in the world.”<sup>22</sup> (Free translation of the original French citation)

In his dissenting opinion in the *Gabçikovo-Nagyymaros* dam case, Judge Weeramantry speaks of sustainable development with reference to reconciliation, which may apply to situations involving overlapping or contradictory standards. He also notes the importance of avoiding “normative anarchy”.<sup>23</sup> This idea is similar to that expressed by Vaughn Lowe, who stated that sustainable development describes a group of norms, which can be analyzed as a “metaprinciple, acting upon other legal rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other”.<sup>24</sup> In Lowe’s view, sustainable development is a legal notion that exercises a kind of interstitial normativity in the decision-makers’ mind, forcing them to balance the various aspects of sustainable development in any given context.<sup>25</sup>

The question raised by this approach is whether or not the need for a compromise that is not, at first glance, focused on *ecological* sustainability, can in fact truly serve as a guide for decision-makers, or should it constantly try to answer the question asked by Wilfred Beckerman: “How Would you Like your 'Sustainability', Sir? Weak or Strong?”<sup>26</sup> And this question itself raises the further question of what the goals of our environmental policies should be. Should we be protecting the environment at all costs, or only to the extent that would allow us to meet human needs, now and in the future? Should we be protecting the environment only if the environmental benefits of protection exceed their economic costs? How can the law governing decision-making processes be adjusted to reflect the value of the future costs and benefits of a legal regulation or system, compared to their value today? What should be done to take into account risks that are both certain and uncertain? And ultimately, can “sustainable development” actually help us to answer these questions?<sup>27</sup> The general nature of the definition of sustainable development presented in the Brundtland Report and subsequently developed

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<sup>21</sup> *Ibid.* Chapter 2 – Towards Sustainable Development.

<sup>22</sup> Jean-Guy Vaillancourt, “Penser et concrétiser le développement durable”, (1995) 15 *Ecodécision* 24, p. 25.

<sup>23</sup> *Gabçikovo-Nagyymaros Project*, *supra* note 13, p. 90 (judge Weeramantry opinion).

<sup>24</sup> Vaughn Lowe, “Sustainable Development and Unsustainable Arguments”, in Alan Boyle et David Freestone, dir, *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford, Oxford University Press, 2001, p. 31.

<sup>25</sup> *Ibid* p. 31.

<sup>26</sup> Wilfrid Beckerman, “How Would you Like your 'Sustainability', Sir? Weak or Strong? A Reply to my Critics” (1995) 4:2 *Environmental Values* 169.

<sup>27</sup> Bosselmann, *supra* note 2; Daniel Bodansky, *The Art and Craft of International Environmental Law*, Boston, Harvard University Press, 2010, [Bodansky].

in the principles of the *Rio Declaration* in 1992, has often been criticized. According to several authors, the concept is meaningless due to its fuzzy nature, and is therefore not sufficiently clear to serve as guidance for decision-makers. Worse still, it is regarded by some as a powerful vehicle for liberal and neo-liberal economic theories advocating public policies based on cost-benefit factors rather than on values such as those that underlie environmental justice and ecological justice.

In a book entitled *The Art and Craft of the International Environmental Law*, Daniel Bodansky explains the difference between the ecocentric and anthropocentric-utilitarian definitions of environmental protection. His caricature shows a lumberjack with a saw who finds a tree bearing a sign identifying it as “the very last tree”, and who says to himself: “oh, no, it’s the very last chair!” The views of this lumberjack, compared to those of the people who find it hard to cut down wild trees because to do so would destroy old-growth forests, are worlds apart. For the lumberjack, as long as there are enough trees to satisfy human needs, then there is no problem.<sup>28</sup> This is the approach taken in the Brundtland Report and the Rio Declaration, both of which suggest that Western societies should consider the situation from the standpoint of compromise and a balance between costs and benefits, in order to achieve the best outcome for *humans*. Approaches such as this are also encouraged by the law in many countries, particularly in what is known as intelligent regulation, as encouraged by the OECD.<sup>29</sup> Unfortunately, however, intelligent regulation often sets aside the core aspect of sustainable development – the principle of sustainability itself.

### ***The Forgotten Principle of Sustainability***

The principle of sustainability is often forgotten in modern approaches to sustainable development. Many of the authors who discuss sustainable development refer to its underlying structural principles, namely the inclusion of environmental considerations in development (Principle 4 of the *Rio Declaration on Environment and Development*), inter-generational fairness (Principle 3) and intra-generational fairness (also Principle 3). They also mention its operative principles – in other words those used to apply the structural principles: polluter pays, prevention, precaution, common but differentiated responsibilities. On the other hand, they often fail to include the principle of sustainability as one of the structural principles. Many authors, Philip Sands among them, include non-exhaustion of renewable natural resources as one of the key principles for sustainable development.<sup>30</sup>

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<sup>28</sup> Bodansky, *supra* note 27, p. 59.

<sup>29</sup> OECD, *Analyse de l'impact de la réglementation: meilleures pratiques dans les pays de l'OCDE*, Paris, OECD, 1997; Joseph H. Guth, “Resolving the Paradoxes of Discounting in Environmental Decisions”, (2009) 18 *Transnat'l L. & Contemp. Probs.* 95; Pierre Issalys, “L’analyse d’impact des lois et règlements : impératif d’efficacité ou condition de légitimité ?”, in Stéphane Beaulac, Mathieu Devinat, dir, *Interpretatio non cessat : Mélanges en L’honneur de Pierre-André Côté*, Cowansville, Éditions Yvon Blais, 2011, at p. 133; Michael J. Trebilcock, “The Consumer Interest and Regulatory Reform” in G. Bruce Doern, dir, *The Regulatory Process in Canada*, Toronto, Macmillan, 1978, 94.

<sup>30</sup> Philippe Sands, “International Law in the Field of Sustainable Development”, (1995) 65:5 *British Yearbook of International Law* 303, p. 338.

## **CATEGORIES OF PRINCIPLES FOR THE CONCEPT OF SUSTAINABLE DEVELOPMENT**

### **1- Principles inherent to sustainable development**

- The inclusion of environmental considerations in development
- Intra-generational fairness
- Inter-generational fairness
- Non-exhaustion of renewable natural resources

### **2- Principles used to operationalize sustainable development**

- Permanent sovereignty over natural resources, and the responsibility not to damage the environment (principle of prevention)
- Precaution
- Polluter pays
- Good neighbours and international cooperation
- Common but differentiated responsibility

Although modern law is virtually silent on the subject, the principle of sustainability has existed for centuries and never had any purpose other than to give basic protection to natural resources.<sup>31</sup> While this purpose may have been extended over time, from local resources in the beginning to ecosystems today, the principle of ecological sustainability itself has not changed. Klaus Bosselmann is convincing when he states that core "sustainability" cannot be different from what is meant by the word "sustainable" in the context of "development", and that the fact of including the economic and social aspects in the concept of "sustainable development" should consequently not move it away from the ecological core. In his view, it is precisely because of this core element that the social and economic components of development can be linked to a central reference point. Development is only sustainable if it preserves the integrity and sustainability of ecological systems, and is neither sustainable nor supportable if it does not. In other words: "No economic prosperity without social justice and no social justice without economic prosperity, and both within the limits of ecological sustainability. As a norm this can be formulated as the obligation to promote long-term economic prosperity and social justice within the limits of ecological sustainability."<sup>32</sup> Gerd Winter, for his part, rightly explains that "the dynamic potential of principles is based on their somewhat elusive status behind the scenes".<sup>33</sup> As for Bosselmann, he shows that sustainable development provides sufficiently accurate indications to be a key, prescriptive norm. He accepts that this conclusion is still open to debate, but adds that it can be regarded as an emerging legal principle. In his view, sustainable

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<sup>31</sup> U. Grober, "Tiefe Wurzeln: eine kleine Begriffsgeschichte von «sustainable development» - Nachhaltigkeit", (2002) 3 *Natur und Kultur* 1.

<sup>32</sup> Bosselmann, *supra* note 2, p. 53.

<sup>33</sup> Gerd Winter, "The Legal Nature of Environmental Principles in International, EC and German Law", in Richard Macrory, dir, *Principles of European Environmental Law*, Groningen, Europa Law Publishing, p. 25.

development has the characteristics of a legal principle but has not yet been recognized as such in international law.<sup>34</sup>

## Sustainable Development without Ecological Justice

Environmental degradation depends on technological progress and social organization.<sup>35</sup> Consequently, the environment is a central theme of modern policies and debates on distributive justice, in terms of distributing and exploiting resources and even providing protection from them. How can the principle of sustainability be regarded as a question of justice when it focuses on ecological processes and ecosystem carrying capacities, as opposed to human relationships? The reason is simple: because the principle is applied in a context that requires choices to be made between competing needs, distributive justice issues are inevitable and the law therefore has a role to play in deciding how and to what extent ecological systems should be maintained. Bosselmann explains that in the view of many environmental ethicists<sup>36</sup>, two main relationships need to be considered when addressing issues relating to environmental protection:

1. Justice relating to environmental distribution between individuals, referred to as “environmental” justice.
2. Justice between humans and the rest of the natural world, referred to as “ecological” justice.

“Ecological” justice is a concept developed by certain schools of environmental ethics, but has not been explored to any extent by jurists. Instead, the legal literature has been influenced by the classical theories of justice, which regard it as a notion applicable to the fair distribution of goods and loads between *people*, not between people and the *natural environment*. This is why the term “environmental justice”, used to refer to social distribution problems in the environmental field, has received more attention from environmental jurists than the term “ecological justice”.

Generally speaking, developments in the eco-justice field can be divided into two categories of approaches: the *liberal* approach and the *ecological* approach. The liberal approach is reflected in the theory proposed by John Rawls, who regards the human-nature relationship as a question of ethics and morals, rather than a question of justice. This *liberal* approach to environmental issues allows them to be regarded as ideals that may compete democratically against other ideals.<sup>37</sup> Rawls has always been very clear about this exclusion: “The status of the natural world and our proper relation to it is not a constitutional essential or a basic question of justice”. Although he acknowledges “duties” towards the natural world, he describes them as duties of compassion and humanity, rather than duties of *justice*.<sup>38</sup>

On the other hand, the ecologists have attempted to introduce respect for “non-humans” into the notion of justice, by changing the constitutional legal framework so that it takes into account concerns

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<sup>34</sup> Bosselmann, *supra* note 2, p. 53 and 56: “With respect to the concept of sustainable development, the principle provides important guidance to make the concept operable. Whether this amounts to determinable legal content, making sustainable development a legal principle, is a matter of debate. In what follows, I will argue in favour of a legal principle, but one that has not yet been recognized as such by international law”.

<sup>35</sup> Brundtland Report, *supra* note 16, Chapter 2 - “Towards Sustainable Development”.

<sup>36</sup> Bosselmann, *supra* note 2; A. Dobson, (1996), “Environmental Sustainability: An Analysis and Typology”, *Environmental Politics* 5, 401; Andrew Johnson, “Barriers to Fair Treatment of Non Human Life”, in David Cooper et Joy Palmer, dir., *Just Environments – Intergenerational, International and Inter-Species Issues*, London, Routledge, 1995, p. 165; Vernon W. Ruttan, “Sustainability is Not Enough”, (1988) 3 *American Journal of Alternative Agriculture* 128.

<sup>37</sup> Bosselmann, *supra* note 2, p. 93.

<sup>38</sup> John Rawls, *Political Liberalism*, Oxford, Oxford University Press, 1993, p. 246: “status of the natural world and our proper relation to it is not a constitutional essential or a basic question of justice”.

relating to the condition of nature.<sup>39</sup> The *ecological* approach to sustainable development criticizes economic growth and promotes ecological sustainability, whereas the *environmental* approach assumes the validity or need for economic growth and considers environmental sustainability, social justice and economic prosperity to be equally important. The environmental approach was the one applied in Rio, and is clearly far removed from the Report published by the Club of Rome twenty years earlier, which recommended that *growth should be stopped*.<sup>40</sup> It is also far removed from the first principle of the *Stockholm Declaration*, which asked the international community to recognize the human right to environment. In fact, according to the *environmental* approach, human respect for the natural non-human environment should be regarded as an ethical and moral issue, not a justice issue. In other words, decision-makers should regard the environment only as something to be taken into account in order to balance differing interests or preferences.

Unlike this liberal approach that has influenced the production of law internationally and nationally for many years, some ecologists have attempted to define the goal of the policies in absolute terms, rather than in terms of balance, going so far as to propose the term “ecological justice”. They believe there is a need to focus on approaches aimed at preventing pollution and preserving species, using legal instruments in which the principle of sustainability plays a central role. In their view, sustainable development means using natural resources in an *ecologically sustainable way*. For this to be possible, the law must not only introduce the necessary institutions and regulations, but must also make sure the principle of sustainability occupies a significant place in the hierarchy of legal norms, by recognizing the rights of nature. By approaching nature through rights, what they are trying to do is to define environmental protection in “absolute” terms.<sup>41</sup> By obtaining a preferential place in the hierarchy of legal norms, it moves out of the area of preferences that can be changed through policy, into the area of rights that must be compared and balanced among themselves – a much more difficult challenge to meet.

### ***Gradual Recognition of the Human Right to the Environment***

In 1972, the *Stockholm Declaration* asked the international community to acknowledge the link between human rights and a healthy environment, but did not go so far as to acknowledge the right to nature:

Principle 1. Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

This first principle from the *Stockholm Declaration* states that a healthy environment is essential if humans are to enjoy their other rights.<sup>42</sup> Although the Declaration does not have mandatory status under article 38.1 of the *Statute of the International Court of Justice*, its scope is nevertheless considerable, since the fundamental connection that it sets up between the environment and human

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<sup>39</sup> B. Almond (1995), “Rights and Justice in Environmental Debate”, D. Cooper and J. Palmer (Eds.), *Just Environments – Intergenerational, International and Inter-Species Issues*, London, Routledge, 1, p. 6; C.D. Stone (1987), *Earth and Other Ethics: The Case for Moral Pluralism*, New York, Harper and Row; K. Bosselmann, (1995), *When Two World Collide: Ecology and Society*, Auckland, RSVP; J.B. Callicott (1990), “The Case Against Moral Pluralism”, *Environmental Ethics* 12, 99.

<sup>40</sup> Donella H. Meadows et al, *The Limits to Growth*, Universe Books, 1972.

<sup>41</sup> Bodansky, *supra*, note 27, p. 59-60.

<sup>42</sup> Sumudu A. Atapattu, “The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment under International Law”, (2002) 16:1 *Tulane Environmental Law Journal* 65, p. 67.

rights and freedoms gives philosophical and legal motivation for the right to the environment.<sup>43</sup> Since 1972, we have witnessed the development of what we might refer to as the “right to a healthy or good quality environment”. This right, as Kiss explained, underpins the same major objective as environmental law, namely the protection of humans through a proper living environment.<sup>44</sup> What separates the two is the fact that environmental law – defined as the set of environmental legislation – is applied by public authorities, whereas the right to environment is a fundamental human right, which humans are responsible for enforcing against the State, companies and individuals who do not uphold it. The right to environment is therefore one of the fundamental human rights, and many people are hopeful about its role in protecting the environment, even going so far as to suggest that it is the best way to do so, provided individuals are given proper procedural laws in order to be effective.

Some authors have used the international stage to claim recognition of the right to environment, as a third generation human right. It is true that, since the early days, international environmental law has not managed to impose universal limitations on environmental practices in all States<sup>45</sup>. It is mainly for this reason that environmentalists have begun to ask, in addition to classic environmental law, whose effectiveness depends on the actions of States and other authorities, for recognition of a right to environment, whose effectiveness would depend on the individuals on whom it was conferred. These individuals would therefore have a number of concurrent duties towards the environment.

The *Universal Declaration of Human Rights* and the 1966 *International Covenant on Civil and Political Rights* set out the basic civil and political rights – the first generation rights for which the French and American revolutionaries fought, namely the right to life and personal safety, freedom of movement, freedom of thought, freedom of expression, freedom of press and religion, the right to a full and complete defence, the presumption of innocence, and equality in the eyes of the law. These “rights and freedoms”, which may be set up against the State, can be asserted directly by individuals in common law courts or before international bodies such as the Human Rights Committee set up by the *International Covenant on Civil and Political Rights* in 1966.

Although the first two generations of human rights are acknowledged in the universal human rights instruments (i.e. the 1948 *Universal Declaration of Human Rights* and the two Covenants of 1966), the new rights to development, peace and environment, which emerged roughly 20 years ago in the international legal literature,<sup>46</sup> are not. In fact, the *Universal Declaration of Human rights*, adopted by the United Nations General Assembly on December 10, 1948, does not expressly acknowledge human’s right to environment, although the preamble notes the fundamental nature “of the inherent dignity and of the equal and inalienable right of all members of the human family”, article 3 states that “Everyone has the right to life, liberty and security of person”<sup>47</sup> and article 25 states that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family”. As Déjeant-Pons explains, health is perceived as being conditioned not by the individual’s

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<sup>43</sup> A. Mararewicz, La protection internationale du droit à l’environnement, in Pascale Kromarek, Dir., *Environnement et droits de l’homme*, Paris, UNESCO, 1987, pp. 80-81.

<sup>44</sup> Alexandre Kiss, “Définition et nature juridique d’un droit de l’homme à l’environnement”, dans Pascale Kromarek, dir., *Environnement et droits de l’homme*, Paris, UNESCO, 1987, p. 17; “Quel droit à l’environnement? Historique et développement». In P. Kromarek (Dir.), *Environnement et droits de l’homme*, Paris, UNESCO, 1987, p. 17; Aude Tremblay, “Regard sur l’évolution du concept de droit à l’environnement”, (2005) 18 *R.J.E.U.L* 5.

<sup>45</sup> Among others, Grandbois and Bérard criticize the fact that the constant opposition of large corporations towards any suggestion of a universal environmental standard should have limited international environmental law to the most flexible of commitments: Maryse Grandbois et Marie-Hélène Bérard, “La reconnaissance internationale des droits environnementaux: le droit de l’environnement en quête d’effectivité”, (2003) 44: 3 *Les Cahiers de droit* 427, p. 429.

<sup>46</sup> Dominique Rousseau, “Les droits de l’homme de la troisième génération” dans Louis Favoreu et al, *Droit constitutionnel et droits de l’homme : rapports français au IIe Congrès mondial de l’Association internationale de droit constitutionnel*, Paris-Aix-en-Provence, Paris, Economica, 1987, p. 125. [Rousseau].

<sup>47</sup> *Universal Declaration of Human Rights*, Res. AG 217(III), Doc off AG NU, 3rd sess, supp no. 13, Doc NU A/810 (1948).

framework and living environment<sup>48</sup>, but by food, clothing, housing, medical care and the necessary social services.<sup>49</sup> In 1966, human rights took a significant step forward thanks to the international Covenants adopted by the United Nations, one to protect civil and political rights and the other to protect economic, social and cultural rights.

It is somewhat surprising to see just how few individual briefs have been submitted to the Human Rights Committee, claiming that damage to the environment has violated a human right protected by the *International Covenant on Civil and Political Rights*, in particular the right to life. Indeed, the right to life – a civil and political right – is clearly the most fundamental of all human rights. It is inherent to the person, and precedes positive law<sup>50</sup>, meaning that it is *erga omnes* a norm that can be set up against every actor, as one of the *jus cogens* norms “from which no derogation is permitted”.<sup>51</sup> Stipulated in article 3 of the *Universal Declaration of Human Rights* and in article 6 of the *International Covenant on Civil and Political Rights*, it forms the basis for every other fundamental right: “This right shall be protected by law. No one shall be arbitrarily deprived of his life”. Harm to the environment can also harm peoples’ lives.<sup>52</sup> This was the argument put forward by 129 Canadian citizens in an individual communication lodged against Canada before the Human Rights Committee on April 11, 1980. The citizens in question alleged that radioactive waste initially produced by a federal corporation and then dumped near their homes during a decontamination operation undertaken by the Atomic Energy Control Agency, was a threat to their lives and those of future generations. They asked the Human Rights Committee to order the Canadian Government to remove all radioactive waste from the Port Hope region in Ontario. Although the Committee agreed that the communication raised some serious questions about the Canadian Government’s duty to protect human life, a right guaranteed in article 6(1) of the *International Covenant on Civil and Political Rights*, and although it recognized the author’s interest in the issue, it nevertheless declared the communication invalid because the author had not first exhausted his recourses under Canadian law and had not shown that those recourses, if undertaken, would be unreasonably long.<sup>53</sup>

A number of international soft law texts were adopted following the Stockholm Conference. In 1980, the *World Conservation Strategy*, adopted by the IUCN, the UNEP and the WWF, underscored the content of the *Stockholm Declaration*, claiming that humans should maintain the ecological processes that are essential to life, preserve biological diversity and ensure the sustainable use of species and ecosystems.<sup>54</sup> In 1982, the *World Charter for Nature*, a principle text adopted by the United Nations General Assembly, stated that: “All persons, in accordance with their national legislation, shall have

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<sup>48</sup> Maguelonne Dejeant-Pons, “L’insertion du droit de l’homme à un environnement dans les systèmes régionaux de protection des droits de l’homme”, (1991) 3 *Revue universelle des droits de l’homme*, 461, p. 462, [Dejeant-Pons].

<sup>49</sup> *Universal Declaration of Human Rights*, *supra* note 47, art. 25.

<sup>50</sup> Pascale Steichen, “Évolution du droit à la qualité de vie, de la protection de la santé à la promotion du bien-être”, (2000) 3 *RJE* 361.

<sup>51</sup> *Vienna Convention on the Law of Treaties*, May 23 1969, 1155 RTNU 331, article 52.

<sup>52</sup> Bertrand G. Ramcharan, *The Right to life*, (1983) 30 *NILR* 297, à la p. 310, citant A.A Cancado Trindade, “The parallel evolutions of international human rights protection and of environmental protection and the absence of restrictions upon the exercise of recognized human rights”, (1991) 13 *Revista del Instituto interamericano de Derechos Humanos* 50, Economic and Social Council, Human Rights Committee, Examen des faits nouveaux intervenus dans les domaines dont la Sous-Commission s’est déjà occupée, *Droit de l’homme et environnement, Final Report, Fatma Zohra Ksentini*, Special Rapporteur, E/CN.4/Sub.2/1994/9, July 26, 1994, French version, p. 51.

<sup>53</sup> Communication no 67/1980, *EHP v. Canada*, CCPR/C/17/D/67/1980, paragraph. 8 : “The Committee observes that the present communication raises serious issues, with regard to the obligation of States Parties to protect human life (article 6 (1)). The Committee recognized the author’s interest, since he claimed to have suffered a violation of his own right to life. It also said it did not need to consider the author’s interest in the health of future generations, but felt that if it allowed the communication, its decision would also protect future generations.

<sup>54</sup> IUCN/UNEP/WWF, 1980. *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, International Union for the Conservation of Nature and Natural Resources, United Nations Environment Programme and World Wildlife Fund, Gland, Switzerland; Dejeant-Pons, *supra* note 48, p. 461.



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<sup>55</sup>.

The *International Covenant on Economic, Social and Cultural Rights* was adopted and opened for signature and ratification by the United Nations General Assembly in resolution 2200A (XXI) on December 16, 1966, after nearly two decades of debate on the wording of the text. The Covenant came into force ten years later, on January 3, 1976, and 160 States, including Canada<sup>56</sup>, had ratified it by April 6, 2009. The Convention signatories' performance with regard to human rights is monitored by the United Nations' Committee on Economic, Social and Cultural Rights, a subsidiary of the United Nations Economic and Social Council (ECOSOC), which makes recommendations following consideration of reports from Convention signatories on the measures they have adopted and the progress they have made in upholding the rights recognized in the Covenant.<sup>57</sup> Article 12 of the Covenant recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Until very recently, there was no Convention control mechanism available to individual citizens, and consequently this provision had never been invoked by an individual in support of a right to environment. However, this situation may change in the near future, if the Optional Protocol<sup>58</sup> to the Covenant comes into force, introducing the possibility for individual recourse. Under the Protocol, individuals or groups of individuals will be permitted to submit communications to the Committee, complaining of situations involving pollution that have not been addressed by the national authorities, and which they feel are harmful to their health. For communications to be admissible, the authors must first have exhausted their recourses under domestic law. In addition, the environment must have been damaged to such an extent that it has become a threat to human health. Clearly, this will place a greater burden of proof on complainants than in cases of environmental damage not involving human rights. Communication authors will have to prove a causal link between the environmental damage and the threat to health that violates their right to good health. Only the future will tell whether the Committee will interpret the right to health restrictively, or whether it will take a more liberal view that will allow for significant development of a right guaranteed in the Covenant.

There are two international conventions that also recognize the right to the environment in specific circumstances. In the first of these, the *Convention on the Rights of the Child*<sup>59</sup>, adopted on November 20, 1989, and signed by Canada, article 24 protects the right to the environment in order to uphold the right of children to enjoy the best possible state of health. However, there is no procedure that allows individuals to complain to the Committee on the Rights of the Child. *Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries*<sup>60</sup>, adopted by the International Labour Organization on June 27, 1989 and brought into force on September 5, 1991, also refers to the right to

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<sup>55</sup> *World Charter for Nature*, *supra* note 18, principle 23.

<sup>56</sup> Canada ratified the International Covenant on Economic, Social and Cultural Rights on May 19, 1976. See current ratifications [online : <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=321&chapter=4&lang=fr>]. (brought into force on January 1976) [ICESC].

<sup>57</sup> *Ibid* article 16 § 1er.

<sup>58</sup> Optional Protocol, *International Covenant on Economic, Social and Cultural Rights*, Doc.A/63/435; C.N.869.2009.TREATIES-34 (not yet in force).

<sup>59</sup> *Convention on the Rights of the Child*, November 20, 1989, brought into force on September 2, 1990.

<sup>60</sup> *Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, 1650 RTNU 383 (adopted by the General Conference of the International Labour Organization at its 76th session on June 27, 1989, came into force on September 5, 1991). Canada did not ratify it because it feared the Convention may have supported recognition of the right of Aboriginal peoples to self-government in international law: Jill Wherret, *Aboriginal Peoples and the 1995 Québec Referendum: A Survey of the Issues, Government of Canada*, February 1996, [online] : <http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp412-f.htm> (September 5, 2011).

the environment in the first paragraph of article 4, which requires States to take special steps to protect the environment of their indigenous peoples.<sup>61</sup>

Regionally, the 1981 *African Charter on Human and Peoples' Rights*<sup>62</sup> is the first international human rights' charter to specifically state (in article 24) that "All peoples shall have the right to a general satisfactory environment favourable to their development". This text is interesting not only because it originated in the Third World and is the first to have included a mandatory right to environment, but also because it guarantees that right collectively, for "peoples" as opposed to individuals. The African Human Rights Commission has had to consider a number of communications against Zaire, and has concluded that the Zaire Government's failure to provide basic services such as access to drinking water constitutes a violation of article 16, which guarantees the fundamental right to health.<sup>63</sup> In the well-known *Ogoniland Case*, the African Commission on Human and People's Rights interpreted article 24 of the African Charter and stated that "(...) an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecological equilibria is harmful to physical and moral health".<sup>64</sup> Franseco Francioni, who also signed a text in this publication, noted that the Commission's interpretation was a significant step forward towards better environmental protection:

"This language transcends the purely individualistic approach to environmental rights as seen in the jurisprudence of the European Court, and construes human rights guarantees in broad collective terms as legitimate claims of the community to have the quality of its environment preserved against the devastation wrought by unsustainable exploitation of mineral resources. Also, the Commission's decision does not stop at the finding of a violation of the Charter, but goes on to order remedial action to clean up and rehabilitate the lands and rivers damaged by oil operations, and to require the preparation of environmental impact assessments as well as the provision of information and guarantees of public participation in decision-making bodies".<sup>65</sup>

This more collective acceptance of the protection provided by the fundamental right to environment can also be seen in the inter-American human rights system, which includes three levels of commitment. The first, and least demanding<sup>66</sup>, is the 1948 *American Declaration of the Rights and Duties of Man*, which binds<sup>67</sup> the 35 States that are members of the Organization of American States (OAS). It is applied by the Interamerican Commission for Human Rights, which has only moral power, on the basis of petitions submitted to it by individual citizens.<sup>68</sup> The other two levels of commitment are more demanding. The first is the system built on the foundations of the *American*

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<sup>62</sup> *African Charter on Human and Peoples' Rights*, June 27, 1981, 1520 RTNU 217 (adopted on June 27, 1981, in Nairobi, Kenya, at the 18th Conference of the Organization of African Unity (OAU). Brought into force on October 21, 1986).

