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Coordinators

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PREFACE

Year after year, we have faced a huge challenge: to present you, readers, these five books, in five languages(Portuguese, Spanish, English, French and Italian), which deal with the central themes of the Brazilian interdisciplinary courses on human rights, held in Fortaleza, Ceará (Brazil), under the organization of the Brazilian Institute of Human Rights and the Inter-American Institute of Human Rights, in association with the Center for Studies and Training of the Attorney General Office of the State of Ceará and with the support of numerous local, national and international institutions.

In each version, since 2012, the selected theme is subject of lectures, panels, workshops (in which four groups of students discuss a specific item, with the help of facilitators, in order to present proposals at the municipal, state and federal levels), and a case study (simulation, also guided by a facilitator, of a complaint addressed to the inter-American human rights system), comprising a vast program of 120 hours distributed over two weeks in three shifts, under an immersion regime.

In 2017, in anticipation of the Fraternity Campaign promoted by the Catholic Church in Brazil, under the title "Fraternity: Brazilian Biomes and the Defense of Life", we chose the theme "Human Rights and Environment" for the VI Brazilian Interdisciplinary Course on Human Rights (to be held from August 28 to September 8). In previous years, the topics covered were as follows: "Human Rights from the Poverty Dimension" (2012), "Access to Justice and Citizen Security" (2013), "Equality and Non-Discrimination" (2014), "The respect for Human Dignity" (2015) and "The Principle of Humanity and the Safeguarding of the Human Person."

The choice of the theme "Human Rights and the Environment" was made due to the recognition of its importance at a time when priority attention is required to the preservation of our habitat, pursuing an environment that must be safe, balanced, able to ensure quality of life and well-being to everyone; in other words, those fundamental conditions for a healthy and dignified existence.

It is precisely in the dignity of all human beings that the greatest effort must be made to offer ecological protection that opposes the

constant damage to nature, to the abusive practices that, for example, cause pollution (atmospheric, water, sound, visual, etc.), accelerate the processes of desertification, reduce natural resources and cause climate change responsible for millions of victims of environmental damage. It should not be overlooked that, at this historic moment, the United Nations Conference on the Prohibition of Nuclear Weapons (March-July 2017) takes place in New York.

Numerous authors, from different nationalities, in reply to our invitation, have written substantial articles that examine aspects of the theme proposed from different perspectives. Many refer to declarations (such as those of Stockholm and Rio about the environment, transcribed in all books), as well as the covenants and constitutions that integrate a mosaic of instruments, of norms, that seek to create a culture of respect to the environment, contextualizing man in a less harmful, less hostile and more harmonic scenario.

As the Stockholm Declaration on the Environment, adopted by the United Nations Conference on the Environment in June 1972, mentions, Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet, a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights, the right to life itself.

It should also be borne in mind that, as stated in the Rio Declaration on Environment and Development of June 1992, Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature (Principle 1), and all States and all people, as an indispensable requirement for sustainable development shall co-operate in the essential task of eradicating poverty, in the effort to decrease income disparities and consequently to build standards of living and better meet the needs of the majority of the people of the world.

Our expectation is that the present collection becomes part of the intense agenda of debates that will make the 6th Brazilian Interdisciplinary Course on Human Rights a milestone in the

fight for the defense and protection of the environment, together with human rights, pointing out, with the necessary emphasis, the colossal challenge in this regard, of the State and civil society.

The Hague / Fortaleza, July 7, 2017.

Antônio Augusto Cançado Trindade and César Barros Leal

HUMAN RIGHTS AND THE ENVIRONMENT: WHERE NEXT?

Alan Boyle

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1. IS THE ENVIRONMENT A HUMAN RIGHTS ISSUE?

Why should environmental protection be treated as a human rights issue? There are several possible answers. Most obviously, and in contrast to the rest of international environmental law, a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general. It may serve to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life. Above all, it helps to promote the rule of law in this context: governments become directly accountable for their failure to regulate and control environmental nuisances, including those caused by corporations, and for facilitating access to justice and enforcing environmental laws and judicial decisions. Lastly, the broadening of economic and social rights to embrace elements of the public interest in environmental protection has given new life to the idea that there is, or should be, in some form, a right to a decent environment.

Remarkably, the environmental dimensions are rarely discussed in general academic treatments of human rights law, where there is almost no debate on the relationship between human rights and the environment.[1] Thus, the literature is mainly written by environmentalists or generalist international lawyers.[2] But the

1 P. Alston, H. Steiner, and R. Goodman, *International Human Rights in Context* (3rd edn, 2008) and O. De Schutter, *International Human Rights Law* (2010) refer to some of the precedents and list 'environment' in their indexes but there is no significant discussion of the precedents from an environmental perspective. Compare Loucaides, 'Environmental Protection through the Jurisprudence of the ECHR', 75 *BYBIL* (2004) 249 and Desgagné, 'Integrating Environmental Values into the ECHR', 89 *AJIL* (1995) 263.

2 See in particular D. Anton and D. Shelton, *Environmental Protection and Human Rights* (2011); Francioni, 'International Human Rights in an Environmental

growing environmental caseload of human rights courts and treaty bodies nevertheless indicates the importance of the topic in mainstream human rights law. It is self-evident that insofar as we are concerned with the environmental dimensions of rights found in avowedly human rights treaties – the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (AmCHR), and the African Convention on Human and Peoples' Rights (AfCHPR) – then we are necessarily talking about a 'greening' of existing human rights law rather than the addition of new rights to existing treaties. The main focus of the case law has thus been the rights to life, private life, health, water, and property. Some of the main human rights treaties also have specifically environmental provisions,[3] usually phrased in relatively narrow terms focused on human health,[4] but others, including the ECHR and the ICCPR, do not. The greening of human rights law is not only a European phenomenon, but extends across the IACHR, AfCHPR, and ICCPR. Judge Higgins has drawn attention to the way human rights courts 'work consciously to co-ordinate their approaches.'[5] There is certainly evidence of convergence in the

Horizon', 21 *EJIL* (2010) 41; D. Bodansky, J. Brunnée, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007), at chs 28 and 29; Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental L Rev* (2007) 471; A.E. Boyle and M.R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996). Even environmental lawyers can be blind to the human rights perspectives: there is no reference to them in C. Streck *et al*., *Climate Change and Forests, Emerging Policy and Market Opportunities* (2010).