<sup>63</sup> Communications 25/89, 47/90, 56/91 et 100/93. In this case, the right to the environment was not claimed, even though it is guaranteed by article 24 of the *African Charter on Human and Peoples' Rights*.

<sup>64</sup> Soc. And Econ. Rights Action Centre v. Nigeria, Case No ACHPR/COMM/A044/1, OUA Dov. CAB/LEG/67/3 rev. 5, par. 51.

<sup>65</sup> Francesco Francioni, in this publication.

<sup>66</sup> It is interesting to note that Canada and the United States signed only this Declaration, and not the two Protocols that make up the inter-American human rights system: Report of the Senate Standing Committee on Human Rights, May 2003 (the Standing Committee's press release is available online at: <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-f/huma-f/press-f/28may03-f.htm>).

<sup>67</sup> In its advisory opinion of July 14, 1989, the Interamerican Court of Human Rights judged that the *American Declaration of the Rights and Duties of Man* had a normative value and was part of Interamerican law: Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, OC-10/89, July 14, 1989.

<sup>68</sup> Art. 18 of the *Statutes of the Interamerican Commission for Human Rights*, approved by Resolution N1 447 (IX-O/79) adopted by the OAS General Assembly at its ninth ordinary session held in La Paz, Bolivia. In October 1979, and arts. 23 and 24 of the *Regulations of the Interamerican Commission for Human Rights*, adopted by the Commission at its 109th extraordinary session held on December 4-8, 2000 and subsequently amended on several occasions.

*Convention on Human Rights*, adopted in 1969 in San José,<sup>69</sup> which allows individuals and States to complain to the Interamerican Commission for Human Rights (in this case the Commission acts as a mediator). The second is the stronger system of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, adopted in San Salvador on November 14, 1988 and known generally as the *San Salvador Protocol*. Article 11 of the Protocol sets out the right to a clean environment, and gives a highly anthropocentric twist to it by linking it to health<sup>70</sup>. The individual motions mentioned in articles 44 to 51 and 61 to 69 of the *American Convention on Human Rights* cannot be used to enforce the right to environment, because it is only violations of article 8 a)<sup>71</sup> or article 13<sup>72</sup> that give recourse to the Interamerican Commission for Human Rights and, where applicable, the Interamerican Court of Human Rights.<sup>73</sup>

The Interamerican Commission for Human Rights has nevertheless had to consider the connections between environmental damage and the other rights set out in the *American Declaration of the Rights and Duties of Man*, including the right to communal property in the Case *Mayagma Sumo Awas Tigni Community v. Nicaragua* and the right to life and physical integrity in the Case of Yanomani Aboriginal people.<sup>74</sup> This was the case, among others, for a motion presented by the Yanomani Aboriginal people of Brazil. In this case, the motion alleged that the Brazilian Government had violated the Yanomani's right to freedom, safety and personal integrity guaranteed by article 1 of the *American Declaration of the Rights and Duties of Man*, as well as their right of residence and movement, guaranteed by article VIII, and their right to health, guaranteed by article XI. The motion also alleged that the Brazilian Government, by building the Trans-Amazon road across their territory, had violated their right to life since it had dislodged the Aboriginal people from their ancestral lands, authorized the harvesting of natural resources, including subsoil resources, within their territory, and allowed a massive influx of newcomers to their territory, causing disease to be spread, without providing the necessary medical care. The Court ruled that the right to life, freedom and personal security, the right of residence, the right of free movement and the preservation of health and well-being guaranteed by the *American Declaration of the Rights and Duties of Man* had indeed been violated.

In addition, in 2005, Canadian Sheila Watt-Cloutier and the NGO EarthJustice petitioned the Interamerican Commission for Human Rights, claiming that the United States' refusal to ratify the Kyoto Protocol violated the lifestyle of the Inuit people and contravened not only various international instruments, but also the constituting instruments of the Interamerican System of Human Rights, including article XIII of the *American Declaration of the Rights and Duties of Man*, which states that "Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries", and article XI, which recognizes the right to health. The Commission's response was that, based on article 26 of its Procedural Regulation<sup>75</sup>, it was unable to consider the petition because the information it

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<sup>69</sup> Convention signed in San José on November 22, 1969, which came into force in 1978. By September 2011, it was binding upon 23 States, with the notable exceptions of Canada and the United States.

<sup>70</sup> Article 11, Right to a Healthy Environment.

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation, and improvement of the environment.

<sup>71</sup> The right of workers to organize unions (freedom of association).

<sup>72</sup> The right to education.

<sup>73</sup> Additional Protocol to the American Convention on Human Rights. OAS Treaty Series 69 (brought into force on November 16, 1999), article 19 (6).

<sup>74</sup> Case of Mayagma community: INTER-AM, IACtHR Series C-79, 31 August 2001; Case of Yanomani Indians: Decision 7615 (Brazil), INTER-AM. C.H.R., 1985, March 5, 1985, 1984-1985 Annual Report 24, OEA/Ser.L/V/11.6, Doc. 10, rev. 1 (1985), art. 24, 31.

<sup>75</sup> *Procedural Regulation of the Interamerican Commission on Human Rights* [online: <http://www.cidh.oas.org/Basicos/French/u.reglement.cidh.htm>].

contained was insufficient to determine whether the alleged facts might constitute a violation of rights guaranteed by the *American Declaration of the Rights and Duties of Man*. In 2007, Ms. Watt-Cloutier and EarthJustice asked the Commission for a hearing, to prove the violation through testimony. The Commission agreed to hold a hearing, which took place on March 1, 2007, but has not followed up on the matter since that time.

Neither the *European Convention for the Protection of Human Rights*, adopted in the 1950s, nor its protocols, recognize a right to environment. However, the Strasbourg Court, ruling that it was incompetent *ratione materiae* in certain cases<sup>76</sup> in which applicants claimed violations of the right to life guaranteed by article 2 in environmental protection issues, nevertheless helped indirectly to assert recognition of a right to environment in member States, by considering alleged violations of the right to privacy in a large number of cases (too many to list here), some of which were interpreted progressively by the Court. In the European system of human rights, individual environmental rights are regarded as an extension, by way of interpretation, of other expressly recognized human rights, such as the rights to life, health, private and family life, information and consultation as a condition for the fulfilment of the obligations inherent in the right to private and family life recognized by article 8 of the Convention.<sup>77</sup>

Based on all these international declarations of principle, international and regional conventions and jurisprudence recognizing the right to environment, it is possible to assert that this right has indeed evolved, slowly but surely, since the 1960s. Its development has been welcomed by some jurists, but criticized by others. There has been much formal and recurrent debate in the last 20 years concerning the recourse to human rights as a means of resuscitating environmental law and achieving a better balance between this particular component of sustainable development and economic development.

Some authors have used political and juridical reasons as their basis for stating that there is a potential conflict between economic, social and cultural rights and the third generation human rights.<sup>78</sup> However, if we look more closely, it becomes clear that the second and third generation rights form part of a broader regulatory process which, according to Lucie Lamarche, is not really based on the absence or level of juridicity of any kind of right<sup>79</sup>, which has led authors including Lamarche to conclude that it is useless to continue to focus on delimiting the generational boundaries of rights, since all rights develop within a general context that determines their juridicity. This is the case of the "tension rights" to which Atias refers<sup>80</sup>. Provided we remember the fundamental difference between the law as it is (*lex lata*) and the law as it should be (*de lege ferenda*), then we should not really object

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<sup>76</sup> *Dr S c/RFA*, August 5, 1960 (nuclear testing); *X and Y c/RFA*, May 13, 1976 (use of a swamp for military purposes); *X c/RU*, July 12, 1978 (damage due to a vaccination campaign).

<sup>77</sup> For example : ECtHR *Lopez Ostra v. Spain*; ECtHR, 19 February 1998, *Guerra et al v. Italy*; ECtHR 8 July 2003, *Hatton et al v. United Kingdom*; ECtHR, 16 November 2004, *Moreno Gomez v. Spain*; ECtHR, 9 June 2005, 6 September 2005, *Ruano Morcuende c. Spain*; ECtHR, 9 June 2005, *Fadeïva v. Russia*; ECtHR, 22 May 2003; *Kyrtatos v. Greece*; ECtHR, 18 June 2002 (29 & 30 November 2004), *Oneryildiz v. Turkey*; ECtHR, 12 July 2005, *Okay v. Turkey*; Pascale Steichen, "Évolution du droit à la qualité de vie, de la protection de la santé à la promotion du bien-être", *RJE* 3/2000, 361-390; Francis Haumont, "Le droit fondamental à la protection de l'environnement dans la CEDH", in *L'environnement, objet d'un droit fondamental*, special edition, *Amén-Envt*, Kluwer, Brussels, 2008, pp. 9-56.; Francis HAUMONT, "L'absence de statut spécial aux droits environnementaux de l'homme", *D.* 2003, pp. 2273-2274; Nathalie Herve-Fournereau, "Droit à l'environnement et ordre juridique de l'UE. Une alliance d'ombres et de lumières", in *Pour un droit commun de l'environnement*. Mélanges Michel Prieur, Dalloz, 2007, 112; Alan Boyle, "Human Rights or Environmental Rights? A Reassessment", *XVIII Fordham Environmental Law Review*, (2007) 471; Nicolas De Sadeleer, *Environnement et marché intérieur*, 2010, Éditions de l'Université de Bruxelles, p. 97-111; Francesco Francioni, "International Human Rights in an Environmental Horizon", *European Journal of International Law*, 2010, Vol. 21, Issue 1, pp. 41-55.

<sup>78</sup> Lucie Lamarche, *Perspectives occidentales du droit international des droits économiques de la personne*, Collection de droit international, Bruxelles, Éditions Bruylant, 1995, p. 144.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, pp. 145-146; Christian Atias, "Quelle positivité? Quelle notion de droit?", (1982) 27 *Archives de philosophie du droit*, 209, p. 233.

to the term “third generation right” if we agree that it refers to rights that are in the process of being created or formed. The secret of human rights, as pointed out by French President François Mitterand, is democracy.<sup>81</sup> It is clearly true that just because a State promotes and protects one generation of rights, it should not be excused from promoting and protecting other generations. All human rights are interdependent and inseparable<sup>82</sup> and modern international doctrine identifies not just two, but three times or generations in the development of human rights, thereby highlighting the fact that the catalogue of human rights itself is continually evolving, is never defined once and for all, and is always open to meet modern needs, especially in the field of environmental protection. The need to recognize an environmental right as a counterbalance to economic power has been noted in every proposal concerning the identity of the third generation rights.<sup>83</sup> This is hardly surprising, given that the right to environment would contain all the elements of a third generation right, in terms of its individual and collective aspects. Although it could be set up against the State, it would also need the State to uphold it.<sup>84</sup>

Debate on the relevance of a right to environment addresses a number of other questions, which we have grouped together as follows: Can such a right be implemented simply by applying existing human rights, such as the right to life, the right to privacy or the right to health, or by enforcing the adjective laws available to every individual to ensure that the environment is protected? In short, these questions all focus on one central issue, namely: Do we need a new human right to apply the right to the environment? Why acknowledge that humans have a right to environment? How should the term “environment”, and the new right to environment, be defined, and what should that right encompass? In other words, what we refer to as the debate on man’s right to environment is in fact a debate on a large number of different aspects relating to some future right to a healthy environment – namely the relevance of such a right, its future existence as reflected in international instruments and acts, and the possibility of enforcing such a right if it is not expressly formulated, either by using other established human rights, such as the right to life or health, or by applying adjective law.

### ***The Debate on the Anthropocentrism of the Right to Environment, and the Possibilities of Reformulating Justice Based on the Principle of Sustainability***

In any discussion of the relevance of recognizing a right to environment as a human right, the problem of the anthropocentrism of human rights and the need to bring the human rights approach into line with environmental preservation needs is a constant concern, particularly when defining the right. Many authors have focused on the inherent anthropocentric nature of human rights, believing that their very existence underscores the idea that the environment exists only for the benefit of human beings, and has no intrinsic value. They even believe that human rights lead to the creation of a hierarchy in which human beings hold a position of superiority, making them more important than the other members of the natural community.<sup>85</sup> The goals and norms of human rights are focused on human

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<sup>81</sup> Cited in Rousseau, *supra* note 46, p. 136.

<sup>82</sup> UN law raises the principle of the indivisibility and interdependency of human rights. This principle was recognized in the 1968 *Teheran Proclamation*, which regards all human rights as being equal in terms of their value and importance. Vasak notes that, in the Proclamation, the indivisibility and interdependency of human rights was extremely theoretical and was more like a statement of principle than a reflection of everyday life. Karel Vasak, “Les différentes catégories des droits de l’homme”, in André Lapeyre, François De Tinguy, Karel Vasak, dir, *Les dimensions universelles des droits de l’homme*, Bruxelles, Bruylant, 1990, at p. 297 [Vasak].

<sup>83</sup> Allan Rosas, “So-called rights of the third generation”, in Asbjørn Eide, Catarina Krause, Allan Rosas, dir, *Economic, Social and Cultural rights: A Textbook*, Dordrecht, Martinus Nijhoff, 1995, at pp. 257-269; Vasak, *supra* note 82.

<sup>84</sup> Vasak, *supra* note 82.

<sup>85</sup> For an overview of these positions, see Patricia W. Birnie and Allan E. Boyle, *International Law and the Environment*, Oxford, Oxford University Press, 2002, p. 257-258; Jean-Maurice Arbour and Sophie Lavallée, *Droit international de*

beings, the survival of humanity and the ongoing use of resources, and it is these goals, when applied in environmental law, that have caused the environment to deteriorate. Second, this anthropocentric approach deprives the environment of direct protection. Environmental damage must be very severe before it affects the right to health, for example. Environmental damage does not provide sufficient grounds, of itself, to complain legally. On the contrary, the damage must be connected to human well-being. There is no acknowledgement of the fact that nature is the victim of the damage. Lastly, environmental protection always depends on the fact that human beings see their rights as being affected, use the procedural mechanisms recognized by law to object to a violation of their human rights, claim compensation for themselves and the compensation granted will not necessarily be used for the benefit of the environment.

Traditionally, juridical relationships, including those described as issues relating to justice, are perceived solely as interpersonal relationships. Based on this view of justice, people have no legal obligation towards nature, and nature can claim no rights from the people. Since time immemorial, the law's main goal has been to govern relationships between humans, and not between humans and nature. Its very basis is therefore anthropocentric, because even when the purpose of a law is to regulate hunting, fishing or forestry, its ultimate goal is to defend the interests of hunters, fishers and forestry companies against potential abuse. It is certainly not a matter of protecting wildlife species or ecology, which have no marketable value. The law addresses only corporal elements such as water, air, soil, animals and plants, using purely anthropocentric qualifiers based on the concepts of appropriation and sovereignty: *res communes*, *res propriae*, *res nullius*. Humans are therefore, *a priori*, free to destroy and alter whatever they own and, *a fortiori*, whatever does not belong to anyone. This right to destroy has, in fact, only one limitation: the protection of other human interests. The destruction of the species and ecosystems that make up biodiversity does not always affect a human interest protected by law.<sup>86</sup> The damage is first and foremost inflicted on nature, and indirectly, in a way that is difficult to assess in financial terms, on humans. The State can always pass laws to protect nature, but those laws are deformed by their primary function, which is basically to protect human interests, and the problem of legitimacy is bound to arise sooner or later. This problem of legitimacy forms the basis for all the criticism aimed at the idea of recognizing the right to environment as a third generation human right.

An overview of the ethical theories of environmental law reveals a discourse intersected by two opposing trends, namely anthropocentrism (nature as an object) and *deep ecology* (nature as a subject). The anthropocentric trend originated with Descartes, who believed humans should become masters and owners of nature. He helped to shape modern Western societies in the 19<sup>th</sup> century, and was followed by the French Revolution and Jean-Jacques Rousseau, who took the view that nature should be controlled, cultivated and humanized. The fact that humans are the only entities with a conscience means they are sovereign and the measure against which all other things should be compared. Under this type of anthropocentric approach, nature's only ethical value is from an instrumental standpoint.<sup>87</sup> The only valid reason to limit human action is where damage to nature threatens humans themselves.<sup>88</sup> This view is often criticized as being at the root of the many environmental problems now facing the

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*l'environnement*, Cowansville, Éditions Yvon Blais, 2006, p. 105-130; Bosselmann, *supra*, note 2; Noralie Gibson, "The Right to a Clean Environment", (1990) 54 *Saskatchewan Law Review*, p. 5; C. Redgwell, "Life, the Universe And Everything: A Critique of Anthropocentric Rights", in M. Anderson and A. Boyle, *op. cit.*, note 63. *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford, 1996; Patrice Meyer-Bisch, *Le Corps des droits de l'homme*, Éditions Universitaires de Fribourg, 1992, p. 250; Arne Naess, "A defence of the Deep Ecology Movement", *Environmental Ethics*, no. 6, 1984, p. 265-270, [Naess].

<sup>86</sup> Marie Angèle Sanson-Hermitte and Bernard Edelman, *L'homme, la nature et le droit*, Paris, C. Bourgois, 1988; Martine Rémond-Gouilloud, *Du droit de détruire: essai sur le droit de l'environnement (les voies du droit)*, Paris, Presses Universitaires de France, 1989.

<sup>87</sup> Serge Gutwirth, "Trente ans de théorie du droit de l'environnement", (2001) 26 *Environnement et société* 1, pp. 5-8 [Gutwirth].

<sup>88</sup> *Ibid* p. 8.

world, and it is hardly surprising to note that it also led to the creation of its antithesis, referred to by the Anglo-Saxon community as *deep ecology*. In deep ecology, as opposed to anthropocentrism or shallow ecology, humans form part of the general ecosphere, and are not placed on a pedestal at the top of the living hierarchy. The term *deep ecology* was first used in 1973 by Norwegian author Arne Naess<sup>89</sup>, and can be described as an environmentalist trend that reveres nature and questions the central role played by humans. Its goal, too, is the direct opposite of that pursued by anthropocentrism: humans are the servants of nature, and not vice-versa. Deep ecology is based on the notion of biocentric equality, and regards moral egalitarianism between humans and animals as a basis for concluding that all the constituent entities of nature have an equal right to exist. All these entities together form what is commonly referred to as “nature”, and none are its masters. Chemist James Lovelock supported this view of nature, and devised the Gaia theory, where nature is an independent entity with immanent will that cannot be controlled by humans.<sup>90</sup>

Edgar Morin, a fervent supporter of the environmental philosophy, also said nature could only be regarded as having a dual control system; nature must be driven by humans, but humans, in return, must also be driven by nature<sup>91</sup>. This ontological equality does not allow the human race – a constituent element of nature – to submit nature’s other elements to its destructive will. Ultimately, according to Perrin, ecological destruction is the philosophical destruction of nature by natural anthropocentrism<sup>92</sup>. This is consistent with the view of those authors who regard the human race as an integral part of the ecosystem.<sup>93</sup>

*Deep ecology* has three significant consequences. First, if the human race is to be respectful of the environment, it must plan the number of births so as to limit the world population<sup>94</sup>. This is consistent with the malthusian view<sup>95</sup>, and also with Lovelock’s view, namely that “if there were only 500 million people on Earth, almost nothing that we are now doing to the environment would disturb Gaia”<sup>96</sup>. The second consequence is the suggestion that trees and natural resources in general should have rights, and the environment should be regarded as a whole.<sup>97</sup> According to Christopher D. Stone, the fact of ascribing these rights to elements of nature is by no means revolutionary if we consider that women and slaves used not to have rights, and it was equally inconceivable at that time that the situation would change in the future. Stone’s proposal was followed by the opinion issued by the three dissident United States Supreme Court judges (out of seven) in *Sierra Club v. Morton*.<sup>98</sup> The third and

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<sup>89</sup> Arne Naess, “The Shallow and the deep. Long-Ranged Ecology Movement”, (1973) 16 *Inquiry* 95. For further information on deep ecology, see also Naess, *supra*, note 86 and Joseph Hofbeck, “La “deep ecology”: un essai d’évaluation éthique”, in José A. Prades, Jean-Guy Vaillancourt et Robert Tessier, dir, *Environnement et développement : questions éthiques et problèmes socio-politiques*, Montréal, Fides, 1991, p. 165-181.

<sup>90</sup> James E. Lovelock, *Les âges de Gaïa*, Paris, O. Jacob, 1990 [Lovelock].

<sup>91</sup> Edgar Morin, *Introduction à la pensée complexe*, Paris, ESF Editeur, 1974, p. 77.

<sup>92</sup> Pierre Perrin, *Deep Ecology et Environmental philosophy: du sophisme au contrôle autoritaire de la population*, Institut économique Molinari, September 21 2004.

<sup>93</sup> The United Nations General Assembly states that “Mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients”, Preamble to the *World Charter for Nature*, *supra* note 18, preamble.

<sup>94</sup> Bill Devall and George Session, *Deep Ecology*, Layton, Gibbs Smith, 1985, p. 166.

<sup>95</sup> In his *Essay on the Principle of Population*, published in 1789, British economist Thomas Malthus supported the idea that the world population would increase more quickly than the planet’s agricultural production capacity, and predicted that the imbalance would lead humanity into a crisis situation where food resources would be insufficient to meet the demand. Although the crisis never occurred, the same Malthusianism is still used today to support fears about the balance between population and natural resource levels. According to Malthus, humanity must deal with the support capacity of its environment and make decisions to ensure its sustainability.

<sup>96</sup> Lovelock, *supra* note 90, p. 214.

<sup>97</sup> Stone, *supra* note 12; Christopher D. Stone, *Should Trees Have Standing?: And Other Essays on Law, Morals & the Environment : 25th Anniversary ed.*, Dobbs Ferry, Oceana, 1996.

<sup>98</sup> *Sierra Club v. Morton*, 45 U.S. 727 (1972). Ruling handed down on April 19, 1972.

last consequence of deep ecology is the marked objection to human rights as a means of protecting the environment. Many authors have in fact wondered whether human rights provide the right framework for this. In their view, human rights protect the interests of human beings, and therefore instrumentalize the environment. Nature is an object that belongs to humans, who may ask the international community, the State and other citizens to protect it. In the view of these authors, if the formulation of a right to environment does contribute something positive to the environment, it will be purely by chance, and will not be because the environment is given any intrinsic value<sup>99</sup>. If a right to environment is supported by State measures allowing individuals to impose limitations on environmental damage, those limitations may fulfill the *human aspiration* to live in a good quality environment.

The arguments put forward by the supporters of deep ecology have been taken up to some extent by many green pressure groups, and are echoed in the concerns expressed by some members of the scientific community, who believe our model of economic development comes with an excessive ecological footprint. This is consistent with the 1972 *Limits on Growth* document issued by the Club of Rome, whose model compared the limited availability of natural resources with our unlimited economic growth model. History has shown, however, that international environmental law has been developed instead around concepts such as intra-generationality and inter-generationality of the environment as a shared human heritage in some texts<sup>100</sup> and even more strongly, of sustainable development, defined by the Brundtland Commission as (1987) "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".<sup>101</sup> Ever since the Rio Earth Summit, there has been general international agreement on the need to promote a form of sustainable development that will allow environmental concerns to be built into productive process and individual behaviours.<sup>102</sup> Viewed in this way, sustainable development is a concept that can be used to formulate economic development policies<sup>103</sup> that regard social fairness and environmental protection as being equally important, thereby moving away from the radical standpoint of deep ecology.<sup>104</sup>

The ecologists believe that to respond to the current ecological situation, rather than simply adding duties to existing human rights, we must redefine those rights in order to guarantee the right to nature. The proponents of *deep ecology*, who are extremely critical of the *Universal Declaration of Human Rights* because it regards mankind as the source and destination of all moral, political and ecological values, have not achieved the success they hoped for, and their position has become weaker as a result, to such an extent that, today, they do not appear to have the ideological strength required to oppose the

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<sup>99</sup> Gutwirth, *supra* note 87, p. 8.

<sup>100</sup> The Agreement of December 5, 1979, proclaims the "moon and other celestial bodies" to be a shared human heritage. *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, December 5, 1979, 1363 RTNU 3; *United Nations Convention on the Law of the Sea*, December 10, 1983, 1834 RTNU 3 does the same for mineral resources on the sea bed.

<sup>101</sup> Brundtland Report, *supra* note 16.

<sup>102</sup> Principle 8 of the *Rio Declaration* states that: "To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies". In addition, Chapter 4 of Agenda 21 states that progress will be made by strengthening positive trends and orientations as part of a process aimed at considerably changing the consumption habits of industrial companies, governments, households and individuals, in order to use resources in the most rational way possible and reduce waste to a minimum, *Rio Declaration, Earth Summit Declaration*, Rio de Janeiro, United Nations Conference on Environment and Development, June 3-14, 1992.

<sup>103</sup> Vaillancourt, *supra* note 22, p. 24-27.

<sup>104</sup> "In a short career spanning a handful of decades, the ecologist movement appears to have taken a fundamental direction that has ultimately moved it away from deep ecologism. The ecologist movement, which generally supports the theses made popular by the United Nations Commission for Environment and Development, is moving towards a reconciliation between the demands of economic development and the demands of environmental protection" (free translation of the original French text). José A. Prades, *Éthique de l'environnement et du développement*, Paris, Presses Universitaires de France, 1995.



recognition of a human right to environment. Nevertheless, deep ecology does allow us to question our perception of “sustainable development” and question the suitability of existing and future legal instruments to implement the principle of sustainability. In fact, the principle of sustainability should change our conception of justice itself.

Liberal democrats such as Rawls and those who followed him tried to expand a liberal theory of justice to include environmental concerns. They believe ecologism and democratic liberalism are compatible. The core concern of the liberals is to reconcile liberalism with the individual, individualism, State neutrality and a commitment to good environmental practices. Their goal is to consider environmental issues through the paradigm of liberalism, rather than to replace it. The result is a “greening” of public policies, which depends on democratic majorities rather than a strong State commitment to ecologism. They do not support recognition of a right to environment, and are even less enthusiastic about the rights of nature.