3 The most important is Art. 24, 1981 AfCHPR, on which see Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria ('SERAC v. Nigeria – the Ogoniland Case'), AfCHPR, Communication 155/96 (2002), at paras. 52–53.

4 E.g., ICESCR 1966, Art. 12; European Social Charter 1961, Art. 11; Additional Protocol to the AmCHR 1988, Art. 11; Convention on the Rights of the Child 1989, Art. 24(2)(c). See Churchill, 'Environmental Rights in Existing Human Rights Treaties', *in* Boyle and Anderson (eds), *supra* note 2, at 89.

5 Higgins, 'A Babel of Judicial Voices?', 55 *ICLQ* (2006) 791, at 798. See also *Diallo Case (Guinea v. Democratic Republic of Congo)* [2010] ICJ Rep, at paras 64–68.

environmental case law and a cross-fertilization of ideas between the different human rights systems.[6]

The rapid development of environmental jurisprudence in Europe has resulted in the consistent rejection of proposals for an environmental protocol to be added to the ECHR.[7] However, a *Manual on Human Rights and the Environment* adopted by the Council of Europe in 2005 reviews the Court's decisions and sets out some general principles.[8] In summary, cases such as *Guerra*, *Lopez Ostra*, *Öneryildiz*, *Taskin*, *Fadeyeva*, *Budayeva*, and *Tatar* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information.[9] Both the right to life and the right to respect for private life and property entail more than a simple prohibition on government interference: governments additionally have a positive duty to take appropriate action to secure these rights.[10] That is why some of the environmental cases concern the failure of government to regulate or enforce the law (*Lopez Ostra*, *Guerra*, *Fadeyeva*) while others focus especially on the procedure of decision-making (*Taskin*).[11] However, although protection of the environment is a legitimate objective that can justify governments limiting certain rights, including the right to possessions and property, human rights law does not protect the environment *per se*.[12]

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6 See Judge Trindade *in Caesar v. Trinidad and Tobago* (2005) IACHR Sers. C, Nº. 123, at paras 6–12: '[t]he converging case-law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection' (at para. 7).

7 On 16 June 2010 the Committee of Ministers again decided not to add a right to a healthy and viable environment to the ECHR.

8 See Council of Europe: *Final Activity Report on Human Rights and the Environment*, DH-DEV (2005) 006 rev, 10 Nov. 2005, App. II ('Council of Europe Report').

9 *Lopez Ostra v. Spain*, 20 EHRR (1994) 277; *Guerra v. Italy*, 26 EHRR (1998) 357; *Fadeyeva v. Russia*, 45 EHRR (2007) 10; *Öneryildiz v. Turkey*, 41 EHRR (2005) 20; *Taskin v. Turkey*, 42 EHRR (2006) 50, at paras 113–119; *Tatar v. Romania* [2009] ECtHR, at para. 88; *Budayeva v. Russia* [2008] ECtHR.

10 See *ibid.*, at paras 129–133; *Öneryildiz v. Turkey*, *supra* note 9, at paras 89–90. See also UNHRC, General Comment Nº. 6 on Article 6 of the ICCPR, 16th Session, 1982; *Villagram Morales et al. v. Guatemala* (1999) IACHR Sers. C, Nº. 63, at para. 144.

11 See *infra*, section 3.

12 See *infra*, section 4.

Early in 2011, the UN Human Rights Council initiated a study of the relationship between human rights and the environment.[13] This led in March 2012 to the appointment of an independent expert who was asked to make recommendations on human rights obligations relating to the enjoyment of a 'safe, clean, healthy and sustainable environment'.[14] We will look at the work of the UNHRC in section 2. UNEP has also considered much the same question, and an expert working group produced a draft declaration and commentary in 2009–2010.[15] An earlier UNHRC project to adopt a declaration on human rights and the environment terminated in 1994 with a report and the text of a declaration that failed to secure the backing of states.[16] With hindsight it can be seen that this early work was premature and overly ambitious, and it made no headway in the UN. However, the relationship between human rights and environmental protection in international law is far from simple or straightforward. The topic is challenging for the agenda of human rights institutions, and for UNEP, partly because it straddles two competing bureaucratic hegemonies, but it also poses some difficult questions about basic principles of human rights law. We will explore these in later sections of this article.

The merits of any proposal for a declaration or protocol on this subject thus depend on how far it deals with fundamental problems or merely window dresses what we already know. There is little to be said in favour of simply codifying the application of the rights to life, private life and property in an environmental context. Making explicit in a declaration or protocol the greening of existing human rights that has already taken place would add nothing and clarify little. As Lauterpacht noted in 1949, '[c]odification which constitutes a record

13 UN Human Rights Council (UNHRC) res. 16/11, 'Human Rights and the Environment', 24 Mar. 2011.

14 UNHRC res. 19/12, 'Human Rights and the Environment', 20 Mar. 2012.

15 UNEP, High Level Expert Meeting on the New Future of Human Rights and Environment, Nairobi 2009. This draft declaration was completed in 2010 but has not been published. The author was co-rapporteur together with Prof. Dinah Shelton.

16 Draft Declaration of Principles on Human Rights and the Environment, ECOSOC, *Human Rights and the Environment*, Final Report (1994) UN Doc E/CN 4/Sub 2/1994/9. The text of the draft declaration is reproduced in Boyle and Anderson, *supra* note 2, at 67–69. See Popovic, 'In Pursuit of Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment', 27 *Columbia Human Rts L Rev* (1996) 487.

of the past rather than a creative use of the existing materials – legal and others – for the purpose of regulating the life of the community is a brake upon progress'.[17] If useful codification necessarily contains significant elements of progressive development and law reform, the real question is how far it is politic or prudent to go.[18] The question therefore is not whether a declaration or protocol on human rights and the environment should deal with existing civil and political rights, but how much more it should add. What can it say that is new or that develops the existing corpus of human rights law? There are three obvious possibilities.

First, procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account. Doing so would build on existing law, would endorse the value of procedural rights in an environmental context, and would clarify their precise content at a global level. In section 3 we consider whether it could also go further by developing a public interest model of accountability, more appropriate to the environmental context, and drawing in this respect on the 1998 Aarhus Convention.

Secondly, a declaration or protocol could be an appropriate mechanism for articulating in some form the still controversial notion of a right to a decent environment. Such a right would recognize the link between a satisfactory environment and the achievement of other civil, political, economic, and social rights. It would make more explicit the relationship between the environment, human rights, and sustainable development and address the conservation and sustainable use of nature and natural resources. Most importantly, it would offer some means of balancing environmental objectives against economic development. In section 4 we consider including such a right within the corpus of economic, social, and cultural rights.

Thirdly, in section 5 we consider the difficult issue of the extra-territorial application of existing human rights treaties. This is relevant to transboundary pollution and global environmental problems, such as climate change, because if human rights law

17 UN, *Survey of International Law in Relation to the Work of the ILC*, GAOR A/CN.4/Rev. 1 (1949), at paras 3–14 (hereafter 'UN Survey').
18 *Ibid.*, at para 13.

does not have extraterritorial scope in environmental cases then we cannot easily use it to help protect the global environment. Even if we cross this hurdle, however, the problems remain considerable.

2. ENVIRONMENTAL RIGHTS AND THE UN HUMAN RIGHTS INSTITUTIONS

Unlike human rights courts, it has not been clear until now how far the UN human rights community takes environmental issues seriously. There is no doubt that the UN institutions realize that civil, political, economic, and social rights have environmental implications that could help to guarantee some of the indispensable attributes of a decent environment. A 2009 report for the Office of the High Commissioner on Human Rights (OHCHR) emphasizes the key point that '[w]hile the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing'.[19]

The 2011 OHCHR Report notes that '[h]uman rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection and promoting policy coherence, legitimacy and sustainable outcomes',[20] but it does not attempt to set out any new vision for the relationship between human rights and the environment. It summarizes developments in the UN treaty bodies and human rights courts, and records what the UNHCR has already done in this field. Three theoretical approaches to the relationship between human rights and the environment are identified.[21] The first sees the environment as a 'precondition to the enjoyment of human rights'. The second views human rights as 'tools to address environmental issues, both procedurally and substantively'. The third integrates human rights and the environment under the concept of sustainable development. It identifies also 'the call from

19 UNHRC, *Report of the OHCHR on the Relationship Between Climate Change and Human Rights* (hereafter 'OHCHR 2009 Report'), UN Doc. A/HRC/10/61, 15 Jan. 2009, at para. 18.

20 OHCHR, *Analytical Study on the Relationship Between Human Rights and the Environment* (hereafter 'OHCHR 2011 Report'), UN Doc. A/HRC/19/34, 16 Dec. 2011, at para. 2.

21 *Ibid.*, at paras 6–9.

some quarters for the recognition of a human right to a healthy environment' and notes the alternative view that such a right in effect already exists.[22] The report recognizes that many forms of environmental damage are transnational in character, and that the extraterritorial application of human rights law in this context remains unsettled. It concludes that 'further guidance is needed to inform options for further development of the law in this area'.[23]

UNHRC Resolution 2005/60 (2005) also recognized the link between human rights, environmental protection, and sustainable development. *Inter alia*, it '[e]ncourages all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings, including redress and remedy'. Implementation of Rio Principle 10 is the most significant element here because, like the Aarhus Convention, it acknowledges the importance of public participation in environmental decision-making, access to information, and access to justice.

The Council has made the connection between human rights and climate change:[24]

> *Noting* that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.

It is worth noting here that climate change is already regarded in international law as a 'common concern of humanity',[25] and thus as an issue in respect of which all states have legitimate concerns. The Human Rights Council is therefore right to take an interest in the matter. Nevertheless, before concluding that human rights law may

22 *Ibid*., at para. 12.
23 *Ibid*., at paras 64-73.
24 UNHRC res. 10/4 (2009) on Human Rights and Climate Change. See generally S. Humphreys (ed.), *Human Rights and Climate Change* (2009).
25 See UN GA Res. 43/53 on Global Climate Change (1988); 1992 Convention on Climate Change, Preamble.

provide answers to the problem of climate change, two observations in the 2009 OHCHR report are worth highlighting. First, '[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense'.[26] The report goes on to note how the multiplicity of causes for environmental degradation and the difficulty of relating specific effects to historic emissions in particular countries make attributing responsibility to any one state problematic. Secondly, 'human rights litigation is not well-suited to promote precautionary measures based on risk assessments, unless such risks pose an imminent threat to the human rights of specific individuals. Yet, by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasizes the need to avoid unnecessary delay in taking action to contain the threat of global warming'.[27] On the view set out here, a human rights perspective on climate change essentially serves to reinforce political pressure coming from the more vulnerable developing states. Its utility is rhetorical rather than juridical. We will return to this question later.