According to the supporters of the human right to environment, nature may not have rights but humans have high-level duties towards it and, ultimately, towards themselves. Some authors, such as Dinah Shelton and Alexandre Kiss, go so far as to defend the idea that just because the right to environment is anthropocentric of itself, this should not mean that the environment cannot be protected or a human right to environment implemented. From this standpoint, such a right may even be formulated in a way that protects what we refer to as “ecological damage”, providing further motivation for non-governmental environmental organizations and financial means provided out of environmental funds financed partly by the compensation obtained through recourses to and recognition of procedural laws, so that individuals can enforce their right effectively through the law<sup>105</sup>. Although these conditions for a right to environment do not, as yet, go as far as the theories of those who, like Stone, believe trees should have rights<sup>106</sup>, the wording of the right and the progressive interpretations of the courts could still help to provide better protection for the carrying capacity of our ecosystems, just as the definition of sustainability from the United Nations Environment Programme (1991), which is “improving the quality of human life while living within the carrying capacity of supporting ecosystems”<sup>107</sup>, and principle of sustainability set out in the 1982 *World Charter for Nature*<sup>108</sup> and in the *Earth Charter of 2000*<sup>109</sup> requires.

## Conclusion

The systemic concept of sustainable development, as defined in 1987 by the World Commission on Environment and Development (Brundtland Report, 1987), became the subject of a broad international consensus that was eventually set out in the principles of the Rio Declaration on Environment and Development in 1992. The preamble to the Marrakesh Agreement<sup>110</sup> creating the World Trade Organization (WTO) also refers to sustainable development, sending a clear sign of the importance of this concept in international law.

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<sup>105</sup> Alexandre Kiss & Dinah Shelton, *International Environmental Law*, 3rd Edition, New York, Transnational Publishers inc., 2004, at p. 665: “The third possibility is to formulate a new human right to an environment not defined in purely anthropocentric terms, an environment that is safe not only for humans, but one that is ecologically balanced and sustainable in the long term.”

<sup>106</sup> Stone, *supra* note 12.

<sup>107</sup> IUCN/UNEP/WWF, *Caring for the Earth: A strategy for sustainable living*. Gland, Switzerland, 1991.

<sup>108</sup> World Charter for Nature, 1982, *supra*, note 18.

<sup>109</sup> International Union for Conservation of Nature, “Earth Charter”, June 29 2000, online at: [<http://www.earthcharterinaction.org/contenu/pages/La-Charte-de-la-Terre.html>].

<sup>110</sup> *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867- 1868-1869 RTNU 1, Gaz. C. 1994.I.4845.

Sustainable development is certainly a concept that brings people together, in spite of, or perhaps because of its fuzzy conceptual nature. There are many different conceptual trends, in the treaties and soft law (a “source” of law that plays a major role in the legal reception reserved for the concept) and in doctrine. We have explained that there are two major trends, one based on an anthropocentric standpoint (Brundtland Report, 1987; Rio Declaration, 1992), and known as weak sustainability, and the other based on an ecocentric standpoint (World Charter for Nature, 1982; 2000 Earth Charter), and known as strong sustainability. Based on the weak or anthropocentric approach, it is possible, in sustainable development, to reconcile economic, ecological and social interests, even though they are perceived as being antinomic. Depending on the sub-trend (and there are many of these), the approach tolerates different levels of non-sustainable development, since all three interests are considered to be equally important to humans. Based on the strong or ecocentric approach, development is sustainable only if ecological limits are upheld in the pursuit of social interests through the application of economic means. From this standpoint, respect for ecological limits is a key aspect in maintaining our living framework. Moreover, because the economy is not an end of itself, it must serve the well-being of all humans.

While it is true that the anthropocentric model of sustainable development as presented by the World Commission on Environment and Development in *Our Common Future* (Brundtland Report) does not rank the three components of the concept (economy, environment and society) in a hierarchy, and that the legal instruments used to operationalize it tend, all too often, to work in favour of economic interests, we do not believe the concept itself should be set aside. On the contrary, it must be reworked to construct a “sustainable development” law that promotes strong sustainable development by restoring the principle of sustainability to its central place. Indeed, sustainability is seen by many as being one of the most ancient ideas in the human heritage.<sup>111</sup>

A collective and more ethical fundamental right “to ecological sustainability”, not only for individuals but also for entire peoples, with a broader interest to act, should therefore be considered, based on the example of the African Charter on Human and People’s Rights, and inspired by the Earth Charter of 2000.

Indeed, if only the individual aspect of human rights is protected, this may be a factor for social regression, since the “judicial” power or even a human rights committee, while it could prevent the State from violating the right to life, freedom and security, could not improve the situation of the underprivileged or of the environment. Individual human rights can only prevent the worst from happening, and do not allow for any kind of social progress:

“Although individual human rights are sometimes the instruments of freedom, they can also, in other circumstances, be the instruments of dominion, used wisely by those already in a position of strength in order to promote social regression. In reality, the vindication of the Charters is actually a dual discourse. First, it is intended to prevent the intolerable, such as torture, from being inflicted upon individuals, and second, it provides a golden alibi for a form of economic liberalism that is entirely satisfied by government inaction.”<sup>112</sup>

Similarly, recognition of a right to sustainability, based on ecological damage and recognition of the value of the “community of life” on Earth, as is the case for the *Earth Charter* of 2000<sup>113</sup>, could serve as a counterbalance to economic rights such as the right to ownership, and hence become an element of progress for the living human and non-human world. If such a right were to be recognized,

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<sup>111</sup> Dissenting opinion of Judge Christopher Weeramantry in *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, *supra* note 13.

<sup>112</sup> Henri Brun, Guy Tremblay, *Droit constitutionnel*, 4th Edition, Cowansville, Yvon Blais, 2002, p. 880-881. (free translation of the original French text); Henri Brun, Guy Tremblay, Eugénie Brouillet, *Droit constitutionnel*, 5e édition, Cowansville, Yvon Blais, p. 902-906.

<sup>113</sup> Klaus Bosselmann, “Earth Charter” in Rüdiger Wolfrum, dir., *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, online at: [www.mpepil.com/].

however, the relationship between individuals, society and the State would have to be redefined, as would our relationship with nature, and this calls into question the individualistic liberalism of modern society. Indeed, the principle of sustainability requires Northern countries to eliminate unsustainable production methods and consumption habits, and Southern countries to promote appropriate demographic policies.

At the risk of appearing utopian, in the 21st century, it seems to be time to look at the progress made, think about what to do, and become aware that what we need is not a human right to environment, but a fundamental right to ecological sustainability, in order to ensure the well-being of all living species, both human and non-human. This right, once finalized, would help to change the models used to govern our societies. This substantial step forward across all sectors could encompass the different branches of international, regional and national law. It is only on this condition that the concept of sustainable development will become a general, integratory concept, and development can no longer be performed independently of basic natural resource preservation.

# Realising Social Environmental Justice: Human Rights, Sustainable Development and Possible Ways Forwards

Emanuela Orlando

## Introduction

Current environmental problems increasingly highlight the functional interconnections between the protection of the environment and the guarantee of human and social rights. Our lives, culture, drinking water and sanitation, health and homes, as well as the use and value of property are clearly affected by environmental pollution. When environmental degradation affects vulnerable groups, considerations of equity and justice come to the fore. Both at national and at global level, poor people, particularly those living in developing countries, indigenous communities, minorities and other marginalised groups, are often those most severely affected by the social and environmental side effects of economic development.

Issues of equity have become prominent at the international level. Globalisation has accentuated social divergences, widened the gap between rich and poor and expanded the socio-economic effects of environmental problems. Because of the unequal and unfair distribution of costs and benefits of economic globalisation, international economic policies and liberalisation of markets and trade rather than enabling the achievement of economic, social and cultural rights, have increased environmental threats and deepened global inequality.<sup>1</sup> Disparities around the globe have been worsened by the fact that the most powerful groups – be they states or private corporations – are using globalisation as a means of retaining and entrenching control over weaker actors.<sup>2</sup>

The interconnectivity of the earth system also meant that the social and environmental effects of unsustainable consumption patterns in the more developed and industrialised parts of the world are being most keenly felt by developing countries. At the beginning of this century the developed and industrialised world used about eighty per cent of the global energy and mineral resources and generated more than eighty per cent of the world's pollution, but the impacts of such production and consumption patterns disproportionately affected poor countries and developing states in the southern parts of the world. While developing countries host most of the Earth's natural and biological resources, they are also the ones most affected by poverty and least benefiting from the exploitation of these resources.

Reversal of this global trend characterised by unsustainable patterns of natural resources degradation, over-consumption, inequitable distribution of resources and poverty cannot be successfully achieved without an integrated and co-ordinated approach capable of accommodating the demands of economic developments with environmental protection and human rights. In spite of the profound functional interconnection between the environment, development and human and social rights, the three issues have often been addressed separately and disconnected to each other.<sup>3</sup> Economic projects appear too often to subordinate environmental and human rights concerns to financial results. On the other hand,

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<sup>1</sup>S. Alam, 'Economic Globalisation: Rethinking its promises for economic and social development from a developing country perspective', in S. Alam et al. (eds.), *Globalisation and the Quest for Social and Environmental Justice*, (Abingdon: Routledge, 2011).

<sup>2</sup>Ibid. 77

<sup>3</sup>M.C. Cordonnier-Segger and A. Khalfan, *Sustainable Development Law – Principles, Practices & Prospects*, (Oxford: OUP, 2004).

environmental conservation initiatives have at times ignored human rights considerations, while international human rights obligations have not been applied in a way to fully address environmental issues.<sup>4</sup>

The above remarks provide important arguments in support of the inclusion of a justice dimension within environmental, social and economic policies, and more generally in the sustainability discourse.<sup>5</sup> There are many theories, conceptions and interpretations of justice. One of the earliest accounts of the form of justice is found in Aristotle's *Nicomachean Ethics*, where the ancient philosopher distinguishes between corrective justice and distributive justice. In more recent times, John Rawls elaborated a theory of justice as a set of principles governing the basic structure of a society, with specific respect to the group of institutions that directly or indirectly allocate liberties, rights, resources, and other advantages to its members.<sup>6</sup>

Underlying these different approaches to justice there is a common understanding of justice as an overarching principle against which to measure fairness in human interactions and critically appraise existing institutions. Critical justice appraisals can, thus, reveal the unjust distributive effects of legal concepts, institutions and principles, restore past unbalances and contribute to meaningful participatory democracy. Furthermore, besides being an aspiration in its own right, justice contributes to legitimacy and effectiveness of certain policies and legislation.

In light of the above general remarks, the present paper explores the relationship between social justice and environmental justice and seeks to ascertain whether principles of justice can provide the common conceptual background through which to address social and environmental concerns in an integrated and coherent manner. The analysis will look in particular at three areas where current developments clearly point to the close linkages between environmental, social and development/economic aspects of policies and legislation, namely the fields of environmental justice, human rights law, and sustainable development. Drawing on concrete examples of policy and legal developments, the paper endeavours to show how principles of justice can provide the conceptual underpinning necessary to give operational meaning to sustainable development and to enhance the potential of human rights approaches.

## **Environmental Justice: An Expanding Conceptual Framework**

While the search for justice has constantly permeated debates and reflections about institutions and structures in the society since ancient times,<sup>7</sup> the application of justice principles to critically appraise laws and policies concerning the environment is a more recent phenomenon. The expression 'environmental justice' was initially used with reference to the social activist movement which spurred in the United States during the 70s and the 1980s as a reaction to certain side-effects of environmental policies perceived as discriminatory against poor communities and minorities. However, there were prominently social concerns rather than pure ecological considerations at the origin of the term environmental justice. In particular, the movement was very much concerned with plea of environmental racism and social discriminations against poor communities on the belief that the latter were exposed to a disproportionate share of toxic substances and hazardous waste. The sociologist R. Bullard, one of the foremost scholars in the study of the movement, described this phenomenon whereby toxic dumping and location of unwanted land uses were usually located near black and poor communities which were consequently disproportionately burdened with these types of externalities.

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<sup>4</sup>Ibid. 'Introduction', 1.

<sup>5</sup>See generally, D. French (ed.), *Global Justice and Sustainable Development*, (Leiden: Martinus Nijhoff Publishers, 2010).

<sup>6</sup>Rawls, *Theory of Justice*, 1971.

<sup>7</sup>See W. Morrison, *Jurisprudence from the Greeks to Post-modernism*, (Cavendish, London, 1997), 34-35, 46-48.

The movement has achieved extraordinary success in the United States, raising public awareness of the disproportionate impact of environmental degradation on minorities and lower classes. Although apparently focused more on the social effects of environmental degradation than on the protection of the environment as such, it had nevertheless the merit to highlight the link between the environment and the people and to promote the idea that environmental policies and law should not be planned in a vacuum but environmental objectives shall take into account social and economic realities. It is important to remark that the environmental justice movement has not invoked social justice at the expenses of higher environmental protection;<sup>8</sup> indeed, the ethical underpinnings of the environmental justice struggle very much include an environmental dimension.<sup>9</sup> In particular, some of the Principles of the Environmental Justice Manifesto<sup>10</sup> acknowledge the intrinsic value of nature, thereby revealing an eco-centric approach and suggesting that social justice and “ecological justice”<sup>11</sup> are not mutually exclusive, but could even become reciprocally supportive.

Since the earliest manifestations in the US in the 1970s, environmental justice discussions have considerably evolved. Awareness of ecological and ecosystems interdependence and the rapid economic globalisation have inevitably shifted the focus of environmental justice movements from domestic realms to the international and global level. There is growing acknowledgment to the fact that activities within state jurisdiction can affect not only the state's own environment, but also that of neighbouring states and the global environment. At the same time, the rise at the international level of non-state actors, in the form of corporations or civil society organisations urges the development of new international norms that take into account the individual rights and responsibilities, as well as of new mechanism of accountability. The language and frame of environmental justice have accordingly expanded in order to encompass an understanding of unequal environmental exposures around the world. To a large extent, this process of ‘internationalisation’ and of ‘globalisation’ of environmental justice<sup>12</sup> represents the environmental facet of a broader discourse revolving around an emerging idea of global or cosmopolitan justice.<sup>13</sup> There are various aspects of this process which are possible to discern.

In the field of environmental law, theories of justice build upon the increasing recognition of world ecological interdependence. When the injurious environmental impacts of unsustainable development patterns taking place in the industrialised and most developed parts of the planet affect the poorest and most vulnerable nations, issues of justice arise prominently,<sup>14</sup> calling for the assertion of collective responsibilities.<sup>15</sup> The phenomenon of “environmental migration” offers a visible example of the linkages between unsustainable development, environmental change and human rights violations, in the form of consequential forced displacement of people.<sup>16</sup> “Environmental refugees” - or more specifically “climate refugees” - are forced to abandon all their possessions in the aftermath of hurricanes, tsunamis, earthquakes and other grave environmental disturbances. The lack of basic

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<sup>8</sup>For a contrary view and a critique of the anthropocentric aspects of environmental justice movement, see K. De Luca, “A Wilderness Environmentalism Manifesto: Contesting the Infinite Self-Absorption of Humans”, in R. Sandler and P. Pezzullo (eds.), *Environmental Justice and Environmentalism: the Social Justice Challenge to the Environmental Movement*, (Cambridge MA, London: MIT Press, 2007), 27-55.

<sup>9</sup>K. Bosselmann, “Justice and the Environment: Building Blocks for a Theory on Ecological Justice”, in K. Bosselmann and B. J. Richardson (eds.), *Environmental Justice and Market Mechanism – Key Challenges for Environmental Law and Policy* (London: Kluwer Law International, 1999), 30-57, 34.

<sup>10</sup>Adopted at the First National People of Color Environmental Leadership Summit held in Washington DC in 1991.

<sup>11</sup>The term is used and advocated by K. Bosselmann, *cit. above*.

<sup>12</sup>A. Linklater, “The Evolving Sphere of International Justice”, (1999) 75 *International Affairs* 3, 473-482.

<sup>13</sup>There is a vast literature about global justice or process of ‘globalisation of justice’; among these see, in particular: T. Pogge (ed.), *Global Justice*, (Oxford: Blackwell Publishing, 2001); and R. Pierik and W. Werner, ‘Cosmopolitanism, Global Justice and International Law’, (2005) 18 *Leiden Journal of International Law*, 679-684.

<sup>14</sup>H. Shue, “Global Environment and International Inequality” 75 *International Affairs*, 3 (1999) , 531-545.

<sup>15</sup>R.W. Miller, *Globalising Justice*,

<sup>16</sup>M. Morel and F. Maes, “The Curious Phenomenon of “Environmental Migration/Displacement” and the Role of International Law in Cross-Border Protection”, in D. French (ed.) *Global Justice and Sustainable Development*, 273-288.

resources forces them to leave their normal places of habitation, as desertification, and increasing pollution of land and water render their survival with dignity almost impossible. In other cases, environmental refugees are populations victim of economic oppression, aggression or ethnic conflicts which, themselves, are often based on resources depletion and on the desire of powerful states, or powerful lobbies within states, to enter in possession of and exploit the mineral or oil resources of the territory.<sup>17</sup>

The transnational and global dimension of the environmental justice issue relates to the social and environmental consequences of international economic integration and the expanding reach of multinational corporations. The rapid growth of economic globalisation through the trading and investment activities of multinational enterprises has opened new opportunities for developing countries governments to attract foreign investments.<sup>18</sup> In principle, corporations can contribute positively to the creation of a supportive environment in which everyone can enjoy human rights; they have an enormous capacity to create wealth, jobs and to generate innovation and development. However, especially in those countries where institutions and systems of redress are weak, the practices of multinational enterprises have often collided in many ways with local communities and their environment, bringing the interface between environment and human rights in close connection with issues of social justice.<sup>19</sup>

The economic as well as ecological impacts of globalisation have posed significant challenges to the classic pillar structures of the international legal order. The responses have often entailed the development of new concepts or adjustments to existing frameworks in order to cope with such evolving scenario. In both respects, the quest for social and environmental justice at global level has prompted the development of new conceptual approaches to the international relations between states as well as the elaboration of novel mechanisms that enable to consider individuals and non-state entities.

The intrinsic interdependence of ecosystems and the complex and pervasive nature of environmental problems have not easily met with the traditional concept of 'sovereignty' as the governing concept in the relations between States.<sup>20</sup> With this respect, the emergence of legal concepts underlying the existence of a community of interests of states signals a progressive reconsideration of sovereignty in the light of international obligations to the environment based on ideas of cooperation and collective action.<sup>21</sup>

In particular, the concept of common concern of mankind entails the cooperation of all states on matters being similarly important to all nations and to the whole international community.<sup>22</sup> Thus far, this concept has been expressly adopted with respect to climate change, depletion of ozone layer and protection of biodiversity. Yet, its potential implications could be more far-reaching and the common concern concept can be viewed in a wider dimension.<sup>23</sup> The global environment can also be seen as a physical common; access to it cannot be prevented and what happens in one part of the globe may

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<sup>17</sup>See, L. Westra, *Environmental Justice & the Rights of Ecological Refugees*, (London: Earthscan, 2009).

<sup>18</sup>P. Muchlinski, 'Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations', (2003) *Non-State Actors and International Law* 3, 123-152.

<sup>19</sup>L. Zarsky, *Human Rights and the Environment – Conflicts and Norms in a Globalizing World*, (Earthscan: London, 2002).

<sup>20</sup>D. Shelton, 'Environmental Justice in the Post-Modern World', in B. Richardson and K. Bosselmann (eds), *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy*, (The Hague/London/Boston: Kluwer Law International, 1999), 21.

<sup>21</sup>L. Horn, "Globalisation, Sustainable Development and the Common Concern of Humankind", (2007) 7 *Macquarie Law Journal*, 53-80,56.

<sup>22</sup>Note of the Executive Director of UNEP Dr. Mostafa K. Tolba to the Group of Legal Expert Meeting, Malta December 13-15, 1990.

<sup>23</sup>A. Kiss, 'Economic Globalisation and the Common Concern of Humanity', in A. Kiss, D. Shelton and K. Ishibashi (eds.), *Economic Globalisation and Compliance with International Environmental Agreements*, (The Hague/ London/ New York: Kluwer Law International, 2003), 3, 8.

affect the environment in other parts.<sup>24</sup> While international law has traditionally appeared neutral towards the protection by states of their own environment<sup>25</sup> and emphasis on sovereignty restricted the application of international law to the environment that extends beyond state boundaries,<sup>26</sup> the common concern of mankind concept, through the requirement of cooperation of all states in global partnership, can well contribute to achieve a balance between considerations of sovereignty and environmental protection.<sup>27</sup>

While the idea of common concerns emphasises the collective responsibility of all states to the protection of the global environment, the principle of common but differentiated responsibilities enshrines considerations of equity and international justice in the distribution of the burdens of environmental protection. It recognises historical differences in the contribution of developed and developing states to global environmental problems, and differences in their economic and technical capacities to address these problems. Therefore, it embeds both a distributive as well as a corrective justice dimension.

The concept of common but differentiated responsibilities has found prominent expression in the international climate change regime, as well as in other important international environmental law instruments. Its application in the field of climate change is particularly interesting from an international justice perspective. Under the UNFCCC and KP, considerations of equity and justice led originally to a different categorization of the participant countries according to their level of development and industrialisation, typically Annex I (industrialised states, mainly OECD countries) and Non Annex I countries (developing states, mainly located in southern parts of the world). Those categories bear relevance to the type and extent of commitments under the international climate change legal framework. Presently, similar considerations based on equity and justice are calling for a re-examination of such traditional distinctions and the associated differentiated treatment in light of a changing scenario and evolving circumstances.<sup>28</sup>

A further challenge to traditional conceptions of international law has come from the ever more prominent role on the international level of non-state actors, more often in the form of corporations or civil society organisations. The rise of non-state, private, actors on the international arena has put into crises the paradigm of the state as the main regulatory entity and as the centre of international relations. This implied the need to re-frame the justice discourse at the international level in order to take into account the behaviour of non-state actors who are responsible for serious violations of human rights and the causation of environmental damage, as well as to address the position of individuals who are the victims of such abuses. On a theoretical level, alternative, more cosmopolitan, conceptions of justice have therefore been put forward by those scholars seeking to overcome the limits of John Rawls' state-centred approach.<sup>29</sup> Cosmopolitan justice is effectively concerned with the individuals, and requires that the impact on, and the opportunities for, each and every individual be taken into account.<sup>30</sup>

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<sup>24</sup>E. B. Weiss, 'Common but Differentiated Responsibilities in Perspective', in (2002) *Proceedings of the Annual Meeting of the American Society of International Law*, 366.

<sup>25</sup>A. Noellkamper, 'Sovereignty and Environmental Justice in International Law', in J. Ebbesson and P. Okowa, *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2008),

<sup>26</sup>See Principle 2 of the Rio Declaration which affirms the basic sovereign right of states to exploit their own natural resources pursuant to their own environmental and development policies, as long as no transboundary effects or effects to the commons occur. See in this sense, L. Horn, above, 55 and Noellkamper, 255.

<sup>27</sup>L. Horn, cit. above, at 57.

<sup>28</sup>S. Atapattu, 'Climate change, differentiated responsibilities and state responsibility: devising novel legal strategies for damage caused by climate change', in B. Richardson (ed.), *Climate Law and Developing Countries*, (Cheltenham (UK) and Northampton (MA): Edward Elgar, 2009), 37-62, 58.

<sup>29</sup>T. Pogge, *Realising Rawls*, Ithaca: Cornell University Press; see

<sup>30</sup>Other scholars have linked justice to the concept of the notion of 'human capabilities', that is basic entitlements which are to be given to all individuals. Along this line, A. Sen considers human capabilities as the substantive freedom of a person to achieve different lifestyles, thereby founding justice on the concept of freedom.



The other trend marking the evolution of discussions over environmental justice is represented by the ever increasing focus on the environment and its protection. Compared to the original frame that characterised the environmental justice movement, there is nowadays less emphasis on the aspects of social or racial discrimination and a major focus on the protection of the environment and on the rights of all citizens to a clean and healthy environment.<sup>31</sup> The most far-reaching elaborations of this trend are reflected in the emergence of a theory of ecological justice (“eco-justice”). Building upon a principle of environmental ethic concerning the relationship between the humans and the natural world, the eco-justice theory aims at the inclusion of the ‘ecological community’ of humans and other species of the natural world in the environmental justice debate.<sup>32</sup> Though fascinating, the idea of ‘ecological justice’ as a notion of justice that extends beyond human interaction to nature itself is yet to be fully recognised in legal terms. Nevertheless, it has the valuable merit to place the emphasis on the inherent and intrinsic value of non-human species and to attribute relevance to goods and interests independently from their utility for humans.

Having illustrated how contemporary conceptions of justice feature a move beyond the domestic realm and beyond a pure focus on human, to encompass also environmental and non-human values, the analysis shall move to consider how principles of justice and how environmental justice can provide the framework to integrate the human, social, economic and environmental dimension. To this purpose, the following section will look at how principle of justice reflected in two areas that have traditionally provided the framework to link human and social rights and environmental issues, namely human rights and sustainable development.

## **Human Rights Approaches for Social and Environmental Justice**

### *Potentialities and Limitations of a Human Rights Approaches*

The field of human rights provides an interesting ground for analysis of how the pursuit of social and environmental justice contribute to shaping legal understanding of the intersection between the environment and human rights by adding a broader social dimension. Evidence around the world provides several examples of the close inter-linkages between environmental and human rights issues. There is increasing support to the claim that a quality environment is an indispensable precondition for the enjoyment of the most basic human rights, and that an effective system of environmental protection may not only contribute to the preservation of the environment, but can be cast as an important means to the end of fulfilling human rights standards. Unfortunate cases of severe environmental pollution such as - to quote some of the most sadly notorious ones - Bhopal, Chernobyl, or most notably the Ogoni case in Nigeria, - offer clear demonstration of how the degradation of the physical environment easily translates into violation of the most basic human rights, such as especially the right to health or to life. Other contexts show how environmental protection can be instrumental to the fulfillment of the right to equality and to the combat against discrimination to the extent that degraded environment, pollution, resources depletion and climate change affects the most vulnerable sections of society. Tragedies such as the murder of Chico Mendes, a Brazilian labour union activist, and Ken Saro Wiwa in Nigeria, highlighted the immediate human cost of severe environmental

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<sup>31</sup>L. Kramer, ‘Environmental Justice in the European Court of Justice’, in J. Ebbeson and P. Okowa (eds.), *Environmental Law and Justice in Context*, (Cambridge: Cambridge University Press, 2009), 195-210, at 196. See in this volume the contribution of Sophie Lavallée.