A final but important point is that the UNHRC has appointed special *rapporteurs* to report on various environmental issues.[28] A number of these independent reports have covered environmental conditions in specific countries,[29] but the most significant is the longstanding appointment of a special *rapporteur* on the illicit movement and dumping of toxic and dangerous products and wastes. The activity of the special *rapporteur* is confined to country visits and annual reports. The present incumbent does not paint an encouraging picture:

> The Special Rapporteur remains discouraged by the lack of attention paid to the mandate. During consultations with Member States, the Special Rapporteur is often confronted with arguments that issues of toxic waste management are

26 OHCHR 2009 Report, *supra* note 19, at para. 70.

27 *Ibid*., at para. 91.

28 For a full summary see OHCHR 2011 Report, *supra* note 20, at paras 41–55.

29 See, e.g., UNHRC, Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation in Costa Rica, UN Doc. A/HRC/12/24/Add. 1, 23 June 2009; UNHRC, Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/10/18, 24 Feb. 2009.

> more appropriately discussed in environmental forums than at the Human Rights Council. … He calls on the Human Rights Council to take this issue more seriously. He is discouraged by the limited number of States willing to engage in constructive dialogue with him on the mandate during the interactive sessions at the Human Rights Council.[30]

This report is revealing for what it says about the lack of priority given to the subject and sense that it is not really perceived as a human rights issue at all.

One possible explanation for the reluctance of UN human rights institutions to engage more directly with human rights and the environment is their long-standing project on corporate responsibility for human rights abuses. While the primary responsibility for promoting and protecting human rights lies with the state,[31] it has long been recognized that businesses and transnational corporations have contributed to or been complicit in the violation of human rights in various ways. Developing countries, especially, may lack the capacity to control foreign companies extracting minerals, oil, or other natural resources in a manner that harms both the local population and the environment. Weak government, poor regulation, lax enforcement, corruption, or simply a too-close relationship between business and government underlies the problem. Classic examples are Shell's impact on the environment, natural resources, health, and living standards of the Ogoni people in Nigeria,[32] or the health effects of toxic waste disposed of in Abidjan by a ship under charter to Trafigura, an oil trading company based in the EU.[33]

In 2005, at the request of the UN Commission on Human Rights, the UN Secretary-General appointed Professor John Ruggie of Harvard University as his special representative on the issue of human rights and transnational corporations and other business enterprises. The 'Protect, Respect and Remedy Framework' adopted

30 UNHRC, Report of the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, UN Doc. A/HRC/9/22, 13 Aug. 2008, at para. 34.

31 See, e.g., UNHRC Res. 17/4, 'Human rights and transnational corporations and other business enterprises', 6 July 2011.

32 SERAC v. Nigeria, supra note 3.

33 UNEP, Report of 1st meeting of the Expanded Bureau of the 8th meeting of the Conference of the Parties to the Basel Convention (2007) UNEP/SBC/BUREAU/8/1/7, sect. III.

by the UN Human Rights Council[34] does not require us to presuppose that international human rights obligations apply to corporations directly. It focuses instead on the adverse impact of corporate activity on human rights and corporate complicity in breaches of human rights law by government.[35] There are three pillars: first the state's continuing duty to protect human rights against abuses by business;[36] secondly, the responsibility of corporations to respect human rights through the use of due diligence;[37] thirdly, individual access to remedy: governments must ensure that where human rights are harmed by business activities there is adequate accountability and effective redress, whether judicial or non-judicial.[38]

What should we make of this 'framework' for business and human rights when considering the current law on human rights and the environment? There is no doubt that states have a responsibility to protect human rights from environmental harm caused by business and industry. It is irrelevant that the state itself does not own or operate the plant or industry in question. As the ECtHR said in *Fadeyeva*, the state's responsibility in environmental cases 'may arise from a failure to regulate private industry'.[39] The state thus has a duty 'to take reasonable and appropriate measures' to secure rights under human rights conventions.[40] In *Öneryildiz* the ECtHR emphasized that '[t]he 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'.[41] The Court held that this

34 UNHRC, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/8/5, 7 Apr. 2008. Guiding Principles on Business and Human Rights, UN Doc. A/HRC/17/31, 21 Mar. 2011, are intended to provide guidance on implementation of the framework.

35 UNHRC, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Annex: 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), at paras 73–74, 77.

36 *Ibid*., at paras 27–50.

37 *Ibid*., at paras 50–72.

38 *Ibid*., at paras 81–102.

39 45 EHRR (2007) 10, at para. 89.

40 *Ibid*.

41 41 EHRR (2005) 20, at para. 89.

obligation covered the licensing, setting up, operation, security, and supervision of dangerous activities, and required all those concerned to take 'practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks'.[42]

Nor is this view of human rights law uniquely European. The *Ogoniland Case* is a reminder that unregulated foreign investment which contributes little to the welfare of the local population but instead harms its health, livelihood, property, and natural resources may amount to a denial of human rights for which the host government is responsible in international law.[43] As Shelton has observed, 'The result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights'.[44] It also shows how empowering national NGOs can provide the key to successful legal action.[45]

These examples do not in any sense invalidate the UN Framework's focus on the need for business to respect human rights, but they do serve to emphasize again that failure by states to respect their human rights obligations is the core of the problem, not the periphery. Even if we endorse the UN Framework on Business and Human Rights, it is still necessary to identify the relationship between human rights obligations and environmental protection in order to determine what environmental responsibilities we expect corporations to respect.

Overall, therefore, the record of the UNHRC and OHCHR on human rights and environment has been somewhat understated until now: human rights courts have contributed a great deal more to the subject than interstate environmental negotiations or the specialists of the UN human rights community. It is not immediately clear why this should be so, but of course it also begs the question what more the UN could contribute to the development of human rights approaches to environmental protection. To answer that question requires us to stand back and review the three difficult questions identified in section 1. These questions will form the subject of the rest of this article.

42 *Ibid*., at para. 90.
43 SERAC v. Nigeria, supra note 3.
44 Shelton, 'Decision Regarding case 155/96', 96 *AJIL* (2002) 937, at 942.
45 *SERAC v. Nigeria*, *supra* note 3, at para. 49.