<sup>32</sup>K. Bosselman, ‘Justice and the Environment: Building Blocks for a Theory on Ecological Justice’ in K. Bosselman and B. Richardson (eds.), *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy*, (London: Kluwer International, 1999), 30-57.

degradation and show how this price has often been disproportionately paid by the most vulnerable and marginalised people.<sup>33</sup>

The crucial role of environmental protection for the enjoyment of internationally-guaranteed human rights finds the most well-known recognition in the 1972 Stockholm Declaration on the Human Environment.<sup>34</sup> Principle 1 of the Declaration states that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” At the national level, there are 65 Constitutions that provide for a right to a quality environment. In spite of these important statements, the link between environment and human rights has not yet gone so far as to recognise the existence of a substantive human right to the environment. Many international human rights treaties either make no specific reference to the environment at all – such as notably the European Convention on Human Rights – or they do so only in relatively narrow terms focused on human health. Only the 1981 African Charter on Human and Peoples Rights proclaim environmental rights in broad qualitative term, and its provisions could be relied upon by the African Commission on Human and People Rights in the *Ogoni* case.<sup>35</sup>

A most common approach has consisted in exploring the possibility of relying on human rights protected under existing international conventions for the protection of the environment. ‘Greening’ existing human rights and reformulating them so as to develop their environmental dimension can therefore be one option to compensate the lack of a substantive right to the environment.<sup>36</sup> The jurisprudence of some regional human rights bodies shows that existing and well-established human rights, such as the right to life, to privacy, and property, or the right to a fair trial and freedom of information, can well offer the legal ground to pursue environmental claims. Some national courts have also taken a progressive stance by recognizing the environmental dimension of specific individual rights. The Indian judiciary, for example, has been particularly active in fashioning environmental rights out of a more conventional catalogue of constitutional rights. In a very progressive way Indian judges have gone far enough to explicitly state that the right to life includes the right to live in a healthy, pollution-free and ecologically-balanced environment.<sup>37</sup>

Human rights law may offer a potential avenue to victims of environmental pollution in order to obtain redress when other legal options are unavailable. It may be used for example in support to environmental claims in order to overcome the limitations of international environmental law. The US jurisprudence under the ATCA illustrates how in cases involving transnational pollution, advocates have used human rights law to bring actions before various tribunals on behalf of victims of environmental harm when other legal options would have led to a sovereignty roadblock.<sup>38</sup> Because of the various and multifaceted nature of the impact of environmental pollution to humans, and the diversity of situations in which environmental harm may occur, the combination human rights and environment may provide an avenue for redress in cases involving other abuses. Very often indeed the environmental impact occur in the context of other abuses on basic social rights of the people.<sup>39</sup>

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<sup>33</sup> Centre for International Environmental Law (CIEL), *One Species, One Planet: Environmental Justice and Sustainable Development - Final Edition* (Washington, 2002)

<sup>34</sup> Declaration of the U.N. Conference on the Human Environment, 16 June 1972, U.N.Doc. A/CONF.48/14/Rev.1 (1973), reprinted in 11 I.L.M. 1416 (1972).

<sup>35</sup> *Social and Economic Rights Action v Nigeria*, OAU Doc. CAB/:EG/67/3 rev.

<sup>36</sup> More extensively on the functional relationship between human rights and environmental protection, see M. R. Anderson, ‘Human Rights Approaches to Environmental Protection: An Overview’, in *Human Rights approaches to Environmental Protection*, A. E. Boyle and M.R. Anderson (eds.) (Oxford: Clarendon Press, 1996), 1-24.

<sup>37</sup> F. Du Bois, ‘Social Justice and Judicial Enforcement of Environmental Rights and Duties’, in M. Anderson and A. Boyle (eds.), *Human Rights Approaches*, cit. above, 153-175.

<sup>38</sup> H. M. Osofsky, ‘Learning from Environmental justice: A New Model for International Environmental Rights’, (2005) 24 *Stanford Environmental Law Journal*, 71, 86.

<sup>39</sup> *Ibid.*, 88.

The above remarks highlight the link between a human rights approach to the environment and the substantive facets of environmental justice, in terms of a right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment.<sup>40</sup> On the other hand, the limits of a human rights approach to the achievement of social and environmental justice are well-known. From an environmental perspective, classic human rights approaches remain an indirect way of safeguarding the more general environmental interests: human rights tend to focus on individuals, and are available to those affected in their individual rights; as such they do not appear suitable to fully address the public and collective dimension of the environment.<sup>41</sup> Because the application of human rights norms to environmental issues is mainly the result of jurisprudential interpretation, their effectiveness in terms of environmental protection very much depend on the contingent application of these rights on a single case basis, and very often on the inclination of the judicial body towards adopting a broader interpretation of human rights law. Moreover, the relationship between environment and human rights is not always straightforward as there might be tensions between a specific individual right versus the collective environmental dimension; frequent cases indeed see the individual right to property colliding with the right of safeguard of particularly ecologically valuable area. A further strand of criticisms concerns the anthropocentricity<sup>42</sup> inherent in human rights law, which would render it unsuitable to effectively address non-human values.<sup>43</sup>

Against this backdrop, the following section will try to identify certain trends revealing a progressive move of the individualistic human rights frame to encompass also collective issues related to environmental or social concerns.

### ***From Individual to Collective Rights***

Over the past two decades, there have been certain developments envisaging a more synergic relationship between the law of human rights and the protection of the environment as a common, collective value. The following analysis will highlight some of the areas where the application of justice principles paves the way to a broad understanding of human rights as including social and collective rights.

To start with, the adoption of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters<sup>44</sup> represents a most outstanding achievement in advancing the implementation of environmental justice. Though it does not embody any substantive right to quality environment and it is strictly procedural in its content - limited to granting to the public procedural rights to information, participation and access to justice - the Convention has a ground-breaking impact in the assertion of collective environmental rights. It gives operational meaning to the procedural aspect of the environmental justice principles – i.e. meaningful

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<sup>40</sup> See the definition adopted by the Commonwealth of Massachusetts in its Environmental Justice Policy (2002), where it is possible to distinguish a substantive and a procedural dimension: "Environmental Justice is based on the principle that all people have a right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment. Environmental justice is the equal protection and meaningful involvement of all people with respect to the development, implementation and enforcement of environmental laws, regulations and policies and the equitable distribution of environmental benefits. On this, see J. Agyeman and B. Evans, 'Just Sustainability: the emerging discourse of environmental justice in Britain?', (2004) 170 *The Geographical Journal*, 155-164, 156.

<sup>41</sup> For a thoughtful analysis, see F. Francioni, 'International Human Rights in an Environmental Horizon', (2010) 21 *European Journal of International Law* 1, 41-55.

<sup>42</sup> See for an overview of arguments and critiques of the human rights approach to environmental protection, A. Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in M. Anderson and A. Boyle (eds.) *Human Rights Approaches to the Environmental Protection*, cit., 43-70.

<sup>43</sup> C. Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights', in M. Anderson and A. Boyle (eds.), *Human Rights Approaches to the Environmental Protection*, cit., 71-89.

<sup>44</sup> United Nations Economic Commission for Europe (UNECE) *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus 25 June 1998, available at <http://www.unece.org/env/pp/treatytext.html>.

involvement of all people with respect to the development, implementation and enforcement of environmental laws, regulations and policies and the equitable distribution of environmental benefits. Moreover, through the recognition of procedural rights, it realizes the link between international environmental law, human rights and social justice: its provisions are directly aimed at empowering the public to actively participate to defend the environment, thereby contributing to implement and protect the collective rights of the community affected or potentially affected by the environmental impact.

Another strand where principles of environmental justice link with human rights and contribute to overcome the individualistic frame typical of classic versions of human rights approaches to the protection of the environment consists in the gradual recognition of community based rights. These rights have emerged especially in connection with the recognition of indigenous peoples as special subject of concern and stem primarily from the need to protect the indigenous communities' cultural identity. As such they have an inherent collective character: they are recognised to the community, for the protection of the community's religious, cultural and social identity. Therefore, they are enforceable by the single individuals because, and in so far as they are members of the community.<sup>45</sup> The United Nations Declaration on the Rights of Indigenous Peoples<sup>46</sup> sets an important milestone with respect to the recognition of indigenous peoples' collective rights. Article 1 of the Declaration recognizes their right to fully enjoy, also as collective entities, all human rights and fundamental freedoms recognized by international human rights law. Of particular interest, to the present purposes, are Article 24 on the rights of indigenous peoples to "their traditional medicines and to maintain the health practices, including the conservation of their vital medicinal plants, animals and minerals"; and article 31 providing for the right "to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".

A common element of the indigenous peoples and their culture is the special attachment and profound spiritual relation with their territory. One of the main manifestations of the indigenous communities' collective cultural rights is the recognition of their entitlement over their ancestral lands and the use of their natural resources, including the protection of their traditional knowledge and traditional methods of utilizations of such resources. The relevance of such rights to the very existence and subsistence of the indigenous communities has recently found increasing recognition in international practice. The jurisprudence of the Inter-American Court of Human rights, for example, has offered a substantial contribution to the affirmation of the right of the indigenous community over their land. In the *Awasi Tigni* case, the Court declined Nicaragua's argument that the indigenous group in question did not have a formal entitlement over their lands because they did not have a formal title, and accepted instead that the right to property should also uphold the collective right of the indigenous community, as deriving in this case from customary law. This jurisprudence has then been confirmed in subsequent case-law of the IACHR. These developments are particularly relevant to the purpose of the present paper as they witness the evolution of the human rights approach from an individualistic frame to encompass collective and social concerns. The legal protection afforded to indigenous peoples' cultural rights is in fact based on the recognition of their relevance to the social, cultural and economic subsistence of these communities.

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<sup>45</sup> F. Lenzerini, 'Indigenous People Cultural Rights and the Controversy Over Commercial Uses of their Traditional Knowledge', in F. Francioni and M. Sheinin (eds.), *Cultural Human Rights*, (Leiden: Martinus Nijhoff Publishers, 2008) 119-149.

<sup>46</sup> UN Declaration on the Rights of Indigenous Peoples, adopted on the 13<sup>th</sup> September 2007, (A/RES/61/295).

Another area where a human rights approach has more recently been used to address the human, social and economic implications of environmental problems is the field of climate change. Climate change debates have traditionally focused on scientific, environmental and economic aspects. As scientific understanding of the causes and consequences of climate change has evolved and impacts on human lives and living conditions have become more evident, the focus of the debate has progressively broadened with increasing attention being given to the human and social implications of climate change. The international interest in the linkages between climate change and human rights is a relatively recent phenomenon. The petition of the Alliance of Inuit from Canada and the United States with the Inter-American Commission on human rights in 2005 is considered as the first explicit assertion of the link between climate change and human rights.<sup>47</sup> The petition alleged that the human rights of the plaintiffs had been infringed and were being further violated due in large part to the failure of the United States to curb its greenhouse gas emissions.<sup>48</sup> Although the petition was eventually rejected, the relationship between climate change and human rights has become prominent on the international agenda and a number of initiatives have spurred both at the institutional levels, by States and international organization, and at the level of civil society and non-governmental organizations.

The Human Rights Council has specifically addressed the issue of the adverse impact of climate change and associated environmental harm on the full enjoyment of human rights in two Resolutions and in an analytical study – the Report of the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights.<sup>49</sup> In exploring the implications of climate change and global warming for certain human rights - particularly the right to life, to adequate food, to water, to health, to adequate housing and to self-determination - the conclusions of the UN Human Rights Council Report highlight the special situation of certain countries and certain categories of individuals which are more vulnerable than others to the adverse effects of global climate changes: particularly affected countries include small island states, countries with low-lying coastal deltas, countries liable to flood, droughts and desertification; more vulnerable groups in the society, which are likely to be disproportionately threatened include women, children, indigenous groups and minorities. Interestingly, the report address the question of the human rights implications of response measures, and stresses the fact that policies and actions undertaken to mitigate the consequences of climate change may have adverse secondary effects on the realisation and enjoyment of certain human rights, such as in the case of bio-fuel production, whose impact on the availability of land and the consequent increase in food prices, represent a threat to the right to food.

Overall, a human rights approach to global environmental problems, such as climate change, has the potential benefit of enabling a more comprehensive and holistic outlook of the issues at stake and to promoting a shift in emphasis from the physical science to the people and their lives. This has proved particularly important in a field such as climate change, where negotiations and discussions have until recently focused too much on the scientific and economic aspects, but failed to fully grasp the human and social impacts.<sup>50</sup> It has also been remarked that human rights regimes tend to be more legalistic in nature than environmental law regimes. Once an issue is conceived in terms of rights, it is removed from the political arena of competing interests and policies. Moreover, as the Inuit and Tovalu case before international tribunals show, human rights mechanisms may compensate traditional shortcoming of international environmental law regimes, which are often more focused on regulation

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<sup>47</sup> M. Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action', (2009) *Harvard 33 Environmental Law Review*, 440, 441.

<sup>48</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (December 2005), available at [http://www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf).

<sup>49</sup> Report of the Office of the UN High Commissioner for Human Rights on the relationship between climate change and human rights, UNGA A/HRC/10/61, 15 January 2009.

<sup>50</sup> M. Limon, *cit.*, 451.

of activities and prevention of environmental damage, and lack the sophisticated machine typical of certain human rights regimes, with their institutions, relief mechanisms and direct standing for individuals.<sup>51</sup> To this respect, using a human rights framework helps amplify the voices of those who are disproportionately affected by climate change and who, if empowered to do so, could make an important contribution to improving climate change policies.<sup>52</sup> Moreover, given the slow pace of negotiations, human rights can in the meantime help mobilize the public and can play an important role in promoting the political process.<sup>53</sup>

On the other hand, there are inherent limitations in using human rights mechanisms to tackle issues such as global warming. To start with, the usual limits arising in environmental liability cases - such as the difficulty to establish the causal link between the dangerous activity and the environmental harm, in case of diffuse or cumulative pollution - also apply in climate change litigation. Attributing particular harms to climate change is difficult, as well as it is hard to trace the causal connections between specific types of activities and the injury. There are also conceptual difficulties. In the absence of consistent practice, it is not clear to what extent existing human rights, such as the right to life or certain socio-economic rights, may be effectively interpreted as to encompass the claims of victims of global climate change. It has been remarked<sup>54</sup> that in spite of emerging evidence that the international community is starting to accept a broader view of the right to life, there is not yet a unanimous consensus in this regard; the contents of certain socio-economic rights in terms of state obligations *vis-a-vis* individuals also tend to remain rather fluid. Finally, climate change is ultimately an issue whose solution ultimately will depend on government regulation or technological developments, or a combination of the two.<sup>55</sup>

## **The Sustainable Development Approach**

The concept of sustainable development started to gain recognition at the global level during the 1970s and 1980s, when it first emerged in relation to the perceived need to introduce fundamental changes in the way natural resources were exploited in production processes for economic purposes. Principle 13 of the 1972 Stockholm Declaration called on states to adopt an integrated and coordinated approach to their development planning, so as to ensure that their development is compatible with the need to protect and improve the human environment. Though not explicitly mentioning the term sustainable development or sustainability, it clearly referred to it when it sought to put limits to the right of states to exploit their natural resources, especially those that are non-renewable, in an unhindered manner.<sup>56</sup> Few years later, and in a similar vein, the 1980 World Conservation Strategy of the IUCN explicitly mentioned sustainable development to indicate “the modification of the biosphere and the application of human, financial, living and on-living resources to satisfy human needs and improve the quality of human life”.<sup>57</sup>

While these early definition of sustainable development focus on the environment and reflect an underlying concern for ecological sustainability<sup>58</sup>, the term development gained prominence in the context of the wider discourse concerning the North-South divide. In the work of the UN World Commission on Environment and Development (WCED), the concept of sustainable development is

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<sup>51</sup> S. Atapattu, *cit.*, at 47.

<sup>52</sup> M. Limon, 451

<sup>53</sup> D. Bodansky, *Climate Change and Human Rights: Unpacking the Issues*, (2010) 38 *Georgia Journal of International and Comparative Law*, 511.

<sup>54</sup> P. Stephens, ‘Applying Human Rights Norms to Climate Change: the Elusive Remedy’, (2010) 21 *Colorado Journal of International Environmental Law and Policy*, 49-84, 52-62.

<sup>55</sup> D. Bodansky, *cit.* above.

<sup>56</sup> Principle 3 of the Stockholm Declaration

<sup>57</sup> Union for Conservation of Nature and Natural Resources (IUCN), *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Switzerland, Morges, IUCN, 2008).

<sup>58</sup> K. Bosselman, *The Principle of Sustainability: transforming Law and Governance* (Ashgate Publishing: 2008), 27-29

presented as a global objective, and principally as a means to bridge the contrasting views of developed and developing countries on the environmental limits to development and economic growth. The well-known definition of sustainable development is the one provided in the Brundtland Report which defines it as “development that meets the need of the present without compromising the ability of future generations to meet their own needs”.<sup>59</sup> The definition highlights the two main concerns at stake: on the one hand, the “essential needs of the poor, to which overriding priority should be given”; and on the other hand, “the idea of limitations imposed by the state of the technology and social organisation on the environment’s ability to meet present and future needs”.

Nowadays, sustainable development has found recognition in several international instruments, and has become an inspiring principle for initiatives at the global and at the regional level. On the international level, it features prominently in the text of the 1992 Rio Declaration on Environment and Development<sup>60</sup>, particularly in Principle 3,<sup>61</sup> which enshrines the idea of inter-generational justice, and Principle 4 which contains the fundamental principle of integration of environmental protection in the development process. In Europe it made its official appearance in 1990 when, in response to the Brundtland Commission, the European Council adopted the Dublin declaration on the Environmental imperative, where it identified sustainable development as one of the objectives of the European Community.<sup>62</sup>

Both the work of the WCED and Rio conferred to the concept of sustainable development full recognition as a fundamental concept of international law. Though being not a legally binding norm, but rather regarded as a ‘method’,<sup>63</sup> a goal or a “meta-principle”,<sup>64</sup> sustainable development has formed the interpretative paradigm through which to reconcile the competing interests of economic development, and environmental preservation. It is conceived as having a three pillar structure, which would include environmental protection, social and human rights, and economic development. Thus far, the principle seemed to have had its greater impact in the environmental field. In the famous *Gabcikovo-Nagymoros* case,<sup>65</sup> Judge Weeramantry pointed to the practical relevance of this concept which “offers an important principle for the resolution of tensions between two established rights. It affirms in the arena of international law that there must be both development and environmental protection and that neither of these rights can be neglected”.<sup>66</sup>

In spite of the positive implications of sustainable development in promoting the integration of environmental concerns into a broad range of policy areas, the concept’s lack of binding normative value reveals its limits when giving priority to social and environmental concerns entails a greater amount of costs and expenses. The lack of conceptual clarity coupled with obstacles from many powerful economic interest groups, has made quite difficult to implement sustainable development in international policy and in binding international norms.<sup>67</sup> The vagueness and over-inclusiveness of the concept have certainly favoured its acceptability to many different local and global perspectives, from

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<sup>59</sup> World Commission on Environment and Development (WCED), *Our Common Future*, Brundtland Report (Oxford and New York: Oxford University Press, 1987).

<sup>60</sup> United Nations, Report of the UN Conference on Environment and Development (UNCED), Vol. I, Chpt. I, Annex I, “Rio Declaration on Environment and Development”, UN Doc. A/CONF.151/26 (1992), 31 ILM 874 (1992)

<sup>61</sup> According to Principle 3 of the Rio Declaration: “the right to development must be fulfilled equitably so as to meet developmental and environmental needs of present and future generations”

<sup>62</sup> Declaration by the European Council on the Environmental Imperative, Bull. E.C. No. 6 at 17 (1990)

<sup>63</sup> F. Francioni, ‘Sviluppo Sostenibile e Principi di Diritto Internazionale dell’Ambiente’, in P. Fois (ed.), *Il Principio dello Sviluppo Sostenibile nel Diritto Internazionale ed Europeo dell’Ambiente*, (2006, Editoriale Scientifica), 43.

<sup>64</sup> V. Lowe, ‘Sustainable Development and Unsustainable Arguments’, in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, (Oxford: Oxford University Press, 1999), 19, at 30-1.

<sup>65</sup> *Case Concerning the Gabcikovo Nagymaros Project* (Hungary v Slovakia), judgment, 37 ILM 162, 201 (1988).

<sup>66</sup> *Ibid.*, 207.

<sup>67</sup> M.C. Cordonnier-Segger and C.G. Weeramantry, *Sustainable Justice – Reconciling Economic, Social and Environmental Law*, (Leiden: Martinus Nijhoff Publishers, 2005), 3.

many cultures and regions;<sup>68</sup> but it has also left the substantive meaning of the principle open to different, and instrumental, interpretations, and eventually undermined its effectiveness.<sup>69</sup> The 2005 UN Millennium Development Goals Report acknowledged that while “most countries have committed to the principles of sustainable development and to incorporating them into their national policies and strategies, including agreeing to the implementation of relevant international accords, “these good intentions have not resulted in sufficient progress to reverse the loss of our environmental resources”.<sup>70</sup> In the absence of specific indicators, it becomes difficult to effectively evaluate the costs and benefits of a project in terms of environmental protection and improved social-well being; similarly, it is difficult to ascertain whether and to what extent, determined policy choices have de facto conferred overriding priority to economic development. Recent discussions have largely focused on the need to reframe the balance among the three-pillars of sustainable development - environmental protection, development and the and the social dimension linked to a broad concept of human rights. While sustainable development has been widely perceived in terms of integration of environmental concerns into economic decision-making, the social dimension has commonly been recognised as the weakest pillar of sustainable development.<sup>71</sup>

Current initiatives in the field of climate change under the framework of the Kyoto Protocol show the lack of operational strength of the sustainable development principle and the inherent risks of legitimising policy choices that prioritise development over sustainability. Both the UNFCCC and the Kyoto Protocol incorporate sustainable development among the fundamental principles of the international climate change regime. In particular, the Kyoto Protocol includes sustainable development among the objectives of the Clean Development Mechanisms (CDM). Typically, CDM is one of the flexible mechanisms provided in the Kyoto Protocol to support Annex I (i.e. industrialised countries) efforts to achieve their emission reduction targets. Under this mechanisms, Annex I country may invest in the development of environmentally sound projects in a non-Annex I (developing country); once the project has gained official registration by the UNFCCC Executive Board, the Annex I country is entitled to use the amount of emissions avoided or reduced through the implementation of the project to comply with its emissions reduction commitments. Article -- of the Kyoto Protocol make clear that the proposed project must obtain the approval and confirmation from the non-Annex I Party (host country) that the project will assist it in achieving sustainable development.

Nevertheless, sustainable development appears as a crucial concept in the implementation of CDM projects, empirical research has shown that in practice, economic priorities of both the project developers and of the Host country have prevailed over social and environmental objectives.<sup>72</sup> Project developers are mainly focused on cost-effectiveness considerations rather than genuine attention to the social and environmental benefits of the project. As to the host countries, the prospective of attracting substantial economic investments have often prevailed over the attention paid to the effective social and environmental benefits of the project; in other cases, the host country did not have the instruments and the capabilities to effectively assess the real impact of the project. Finally, there have been

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<sup>68</sup>See M.C. Cordonnier-Segger and A. Khalfan, cit. above, 4.

<sup>69</sup>M. Jacobs, “Sustainable Development: A Contested Concept”, in A. Dobson (ed.), *Fairness and Futurity – Essays on Environmental Sustainability and Social Justice*, (Oxford: OUP, 1999).

<sup>70</sup>United Nations, *The Millennium Development Goals Report (2005)*, 30.

<sup>71</sup>M. Lehtonen, ‘The Environmental-Social Interface of Sustainable Development: Capabilities, social capital, institutions’, (2004) 49 *Ecological Economics*, 199-214.

<sup>72</sup>For an overview of the literature and of existing studies on this point, see K. Holm Olsen, ‘The Clean development Mechanism’s Contribution to Sustainable development: a Review of the Literature’, (2007) *Climatic Change*, 59-73. See also J. Ellis et al., ‘Taking Stock of Progress under the Clean Development Mechanism (CDM)’, *Organisatin for Economic Cooperation and Development (OECD, Paris, 2004)*, 1-51.



extreme cases where CDM projects have been the vehicle for further violations of human rights and environmental standards in developing countries.<sup>73</sup>

### *The role of justice in implementing sustainable development*

Having outlined the limitations of sustainable development and human rights approaches to fully achieve social justice and environmental protection, the final part of the present contribution will discuss how principles of justice can play a role in making sustainable development operational by integrating and linking together the social and environmental pillars. To this purpose, it will show that an idea of justice is to a large extent implied in the concept of sustainable development. The analysis will then move to examine the different dimensions of justice embedded in the provisions of a growing number of international environmental treaties, and how they may be seen as a viable avenue to integrate environment and human rights, and to effectively implement the social dimension of sustainable development. With this respect, it is appropriate to cite the assertion of an authoritative legal scholar in the field whereby “when States set sustainable development as a policy objective of an international treaty, they also adopt certain norms to realise their joint purpose”.<sup>74</sup>

Ideas of justice and related notions of equity and fairness increasingly underpin several provisions of international environmental regimes, in a more or less explicit way. It is possible to distinguish different dimensions of justice as applied in the environmental field.<sup>75</sup> Distributive justice focuses on the equitable distribution of the natural resources and of the outcomes, which can be either public goods or public burdens. Procedural justice focuses on the processes by which decisions are made in the pursuit of societal goals, with a special concern for transparency and procedural fairness. Retributive or compensatory justice in the environmental field relates to reparation of environmental damage and adequate compensation for victims of environmental harm; parallel to retributive justice there is an idea of corrective justice, concerned about the establishment of appropriate sanction mechanisms for those responsible for wrongful damage. Normally, procedural and distributive types of justice operate *ex ante*, at the regulatory level, whereas corrective and compensatory justice intervenes *ex post*, mainly through liability systems or compensation funds.

There is an intimate relationship between the idea of justice and the principle of sustainable development. Principles of justice underline the very notion of sustainable development as well as its different applications. They are inherent in the definition of sustainable development put forwards by the World Commission on Environment and Development, and are more specifically reflected in the different manifestations of sustainable development as embedded in the Rio Declaration, such as the principle of common but differentiated responsibility, the idea of inter-generational and intra-generational justice, the idea of equitable utilisation of and equitable access to shared resources as well as in ideas of access to justice, and participation.

The huge popularity gained by the notion of sustainable development has promoted the incorporation of principles of justice into environmental law regimes, and their translation into binding norms of international environmental treaties. Through the idea of sustainable development, principles of justice are becoming increasingly embedded into the body of international environmental agreements. While not pretending to provide an exhaustive analysis of the justice implication in the many international environmental regimes, the present analysis will focus on but a few remarkable examples.

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<sup>73</sup> See N. Roht-Arriaza, ‘International Human Rights and Climate Change: “First, Do no Harm”’: Human Rights and Efforts to Combat Climate Change’, (2010) 38 *Georgia Journal of International and Comparative Law*, 593.

<sup>74</sup> M. Claire Cordonnier Segger, ‘The Role of International Forums in the Advancement of Sustainable Development’, (2009-2010) 10 *Sustainable Development Law & Policy* 4-18, 10.

<sup>75</sup> See generally, J. Ebbesson, ‘Dimensions of Justice in Environmental Law’, in J. Ebbesson and P. Okowa, *Environmental Law and Justice in Context*, (Cambridge: Cambridge University Press, 2009), 1-36

Principles of procedural justice find their probably fullest implementation in the environmental field through the Aarhus Convention. The Convention features the idea of justice in its title and identifies three aspects of procedural justice in environmental matters: access to information, public consultation, participation and involvement in environmental decision-making, and access to justice. The above section of this paper has already shown the potential of the Convention in realising the connection between human rights and collective environmental values. But there is a further important connection that the Convention realises with respect to the implementation of sustainable development. By promoting public participation and involving the citizens in the protection of the environment, the Convention features as an important instrument of democracy, and as a vehicle to improve transparency, fairness and, more generally, good governance in the environmental field.

Distributive justice and equity have permeated much of the debate about sustainable development at the global level and formed the very rationale for the elaboration of the sustainable development principle. Distributive justice underpins the fundamental principles of equitable allocation and utilisation of natural resources, and of equal access to the benefits deriving from it, while considerations of equity and fairness are inherent in the principles of inter-generational, intra-generational justice and in the idea of common but differentiated responsibilities. The link between justice and sustainable development also emerges more or less explicitly from specific treaty regimes. Considerations about equity and distributive justice, mainly through the principle of common but differentiated responsibilities, have informed the structure and the provisions of the international climate change regime.<sup>76</sup> They are readily apparent in the categorisation of developed (Annex I) and developing states (Non-Annex I) and in the differentiation of their respective commitments to the fight against global warming. Concerns over the equitable distribution of the burdens of environmental protection supports the creation of mechanisms for financial assistance and technology transfer from developed to developing countries.<sup>77</sup> It is interesting to remark that the UNFCCC explicitly mentions the promotion of sustainable development amongst its principles.

A new and interesting manifestation of distributive justice is enshrined in the emerging principle of access to natural resources and benefit sharing within the framework of the Convention on Biological Diversity.<sup>78</sup> While the sustainable management and use of biological resources features amongst the goals of the Convention, the treaty remarkably contains principles for the access and fair and equitable sharing of the benefits arising from the sustainable use of biological resources. Article 15 of the Convention regulates access to genetic resources; while reaffirming the sovereign right of the States over their natural resources under their jurisdiction, and their authority to determine access to genetic resources, it obliges the contracting parties to implement the appropriate legislative or administrative steps “to share in a fair and equitable way the result of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting party providing these resources”. Whilst article 15 concerns natural resources within the jurisdiction and therefore under the sovereignty of states, article 8(j) deals with access to and benefit sharing for the use of traditional knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles for the conservation and sustainable use of biological diversity; here the holders are the individuals and the communities. Within this framework, the Protocol to the Convention on Biological Diversity on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation, adopted in Nagoya in October 2010,<sup>79</sup> provides a

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<sup>76</sup> J. Brunnee, ‘Climate Change, Global Environmental Justice and International Environmental Law’, 316-329.

<sup>77</sup> D. Shelton, ‘Describing the Elephant: International Justice and Environmental Law’, in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (Cambridge: Cambridge University Press, 2008), 55-73, 62.

<sup>78</sup> Convention on Biological Diversity (Rio de Janeiro, 14 June 1992); see D. Schroeder and T. Pogge, ‘Justice and the Convention on Biological Diversity’, (2009) 23 *Ethics and International Affairs* 3, 267-280.

<sup>79</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation, (Nagoya, 30 October 2010).

major tool to implement benefit sharing.<sup>80</sup> This international agreement contains specific provisions aimed at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way, including by appropriate access to genetic resources, by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and by appropriate funding.

A clear principle of corrective justice emerges from the development of specific international regimes on liability for damage to the environment. Environmental liability provisions embody an ambivalent concept of corrective and retributive or compensatory justice. In particular, while fault liability regimes reflect a principle of corrective justice, the retributive function of liability is apparent in the norms providing compensation for victims of environmental pollution. With this respect, there are recent developments taking place in the field of environmental liability that reveal, albeit implicitly, the influence or at least the convergence with the principle of sustainable development. These are in particular the current movements towards the recognition of ecological damage within the scope of compensable damage, as well as mechanisms improving access to justice not only for victims of environmental damage but also for non-governmental organisation and public interests groups.

### **Concluding Remarks**

The present contribution sought to examine the role that principles of justice can play in promoting the achievement of social and environmental objectives. Focusing on the use of human rights instruments for the protection of the environment and on the idea of sustainable development, the analysis has shown how concepts of justice can enhance the potentiality of existing legal frameworks to address social and environmental concerns. It has also shown that there is a mutually supportive relationship between justice, on the one hand, and respectively human rights and sustainable development, on the other.

In the field of human rights, the Aarhus Convention offers one example of how human rights can be a tool for the implementation of environmental justice, in terms of improving access to justice and citizens' involvement in environmental matters. Similarly, litigation in the field of climate change illustrates how human rights may offers climate affected communities the avenue to claim justice, when other remedies are unavailable. At the same time, sustainable development provides the conceptual paradigm to locate the principle of justice at the intersection between environment and human rights. The emerging and increasingly popular notion of sustainability is particularly helpful in this respect. One possible definition of sustainability interpret it as meaning "the need to ensure a better quality of life for all, now and into the future, in a just and equitable manner, whilst living within the limits of supporting ecosystems". This definition represents an attempt to look holistically at both the human condition and to ecology with a view to foster an integrated solution to the problem of social injustice and environmental degradation. In this perspective, sustainability can help shaping the idea of justice in its practical application to situations where social and environmental interests are at stake. By placing limits drawn on the basis of the ecosystems capacity and on the idea of preserving the ecological balance, the principle of sustainability can work as a benchmark in the implementation of social and environmental justice. By realizing the link between justice and sustainability it will be possible to connect in an integrated way the social and environmental pillars of sustainable development. After all, it is possible to share the thought of those scholars who affirmed that not only are the two concepts (of sustainable development and justice) mutually supportive, but they are

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<sup>80</sup> M. Buck and C. Hamilton, 'The Nagoya Protocol on Access to genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity', (2011) 20 *Review of European Community and International Environmental Law* 1, 47-61.

“normative integrated”, in that they are pursuing the same goal.<sup>81</sup> Indeed, a society cannot be sustainable if it is not also just.<sup>82</sup>

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<sup>81</sup> D. French, ‘Sustainable Development and the Instinctive Imperative of Justice’, in D. French (ed.), *Global Justice and Sustainable Development* (Leiden/Boston: Martinus Nijhoff, 2010), 5.

<sup>82</sup> J. Agyeman and B. Evans, ‘Just Sustainability’: the emerging discourse of environmental Justice in Britain? (2004) 170 *The Geographical Journal*, 155-164.



# Corporations and Social Environmental Justice: The Role of Private International Law

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## Introduction

Multinational, or transnational, corporations (hereafter ‘TNC’) have a longstanding, and uneasy, relationship with both society and the environment. Private law, and in particular the law of torts or civil liability, has often been used as a weapon by litigants to address environmental or personal concerns in respect of corporate acts. As national and international environmental and human rights regimes become more sophisticated, however, it is worth revisiting whether an integrated approach, built around a concept of ‘social environmental justice’ is useful or relevant in regulating the conduct of TNCs in this respect. In this paper, we argue that in spite of its limitations, the private international law of torts, is a useful tool for meeting regulatory challenges relating to TNCs and the environment, and that the approach that has been generally followed in the case law bears witness indeed to such an integrated approach.

Before we can address this development, however, it is important to define the basic conceptual topography in which the TNC operates. For the purposes of the present paper, the term ‘Transnational Corporation’ is used to denote both companies owned or controlled by persons or entities from one country but operating across national borders, and those owned or controlled by persons or entities from more than one country.<sup>1</sup> We will focus on those companies that conduct cross-border activities through subsidiaries, agencies, or branches, and which are therefore potentially subject to several legal orders.<sup>2</sup> Our reasons for making this distinction are straightforward: although other corporate structures, including in particular contractual supply-chains and network arrangements, can also act in similarly detrimental (or positive) ways as more “traditional” TNCs, they raise distinct issues from a regulatory point of view, and interact with law in subtly different ways, the discussion of which is beyond the scope of this paper.

Tort law offers interesting possibilities and challenges as a tool for regulating transnational corporate conduct. In so far as it seeks to deter and remedy wrongful conduct, tort is at once a tool of corrective and distributive justice. In the transnational context, it is particularly attractive as opposed to criminal law, as it is more easily engaged through the mechanisms of private international law, than is the case for criminal law which operates from a basis of strict territoriality.<sup>3</sup> Although in cases of serious human rights or environmental law violations, the legitimacy of using tort law in this manner has been

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<sup>1</sup> See further P. T. Muchlinksi, *Multinational Enterprises and the Law*, (OUP 2007).

<sup>2</sup> See, e.g. M. Menjuq, *Droit international et européen des sociétés*, Montchrestien, 2008.

<sup>3</sup> See e.g. C. M. J. Ryngaert, *Jurisdiction in international law*, OUP 2008. Also, note that there is the limit imposed by the infamous exception of universal criminal jurisdiction for international crimes and crimes against humanity, although this doctrine has been severely curtailed lately in most states which adhered to it: A. Cassese, ‘Is the bell tolling for universality?’ (2003) *J. Int’l Crim. Just.* 589. See further, contesting the validity and the legitimacy of the principle of universal jurisdiction, G. P. Fletcher, ‘Against universal jurisdiction’, (2003) *J. Int’l Crim. Just.* 580. (basing his criticisms, in particular, on the protection of the rights of the defendant with regard to double jeopardy); *Separate Opinion of President Guillaume*, attached to the ICJ judgment in the case of the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002 (the President contests the international legitimacy of universal jurisdiction and strongly criticizes its exercise *in absentia*, see para. 15 of the Opinion).

challenged,<sup>4</sup> some authors have claimed that tort law constitutes in fact the ‘most effective mechanism of restorative justice’.<sup>5</sup> Tort law can thus play the role of ‘a compensator, a deterrer, an educator, a psychological therapist, an economic regulator, an ombudsperson, and an instrument for empowering the injured to help themselves and other potential victims of all sorts of wrongdoing in our society’.<sup>6</sup> Stathis Banakas has pointed out that tort law can serve global justice in several ways, in particular, it ‘can internationally empower individual victims of violations of basic human rights to gain not only compensation but also closure and restored dignity,’ and also through the class action mechanism tort lawyers can act as private attorneys general to victims of international mass torts, independent of national political pressure, enforcing standards of protection of basic human rights on a global basis.

In addition, tort law has an important advantage over criminal law in that it obviates the need for *mens rea*, which poses particular difficulties in relation to TNCs. As Phillip Blumberg puts it, ‘when the small corporation is ... conceived as a separate juridical entity ... [the] theoretical foundation is sorely strained; and when it is applied to the complex corporate structure of the large multinational enterprise, it breaks down’.<sup>7</sup> A good example is provided by the historical focus in common law systems on ‘organisational’ liability or a search for the ‘controlling mind’ of the company, which makes it extremely difficult to inculcate decisions taken at a senior level of management or assign blame to controlling shareholders. Theoretically this fiction is no less present in the case of tort, but courts have traditionally struggled less with imputing actions to companies. This may be because the emphasis is on compensation, as already stated, rather than on inculcating the defendant’s behaviour *per se*.

However, when it comes to transnational action, the TNC presents a unique challenge for transnational regulation and the operation of systems such as private international law; it is a forum shopper *par excellence*, capable of choosing the most favourable legal regime for it at any given time, and even of negotiating with states to opt-out of supposedly mandatory systems of regulation. In this paper, we argue that when it comes to environmental matters, current private international law presents several drawbacks from the point of view of social environmental justice since it favours the quasi-irresponsibility of the TNC, or at any rate of the parent company, in certain situations, and in many cases may even result in a denial of justice for victims of mass harm. The TNC today is one of the largest actors in the environmental field, but international law still remains focused on state liability, and although many developed nations now have extensive environmental protection in place through statutory tort regimes, corporate actors are able to employ a number of strategies to elude effective oversight when they operate transnationally.

From the point of view of litigation, the first hurdle which must be overcome is that of finding a court competent to hear the case, and so Part I of the paper focuses on jurisdiction over tort claims, tracing the development of jurisdiction of companies for torts committed abroad in the United States and Europe and then examining the desirability of an approach which marries the social and environmental aspects of justice. Part II then deals with the question of applicable law, looking in turn at solutions based on the traditional multilateral conflict of laws rule, on attributing responsibility to the parent company, and internationalist solutions. Throughout, we argue that the aims of environmental justice, when taken together with a recognition of the vulnerability of the victims in mass disaster cases, may

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<sup>4</sup> A. Garapon, *Peut-on Réparer l’Histoire ? Colonisation, Esclavage, Shoah*, Odile Jacob, 2008 ; and see B Stephens, ‘Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations’, (2002) 27 *Yale JIL* 1 at 12

<sup>5</sup> S. Banakas, ‘A Global Concept of Justice-Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today’s World’, (2007) 67(4) *Louisiana Law Review* 1021.

<sup>6</sup> A. M. Linden, ‘Viva Torts’, (2004) 5 *J. HIGH TECH. L.* 139, 142 (quoting Tom Lambert).

<sup>7</sup> P.I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’ (2004) 24 *Hastings Int & Comp. LR* 297 at 300

require a new approach which offers claimant choice, both at the stage of jurisdiction and at the stage of applicable law.

## **Jurisdiction**

It is perhaps in respect of jurisdiction that the most startling evolution has taken place in respect of transnational corporate action. We shall briefly set out this evolution, starting from the seminal Bhopal case (1.1), and then proceed to a discussion of to what extent current trends in the so-called conflict of jurisdictions may mean from the point of view of social environmental justice (1.2)

### ***The Recent Historical Development of Jurisdiction for Cross-Border Torts***

Tort law is often accused of being ill-adapted to the problem of transnational torts, particularly when a TNC is involved. Indeed, due to the problems involved in litigating a transnational environmental tort against the perpetrator company, the famous *Trail Smelter* case was subsequently brought as an interstate arbitration between Canada and the United States.<sup>8</sup> The arbitral tribunal neatly sidestepped the various questions of jurisdiction and diffuse effects that the case threw up, holding that it ‘is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government’,<sup>9</sup> however in reality the case threw up the same issues that have plagued private international law and environmental law ever since. Firstly, there is the issue of the adequacy of tort or private law to determine issues of this kind, and secondly the question of diffuse damage or so-called complex torts. Finally, there is the ever-pervasive aspect of the human or social dimension to cases of environmental harm.

Although here is not the place to examine the reasoning of the arbitral tribunal or the public international law perspective on environmental issues,<sup>10</sup> we shall see that it is precisely the issues thrown up in 1941 which private international law has struggled to cope with. In this respect, we will briefly trace the development of jurisdiction in three areas; the common law doctrine of *forum non conveniens*, the European Union (and largely civil law inspired) approach, and the phenomenon of the *Alien Tort Claims Act*<sup>11</sup> in the United States.

#### *Forum Non Conveniens*

The common law has generally been fairly ready to admit its jurisdiction, at least over its own corporate citizens,<sup>12</sup> except in so far as the defendant suggests that an alternative forum is more appropriate, or ‘convenient’, through the plea of *forum non conveniens*. In the 1980s, with the advent of the Bhopal disaster, this became the major battleground in the ensuing litigation between the victims of the explosion and the Union Carbide Corporation.<sup>13</sup> Bhopal has since become an academic phenomenon in itself, which, like the case, has yet to be definitively resolved, and continues to generate a vast amount of literature from a myriad of disciplines and viewpoints. The facts were as follows: on 3<sup>rd</sup> December 1984, toxic methyl isocyanate gas, along with other poisonous gases, was

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<sup>8</sup> The case involved cross-border environmental damage caused by the smoke from smelting works in Canada drifting across the border into the northern United States, where they caused significant crop damage over time. See *United States v Canada (Trail Smelter Case)*, (1941) III U.N. Rep. Int’l Arbitration Awards 1905; See M. Anderson, ‘*Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*’ (2002) 41 *Washburn LJ* 399

<sup>9</sup> *United States v Canada (Trail Smelter Case)*, (1941) III U.N. Rep. Int’l Arbitration Awards 1905 at 1912

<sup>10</sup> For a discussion of the case, see J. E. Read, ‘The Trail Smelter Dispute’, (1963) *Canadian Yearbook Int’l L* 213

<sup>11</sup> 28 U.S.C § 1350

<sup>12</sup> Or, in the US, those companies which have a significant business presence that produces its effects within the jurisdiction.

<sup>13</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal in India*, 1984 809 F. 2d 195 (2d Cir)



released from a facility owned and managed by a subsidiary of the Union Carbide Corporation, which resulted in the exposure of over half a million people to the toxin, killing nearly 3000 people in the immediate aftermath, with government estimates of deaths related to the disaster in the time that followed as high as 15,000. A case was brought against the parent company, Union Carbide, in the United States,<sup>14</sup> who promptly sought to have the case stayed under the doctrine of *forum non conveniens*. The invocation of this procedural tool by Union Carbide, the parent corporation, ultimately resulted in the US court effectively declining jurisdiction by transferring the case to India, largely on the grounds that the ‘public interest’ of India was greater than that of the United States, as well as according to a number of “private interest” factors.<sup>15</sup> The latter bear restating, as Baxi and others argue that the approach of US courts to private interest factors is misconceived in the case of TNCs.<sup>16</sup> The classic private interest factors, under the *Gilbert* doctrine in US law,<sup>17</sup> are access to the ‘sources of proof’, namely documentary evidence and witnesses. Yet, as Joseph points out, developing host-states often lack the resources and judicial architecture to ‘unravel’ the corporate veil.<sup>18</sup> Not only that, but many of the sources of proof in a mass violation will be with the parent company, at least in so far as establishing the latter’s liability or control is concerned. Thus aspects of the US application of *forum non conveniens* may appear hypocritical, given that decisions such as *Bhopal* ignore the factual reality of the very test they purport to apply.

Perhaps the fatal attraction of *forum non conveniens* for private international lawyers and judges lies in the fact that it is often justified on the basis of sound administration of justice, and the idea that justice can best be served by those courts which are most geographically proximate to the facts giving rise to the litigation. This has, in practice, translated into a marked preference for the *forum delicti*, rather than the *forum rei* of the parent company. Such reasoning, we submit, is fallacious for three reasons. Firstly, it ignores the myriad practical reasons why pursuing a parent company in its home state may in fact be better from the point of view of administration of justice, such as discovery rules and high probability of enforcement.<sup>19</sup> Secondly, it may miss aspects of substantive justice, such as underdevelopment in the *locus delicti*, the problem of complex torts with multiple *loca delicti* or *loca damni*, or the fact that assets to meet any claim in damages may have already fled the jurisdiction of local courts.<sup>20</sup> Finally, and perhaps most importantly, it ignores the structural problems in meeting the needs of justice in the host state, which may arise from negotiation in the context of investment, or in terms of legislative competition with other states operative in the same sector.<sup>21</sup>

The second of these problems has found some relief, at least in claims brought in front of English courts, with the doctrine developed in the *Spiliada* case,<sup>22</sup> which added a requirement of ‘substantive justice’ to the *forum non conveniens* test in English law, and which requires the court to consider ‘all the circumstances’ before declining jurisdiction.<sup>23</sup> In subsequent cases, the non-availability of financial assistance in the foreign forum,<sup>24</sup> as well as the lack of developed procedures (considered together with lack of funding),<sup>25</sup> the lack of independence of the judiciary,<sup>26</sup> and excessive delay,<sup>27</sup> have all

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<sup>14</sup> *In re Union Carbide Corp. Gas Plant Disaster at Bhopal in India*, 1984 809 F. 2d 195 (2d Cir)

<sup>15</sup> Se U. Baxi, ‘Mass Torts, Multinational Enterprise Liability and Private International Law,’ (1999) 276 RCADI 297 at 356

<sup>16</sup> *Ibid.*, pp.354 – 364

<sup>17</sup> *Gulf Oil Corporation v. Gilbert* 330 US 501 (1947).

<sup>18</sup> S. Joseph, *Corporations and Transnational Human Rights Litigation*, (Hart, 2004)

<sup>19</sup> See S. Joseph, *op. cit.* n.18

<sup>20</sup> As was the case in Bhopal: see S Baughen, ‘Corporate Accountability and the Law of Tort: The Inconclusive Verdict of Bhopal’, April 1993, University of Manchester Working Paper No. 16, pp. 1-3

<sup>21</sup> See discussion *infra*, at n.98 et s. See also Whincop & M. Keyes, *Policy and Pragmatism in the Conflict of Laws*, (Ashgate, 2001); O’Hara (ed.), *Economics of Conflict of Laws* (2007) ; H. Muir-Watt, ‘Aspects économiques du droit international privé (réflexions sur l’impact de la globalisation économique sur les fondements des conflits de lois et de juridictions)’, (2007) 307 RCADI 25

<sup>22</sup> *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] A.C. 460

<sup>23</sup> *Ibid.*, at 478

<sup>24</sup> *Connelly v RTZ Corporation plc and others* [1997] UKHL 30, HL

<sup>25</sup> *Lubbe and others v Cape plc* [2000] 1 WLR 1545, HL

been found to justify refusing application of *forum non conveniens*. It is also worth noting that other common law jurisdictions, such as Australia, have similar claimant-friendly tests for *forum non conveniens*.<sup>28</sup>

### *The European Approach*

Although the English courts did not accept it as such, the first blow to the application of *forum non conveniens* was dealt by the entry into force of the Brussels Convention 1968<sup>29</sup> in 1973, which has now been replaced by the substantially similar Brussels I Regulation<sup>30</sup> (these two instruments, along with the largely identical Lugano Convention, shall henceforward be referred to as the Brussels system). The general rule, as laid down by article 2 (art. 2 of the Regulation) of the Convention, provides that persons domiciled in a Contracting State shall be sued in that state, subject to special grounds of jurisdiction. By article 53 (art. 60 of the Regulation), a company is domiciled in the country of its statutory seat. The consequence of this provision is that the courts of EU Member States<sup>31</sup> have jurisdiction for any company which has its seat within the EU. Furthermore, according to the case law of the Court of Justice of the European Union (CJEU) in the case of *Owusu v Jackson*<sup>32</sup>, this is an absolute jurisdiction which may not be declined through the doctrine of *forum non conveniens*.<sup>33</sup>

The Brussels system also provides for several grounds of special jurisdiction, including, for our purposes, that in matters relating to tort and delict a person may be sued in the courts of the place where the harmful event occurred (article 5(3) of the Regulation), the *forum loci delicti*. Since this jurisdiction is merely subsidiary to the general ground contained in articles 2, it is only of relevance for torts occurring within the EU, and only in so far as it provides an alternative forum to the claimant. However, in cases of cross-border torts, such as that involving environmental damage, this leads to a multiplicity of potential forums (as was the case in *Trail Smelter*). In the *Mines de Potasse D'Alsace* case,<sup>34</sup> the CJEU held that the harmful event could be construed either as the place where the damage occurred or the place where the event giving rise to the damage occurred, giving the claimant a choice of where to sue.

Leaving aside for a moment the question of the desirability of the Brussels system in providing such a wide palette of competent courts, it is clear that it has had a marked “gravitational” effect, drawing (and keeping) claims in European courts. Although claimants are obviously free to sue in third states which consider themselves competent, they can also sue the defendant in an EU state if the latter is domiciled there, or if the harmful event occurred there. The use of *forum non conveniens* has been severely curtailed. Indeed, in *Owusu*, the reason for issuing an anti-suit injunction was that the case involved multiple defendants involved in events which occurred entirely in Jamaica. Only one of the defendants was domiciled in an EU Member State (the UK). However, this was not sufficient to prevent the application of the Brussels System, despite the relative lack of connection to the EU. It is a legitimate question whether in light of this jurisprudence cases involving multiple corporate defendants must also be tried in the EU. In the English courts, *forum non conveniens* was denied against the other (non-EU domiciled) defendants on the basis that this would be against the

(Contd.) \_\_\_\_\_

<sup>26</sup>*The Abidin Daver* [1984] AC 398

<sup>27</sup>*The Vishva Ajay* [1989] 2 Lloyd's Rep 558 at 560

<sup>28</sup>Cf. *BHP Billiton Ltd. v Schultz* (2004) 2 DDCR 78

<sup>29</sup>Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968

<sup>30</sup>Regulation 44/2001/EC

<sup>31</sup>And the contracting states of the largely identical Lugano Convention.

<sup>32</sup>Case C-281/03 *Owusu v Jackson* [2005] ECR I-1383

<sup>33</sup>See J. J. Fawcett & J N Carruthers, *Private International Law*, (14<sup>th</sup> Ed) (Oxford, 2008) at pp. 320 et s; D. Kinley & R. Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law', (2006) 6 HRLR 447.

<sup>34</sup>Case 21/76, *Bier BV v Mines de Potasse D'Alsace SA* [1976] ECR 1735, ECJ

administration of justice as it would involve splitting up a multi-defendant action.<sup>35</sup> It seems likely that this judgment could be followed in cases where one company in a multinational group is sued, even if the parent company or perpetrator company is domiciled outside of the EU. Indeed, the Commission proposal for the revision of the Brussels system<sup>36</sup> takes significant steps in this direction, extending the regulation to defendants domiciled in non-EU states. In addition to bolstering the special jurisdiction rules for contract and tort, and the protective regimes for consumers, employees and insurance agreements, it also provides for jurisdiction over defendants with assets held in the forum state, and a *forum necessitatis* rule where no other suitable forum is available.<sup>37</sup>

### *The Jurisdiction of Third-State Courts*

What, however, of defendants not domiciled in the state in which they are being sued? At present, the only developed positive law which allows for jurisdiction over non-national, non-domiciled, defendants is the controversial *Alien Tort Claims Act* ('ATCA') in the United States, a piece of 18<sup>th</sup> Century legislation that was "rediscovered" in 1980 with the seminal case of *Filártiga v Peña-Irala*.<sup>38</sup> It has been argued that international law and *jus cogens* form part of the general common law which could give rise to alien tort-like liability in other common law jurisdictions such as the UK, but this has yet to be confirmed in a judgement.<sup>39</sup> In the US, general international law does not form part of the common law and cannot be enforced directly in US federal courts absent a specific statute conferring jurisdiction.<sup>40</sup> However, the ATCA grants just such a jurisdiction for a case brought 'by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.<sup>41</sup> This neatly obviates the need to consider the issue of applicable law, since according to the US courts, the statute creates no new cause of action but simply refers to international law. According to the jurisprudence of the US Supreme Court in *Sosa v Alvarez-Machain*,<sup>42</sup> the international legal norm must meet a very strict standard of universality, specificity and obligation. This has led to a large number of cases being brought against individuals for the most serious violations of international law, including torture, genocide and war crimes.<sup>43</sup> Most international human rights norms have failed, however, to meet the *Sosa* standard.<sup>44</sup> This presents problems from the point of view of environmental law, since it seems unlikely that there is as yet any international customary or treaty norm which is capable of being invoked under the *Sosa* doctrine.

Furthermore, the use of the ATCA to sue corporations is the subject of some controversy. Currently, only the Eleventh Circuit Court of Appeals has explicitly recognised that corporate defendants may be sued under the ATCA,<sup>45</sup> although the Ninth Circuit appears to implicitly accept the principle of

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<sup>35</sup> Cf. the decision of the Court of Appeal [2002] EWCA Civ 877, at paras 19-21

<sup>36</sup> Commission Proposal COM(2010) 748/3

<sup>37</sup> See further, *infra*, n.65.

<sup>38</sup> 630 F.2d 876 (2d Cir. 1980)

<sup>39</sup> See E. Engle, 'Alien Torts in Europe? Human Rights and Tort in European Law', (2005) ZERP Discussion Paper No. 1/2005, Zentrum Für Europäische Rechtspolitik – Center for European Economic Research (Germany); F. McKay, 'Civil Reparation in National Courts for Victims of Human Rights Abuse', in M. Lattimer & P. Sands (eds.), *Justice for Crimes Against Humanity*, (Hart 2008), p.288. As far as judicial discussion goes, the UK House of Lords in *Jones v Kingdom of Saudi Arabia* [2006] UKHL 26 explicitly rejected the idea that the jurisprudence of the ATCA was pertinent in relation to the application of state immunity in a civil claim. However, the issue whether, in the absence of state immunity, has not yet been addressed.

<sup>40</sup> *Princz v Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Sosa v Alvarez-Machain*, 542 U.S. 692 at 720 (S. Ct. 2004)

<sup>41</sup> 28 U.S.C § 1350

<sup>42</sup> *Supra* n.40

<sup>43</sup> See, *inter alia*, *Kadic v Karadzic*, 70 F.3d 232, 238-46 (2d Cir. 1995); *Filártiga v Peña-Irala*, *supra*

<sup>44</sup> Cf. *Wiwa v Royal Dutch Petroleum*, 96 Civ. 8386 (New York D.C., 23 Apr 2009), denying that rights to peaceful assembly met the *Sosa* standard; *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003), which held that the rights to life and health also failed to reach the required level of specificity.