3. THE DEVELOPMENT OF PROCEDURAL RIGHTS IN AN ENVIRONMENTAL CONTEXT

Not all 'environmental' rights are found in mainstream human rights treaties. Any consideration of human rights in an environmental context has to take into account the development of specifically environmental rights in other treaties, and it may be necessary to interpret and apply human rights treaties with that in mind.[46] The most obvious example is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted by the UN Economic Commission for Europe.[47] As Kofi Annan, formerly Secretary-General of the UN, observed, 'Although regional in scope, the significance of the Aarhus Convention is global. . . [I]t is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations.'[48] In his view the Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights'.[49] Its preamble not only recalls Principle 1 of the 1972 Stockholm Declaration on the Human Environment and recognizes that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself ', but it also asserts that 'every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'.

However, these broad assertions of rights are somewhat misleading. The focus of the Aarhus Convention is in reality strictly procedural in content, limited to public participation

46 1969 Vienna Convention on the Law of Treaties (VCLT), Art. 31(3)(c); *Demir v. Turkey* [2008] ECtHR 1345. As 'living instruments' human rights treaties must be interpreted by reference to current conditions: see *Soering v. UK,* 11 EHRR (1989) 439, at para. 102; *Öcalan v. Turkey,* 37 EHRR (2003) 10; *Advisory Opinion on the Right to Information on Consular Assistance* (1999) IACHR Series A, No.16, at paras 114–115; *Advisory Opinion on the Interpretation of the American Declaration on the Rights and Duties of Man* (1989) IACHR Series A, Nº. 10, at para. 43; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) IACHR Ser. C, Nº. 20, at paras 146–148.

47 See UNECE, The Aarhus Convention – An Implementation Guide (2000).

48 *Ibid*., 'Foreword', at p. v.

49 Ibid.

in environmental decision-making and access to justice and information. It draws inspiration from Principle 10 of the 1992 Rio Declaration on Environment and Development, which gives explicit support in mandatory language to the same category of procedural rights.[50] Public participation is a central element in sustainable development, and the incorporation of Aarhus-style procedural rights into general human rights law significantly advances this objective.[51] In this context, the emphasis on procedural rights in Articles 6–8 of Aarhus can be seen as a means of legitimizing decisions about sustainable development, rather than simply an exercise in extending participatory democracy or improving environmental governance.[52]

Aarhus is also significant insofar as Article 9 reinforces access to justice and the obligation of public authorities to enforce existing law. Under Article 9(3) applicants entitled to participate in decision-making will also have the right to seek administrative or judicial review of the legality of the resulting decision. A general failure to enforce environmental law will also violate Article 9(3).[53] Article 9(4) requires that adequate, fair, and effective remedies are provided. This reflects the decisions in *Lopez Ostra* and *Guerra* under Article 8 of the ECHR.[54]

Anyone who doubts that Aarhus is a human rights treaty should bear in mind three points. First, it builds upon the long-established human right of access to justice and on procedural elements that serve to protect the rights to life, health, and family life.[55] Secondly, it confers

50 Principle 10 provides: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

51 See 1992 UN Conference on Environment and Development, Agenda 21, ch. 23, especially at para. 23.2.

52 OHCHR 2011 Report, *supra* note 20, at paras 2, 7–9.

53 Gatina, Gatin, Konyushkova – Findings and Recommendation with Regard to Compliance by Kazakhstan, Compliance Committee, UNECE/MP.PP/C.1/2006/4/Add. 1 (2006), at paras 30–31.

54 *Lopez Ostra v. Spain,* 20 EHRR (1994) 277; *Guerra v. Italy,* 26 EHRR (1998) 357.

55 See D. Zillman, A. Lucas, and G. Pring (eds), *Human Rights in Natural Resource Development* (2002), especially chs 1 and 4; Ebbesson, 'Public Participation', in

rights directly on individuals and not simply on states. Unusually for an environmental treaty the most innovative features of the 'non-confrontational, non-judicial and consultative' procedure established under Article 15 of the Convention are that members of the public and NGOs may bring complaints before a non-compliance committee the members of which are not only independent of the parties but may be nominated by NGOs.[56] The committee has given rulings which interpret and clarify provisions of the convention and a body of case law is emerging.[57] In all these respects it is closer to human rights treaty monitoring bodies than to the non-compliance procedures typically found in other multilateral environmental agreements.[58] Kravchenko concludes that 'independence, transparency, and NGO involvement in the Convention's novel compliance mechanism

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Bodansky, Brunnée, and Hey, *supra* note 2, at Ch. 29; F. Francioni (ed.), *Access to Justice as a Human Right* (2007), at chs 1 and 5; Lee and Abbott, 'Usual Suspects? Public Participation Under the Aarhus Convention', 66 *MLR* (2003) 80; Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yrbk Int'l Environmental L* (1997) 51.

56 Aarhus Convention, Decision 1/7: Review of Compliance, *Report of 1st Mtg of Parties*, UN Doc ECE/MP.PP/2/Add. 8 (2004). See also Report of the Compliance Committee, UN Doc. ECE/MP.PP/2005/13 (2005) and generally Kravchenko, 'The Aarhus Convention and Innovations in Compliance with MEAs', 18 *Colorado J Int'l Environmental L & Policy* (2007) 1; Koester, 'The Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters', in G. Ulfstein, T. Marauhn, and A. Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (2007), at 179; Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1999 Protocol on Water and Health to the 1982 Convention on the Protection and Use of Transboundary Watercourses and International Lakes', in T. Treves *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), at ch.14. The compliance procedure adopted in 2007 under the 1999 UNECE Protocol on Water and Health is modelled directly on the Aarhus procedure.