<sup>45</sup> *Sinaltrainal v Coca-Cola Co.*, 578 F.3d 1252 (11<sup>th</sup> Cir. 2009); *Romero v Drummond Co. Inc.*, 552 F.3d 1303 (11<sup>th</sup> Cir. 2008); *Aldanav Del Monte Fresh Produce Na Inc.*, 416 F.3d 1242 (11<sup>th</sup> Cir. 2005)

corporate liability under the ATCA.<sup>46</sup> The Second Circuit recently denied that corporations could be sued under international law and hence under the ATCA, in the *Kiobel v Royal Dutch Petroleum Co.* decision.<sup>47</sup> Some hailed *Kiobel* as a severe blow to the ATCA, while others have been more optimistic,<sup>48</sup> although it is noteworthy that two circuits have since split with the Second. The Seventh went so far as to hold that ‘the factual basis of the majority opinion in the *Kiobel* case is incorrect’,<sup>49</sup> while the Columbia Circuit held that the *Kiobel* opinion ‘not only ignores the plain text, history, and purpose of the ATS, it rests its conclusion of corporate immunity on a misreading of footnote 20 in *Sosa*’.<sup>50</sup> Given the state of affairs, it is certainly desirable that the present confusion surrounding the status of corporate defendants should be decided by the Supreme Court as soon as possible, a prospect that could now be more likely as fewer defendants may be inclined to settle out of court following the *Kiobel* decision. Unless and until that happens, Corporations will remain amenable to suit under the ATCA in some Circuits, and not in others.

### ***Jurisdiction Today: The Potential Application of Social Environmental Justice?***

Going back to *Trail Smelter*, there are a number of common themes that run throughout the environmental case law. Firstly, there is generally a collectivization of harm, with large numbers of persons affected. Secondly, there is the difficulty in localising the harmful event; often this will result from a decision high-up the corporate ladder, and geographically removed from the *locus damni*. This leads to the third common thread, which is the difficulty inherent in obtaining a sufficient remedy from a company not within the jurisdiction of local courts.

Although it may not always be the case that environmental damage has a human victim of sufficient standing to bring a civil claim – as was held to be the case in the *Amoco Cadiz* oil spill<sup>51</sup> - environmental disasters often have a marked human element. Bhopal is a case in point: as stated earlier there were over 3000 deaths in the immediate aftermath of the explosion, with government estimates of related deaths afterwards as high as 15,000. Similarly, the actions of Shell in Ogoniland (Nigeria) provide another example of the intermingling of human and environmental elements. While conducting oil extraction in Nigeria in the 1990s, Shell was accused of complicity with the Nigerian military authorities in repressing the Movement for the Survival of the Ogoni People (MOSOP), an activist group who campaigned for increased autonomy of the Ogoni people of the region and against the environmental damage caused by Shell’s oil production.<sup>52</sup> In 1994, members of the MOSOP were illegally detained, held incommunicado and then tried by an *ad hoc* tribunal, found guilty and executed. It is widely acknowledged that the detention, trials and executions violated international law standards of due process.<sup>53</sup> However, an interesting fact to note is that the subsequent case brought against Nigeria before the African Commission of Human Rights focused on the environmental aspects; in the decision of the Commission, the terror campaign and killings were largely seen as extensions of violations of environmental rights such as the right to food.<sup>54</sup> This is in sharp contrast to

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<sup>46</sup> *Doe I v Unocal*, 395 F.3d 932 (9<sup>th</sup> Cir. 2002), holding that a ‘private party, such as Unocal’ could be sued under the ATCA.

<sup>47</sup> 2010 U.S.App. LEXIS 19382 (2d. Cir. 2010)

<sup>48</sup> O. Murray, D. Kinley & C. Pitts, ‘Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of *Kiobel*’ (2011) 12(1) *Melbourne Journal of International Law* 57

<sup>49</sup> *Boimah Flomo et al v Firestone Natural Rubber Co. LLC* (7<sup>th</sup> Cir. 2011) No. 10-3675

<sup>50</sup> *Doe et al v Exxon Mobil Corporation et al* (D.C Cir. 2011) No. 09-7125, at 80

<sup>51</sup> See M. Anderson, ‘Transnational Corporations and Environmental Damage: Is Tort Law the Answer?’, (2002) 41 *Washburn L.J.* 399 at 410

<sup>52</sup> In the subsequent case brought before the African Commission on Human and Peoples’ Rights, it was alleged that the Nigerian Authorities had in effect placed ‘the legal and military forces of the state at the disposal of the oil companies’, F Coomans, *The Ogoni Case Before the African Commission on Human and Peoples’ Rights*, (2003) 52 *ICLQ* 749 at 750.

<sup>53</sup> See e.g. <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ShelllawsuitreNigeria>

<sup>54</sup> Case 155/96 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR/COMM/A044/1, esp. paras. 50 – 69.

the ATCA lawsuits which were brought in the US against Shell, culminating in the *Kiobel* decision discussed above,<sup>55</sup> which focused almost exclusively on the human rights and international crime elements.

Both Bhopal and Ogoniland also illustrate the second problem, that of localisation (or glocalisation) of action.<sup>56</sup> The corporate decision to pursue a particular policy is often not a local but a glocal one; the order emanates from the parent company abroad but produces specific effects in the local context. This leads to an essential artificiality in any insistence on local jurisdiction in the *locus damni*, as Baxi has shown.<sup>57</sup> This goes hand in hand with the third problem, that of the difficulty in obtaining a remedy in local courts, either because of difficulties in apprehending capital which flees across borders to the coffers of the parent corporation,<sup>58</sup> or because of simple inadequacies in the legal system to cope with a mass-disaster situation. The latter was in fact argued by the Indian Government in the *Bhopal* case in the US, but did not suffice to prevent the imposition of *forum non conveniens*, as we have seen. In fact, certain states have attempted on occasion to block their own forum through the use of blocking statutes, in order to facilitate litigation in the US. This happened, for example, in the cases of *Aguinda v Texaco*<sup>59</sup> and *Jota v Texaco*,<sup>60</sup> but to little avail.

The aforementioned cases in the English courts, *Lubbe* and *Connelly*, on the other hand, provide examples where a judicial decision has explicitly recognized the inability of the local forum to cope with the procedural aspects of mass litigation. Indeed, the human rights aspects, including the right to a fair trial, that exist in the cases under discussion highlight the vulnerable position in which claimants in an environmental mass-disaster situation find themselves. When this is considered alongside traditional environmental justice concerns, such as the precautionary principle, it becomes clear an insistence on local forums is misplaced: as Baxi points out, it allows TNCs to engage in *reverse forum shopping*, 'a process in which courts empower a ... multinational corporation confronted by mass torts foreign plaintiffs to choose *locus delicti* forum... [which] facilitates ways of corporate governance that promote the best possible mode of multinational enterprise juridical management of the legal aftermath of a mass disaster'.<sup>61</sup> Such stratagems allow a TNC, already negotiating from a much more powerful bargaining position than victims, to act to minimise its losses and, at least partially, frustrate the interests of the latter, resulting in reduced access to justice.

In the preceding section, we noted that this problem may have already been alleviated somewhat in the EU by the application of article 2 of the Brussels System, which allows a parent company incorporated in an EU Member State (or possibly a group with at least one implicated company) to be sued in the EU.<sup>62</sup> It is also strongly arguable that the operation of article 6 of the European Convention on Human Rights ('ECHR') could lead to the same reasoning as the English Courts' consideration of 'substantive justice'.<sup>63</sup>

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<sup>55</sup> Although note that another lawsuit brought under the ATS, *Wiwa v Shell*, *supra*, settled out-of-court for a reputed \$15m.

<sup>56</sup> See U. Baxi, *op. cit.* n.15

<sup>57</sup> *Ibid.*

<sup>58</sup> In Bhopal, for example, a significant factor for suing the parent corporation in the US was that the subsidiary, Union Carbide India Ltd., only held assets of \$39 million, which would be inadequate to meet any likely damages award, whereas Union Carbide was estimated to have total assets of around \$700 million. The total claims in 1988, when the matter came before the Indian courts, amounted to some \$3.3 billion. See S. Baughen, 'Corporate Accountability and the Law of Tort: The Inconclusive Verdict of Bhopal', April 1993, *University of Manchester Working Paper No. 16*, pp. 1 – 3.

<sup>59</sup> *Aguinda et al v Texaco Inc.*, 303 F.3d 470 (2d Cir. 2002)

<sup>60</sup> *Jota et al v Texaco Inc.*, 157 F.3d 153 (2d. Cir., 1998)

<sup>61</sup> U. Baxi, *op. cit.* n.15 at 357

<sup>62</sup> For instance, in the *Trafigura* case, the victims were able to bring their case in London where the operational center of the company was located; Fédération Internationale des ligues des droits de l'Homme (FIDH), 'L'affaire 'Probo Koala' ou la catastrophe du déversement des déchets toxiques en Côte d'Ivoire', Avril 2010.

<sup>63</sup> Cf. J. J. Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law', (2007) 56 ICLQ 1

This issue of victim vulnerability could, however, provide an additional justification for the generous approach of the CJEU in *Mines de Potasse*; given the overriding goals of protecting the environment, coupled with the victim's vulnerability, it is only appropriate to allow the victim to choose the most favourable forum for bringing a claim which contains environmental elements. Vulnerability may enable us to go further, however, since two vulnerable categories receive even more favourable treatment under the Brussels system, namely consumers and employees. Indeed, in the case of employment, article 18(2) of the Regulation deems employers domiciled outside of the EU to be domiciled within it for the purposes of disputes arising from their activities there. Article 15(2) lays down a similar principle for parties who contract with a consumer. In addition to these gravitational provisions, Employees may sue either in the place of domicile (or deemed domicile) of the employer or where they habitually carry out their work (article 19), while consumers can sue either in their home State or the place of domicile (or deemed domicile) of the defendant (article 16). Adopting a similar solution in cases of TNC environmental harm could justify a choice for the claimant between the *forum loci delicti/damni*, or the forum of domicile of the parent company.<sup>64</sup> Furthermore, it would seem to justify the creation of a *forum necessitatis*, namely that a court must, when faced with an apparent situation of lack of forum (a condition arguably satisfied where a theoretical forum exists but is not susceptible in practice of providing substantive justice), declare its own jurisdiction.<sup>65</sup>

The advantage of such a solution would be that it encourages the highest-level of protection of the environment, through the availability of claimant-choice in selecting the most favourable forum, while also recognising the inherent vulnerability of claimants in environmental cases of a mass-disaster type and providing them with effective access to justice. Although it would clearly also allow other claimants to avail themselves of the favourable provisions, including corporate claimants as in *Mines de Potasse*, we submit that this would not result in any inherently negative forum shopping. Firstly, it would still pursue the environmental justice goals of a high level of protection as required by the precautionary principle. Secondly in our submission the current situation, which allows a great deal of strategizing by TNC defendants in any event, produces a number of distortions in global capital markets, in that it encourages environmental externalization on a massive scale by TNCs and investors, with states often left footing the bill for harm,<sup>66</sup> thereby offsetting the benefit to be gained by investment. Also, as Francioni has forcefully noted, 'in matters of environmental law, the international system remains disabled by the lack of a compulsory dispute settlement system'.<sup>67</sup> Yet, when it comes to corporate responsibility for environmental harm which includes a human dimension, the machinery is there; however in order to make it effective sufficient grounds of jurisdiction must be made available which recognize the specificity of collective environmental harm.

## Applicable Law

As we noted in Part I, there are significant issues of substantive justice which arise in relation to cases involving violations of environmental law and human rights. Jurisdiction is the first step to achieve access to justice, but it is not sufficient unless it is accompanied by appropriate legal rules which apply to the dispute. The applicable law to a dispute has indeed major practical consequences as it is according to that tort law that the forum will determine, amongst other things the basis and extent of

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<sup>64</sup> Perhaps along the lines of the *forum conveniens* clause in the Belgian Code of private international law. See C. M. J. Ryngaert & J. Wouters, 'Litigation for Overseas Corporate Human Rights Abuses in the EU: The Challenge of Jurisdiction', (2009) 40 *George Washington I.L.R.* 939 at 964-5.

<sup>65</sup> Something which exists in Dutch law, see N. Jägers, & M.-J. van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands', (2008) 33(3) *Brook J.I.L.* 833

<sup>66</sup> Cf. the Ogoniland case before the African Commission, *supra*. Nigeria was held responsible of having seriously violated human and environmental rights, whereas as we have seen, the potential for the liability of Shell, whose operations in fact caused the environmental damage in the first place, is today far from clear after the *Kiobel* decision.

<sup>67</sup> F. Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21(1) *EJIL* 41 at 43

liability, including the determination of persons who may be held liable for acts performed by them, the grounds for exemption from liability and division of liability, the existence, the nature and the assessment of damage or remedy claimed, the persons entitled to compensation for damage sustained personally, the liability for the acts of another person, and the manner in which an obligation may be extinguished.<sup>68</sup>

### ***The Applicable Domestic Law under Traditional Conflict of Laws Rules***

Theoretically, various approaches exist to determine which law is applicable in the case of tort cases against multinational corporation groups for.<sup>69</sup> Under the traditional conflict Savignian conflict of law rule for torts, the applicable law usually vacillates between the *lex loci damni* and the *lex loci delicti commissi*.

#### *The lex loci damni vs. the lex loci delicti commissi*

In European Private International Law, Article 7 of the “Rome II” Regulation adopted by the European Parliament and the Council of the European Union on 11 July 2007<sup>70</sup> states that:

“The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1) [...]”

Article 4(1) of the Rome II Regulation (hereafter ‘Rome II’) lays down a general conflict of laws rule, to wit that the applicable law for torts is the law of the country in which the damage occurs. This rule, known as the *lex loci damni*, has traditionally been used in the comparative private international law of tort as an alternative to the *lex loci delicti* (i.e. law of the place where the event giving rise to the damage occurred) and to the *lex fori* (i.e. law of the forum).<sup>71</sup> However, difficulties have arisen in cases where the country in which the damage occurred differs from the country in which the event giving rise to the damage occurred, as illustrated by the *Mines de Potasse* case discussed previously, in which the pollution in question, a salt leak, originated in France, went through German waters, and ended up causing damage in the Netherlands.

As a result of this problem, states have had to choose (or leave it up to the victims to choose) between the *lex loci damni* and the law of the place where the event giving rise to the injury occurred (*lex loci delicti commissi*). The drafters of Rome II justified their choice of the former by stating that ‘a connection with country where the direct damage occurred [...] strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability’.<sup>72</sup> One of the main arguments in favour of the *lex loci damni* is that, by making applicable the law of the country of injury, it actually points to the place where the tort materialised, facilitating localisation as a result. In addition, the damage is the starting point of the intervention of tort law, since liability does not always depend on a fault on the part of the tortfeasor but may result from a strict liability regime.<sup>73</sup> Moreover,

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<sup>68</sup> Article 15 of the Rome II Regulation.

<sup>69</sup> See M. Anderson, *op. cit.*n.51 pp.415-418; See also G. Betlem, ‘Transnational Litigation against Multinational Corporations before Dutch Civil Courts’, in M. Kamminga and S. Zia-Zarufi (eds.), *Liability of Multinational Corporations under International Law* (Kluwer Law International, 2000) pp. 283 et s.

<sup>70</sup> Regulation (EC) N° 864/2007 of the European Parliament and of the Council of the 11 July 2007 on the law applicable to non-contractual obligations (Rome II) applicable to all Member States except for Denmark..

<sup>71</sup> M.-A. Moreau, *Structure du rattachement et conflits de lois en matière de responsabilité civile délictuelle* (thèse Université de droit, d’économie et de sciences sociales de Paris, 1985).

<sup>72</sup> Rome II, Recital 16.

<sup>73</sup> H. Batiffol, *Aspects philosophiques du droit international privé*, (Daloz, 2002), 238.

it might be considered that the state in which the damage occurred has “a comparative regulatory advantage” to have its law applied to the situation.<sup>74</sup>

Nonetheless, this rule has been criticized as being excessively detrimental to the tortfeasor in cases such as *Mines de Potasse*, where the injury was not objectively foreseeable.<sup>75</sup> In addition, it has been considered as being unfair to non-European victims by making it unlikely for a European legal system to apply in situations where the tort is committed by the non-European subsidiary of a European head-office, thereby increasing the parties’ inequality even further.<sup>76</sup> Moreover, it can sometimes be extremely difficult to determine precisely where the direct damage took place, which can encompass more than one country. Furthermore, it can be to the disadvantage of the victim who might not be acquainted with that specific law. In such cases as the famous *Babcock v. Jackson*,<sup>77</sup> although the injury occurred in one state (resulting from a car accident that occurred during a short trip in that state), most of the other elements pointed to another state (namely domicile of the parties and the insurer), it has been considered that applying the law of the place of injury would have been to the disadvantage of the victim (as the law of that state prohibited that specific action) and would have failed to take into account the interest that another state might have in having its law apply to the case. As a result, Symeonides states that ‘the only balance the *lex loci damni* rule strikes between the parties is that it can be equally unfair to the plaintiff in some cases as to the defendant in others’.<sup>78</sup> It is for this type of cases that exceptions were added to Rome II, according to which ‘where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply’,<sup>79</sup> and ‘where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than indicated in paragraphs 1 or 2, the law of that other country shall apply’. Those exceptions, however, do not apply in cases of environmental damage. It has been argued that the justification for this exclusion is that the broader societal interests involved in environmental cases go beyond the interests of the litigants.<sup>80</sup>

However in environmental cases specifically, the *lex loci damni* solution fails to address the issue arising from complex torts, such as from cross-border pollution, where the place of injury may span more than one country. Indeed, this was a potential issue in the *Trail Smelter* case, and later came up again in the *Texaco* cases.<sup>81</sup> It is true that article 4(1) of Rome II adds that the country or countries in which the indirect consequences of that damage occur should not be taken into consideration for the purpose of determining the applicable law, but this clarification still leaves some uncertainty as to what types of consequences of a damage are direct and what types are indirect.

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<sup>74</sup> Richard A. Posner, *Economic analysis of law* (7<sup>th</sup> ed) (Wolters Kluwer Law & Business: Aspen Publishers, New York, 2007),.

<sup>75</sup> Symeon S. C. Symeonides, ‘Rome II and Tort Conflicts: A Missed Opportunity’., (2008) 56 *American Journal of Comparative Law* 173

<sup>76</sup> V. Van Den Eeckhout, ‘Corporate Human Rights Violations and Private International Law – The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor’, (2011) Working Paper Series (July 26, 2011), Available at SSRN: <http://ssrn.com/abstract=1895690> at 12.

<sup>77</sup> *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963) in which, pursuant to a traffic accident that occurred during a short trip in Ontario, the plaintiff, passenger in the car of the defendant (that had been driving) sued the latter for the injury sustained Both the plaintiff and the defendant were from New York, as well as the insurer.

<sup>78</sup> Symeon C. Symeonides, “Rome II and Tort Conflicts ...”, *op. cit.* n.75 at 22.

<sup>79</sup> Article 23 of the Regulation goes on saying that: “the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence”.

<sup>80</sup> Symeon S. C. Symeonides, “Rome II and Tort Conflicts ...”, *op. cit.* n.75 at 22.

<sup>81</sup> *Aguinda v Texaco; Jota v Texaco*, both *supra*, n.49 and 50. In those cases, it was alleged that Texaco’s operations had polluted rivers and rainforests in both Ecuador and Perú.



To try and overcome these difficulties, article 7 of Rome II adds that the general tort law conflict rule applies ‘unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred’. This choice of law rule opened to the victim takes into account the specificity of the environmental damage. Indeed, recital 25 of the Regulation states that ‘regarding environmental damage, Article 174 of the Treaty establishing the European Community, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source, and the principle that the polluter pays, *fully justifies the use of the principle of discriminating in favour of the person sustaining the damage*’ (emphasis added). One of the main advantages of this rule is that it makes it possible to subject the tortfeasor to the law of the country in which his actions caused some harm, which is a law that he or she could and should know. It therefore respects the expectations of the parties, or at the very least those of the tortfeasor (if the *lex loci delicti commissi* differs from the *lex loci damni*, the expectations of the victim may be better respected by the *lex loci damni*). Another advantage is that, for complex cross-border torts, it may sometimes be easier to determine where the event giving rise to the damage occurred, as opposed to where the injury occurred. In addition, by allowing the victim to choose the law with the highest standards, this rule actively promotes ‘the interests of the respective countries and the Union as a whole in deterring pollution’.<sup>82</sup> However, the obvious difficulty of such a rule which may arise is that the event giving rise to the damage is not always clearly identifiable either,<sup>83</sup> and there might be several decisions and/or actions/inactions that together, give rise to the damage. In the *Bhopal* case for example, the victim sustained that the decision emanating from the parent company to shut off the refrigerator unit contributed to the damage.<sup>84</sup> One could wonder to what extent it in fact contributed to the damage and whether it would have been enough to make the law of the “home” state applicable, although even if it were, the difficult issue of proof would then arise.<sup>85</sup> Only when the *lex loci delicti commissi* can point to the law of home state as the place where policy decisions were or should have been taken would it be really beneficial to the victims.<sup>86</sup>

Even when the victim does not choose the *lex loci delicti commissi* as the applicable law, its rules of conduct and safety might be used as an “evidentiary tool”<sup>87</sup> providing standards according to which the conduct of the tortfeasor should be appraised. As article 17 of Rome II Regulation states: “In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability”. Furthermore, the overriding mandatory rules of the forum will apply according to Article 16 and the forum can always preclude the application of a foreign law that would be manifestly inconsistent with its public policy by virtue of Article 26 of the Regulation, thereby taking into account the potential regulatory interest that the forum’s state can have to see its policies or values override others. These two mechanisms could also allow for some Human Rights considerations to be taken into account.<sup>88</sup> Wherever the damage occurred, Article 14 of the Rome II Regulation makes it possible for the parties to agree upon the applicable law after the dispute has arisen. It is the manifestation of the spread of party autonomy<sup>89</sup> throughout the different areas of

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<sup>82</sup> S. Symeonides, “Rome II and Tort Conflicts...” *op. cit.* n.75 at 37.

<sup>83</sup> G. Betlem, ‘Transnational Litigation Against Multinational Corporations...’, *op. cit.*

<sup>84</sup> M R Anderson, ‘Public Interest Perspectives in the Bhopal Case: Tort, Crime or Violation of HR?’, in D Robinson & J Dunkley (eds.), *Public Interest Perspectives in Environmental Law*, (Wiley, 1995)

<sup>85</sup> Cf. S Joseph, *op. cit.*, n.18 at pp. 7 – 8

<sup>86</sup> V. Van Den Eeckhout, ‘International Environmental pollution and some other PIL issues of Transnational Corporate Social Responsibility’, (2010) contribution to the REFGOV Project, FR 20; L.F.H. Enneking, ‘The Common Denominator of the Trasfigura Case, Foreign Direct Liability Cases and the Rome II Regulation’, (2008) *European Review of Private Law* 310.

<sup>87</sup> Oxford Pro Bono Publico, ‘Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse’ (3 November 2008), available at: <http://www.law.ox.ac.uk/opbp> at 122.

<sup>88</sup> See part 2.2 of this article.

<sup>89</sup> P. Nygh, *Autonomy in International Contracts* (Clarendon Press, Oxford, 1999); J.-P. Niboyet, ‘La théorie de l’autonomie de la volonté’, (1927) 16 *RCADI* 1.

private international law. However, the choice is limited by the fact that it has to be made after the dispute has arisen, and more importantly, the Article specifies that such agreement cannot, however, prejudice the mandatory rules of a State other than the one which law has been chosen, and in which all the other elements of the situation are situated at the time when the event giving rise to the damage took place. This rule is meant at avoiding a complete detachment from regulatory rules which can sometimes occur as a perverse effect of party autonomy.<sup>90</sup> In tort cases, the place where “all the other elements of the situation are situated at the time when the event giving rise to the damage took place” usually points to the *lex loci damni* or the *lex loci delicti commissi*. As a result, taking these different rules together, in cases where a TNC is conducting activities which damage the environment (resulting in injury to people) through its subsidiaries, the mechanism of applicable law under the Rome II Regulation does usually point to the law of the “host country” as the applicable law for the tort (either as the *lex loci damni* or as the *lex loci delicti*, or both). This solution is not entirely satisfying, rather, it is suggested that allowing for the application of the law of the “home state” would reach a better compromise between the different interests involved.

### *The Law of the Home State*

It could be argued that the Rome II solution is satisfying and respects the spirit of tort law by making applicable the law of the country that has the most territorial proximity with the tort. In the *Bhopal* case for instance, the damage occurred in India, the victims were Indian and the event giving rise to the damage occurred – at least materially – in India. Nevertheless, when it comes to multinational corporate groups causing environmental and/or social harm, the idea of territorial proximity needs to be rethought of in order to take into consideration the economic reality of the business entity as well as the needs of victims to be granted an enhanced access to substantive justice, and the needs of the society as a whole in having higher environmental standards globally. Indeed, in practice, the solution pointing at the law of the host state as the applicable law often results in the victims not being properly compensated if compensated at all, as was the case in Bhopal, and effective access to justice therefore calls for a different applicable law. This, in turn, fails to perform any corrective or distributive function traditionally attributed to tort law to satisfy, nor does it play a deterring role. In reality, the law of the “home state”, i.e. being the state where the parent company has its habitual residence,<sup>91</sup> is much more likely to benefit the claimants than the law of the “host state”.<sup>92</sup> Anderson argues that “generally speaking, parent companies are located in economically developed states that have had the opportunity to develop more sophisticated and generous rules for compensation. Their longer history of environmental degradation, the higher incomes, and the greater freedom to develop complex rules tend to endow them with substantive tort rules better adapted to deal with environmental claims”.<sup>93</sup> Conversely, the applicable law of the state of the subsidiary, often a developing country, is more likely to have lower standards. In the Bhopal case, it was argued that applying American standards as opposed to Indian ones would have been beneficial to the victims. This relates to what was referred to earlier as the structural problems in meeting the needs of justice. There are three main reasons which

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<sup>90</sup> R. Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age’, (2002) *Columbia Journal of Transnational Law* 209; L. Radicati di Brozolo, ‘Mondialisation, jurisdiction, arbitrage: vers des règles d’application semi-nécessaires?’, (2003) *rev. crit. DIP*, 1; H. Muir-Watt and L. Radicati di Brozolo, ‘Party Autonomy and Mandatory Rules in a Global World’, (2004) 6 *Forum du droit international* 2; C. Gibson, ‘Arbitration, Civilization and Public Policy : Seeking Counterpoise between arbitral Autonomy and the Public Policy Defense in View of foreign Mandatory Public Law’, (2009) 113 *Penn St L Rev* 1127; G. P. Romano, ‘Règles internationalement supplétives et règles internationalement disponibles’, in *Regards comparatistes sur le phénomène contractuel*, (PUAM, 2009). H. Muir-Watt, “‘Party Autonomy’ in International Contracts: From the Makings of a Myth to the Requirements of Global Governance”, (2010) 3 *European Review of Contract Law* 250

<sup>91</sup> Which would be the place of central administration, as results from Article 23 of the Regulation.

<sup>92</sup> L.F.H. Enneking, ‘Crossing the Atlantic? The political and legal feasibility of European foreign direct liability cases’, (2009) *The George Washington International Law Review* 4.