57 See, e.g., Bond Beter Leefmilieu Vlaanderen VZW, Compliance Committee, UNECE/MP PP/C 1/2006/4/Add 2 (2006), at paras 33–36; Bystre Deep-water Navigation Canal – Findings and Recommendation with Regard to Compliance by Ukraine, Compliance Committee, UNECE/MP PP/C 1/2005/2/Add 3 (2005), at paras 26–28; Gatina, Gatin, Konyushkova: Findings and Recommendation with Regard to Compliance by Kazakhstan, Compliance Committee, UNECE/MP PP/C 1/2006/4/Add 1 (2006), at paras 30–31.

58 Contrast the Montreal Protocol NCP and the Kyoto Protocol NCP and see UNEP, *Compliance Mechanisms Under Selected MEAs* (UNEP, 2007). On human rights treaty bodies see P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000), and on MEA non-compliance procedures see Treves *et al.* (eds), *supra* note 56.

represent an ambitious effort to bring democracy and participation to the very heart of compliance itself.[59] Thirdly, the essential elements of the convention – access to information, public participation in environmental decision-making, and access to justice – have all been incorporated into European human rights law through the jurisprudence of the ECtHR.[60] In substance, the Aarhus Convention rights are also ECHR rights, enforceable in national law and through the Strasbourg Court like any other human rights. To some extent the same has happened under other human rights treaties, so the point is not simply a European one. For example, the right to 'meaningful consultation' is upheld by the Inter-American Commission in the *Maya Indigenous Community of Toledo Case*,[61] and by the African Commission in the *Ogoniland Case*.[62]

The Aarhus Convention thus represents an important extension of environmental rights and of the corpus of human rights law. How important can best be explained by recalling the most important case, *Taskin v. Turkey*.[63] Turkey, it should be noted, is not a party to the Aarhus Convention. That did not stop the Strasbourg Court from reading Aarhus rights into the ECHR in a particularly extensive form. Two points stand out. First, participation in the decision-making process by those likely to be affected by environmental nuisances will be essential for compliance with Article 8 of the ECHR and Article 6 of the Aarhus Convention. The Court in *Taskin v. Turkey* held that 'whilst Article 8 contains no explicit procedural requirements, the

59 Kravchenko, *supra* note 56, at 49.

60 *Taskin v. Turkey,* 42 EHRR (2006) 50; *Tatar v. Romania* [2009] ECtHR; *Öneryildiz v. Turkey,* 41 EHRR (2005) 20; *Lopez Ostra v. Spain,* 20 EHRR (1994) 277; *Guerra v. Italy,* 26 EHRR (1998) 357.

61 *Maya Indigenous Community of the Toledo District v. Belize* [2004] IACHR Case 12.053, Report Nº. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, at 727, paras 154–155. The Commission relies *inter alia* on the right to life and the right to private life, in addition to finding consultation a 'fundamental component of the State's obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied'. See also ILO Convention Nº. 169 Concerning Indigenous and Tribal Peoples and the UNHRC decision in *Ilmari Lansman et al. v. Finland* (1996) ICCPR Communication Nº. 511/1992, at para. 9.5, which stresses the need 'to ensure the effective participation of members of minority communities in decisions which affect them'.

62 *SERAC v. Nigeria*, *supra* note 3, at para. 53: 'providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.

63 42 EHRR (2006) 50.

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'.[64] The interests of those affected must on this view be taken into account and given appropriate weight when balancing them against the benefits of economic development.[65] Secondly, *Taskin* also envisages an informed process. The Court held that '[w]here a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake'.[66] The words 'environmental impact assessment' are not used here, but in many cases an EIA will be necessary to give effect to the evaluation process envisaged by the Court. Article 6 of Aarhus also has detailed provisions on the information to be made available.[67] As a comparison with Annex II to the 1991 Espoo Convention on EIA in a Transboundary Context shows, the matters listed in Article 6 of Aarhus are normally included in an EIA.[68]

Like the *Ogoniland* and *Maya Indigenous Community* cases, *Taskin* thus suggests that the most important contribution existing human rights law has to offer with regard to environmental protection and sustainable development is the empowerment of individuals and groups affected by environmental problems, and for whom the opportunity to participate in decisions is the most useful and direct means of influencing the balance of environmental, social, and economic interests.[69] From this perspective the ICCPR and IACHR

64 *Taskin*, *supra* note 60, at para. 118. See also *Tatar v. Romania* [2009] ECtHR, at para. 88.

65 See in particular *Hatton v. UK* [2003] ECtHR (Grand Chamber).

66 *Taskin*, *supra* note 60, at para. 119.

67 Aarhus Convention, Art. 6(6) requires, *inter alia*, a description of the site, the effects of the activity, preventive measures, and an outline of alternatives.

68 Annex II to the Espoo Convention additionally includes an indication of predictive methods, underlying assumptions, relevant data, gaps in knowledge and uncertainties, as well as an outline of monitoring plans.

69 A point recognized by the OHCHR: see UN, *Claiming the Millennium Development Goals: A Human Rights Approach* (NY and Geneva, 2008), at VIII, Goal 7: 'a human rights approach to sustainable development emphasizes improving and implementing accountability systems, [and] access to information on environmental issues'.

case law, which espouses participatory rights for indigenous peoples. appears simply as a particular manifestation of the broader principle. The key point is that these participatory rights represent the direction in which human rights law with regard to the environment has evolved since 1994.[70]

The Aarhus Convention is also important because, unlike human rights treaties, it provides for public interest activism by NGOs,[71] insofar as claimants with a 'sufficient interest' are empowered to engage in public interest litigation even when their own rights or the rights of victims of a violation are not in issue. Article 9 of Aarhus thus appears to go beyond the requirements of the ECHR. So does Article 6, which extends public participation rights to anyone having an 'interest' in the decision, including NGOs.[72] 'Sufficient interest' is not defined by the Convention but, in its first ruling, the Aarhus Compliance Committee held that, '[a]lthough what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention'.[73] Governments are not required to develop an *actio popularis*, but they must not use national law 'as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment'.[74] Access to such procedures 'should thus be the presumption, not the exception'.[75]

The contrast between the broader public interest approach of the Aarhus Convention and the narrower ECHR/ICCPR/AmCHR

70 The present author gives a fuller account of the Convention in P. Birnie, A.E. Boyle, and C. Redgwell, *International Law and the Environment* (3rd edn, 2009), at 288–298.

71 Arts 4(1)(a), 6, and 9. See Pedersen, 'European Environmental Human Rights', 21 *Georgetown Int'l Environmental L Rev* (2008) 73.

72 Art. 6 participation rights are available to 'the public concerned', defined by Art. 2(5) as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.

73 See UNECE, Compliance Committee, *Bond Beter Leefmilieu Vlaanderen VZW – Findings and Recommendation with Regard to Compliance by Belgium* (Comm. ACCC/C/2005/11) ECE/MP.PP/C.1/2006/4/Add. 2 (28 July 2006), at paras 33–36.

74 *Ibid*.

75 *Ibid*, at para 36. See also Art. 9(3).

focus on the rights of victims of a violation is evident in the case law.[76] This is a significant difference, with important implications for any debate about an autonomous right to a decent or satisfactory environment. Not only do environmental NGOs use access to information and lobbying to raise awareness of environmental concerns, but research has shown that they tend to have high success rates in enforcement actions and public interest litigation.[77] Moreover, the broader approach taken by Aarhus is followed in later European agreements. Thus, Article 8(1) of the 2003 UNECE Protocol on Strategic Environmental Assessment provides that '[e]ach party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes'. The public for this purpose includes relevant NGOs.[78]

The question therefore arises: should the ECtHR case law follow the public interest precedent set by Aarhus, as it has in so many other respects?[79] What purpose would public interest environmental litigation serve in a human rights context? NGOs are already entitled to protect the human rights of victims of violations, and there is no need to extend their standing for that purpose. Extending their standing in environmental matters makes sense only if the public interest in the environment itself is to be protected – that is the point of Aarhus. Answering the question in the negative would merely affirm the existing position that human rights law does not have anything to say about protection of the environment as such. Answering it in the affirmative would go some way towards opening the door for a right to a decent environment. That brings us to the question of greatest substance: do we want such a right? Do we want to expand rather than simply interpret the existing corpus of international human rights law? This is not simply a matter of European concern. Rather, it potentially affects all of the principal

76 See *Kyrtatos v. Greece* [2003] ECtHR 242, at para. 52; *Metropolitan Nature Reserve v. Panama* [2003] IACHR, Case 11.533, Report Nº. 88/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2, at 524, para. 34; *Brun v. France* [2006] ICCPR Communication Nº. 1453/2006, at para. 6.3. See sect. 4 below where these cases are further considered.

77 See de Sadeleer, Roller, and Dross, *Access to Justice in Environmental Matters*, Final Report, Doc. ENVA.3/ETU/2002/0030, Part I, at sect. 3.

78 UNECE Protocol on Strategic Environmental Assessment Art. 2(8).

79 See Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts', 20 *J Environmental L* (2008) 417.

human rights treaties, given the way human rights courts 'work consciously to co-ordinate their approaches'.[80]

4. A RIGHT TO A DECENT ENVIRONMENT?

What constitutes a decent environment is a value judgement, on which reasonable people will differ. Policy choices abound in this context: what weight should be given to natural resource exploitation over nature protection, to industrial development over air and water quality, to land-use development over conservation of forests and wetlands, to energy consumption over the risks of climate change, and so on? These choices may result in wide diversities of policy and interpretation, as different governments and international organizations pursue their own priorities and make their own value judgements, moderated only to some extent by international agreements on such matters as climate change and the conservation of biological diversity. The virtue of looking at environmental protection through the impact of harmful activities on other human rights, such as life, private life, or property, is that it focuses attention on what matters most to individuals: the detriment to important, internationally protected values from uncontrolled environmental harm. This approach avoids the need to define such notions as a satisfactory or decent environment. Instead, it allows a court to balance respect for convention rights and economic development. The Strasbourg Court makes the point very cogently: 'national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore in reaching its judgments, the Court affords the national authorities in principle a wide discretion'.[81]

When I first wrote on this subject in 1996 I shared the scepticism of others towards the idea of a right to a decent environment.[82] Fundamentally it looked like an attempt to turn an essentially political question into a legal one. It would take power away from democratically accountable politicians and give it to courts or treaty bodies. Predictably, Western governments ensured that the idea was stillborn within the UN system. My own scepticism has not disappeared, but it has perhaps been tempered by an awareness of the

80 *Supra* notes 5 and 6.
81 2005 Council of Europe Report, *supra* note 8, App. II, 10, at para. [13].
82 Boyle and Anderson, *supra* note 2, at ch. 3.

significant value of such a right in countries whose environmental problems are more extreme than those affecting Western Europe.[83] Moreover, in many respects the basic elements of such a right already exist. There may therefore be some merit in revisiting the question, particularly in the context of climate change, where some vision of a decent environment has global implications.

Despite their evolutionary character, human rights treaties (with the exception of the African Convention) still do not guarantee a right to a decent or satisfactory environment if that *concept* is understood in qualitative terms unrelated to impacts on the rights of specific humans. As the ECtHR reiterated in *Kyrtatos*, 'neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such'.[84] This case involved the illegal draining of a wetland. The European Court could find no violation of the applicants' right to private life or enjoyment of property arising out of the destruction of the area in question. Although they lived nearby, the applicants' rights were not affected. They were not entitled to live in any particular environment, or to have the surrounding environment indefinitely preserved. The applicants succeeded only insofar as the state's non-enforcement of a court judgment violated their Convention rights.