<sup>93</sup> M. Anderson, “Transnational Corporations ..” *op. cit.* n.51

bring about or perpetuate legal underdevelopment: general socioeconomic underdevelopment; inequality of bargaining power; and interjurisdictional competition. The first of these, socioeconomic underdevelopment, almost goes without saying – it is a general problem in the developing world that the legal infrastructure is often not equipped to deal with cases like the two above due to the low level of general development in the country.

Inequality of bargaining power is a feature of economic globalisation, and one which it is easy to say at work in the *Saipan* cases. The combined effect of the lax legislation and unique export benefits of Saipan attracted a large amount of investment (including, in the 1980s, around 20 of the largest clothing manufacturers in the USA). Once this investment was in place, any Saipanese legislator would have to think very carefully before upping the level of labour law protection, for fear that the companies would depart taking with them a huge portion of the Island's economy. Indeed, it would even appear that the motivation behind the negotiation of Saipan's Charter was to create a lax, migrant-based labour market in order to attract investment<sup>94</sup>. The inequality of bargaining power between the TNCs (acting collectively or alone) is obvious in such a scenario, and is linked to the mobility of TNCs brought about through economic globalisation. Whether acting directly, as was the case in Saipan, or through subsidiaries, as in much foreign direct investment, it is clear that TNCs have easy opportunities for creating effective exit strategies, so that if they are not pursuable outside of the host-state, victims are left with little, if any, effective redress.<sup>95</sup> This economic inequality can on occasion lead to extreme results for access to justice. In Papua New Guinea, legislation was passed making it a criminal offence to seek compensation in foreign courts, enabling Corporations to pass on the costs of their activity to the local population without fear of reprisals. The Papua New Guinea law was passed in response to investment by B.H.P Ltd, whose 'lawyers apparently drafted the legislation'.<sup>96</sup> BHP subsequently released toxic substances from their mining operations into the Fly River System.<sup>97</sup>

The third reason for underdevelopment, and potentially the most problematic, is interjurisdictional competition. This is the systemic aspect to the coercion of legislative will which applies in the situation of state-investor bargaining just discussed; the so-called prisoners' dilemma. It has been demonstrated, applying the principles borrowed from game theory, that the effect of TNC mobility in an increasingly globalised world is to pit legislators against one another in a 'race to the bottom' as they compete for corporate favour.<sup>98</sup> In effect, although the *collective* interest of all states in a given grouping is to adopt higher standards, levelling the playing field at a high level of minimum protection, their *individual* interest lies in deviating from this strategy, unilaterally adopting lax standards and thereby becoming the most attractive regime for investment opportunities. Thus no single state has a rational interest in unilaterally adopting higher standards. As a consequence, law comes to be treated like a product on the global market.<sup>99</sup> For instance, labour law, environmental protection but also human rights, health and security norms affect the costs involved in running a business. The absence of effective minimum global standards works to the detriment of the local population (of the place where the subsidiary conduct its activities), who, unlike the investors, are not mobile, and are therefore unable to "choose" their law in the way investors do. Perhaps unsurprisingly, those most detrimentally affected by this phenomenon tend to be the poorest and those in varying

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<sup>94</sup> See F-M Chua Short, 'Experiment in Protecting Workers' Rights: The Garment Industry of the U.S. Commonwealth of the Northern Mariana Islands, An *Comment*' (2004-05) 7 U Penn J Labor & Employment Law 971 at 973 – 975.

<sup>95</sup> It is true that where a parent company disowns its subsidiary, leaving an orphan undertaking, some redress may still be obtained from the latter, but if profit maximisation is the strategy, it is likely that the local subsidiary will be left asset-poor, while the parent escapes relatively unscathed

<sup>96</sup> M. J. Whincop & M. Keyes, *Policy and Pragmatism in the Conflict of Laws*, (Ashgate, 2001)116

<sup>97</sup> See *Dagi v B.H.P (No. 2)* [1997] 1 V.R. 428 (Australia)

<sup>98</sup> H. Muir-Watt, 'Aspects économiques du droit international privé (réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions)', (2007) 307 RCADI 25

<sup>99</sup> H. Muir-Watt, "Aspects économiques du droit international privé...", *op. cit.*, at 140 and seq.

degrees of poverty.<sup>100</sup> In order to avoid these persons from becoming the victims of another fundamental right violation, namely a denial of justice, it is crucial that access to substantive justice be given to them.<sup>101</sup>

A potential solution would consist in allowing the victims of corporate human rights abuses a further choice-of-law between the *lex loci damni/delicti commissi* and the law of the “home state”, in order to redress the balance of power between the parties in the case of social environmental torts, something which, it should be said, also furthers the equality of arms as a general principle of law and a Human Right.<sup>102</sup> This, in turn, would insure an effective access to justice. On first glance, this idea may appear to somewhat contradict the general objectives of private international law, namely the neutrality of the *conflict* of laws rules as well as, the legal certainty and predictability that are very much still considered to be overarching goals in European conflict of laws, as opposed to modern American conflict of laws which does not rely exclusively on physical contacts with the involved States anymore regardless of the content of their substantive laws (“jurisdiction-selection”), but rather operates a more “content-orientated law selection”.<sup>103</sup>

However, on closer analysis, it appears justified by the need to redress the balance between the victims, who are in a position of particular vulnerability, TNCs, and society as a whole, which imply incorporating more flexibility in the private international law of torts as well as taking greater consideration of the likelihood for justice to be obtained by the victims as a result of the operation of the conflict rule in question. Indeed, this idea has been largely accepted when it comes to weaker parties who have been given, in European law, choice of law benefits. For instance, on matters of contractual obligations, in which the parties’ freedom to choose the applicable law appears as a cornerstone,<sup>104</sup> parties regarded as being weaker are protected by conflict of law rules that are more favourable to their interests than the general rules.<sup>105</sup> This entails that party choice of law be limited to increasing the protection provided under the law of the weaker party’s habitual residence (in the case of consumers) or place of employment (in the case of employees). By analogy, since victims of Human Rights violations by TNCs are in a similar situation as weaker parties, the syllogism requires that a similar solution be applied to them. The unbalance of powers between the parties therefore fully justifies giving a further choice-of-law option to the victims, allowing them to choose the law of the multinational company’s home state as the applicable law. Just as in the case of weaker parties in contractual obligations, the fact that this choice stay limited ensures some type of legal security and predictability as well as allowing for the choice of law rule to remain efficient in the law and economics approach to conflict of laws<sup>106</sup> which entails that when a dispute arises, settlement is

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<sup>100</sup> H. Muir-Watt, *Aspects économiques du droit international privé*, *op. cit.*

<sup>101</sup> V. Van Den Eeckhout, “Corporate Human Rights Violations and Private International Law...”, *op. cit.*, at 19: “Care should be taken to ensure that PIL is not reduced to an instrument of power in the hands of the stronger party, who can use it in order to benefit even more from a situation of ‘competing norms’. In the dynamics of a situation of competing norms, PIL should not lend itself to be used to the detriment of the structurally weaker party and close all doors for victims.”

<sup>102</sup> For instance, it is protected as part of the right to a fair trial guaranteed in Article 6 of the European Convention on Human Rights.

<sup>103</sup> S. Symeonides, ‘Rome II and Tort Conflicts...’, *op. cit.* n.75

<sup>104</sup> Rome I Regulation, Recital 11.

<sup>105</sup> Rome I Regulation, Recital 23.

<sup>106</sup> Michael J Solimine, ‘An Economic and Empirical Analysis of Choice of Law’, (1989) 24 Ga. L. Rev. 49; Larry D. Kramer, ‘Rethinking Choice of Law’, (1990) 90 Colum. L. Rev., 277; Joel P. Trachtman, ‘Conflict of Laws and Accuracy in the Allocation of Government Responsibility’, (1994) 26 Vand. J. Transnat’l L.; Lea. Brilmayer, ‘Maximizing State Policy Objectives’, in Lea Brilmayer, *Conflict of Laws* (Little Brown & Co Law & Business, 1995), 165; Erin A. O’Hara and Larry E. Ribstein, ‘From Politics to Efficiency in Choice of Law’, (2000) 67 U. Chi. L. Rev.1151; Horatia Muir-Watt, ‘Law and Economics. Quel apport pour le droit international privé?’, in G. Goubeaux, Y. Guyon, C. Jamin, P. Lagarde, G. Viney, J. Waline (eds.), *Le contrat au début du XXIème siècle – Etudes offertes à Jacques Ghestin*, (L.G.D.J., 2001) 685 ; Joel P. Trachtman, ‘Economic Analysis of Prescriptive Jurisdiction’, (2001) 42 Va. J. Int’l L. 1; Andrew T. Guzman, ‘Choice of Law: New Foundations’, (2002) 90 Geo. L. J. 883; Christian Kirchner, ‘An Economic Analysis of Choice-of-Law and Choice-of-Forum Clauses’ in Jürgen Basedow and Toshiyuki Kono (eds.), *An Economic Analysis of Private International Law* (Mohr Siebeck, 2006), 33; G. Rühl, ‘Methods and Approaches in Choice of Law: an Economic Perspective’, (2006) 24 Berkely J. Int’l L. 801.

facilitated and costs of litigation reduced.<sup>107</sup> Furthermore, allowing the victims to choose the law with the highest standards respects the comparative regulatory interest of the state whose law is selected as the applicable law.

As a consequence, in the case of a parent company – usually situated in a developed country – conducting activities through its subsidiaries or other establishments – often situated in developing countries – which result in social environmental damage, it would be in the interest not only of the victims but also of the society as a whole to allow the victims for a wider choice of law. Such a solution would probably realize the best compromise between the different interests coming from the different approaches to private international law in terms of comparative regulatory interests, economic efficiency, neutrality, legal security and predictability and harmony of decisions. This would enable conflict of law rules to perform a regulatory function on the conduct of multinational corporations as opposed to contributing to the “liberalization dynamics” triggered by competing legal norms.<sup>108</sup>

### *The Effect of Non-Domestic Norms*

Having recourse to private international law mechanisms to provide access to justice to victims of Environmental Social abuse, does not mean that other non-domestic norms cannot be taken into account.<sup>109</sup> Rather, it is suggested that international law principles based on Human rights should be taken into consideration to verify that substantive justice is achieved, and that “soft law” norms are used as standards of conduct.

### *International “Hard” Law*

Most of the case-law of the ATCA referred to international law as the applicable law. International law substantive rules could be drawn from treaties, conventions, agreements, the case law of international and inter-regional courts, and customary international law on environmental protection and social standards. The main problem of such an approach is that the current state of international law is such that the rules consist more in general principles than specific rules and therefore, they would not provide enough guidance to determine the specifics of corporate civil liability that are normally dealt with by tort law. In addition, direct and horizontal effect has only been recognized to few international norms.<sup>110</sup>

Nevertheless, that does not mean that the international environmental and social standards should not play a role in those cross-borders tort actions against TNCs. They should be taken into account by the

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<sup>107</sup> Russel J. Weintraub, ‘The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither?’, (2008) 43 *Texas International Law Review* 401.

<sup>108</sup> V. Van Den Eeckhout, ‘Competing norms and European Private International Law. The role of European Private International Law’. Sequel to “Promoting Human Rights within the Union. The Role of European Private international Law”, contribution to the REFGOV Project 2008, FR 20, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1259334](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1259334); ‘Corporate Human Rights Violations and Private International Law...’, *op. cit.*

<sup>109</sup> On the relationships between private international law and non-domestic norms, see: J. Bomhoff and A. Meuwese, ‘The Meta-regulation of Transnational Private Regulation’, (2011) 38 *Journal of law and society*, 138; C. Joerges, ‘The idea of a Three-Dimensional Conflicts Law as Constitutional Form’, (2010) RECON Working Paper;

<sup>110</sup> V. Van Den Eeckhout, ‘Corporate Human Rights Violations and Private International Law’, *op. cit.*, at 16; P.A. Nollkaemper, ‘Public International Law in Transnational Litigation Against Multinational Corporations: Prospects and Problems in the Courts of the Netherlands’, in M.T. Kamminga and S. Zia-Zarifi (eds.), *Public International Law in transnational litigation against multinational corporations: prospects and problems in the courts of the Netherlands* (Kluwer Law International, Den Haag, London, Boston, 2000).

forum while establishing the tort, the damages and so on. In other words, the forum should construe the applicable law in the light of those international standards, thereby providing a floor of minimum protections in respect of environmental harm that would be used as a sort of minimum standards. In a case where a reconciliation between those international minimum standards and the applicable law were not possible, the forum could always substitute its own law (assuming of course that it would include the international minimum standards or could be thus construed) to the normally applicable law through the technique of the public order policy exception. If it were considered that an applicable law did not provide the victims of corporate human rights abuse with effective access to justice, compensation or would disregard international standards laid down by international instruments, that could be considered to contradict the *public policy* of the forum,<sup>111</sup> resulting either in the substitution of the *lex fori*, or in a partial application of the applicable law.<sup>112</sup> In Europe, that position would be further reinforced by the idea that applying a foreign law disregarding international human rights would constitute a violation of the forum State's obligations with regards to the European Convention on Human Rights.<sup>113</sup>

### “Soft Law”

On 16 June 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights elaborated by UN Special Representative John Ruggie, articulated around 3 pillars: the States' obligation to protect Human Rights, the Multinational Companies' obligation to respect Human Rights, and the need for victims to find remedy.<sup>114</sup> Within the EU, the institutions,<sup>115</sup> and more specifically the European Parliament<sup>116</sup> and the Commission,<sup>117</sup> have tried to encourage social responsibility of corporations through the adoptions, on a voluntary basis, of codes of conducts incorporating a certain number of standards that they endeavor to respect in their delocalized activities in the social and environmental spheres, amongst other things. These norms are inspired by international soft law instruments such as the Convention of the International Labour Organization, and the guidelines of the Organisation for Economic Co-operation and Development (OECD). Significant questions surround the legal strength of these soft law instruments that are not legally binding. The French criminal court adopted a very interesting position in the *Erika* case<sup>118</sup> by using the codes of conduct adopted by Total on a voluntary basis to serve as a basis for its criminal liability. The sort of approach, consisting in using soft law instruments as standards for evaluating conduct, could be used in tort law as well. Indeed, a recent first-instance decision of the English High Court seems to go in this direction. In *Chandler v Cape plc.*,<sup>119</sup> it held that a British parent company was liable for the acts of its South African subsidiary on the basis that it 'retained overall responsibility' for the health

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<sup>111</sup> Fédération Internationale des Ligue des Droits de l'Homme, (FILD) « Entreprises et violations des droits de l'Homme – Un guide pratique sur les recours existants à l'intention des victimes et des ONG » (2010), available at: <http://www.fidh.org/Entreprises-et-Droits-de-l-Homme-Un-guide-sur-les>

<sup>112</sup> As the English courts decided to do in *Kuwait Airways Corp. v Iraqi Airways Co. et al* [2002] UKHL 19.

<sup>113</sup> O. De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law', Center for Human Rights and Global Justice, Working paper No. 1, 2004, Global Law School Faculty, New York University School of Law.

<sup>114</sup> Special Representative of the United Nations Secretary-General on Business and Human Rights, Guiding Principles, available at: [www.business-humanrights.org/SpecialRepPortal/Home](http://www.business-humanrights.org/SpecialRepPortal/Home)

<sup>115</sup> A. Voiculescu, 'The other European framework for corporate social responsibility: from the Green Paper to new uses of human rights instruments', in D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability* (CUP, Cambridge, 2007) 370.

<sup>116</sup> Résolution du Parlement Européen A4-0508/98 ; Résolution du Parlement Européen (13 mars 2007) on Corporate Social Responsibility : A new partnership.

<sup>117</sup> Commission Communication (2006) to the European Parliament, the Council and the European Economic and Social Committee implementing the Partnership for Growth and Jobs: making Europe a Pole of Excellence on Corporate Social Responsibility.

<sup>118</sup> Cour d'appel de Paris, 30 mars 2010 ; <http://www.environnement-france.fr/0331-cour-appel-paris-confirme-erika>

<sup>119</sup> [2011] EWHC 951 (QB)

and safety policies of its subsidiaries, and should by implication be judged against the standards of those policies (although this fact was accepted by the defendant company and not in issue at the trial).

### **Conclusions: The Need for a Social Environmental Justice Approach to Justify Victim Choice**

In our view, the private international law of torts can be a useful addition to Public International as a “tool for enhancing human rights”.<sup>120</sup> While public international law aims at holding a State (such as the “home state”) responsible for the conduct of “its” TNCs, private international law looks directly into the responsibility of the TNCs responsible for the damage. In doing so, it respects the “polluter pays” principle and can have an important deterrent effect that may help in reducing future environmental social damage.

By holding TNCs responsible, tort law forces the tortfeasor to incorporate negative externalities directly into the cost of conducting the polluting or degrading activity.<sup>121</sup> It also provides a potential redress to victims who in many cases would go uncompensated, although the growing jurisprudence of international human rights courts in this area, which often provides an alternative route to compensation for victims via the imposition of state liability, should not be underestimated. The real advantage of tort lies in its ability to impose direct liability on the tortfeasor. In order to achieve this task, however, certain improvements may be necessary in order that it be better suited to the complex nature of environmental social torts. In addition, it is important to redress the balance between the parties, while taking into consideration the particular vulnerability of the victims, and the need of the society as a whole for higher standards of environmental social protection. The main innovation we suggest is to take into consideration the economic reality of the entire business entity (that is of the multinational or transnational corporate group) to open up the possibility of victims availing themselves of the jurisdiction of the forum where the parent company is domiciled as well as the application of the law of that domicile, and closing the little pockets of the Wild West that endure when no appropriate forum exists through the medium of the *forum necessitatis*.

This is not to say that tort law is a perfect solution; far from it. As we repeatedly mentioned, there are a number of obstacles to its proper use as a tool for justice. One of the main difficulties that tort law faces when TNCs are involved is the “piercing of the corporate veil”. In an international tort case, piercing the veil enables the imputation of liability to the parent company for the acts of its subsidiary, through an exception to the doctrine of limited liability. However, it remains in practice an almost impossible barrier to surmount,<sup>122</sup> and poses a ‘fundamental barrier to the imposition of liability ... upon parent and affiliates for the activities of a subsidiary of the group’.<sup>123</sup> It is thus easy for multinational companies to take advantage of the complexity of the structures they can create<sup>124</sup> to ensure that parent companies, which generally hold most of the funds (as was the case in Bhopal), carry virtually no responsibility for the acts of their subsidiaries. Nevertheless, such a solution is far from satisfying, as it fails to take into consideration the economic reality of the unity of the all business enterprise and the links that exists between the various components of a group of companies

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<sup>120</sup> V. Van Den Eeckhout, ‘Corporate Human Right Violations and Private International Law’ *op. cit.* 19.

<sup>121</sup> M. Anderson, ‘Transnational Corporations and Environmental Damage...’ *op. cit.*

<sup>122</sup> See, for a study of veil-piercing in the United States which suggests that US courts are *less* likely to pierce the veil in cases involving Corporate shareholders rather than natural persons, and even less likely again if the case involves a tort claim. See J. H. Matheson, ‘The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context’, (2008) 87 *N. Carolina L. R.* 1091

<sup>123</sup> P. I. Blumberg, ‘Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity’ (2004) 24 *Hastings Int & Comp. LR* 297 at 304

<sup>124</sup> M.-A. Moreau, ‘Les restructurations dans les groupes multinationaux’, (2010) *Revue Droit social* 1052 ; M.-A. Moreau, *Normes sociales, droit du travail et mondialisation* (Dalloz, 2006).

and the fact that, as Anderson put it, very often the parent company is the “mind” of the entire transnational enterprise and a single policy decision coming from the headquarters of the parent company can have important consequences (including in terms of social environmental damage) in a number of countries where subsidiaries (and affiliates) are located.<sup>125</sup> Indeed, ‘although conducted world-wide through hundreds of subsidiaries of affiliates, modern large business is, in economic reality, typically a single economically integrated enterprise functioning with a common objective under the control of its parent company’.<sup>126</sup>

Unfortunately, as Blumberg has shown, this transformation of business, which began at the start of the 19<sup>th</sup> century was not followed by a corresponding transformation of legal rules, and in the TNC context we are almost a century behind in this respect. However, the specificity of the need for social environmental justice might justify the adoption of an anthropomorphic approach which would mean that, in the same way a parent bears vicarious responsibility for the torts of their children, the parent company would have a vicarious responsibility for the torts of their subsidiaries, without the need to prove the fault of parent company itself. This type of approach would have the advantage of circumventing the very difficult operation of piercing the veil. Such a solution could be adopted by the States as an overriding mandatory rule (*loi de police*) that would apply before the determination of the applicable law, or could be considered as being part of the international public order (*ordre public*).

Ultimately, as many commentators have argued, greater standards, both in social and environmental terms, benefit investors by reducing long-term risks linked to foreign investment and thereby maximising profits and reducing potential liabilities. Our approach to private international law, we argue, simply levels the playing field by recognising the inherent inequalities which exist between capital and victim mobility in an age of globalisation and the well-recognised societal risks posed by environmental harm. The twin recognition of these two factors justifies, in our view, a move away from local and localised jurisdiction and applicable law solutions to a more glocal system, whereby the national courts of home states, or potentially of third states where a denial of justice would otherwise occur, operate to enforce the highest environmental standards on a global scale through local enforcement against the economic entity which bears ultimate responsibility.

We remain cautiously optimistic about the future. Courts in the U.S. have not yet rejected the premises of the ATCA outright, and some recent decisions go a long way in suggesting that it is precisely to cope with the problems of extraterritoriality and corporations that the statute exists.<sup>127</sup> Meanwhile, across the Atlantic the English courts are similarly opening the concepts of jurisdiction and parent company responsibility, while courts in civil law countries are beginning to show similar adventurist tendencies. The proposal to include a *forum necessitatis* in the revision of the Brussels Regulation<sup>128</sup> also suggests that such matters are not being neglected at the European level, either, while environmental protection remains high on the international agenda. It is to be hoped that this tendency will continue.

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<sup>125</sup> M. Anderson, “Transnational Corporations and Environmental Damage’, *op. cit.* n.51

<sup>126</sup> *Ibid.*

<sup>127</sup> *Doe v Exxon Mobil*, *supra* n.50

<sup>128</sup> Commission proposal (COM(2010) 748/3)





# International Human Rights in an Environmental Horizon

Francesco Francioni

## The Challenge of Environmental Justice

In our search for progress in this field, we ought to ask whether we need to fashion new rights – I will avoid the pedantic and useless schematization of ‘generation rights’ – inherently related to the environment and new technology related risks, or alternatively whether we can ‘adapt’ the conceptual and normative framework of international human rights to new situations so as to extend the scope of protection to novel risks and to the impact of environmental degradation on human rights.

The question whether human rights are the proper legal tools for dealing with the increasing degradation of the environment has now become more timely than ever for at least two reasons. First, contemporary developments at the level of treaty law have tended to fashion the entitlement of individuals, communities, and groups to take part in environmental decisions affecting their lives, and to access justice with respect to adverse impacts caused to their environment in terms of ‘human rights’. We may call this phenomenon the ‘proceduralization of environmental rights’ in the sense of an individual and social empowerment to participate in the deliberative process leading to environmental decisions and in the activation of remedies against environmental harm.<sup>1</sup> Evidence of this trend can be found in the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,<sup>2</sup> as well as in the 1993 NAFTA side agreement on Environmental Cooperation.<sup>3</sup> The importance of these developments cannot be underestimated if we consider that, in matters of environmental law, the international system remains disabled by the lack of a compulsory dispute settlement mechanism, which reduces its effectiveness as compared to the system of international economic law – with compulsory investment arbitration and binding WTO dispute settlement procedures.

The second reason for revisiting the issue of the nature and scope of environmental rights is substantive. Recent practice shows that the protection of the natural environment in special socio-cultural contexts is a *sine qua non* for the enjoyment of human rights by members of the relevant group or community. The high-water mark of this trend can be found in the recent UN Declaration on the Rights of Indigenous Peoples,<sup>4</sup> and in the previous Banjul Charter on Human and Peoples Rights,

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<sup>1</sup> See Redgwell, ‘Access to Environmental Justice’, in F. Francioni (ed.), *Access to Justice as a Human Right* (2007), at 153ff; Cameron and Mackenzie, ‘Access to Environmental Justice and Procedural Rights in International Institutions’, in Boyle and Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996), at 129ff.

<sup>2</sup> Adopted 25 June 1998, entered into force 30 Oct. 2001, 2161 UNTS 447.

<sup>3</sup> Adopted 8 Sept. 1993 and entered into force 1 Jan. 1994, 32 ILM (1993) 1482.

<sup>4</sup> Adopted by GA Res 61/295 of 13 Sept. 2007. Art. 29 of the Declaration expressly addresses environmental rights and reads as follows:

- ‘1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.’

which proclaims in Article 24 the right of African peoples to ‘a general satisfactory environment favourable to their development’.<sup>5</sup>

But does this practice indicate that a human right to a healthy and sustainable environment has emerged in international law? As the following discussion will show, the extensive case law developed by human rights courts and supervisory bodies at regional and universal levels tends to indicate that indeed an environmental dimension of human rights has been recognized as implied in the commitments undertaken by the relevant human rights treaties and conventions. But, with the exception of the Banjul Charter and its implementing jurisprudence, environmentally related ‘rights’ have essentially been conceived as ‘individual rights’ developed as an extension, by way of interpretation, of other expressly recognized human rights – such as the rights to life, health, private and family life - and not as a collective right of the community affected by the disputed environmental impact. The argument put forward here is that this approach, although acceptable as a provisional solution in the face of extreme environmental abuses which directly affect individuals, is ill-suited to addressing environmental degradation as such and the diffused effects that such degradation has on society as a whole. In my opinion, the rigid maintenance of this approach contributes to the ‘stagnation’ of international law, and more particularly to the confinement of the idea of ‘human rights’ within an individualistic horizon, which remains blind to the intrinsic linkage between the individual and the collective interests of society. The plea is therefore for more advanced jurisprudence in the field of human rights which recognizes the collective dimension of the right to a decent and sustainable environment as an indispensable condition of human security and human welfare. The following analysis will try to identify what potential exists for achieving progress toward this goal within the present legal framework of human rights.

## The Human Dimension of Environmental Law

The first important statement on the link between human rights and protection of environmental quality can be found in the 1972 Stockholm Declaration on the Human Environment. Principle 1 of the Declaration, issued from the first UN conference on the environment, proclaimed that ‘Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations’. In its simplicity, this statement contained all the elements for the combination of ecological and human rights approaches to the question of environmental protection. It recognized that the enjoyment of freedom and equality among human beings is inseparable from the preservation of an environmental quality which permits human dignity and human welfare. It was couched in the terms of a solemn ‘covenant’, i.e., a commitment *erga omnes* to the protection of an international public good, rather than a reciprocal obligation between states, thus echoing the language of human rights treaties.<sup>6</sup> It introduced the concept of inter-generational responsibility to protect and improve the environment.

If we look at this statement through the lens of today’s impending environmental disasters, in particular, the aggravating effects of climate change, which is now reaching the level of a threat to human security, it is easy to see that Principle 1 of the Stockholm Declaration contained an innovative, even revolutionary, approach to the safeguarding of human rights and human dignity through

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<sup>5</sup> African Charter on Human and Peoples’ Rights, adopted 27 June 1981, entered into force 21 Oct. 1986.

<sup>6</sup> It is not by chance that only 6 years before the UN had adopted the two most important human rights treaties on civil and political rights, and on Economic, Social and Cultural rights, under the name of ‘Covenants’ thus underscoring, at least at a political and moral level, their character of a solemn commitment toward the international community as a whole rather than a mere contractual instrument.

environmental protection.<sup>7</sup> Unfortunately, subsequent environmental diplomacy at the UN level has not fulfilled that promise. Twenty years after the Stockholm Declaration, the Rio Conference on environment and development ended up with a Declaration which substantially departed from the idea of a link between human rights and environmental protection. Principle 1 of the Rio Declaration limited itself to proclaiming that human beings are ‘the central concern of sustainable development’ and are ‘entitled to a healthy and productive life in harmony with nature’. This is hardly human rights language. The main concern of the Declaration was the conjugation of environmental protection with economic development, not the safeguarding of human rights through enhanced environmental protection. The conciliation of economic growth with environmental protection remains the focus of environmental diplomacy even in the post-Kyoto negotiations on global warming.<sup>8</sup>

A similar lack of progress characterizes the human rights diplomacy with respect to the development of a set of specific environmental rights. The work undertaken to this end in 1992 by the now defunct UN Sub-Commission on the Prevention of Discrimination and Human Rights, although limited to the adoption of a soft law instrument (a ‘Declaration’) on a set of principles on human rights and the environment, received little support from the Human Rights Commission and no progress has since been made at the inter-state level toward the elaboration of a normative instrument of this kind.<sup>9</sup>

More recently, some progress towards the integration of environmental considerations into the existing law and practice of human rights has been made at the regional level. In 2005, the Council of Europe adopted a ‘Manual on Human Rights and the Environment’<sup>10</sup> which takes stock of the growing jurisprudence of the Strasbourg Court on the subject and lays down a set of general principles which have a direct impact on the adjudication of environmental claims which are based on specific Convention rights such as the rights to life, property, a fair hearing, as well as private and family life. According to these principles, (i) states are always obliged to take and implement measures to control environmental problems which affect the enjoyment of human rights recognized in the Convention; (ii) states have an obligation to provide information relating to serious environmental risks, to ensure public participation in environmental decision-making and access to environmental justice; (iii) environmental protection can be a legitimate aim in a democratic society for the purpose of limiting certain Convention rights, in particular the right to private and family life and the right to property; (iv) national authorities enjoy a margin of appreciation in the balancing of individual rights and environmental concerns.<sup>11</sup>

In spite of the unquestionable importance of these principles in opening up an environmental perspective for the implementation of the European Convention on Human Rights, the Council of Europe Manual remains quite conservative with regard to the progressive development of an independent set of environmental human rights. Very pointedly, it clarifies that the ‘Convention is not designed to provide general protection of the environment as such and does not expressly guarantee a right to a sound, quiet and healthy environment’.<sup>12</sup> This statement is certainly correct if one takes into

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<sup>7</sup> This potential of Art. 1 was clearly perceived by some forward looking commentators of the time. See particularly Sohn, ‘The Stockholm Declaration on the Human Environment’, 14 *Harvard Int’l LJ* (1973) 451.

<sup>8</sup> The UN Climate Conference has taken place in Copenhagen 7-18 Dec. 2009.

<sup>9</sup> The Draft Declaration of Principles on Human Rights and the Environment, with the report of Special Rapporteur F. Z. Ksentini, Annex 1, can be seen as an elaboration of Principle 1 of the Stockholm Declaration: it declared in para. 2 that ‘[a]ll persons have the right to a secure, healthy and ecologically sound environment’ and in para. 4 the right to ‘an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs’: UN Doc E/CN.4/Sub.2/1992/7.

<sup>10</sup> CoE Committee of Experts for the Development of Human Rights, ‘Final Activity Report on Human Rights and the Environment’, 10 Nov. 2005, DH-DEV(2005)06 rev.

<sup>11</sup> *Ibid.*, at 10.

<sup>12</sup> *Ibid.*

account only the original intention of the drafters of the European Convention. But it becomes problematic when we take into consideration the profound impact which environmental degradation has on international law, the vast environmental jurisprudence of European Court over the past two decades,<sup>13</sup> and, more important still, the express recognition in the set of principles of the Manual of environmental values as a legitimate aim capable of limiting the applicable scope of the Convention rights. It is hard to understand how such a legitimate aim can work effectively without accepting a certain degree of internalization of environmental values within the system of human rights of the Convention.

In a more specialized context, some progress can be detected with regard to the recognition of the right to water as a specific entitlement to environmental quality and resources. In its General Comment No 15, the UN Committee on Economic, Social and Cultural Rights has recognized that states are under an obligation to ensure an adequate and accessible supply of water for drinking, sanitation, and nutrition in accordance with Articles 11 and 12 of the 1966 UN Covenant on Economic, Social and Cultural Rights.<sup>14</sup> Besides, the Economic Commission of Europe has promoted the adoption of a Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.<sup>15</sup> The formulation in the Protocol of access to water in terms of basic human needs has the effect, as a minimum, of requiring a human rights approach to the interpretation of the relevant international instruments on the use of transboundary watercourses.<sup>16</sup> This could thus provide a criterion for the review of the legitimacy of state policies which authorize the unsustainable use of water resources in such a way as to deprive affected people of their access to safe drinking and sanitation. It is interesting to note that such an argument underlies the claim submitted by Argentine local authorities before the American Commission of Human Rights in the context of the pending dispute before the International Court of Justice (ICJ) between Argentina and Uruguay on the legality of the latter's authorization in its territory of large pulp mills which Argentina fears will damage the downstream ecosystem of the Uruguay river.<sup>17</sup> It remains to be seen how international adjudicatory bodies will balance the collective claim of the local population to access safe drinking and sanitation water with the competing claim of the host state of the investment to proceed with an economic development project, especially when the project has the support of the majority of the population. Certainly, one cannot ignore that, in this context, the progressive implementation of economic and social rights weighs heavily against the justiciability of the right to clean water. Like all economic and social rights, this hypothetical right would still remain a right of progressive implementation contingent on available resources of the state concerned, and thus subject to democratic processes of majoritarian deliberation. Further, even in the unlikely event that the right to water were to trump the competing claim to economic development, the result would remain extremely limited and would imply the overriding importance of access to water for human health and sanitation but not of environmental quality as a broader issue of human rights.

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<sup>13</sup> See below section 3.

<sup>14</sup> General Comment No 15: the right to Water (Arts 11 and 12), 26 Nov. 2002, ESCOR, 2003, Supp. 2, 120.

<sup>15</sup> Adopted 17 June 1999, UN Doc MP. WAT/2000/1.

<sup>16</sup> In this sense see Boyle, 'Environment and Human Rights', in *Max Planck Encyclopaedia of Public International Law* (2009), at para. 14.

<sup>17</sup> *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, filed with the International Court of Justice on 4 May 2006, still pending at the time of writing (1 Sept. 2009). The complaint before the Inter-American Commission on Human Rights was initiated by the Governor of the Argentine Province of Entre Rios on the basis of the alleged violation by Uruguay of a number of Arts of the American Convention, its Protocol on Economic, Social and Cultural Rights, and the American Declaration. For a comment see Piscitello and Andrés, 'The Conflict Between Argentina and Uruguay Concerning the Installation and Commissioning of Pulp Mills before the International Court of Justice and Mercosur', 67 *ZaoRV* (2007) 159, at 181.

## **Economic Rights and Environmental Rights**

Given the modest progress achieved at the level of standard setting, it is now necessary to ask whether more substantial progress towards the merging of human rights and environmental protection has been achieved at the level of judicial implementation of human rights courts and international supervisory bodies. The examination of this practice is important for two reasons: first, since, as we have pointed out, the European Court and other human rights bodies have developed a rich jurisprudence on the role of human rights in adjudicating the legality of certain environmental impacts on the life, property, and the people affected. Secondly, the case law of adjudicatory bodies in the field of international economic law – notably, investment arbitration – shows that the internationalization of investors' rights and trade freedoms entails corresponding limitations on state regulatory powers, with the risk that certain measures taken with a view to ensuring environmental quality and environmental rights of the local population may be attacked for their inconsistency with investors' rights or trade freedom. A case recently adjudicated within NAFTA Chapter 11, concerning the protection of investments, is indicative of this risk. In *Glamis Gold v US*,<sup>18</sup> a Canadian mining company complained that its investment in the United States had been injured by the American authority's denial, allegedly in violation of NAFTA commitments, of the authorization to proceed with mining in a sensitive area of environmental and cultural importance in Northern California. The arbitral decision issued in June 2009 recognized that the conservation of environmental quality and of the cultural values attached to the specific area – which was of great importance as ancestral land of the local native American tribes – were legitimate aims of the United States justifying the limitation of property rights and other economic interests of the investor. Other cases have been decided in recent years where human rights – such as the right to water – have been invoked to counter the investor's claim that local regulations have caused an adverse impact on its internationally protected interests.<sup>19</sup> This jurisprudential trend is important for the purpose of taking into account human needs and conceptions of sustainable development in the enforcement of economic rights and freedoms relating to investments and trade. However, so far, this jurisprudence has played a purely 'negative' role, in the sense of using environmental considerations not so much as constitutive elements of 'human rights' but simply as legitimate aims of the host state capable of legally justifying restrictions on the economic rights guaranteed to investors in *ad hoc* treaties and under customary international law. This approach has its limits. While it is true that it may result in an arbitral decision recognizing the host state's conduct as legitimate and justifiable on the basis of the consideration that the economic interest of the investor are subject to the regulatory powers of the host state, especially when such powers are democratically exercised,<sup>20</sup> at the same time it may result in an award of damages to the investor on the basis of the argument that environmental goals, however legitimate and internationally recognized, do not exclude compensation for the loss caused to the investor and do not even justify discounted compensation.<sup>21</sup>

## **Environmental Values in the European Convention on Human Rights.**

Let us now turn to the jurisprudence of human rights courts and human rights treaty bodies. Even a brief overview of pertinent case law reveals a considerable degree of progress towards the development of an environmental dimension of human rights, but also a degree of ambiguity and

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<sup>18</sup> *Glamis Gold Ltd. v Government of the United States of America*, available at: [www.state.gov./documents/organization/](http://www.state.gov./documents/organization/).

<sup>19</sup> For a systematic analysis of this practice see Dupuy, F. Francioni, and E.U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009).

<sup>20</sup> See *Methanex Corp v United States*, Final Award, 3 Aug. 2005 44 ILM (2005) 1345; *Parkerings-Compagniet AS v Republic of Lithuania*, Case No ARB/05/08/, Award of 11 Sept. 2007, available at: [icsid.worldbank.org/ICSID/Index.jsp](http://icsid.worldbank.org/ICSID/Index.jsp).

<sup>21</sup> *Compania del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, Case No ARB/96/1, Final Award, 17 Feb. 2000, 5 ICSID Rep 157.

significant divergence of approaches in treating such dimension as connected either to ‘individual’ rights or to the ‘collective’ interests of the society.

Let us begin with the European Convention on Human Rights (ECHR). We have already pointed out that in the past 25 years the Strasbourg Court has made a positive contribution to the construction of an environmental dimension of several rights enshrined in the Convention. This has led to the adoption of the Council of Europe’s Manual on Human Rights and the Environment.<sup>22</sup> The Strasbourg case law has contributed to the development of certain ‘environmental obligations’ incumbent upon states parties by virtue of the Convention. These include: (i) the positive obligation to regulate activities of an industrial or technological nature which might adversely affect the sphere of protected rights, such as the right to life (Article 2) and the right to private and family life (Article 8); (ii) the positive obligation effectively to enforce legal, administrative, or judicial measures designed to prevent or remedy the unlawful interference with such rights; (iii) the positive obligation to provide information and engage in consultation with affected individuals and people with regard to the actual risk and danger of the environmental impact in issue. Starting with the early cases of *Lopez Ostra v Spain*<sup>23</sup> and *Guerra v Italy*,<sup>24</sup> the Court has contributed to the jurisprudential development of a concept of environmental obligations covering not only activities carried out by the state but also those conducted by private parties. In *Fadayeva v Russia*,<sup>25</sup> the Court found that industrial activities with a heavy environmental impact gave rise to the respondent state’s responsibility for ‘failure to regulate private industry’ when such failure resulted in a form of environmental degradation such as a failure to secure human rights under the Convention. With regard to the right to life, the Court has emphasized in *Oneryildiz v. Turkey* that the ‘positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 ... entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life’. In addition, it is incumbent on the state to take all ‘practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks’.<sup>26</sup> But the duty does not stop at the adoption of the appropriate environmental measures of protection. These measures must be enforced effectively. As stated in *Taskin v Turkey*:

The Court would emphasise that the administrative authorities form an element of a State subject to the rule of law, and that their interest coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose.<sup>27</sup>

*Taskin* is noteworthy also for the emphasis the Court places on the procedural duties concerning provision of information and consultation with affected parties as a condition for the fulfilment of the obligations inherent in Article 8 of the Convention (private and family life) and for the proper balancing of economic development goals and human rights. The case concerned the environmentally noxious operation of a mine. The Court held that:

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<sup>22</sup> See *supra* note 12.

<sup>23</sup> ECtHR SeriesA, No 303 C.

<sup>24</sup> ECtHR Rep (1998-I) 210.

<sup>25</sup> ECtHR Rep (2005-IV) 255.

<sup>26</sup> *Ibid.*, at paras 89 and 90.

<sup>27</sup> 2004-X Eur. Ct HR 1149, at paras 124–125.

whilst Article 8 contains no explicit procedural requirement, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8.<sup>28</sup>

As has been keenly observed,<sup>29</sup> this pronouncement by the Court has the effect of introducing, by way of interpretation, a requirement of informed process and consultation borrowed from environmental treaties, in particular the 1998 Aarhus Convention<sup>30</sup> and the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context.<sup>31</sup>

We can add to this observation that the Court has taken a remarkable step, again by way of an evolving interpretation, toward the extension of the obligation to avoid ‘interference’ from the category of ‘public authority’, as literally provided by the text of Article 8, to the conduct of private parties. This has important implications for the ‘horizontal’ implementation of the procedural obligation concerning information and participation in environmental decisions to the extent that it permits full consideration, and a fair balancing, of the competing interests – economic and ecological – involved in the environmental case.

But in spite of the undeniable progress marked by these judgments toward the opening up of an environmental horizon of human rights, they still fail to achieve the objective of the recognition of an independent right to a decent environment. This is prevented, first, at a substantive level by the purely individualistic conception of human rights still pervading the jurisprudence of the Strasbourg Court. Negative impacts on the environment, even where severe, are relevant only in that they produce an interference with the sphere of rights guaranteed by the convention to ‘individuals’. Thus, environmental integrity is not seen as a value *per se* for the community affected or society as a whole, but only as a criterion to measure the negative impact on a given individual’s life, property, private and family life. Secondly, at the procedural level, the individualistic approach followed by the Court excludes the admissibility of public interest proceedings to defend the environment, unless the applicants can show a direct impact of the activities complained of on the sphere of their individual rights. Both these limits are well exemplified by the 2003 judgment of the European Court in *Kyrtatos v. Greece*.<sup>32</sup> The case concerned the contested draining of a wetland. Although the drainage and consequent destruction of the wetland resulted in a violation of the law, the Court reaffirmed that ‘neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such’<sup>33</sup> and concluded that the applicants, although they lived in the vicinity of the site, could not prove that their right to private and home life was affected. The paradoxical result of this decision is that the preservation of the environment from the attack caused by illegal activities depends on the interference that such illegal activities produce in the private life of individuals. A different approach would have been preferable. The Court could have given more weight to the illegal character of the environmental destruction and interpreted Article 8 more liberally so as to consider the applicants legitimate stakeholders in the management of natural resources which

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<sup>28</sup> *Ibid.* Art. 8 of the ECHR states: ‘Everyone has the right to respect for his private and family life, his home and his correspondence... There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law’.

<sup>29</sup> Boyle, ‘Human Rights or Environmental Rights? A Reassessment’, XVIII *Fordham Environmental L Rev* (2007) 471, at 497.

<sup>30</sup> Convention on Access to Information. Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 38 ILM 517.

<sup>31</sup> Adopted at Espoo, Finland, 25 Feb. 1991, 30 ILM (1991) 800.

<sup>32</sup> ECtHR Rep (2003-VI) 257.

<sup>33</sup> *Ibid.*, at para. 52.



were not only part of their extended home and private life<sup>34</sup> but, more importantly, constituted a public environmental good affecting the collective life of the people living in and around the area.<sup>35</sup>

## The African Charter and the American Convention on Human Rights

A somewhat more progressive attitude with respect to the conceptualization of environmental rights as 'collective' rather than purely individual entitlements can be found in the case law stemming from the African Charter on Human and Peoples' Rights and under the Inter-American System. As for the first, this comes as no surprise since the whole philosophy of the Charter is informed by the collective dimension of human rights as Peoples' Rights, as can be seen from the Charter's title. In the well-known *Ogoniland* case,<sup>36</sup> where the local population complained of the environmental devastation caused by the oil extraction industry in Nigeria, the African Commission on Human and Peoples' Rights construed the generic language of Article 24 of the Charter<sup>37</sup> in strict environmental terms and declared that:

an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecological equilibria is harmful to physical and moral health.<sup>38</sup>

This language transcends the purely individualistic approach to environmental rights as seen in the jurisprudence of the European Court, and construes human rights guarantees in broad collective terms as legitimate claims of the community to have the quality of its environment preserved against the devastation wrought by unsustainable exploitation of mineral resources. Also, the Commission's decision does not stop at the finding of a violation of the Charter, but goes on to order remedial action to clean up and rehabilitate the lands and rivers damaged by oil operations, and to require the preparation of environmental impact assessments as well as the provision of information and guarantees of public participation in decision-making bodies.<sup>39</sup> This case may be unique in its use of environmental consideration to challenge the sustainability of unbridled oil extraction and in its focus on the collective right to a healthy and satisfactory environment for the local population, which, in the end, may even draw no material benefit from the harmful exploitation of local resources. Certainly, this outcome was facilitated by the express reference to peoples' rights in the African Charter. However, a similar communitarian approach to the use of human rights in environmental disputes can be detected also in a number of cases decided under the American Convention on Human Rights. In its ground-breaking judgment in *Mayagna Sumo Awas Tigni Community v Nicaragua*,<sup>40</sup> the Inter-American Court held that logging concessions awarded by Nicaragua to private investors in an area claimed by a tribal community constituted a violation of the petitioners' property rights guaranteed by Article 21 of the American Convention. In spite of the lack of any express reference to communal

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<sup>34</sup> This argument has also been proposed by Judge Loucaides on the basis of an expansive reading of the notions 'home' and 'private life' used in Art. 8. But his proposal remains confined within an individualistic horizon of rights protection. See Loucaides, 'Environmental Protection through the Jurisprudence of the ECHR', 75 *British Yrbk Int'l L* (2004) 249.

<sup>35</sup> This approach would have been consistent with the approach followed a year later by the Court in *Taskin*. See *supra* note 29.

<sup>36</sup> *Soc. and Econ. Rights Action Centre v Nigeria*, Case No ACHPR/COMM/A044/1, OAU Doc. CAB/LEG/67/3 rev 5, at para. 51.

<sup>37</sup> Art. 24 reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

<sup>38</sup> *Supra* note 38.

<sup>39</sup> *Ibid.*, at paras 54–69.

<sup>40</sup> IACTHR Series C No79, 31 Aug. 2001.

property in the text of Article 21, the Court interpreted the ‘right to property’ as inclusive of the customary community entitlement of the indigenous people to use their ancestral land for agriculture and hunting, and to have it respected against the environmentally and culturally destructive project of commercial logging. In similar circumstances, the Inter-American Commission has used the Convention provisions on the right to life to extend human rights protection to communities threatened by some form of environmental destruction. So in the case of the *Yanomani Indians* the Commission held that the construction of a highway by Brazil through a wild area in the ancestral lands of the petitioners amounted to a violation of their right to life and physical integrity.<sup>41</sup> In the more recent case of the *Maya Indigenous Community of Toledo*, the same Commission, relying on the aforementioned case of *Awas Tigni* and citing the African precedent of *Ogoniland*, held that a logging project authorized by Belize posed such a threat to the natural environment of the Mayan community as to endanger the whole economic and life support on which the community depended. While recognizing the importance of economic development, the Commission concluded that Belize had infringed the petitioners’ right to property in their ancestral lands.

## **The UN Covenants**

At the universal level, the development of an environmental dimension in the human rights provisions of the two UN Covenants has been rather modest, also because of the limited number of cases involving environmental claims. Most of these cases have been brought before the UN Human Rights Committee under the minority protection clause of Article 27 of the Covenant on Civil and Political Rights. This is a cultural provision which expressly refers to the rights of ‘persons belonging to such minorities’, rather than to the collective rights of the group as such. Consistently with this wording, the UN Human Rights Committee has addressed environmental impacts on traditional life of minorities in the perspective of the ‘individual’ rights of minority members rather than of the community. So, in *Ilmari Lansman*, a case involving the impact of stone quarrying on the claimant’s right to pursue reindeer herding in an undisturbed habitat, the Committee observed that ‘Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture’. But ultimately it concluded that ‘measures that have a limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27’, and found that Finland had adopted sufficient measures to minimize the impact on reindeer herding.<sup>42</sup> A similarly restrictive view of the role of environmental protection in human rights adjudication emerges in relation to citizens’ claim to have an environment free from generically modified crops,<sup>43</sup> from nuclear waste,<sup>44</sup> and from the harmful radiological contamination following nuclear tests.<sup>45</sup> At the same time, the case law of the Human Rights Committee reveals instances of bold adherence to a public interest approach in the construction of human rights in light of environmental considerations. In *Lubicon Lake Band v Canada*, the Committee found that the adverse environmental impacts caused by oil and gas extraction on the traditional lands of an indigenous community constituted a violation of Article 27. In spite of

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<sup>41</sup> Case 7615, IACommHR Report No 12/85 OEA/ Ser L/V/II.66 doc. 10 Rev 1.

<sup>42</sup> UN Human Rights Committee, Communication No 511/92, CCPR/C/52/511/1/1992 (1994), at para. 9.

<sup>43</sup> *Brun v France*, where the Human Rights Committee declared that ‘no person may, in theoretical terms and by *action popularis*, object to a law or practice which he hold at variance with the Covenant’: Communication No 1453/2006, UN Doc. CCPR/C/88/D/1453 (2006), at para. 6.

<sup>44</sup> *EHP v Canada*, where the Committee dismissed a claim of local residents based on the protection of the right to life and private life against the opening up of a nuclear waste dumping site. The application was dismissed for failure to exhaust local remedies, but the Committee recognized that the dumping of such waste might have raised a serious threat to life for the local population: Communication No 67/1980, 27 Oct. 1982, *UN Selected Decisions of the Human Rights Committee under the Optional Protocol* (1990), ii, at 20.

<sup>45</sup> *Bordes et al. v France*, Communication No 645/1995, 22 July 1996.

the restrictive language of Article 27, this decision goes beyond the purely individualistic conception of indigenous rights; the finding of the violation relates to the overall environmental impact of the oil operation on the subsistence system of the indigenous community as a whole, and not on individual members of the group. A similar community-oriented approach can be found in *Francis Hopu and Tepoaitu Bessert v France*, where the Committee upheld the petitioners' contention that a tourist development project in Polynesia involved an unacceptable impact on traditional tribal lands, including sacred burial grounds of the indigenous community.<sup>46</sup> The case was decided pursuant to a broad interpretation of Article 17, which provides for protection for private and family life. The Committee accepted the applicants' argument that the term 'family' ought to be interpreted in light of the customary traditions of the island's autochthonous population to include the entire indigenous community whose life was affected by the construction project.<sup>47</sup>

## Progress or Stagnation?

Progress or stagnation? Reverting to the theme of this symposium we can note, based on the practice examined in this brief survey, that some progress has been made toward the integration of environmental considerations in the process of human rights adjudication. At the substantive level, progress has been achieved by an evolutionary interpretation of established human rights provisions – notably, the right to life, family and private life, and minority rights. So, these provisions have yielded a certain amount of environmental protection to the benefit of individual applicants. At the procedural level, the human rights jurisprudence, especially that of the European Court, has read into the applicable human rights treaties a state obligation to guarantee information, meaningful participation, and access to justice to persons directly affected by an environmental impact. This progress however is limited; not so much because it falls short of establishing an independent 'right' to a clean environment, which is neither necessary nor useful, given its indeterminacy; but rather because it is still hampered by what I consider the main obstacle: the persistent and prevailing individualist perspective in which human rights are conceived and often implemented by international courts and supervisory bodies. Legal scholarship has contributed to this obstacle; especially the doctrinal current often referred as *human rightism*,<sup>48</sup> which conceives of human rights as a self-concluded discipline inscribed within the horizon of formal international standards informed by the traditional canon of human rights as rights of the individual. At the same time, human rights scholarship has argued on theoretical grounds against stretching human rights beyond the individual dimension, for fear that the empowerment of the community may result in new threats to human rights.<sup>49</sup> These concerns are understandable, because of the ever-present danger of diluting the strength of human rights guarantees and of subjecting the individual to the tyranny of the community. Yet, one wonders whether the whole idea of international human rights as originated in the UN Charter and developed through the Universal Declaration and later normative instruments were ever meant to be one of purely individual rights isolated from the society. The first paragraph of Article 29 of the Universal Declaration, in stating that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible', points in a different direction. But it is especially in the context of the

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<sup>46</sup> *Francis Hopu and Tepoaitu Bessert v France*, Communication No 549/1993, UN Doc.CCPR/C/60D/549/1993/Rev/1, 29 Dec. 1997.

<sup>47</sup> *Ibid.*, at paras 2.2–10.3.

<sup>48</sup> *Human rightism* is the approximate translation of the picturesque phrase popularized by A. Pellet in his scathing critique of human rights scholarship as an independent and self-sufficient discipline separate from international law. See Pellet, "'Human Rightism" and International Law', *X Italian Yrbk Int'l L* (2001) 3.

<sup>49</sup> Donnelly, 'Third Generation Rights', in C. Broelmann *et al.* (eds), *Peoples and Minorities in International Law* (1993), at 119ff; and by the same author 'Human Rights, Individual Rights and Collective Rights', in J. Berting *et al.* (eds), *Human Rights in a Pluralistic World, Individuals and Collectivities* (1990), at 39.

contemporary debate on the interaction of human rights with environmental protection that a purely individualistic human rights approach appears inadequate and even outdated.

As we have seen in the survey of human rights jurisprudence in environmental cases, it does not make much sense to engage human rights language to combat environmental degradation only when such degradation affects the rights to life, property, and the privacy of certain directly affected individuals. This reductionist use of human rights may even be counter-productive in that it tends to reduce environmental values to the very limited sphere of individual interest, thus adulterating their inherent nature of public goods indispensable for the life and welfare of society as a whole. This does not mean that the human rights approach to environmental protection considered above should be discontinued. On the contrary, my plea is for a more imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation and adapts the language and technique of human right discourse to the enhanced risk posed by global environmental crises to society and, indeed, to humanity as a whole.

Human rights and environmental law occupy a very special place in the field of public international law. Both have developed as branches of the law where states undertake commitments to respect, not another state's rights, but the objective value of human dignity and environmental quality. Both have been used by human rights advocates and environmental activists as emancipatory projects to enhance and augment human freedom, and to guarantee the sustainability of the environments that host human life. More intimate compenetration should result in progress towards generally accepted international standards on the sustainable use of natural resources.