The Inter-American Commission on Human Rights has similarly rejected as inadmissible a claim on behalf of all the citizens of Panama to protect a nature reserve from development.[85] Nor does the practice of the UN Human Rights Committee differ. In a case about genetically modified crops it held that 'no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant'.[86] None of these cases lends support to any conception of a freestanding individual right to a decent environment.

Should we then go the whole way and create a right to a decent environment in international human rights law? There are obvious problems of definition and anthropocentricity, well-rehearsed in

83 Notably the Ogoniland Case, supra note 3, and the Maya Indigenous Community Case, supra note 61.

84 *Kyrtatos v. Greece, supra* note 56, at para. 52.

85 *Metropolitan Nature Reserve v. Panama* [2003] IACHR Case 11.533, at para. 34.

86 *Brun v. France, supra* note 76, at para. 6.3.

the literature.[87] But there are also deeper issues of legal architecture to be resolved. At the substantive level, a decent or satisfactory environment should not be confused with the procedural innovations of the Aarhus Convention, or with the case law on the right to life, health, or private life. To do so would make it little more than a portmanteau for the greening of existing civil and political rights. The ample jurisprudence shows clearly that this is unnecessary and misconceived.[88] To be meaningful, a right to a decent environment has to address the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights, a catalogue which for good reasons there is great reluctance to expand.[89] A right to a decent environment is best envisaged, not as a civil and political right, but within the context of economic and social rights, where to some extent it already finds expression through the right to water, food, and environmental hygiene.

The UN Committee on Economic, Social and Cultural Rights has adopted various General Comments relevant to the environment and sustainable development, notably General Comments 14 and 15, which interpret Articles 11 and 12 of the ICESCR to include access to sufficient, safe, and affordable water for domestic uses and sanitation.[90] They also cover the prevention and reduction of exposure to harmful substances including radiation and chemicals, or other detrimental environmental conditions that directly or indirectly impact upon human health. These are useful and important interpretations that have also had some impact on related areas of international law, including Article 10 of the 1997 UN Watercourses Convention, which gives priority to 'vital human

87 See, e.g., Handl, 'Human Rights and the Protection of the Environment: A Mildly Revisionist View', in A.C. Trindade (ed.), *Human Rights, Sustainable Development and the Environment* (1992), at 117; id, 'Human Rights Protection and the Environment', *in* A. Eide, C. Krause, and A. Rosas (eds), *Economic, Social and Cultural Rights* (2001), at 303-328; Boyle and Anderson, *supra* note 2, at chs 2–4. Contrast Shelton, 'Human Rights, Environmental Rights and the Right to the Environment', 28 *Stanford J Int'l L* (1991) 103.

88 *Supra*, section 1.

89 Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', 78 *AJIL* (1984) 607.

90 UNCESCR, General Comment Nº. 14: The Right to the Highest Attainable Standard of Health, UN Doc.E/C.12/2000/4 (2000); General Comment Nº. 15: The Right to Water, UN Doc.E/C.12/2002/11 (2003). The ICJ has held that 'great weight' should be attributed to interpretations adopted by independent treaty supervisory bodies: see *Diallo Case (Guinea v. DRC), supra* note 5, at paras 66–67.

needs' when allocating scarce water resources.[91] On this view, existing economic and social rights help to guarantee some of the indispensable attributes of a decent environment. What more would the explicit recognition of a right to a decent environment add?

Arguably, it would add what is currently lacking from the corpus of UN economic and social rights, namely a broader and more explicit focus on environmental quality which could be balanced directly against the covenant's economic and developmental priorities. Article 1 of the ICESCR reiterates the right of peoples 'freely [to] pursue their economic, social and cultural development' and 'freely [to] dispose of their natural wealth and resources', but other than to 'the improvement of all aspects of environmental and industrial hygiene' (Article 12), the Covenant makes no specific reference to protection of the environment. Despite the efforts of the treaty organs to invest the Covenant with greater environmental relevance, it still falls short of giving a decent environment recognition as a significant public interest. Lacking the status of a right means that the environment can be trumped by those values which have that status, including economic development and natural resource exploitation.[92] This is an omission which needs to be addressed if the environment as a public good is to receive the weight it deserves in the balance of economic, social, and cultural rights. That could be one way of using human rights law to address the impact of the greenhouse gas emitting activities which are causing climate change and adversely affecting the global environment.

The key question therefore is what values we think a covenant on economic and social rights should recognize in the modern world. Is the environment – or the global environment – a sufficiently important public good to merit economic and social rights status comparable to economic development? The answer endorsed repeatedly by the UN over the past 40 years is obviously yes: at Stockholm in 1972, at Rio in 1992, and at Johannesburg in 2002, the consensus of states has favoured sustainable development as the leading concept of international environmental policy. Although 'sustainable development' is used throughout the Rio Declaration, it was not until the 2002 World Summit on Sustainable

91 See Report of the 6th Committee Working Group, GAOR A/51/869 (1997).
92 Merrills, 'Environmental Rights', in Bodansky, Brunnée, and Hey, *supra* note 2, at 666.

Development that anything approaching a definition of the concept could be attempted by the UN. Three 'interdependent and mutually reinforcing pillars of sustainable development' were identified in the Johannesburg Declaration – economic development, social development, and environmental protection.[93] This seems tailor-made for a reformulation of the rights guaranteed in the ICESCR.

The challenge posed by sustainable development is to ensure that environmental protection is fully integrated into economic policy. Acknowledging that the environment is part of this equation, the 1992 Rio Declaration (Principle 3) and the 1993 Vienna Declaration on Human Rights (paragraph11) both emphasize that '[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations'. The ICJ has repeatedly referred to 'the need to reconcile economic development with protection of the environment [which] is aptly expressed in the concept of sustainable development'.[94] In the *Pulp Mills Case* the Court again noted the 'interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection *that is the essence of sustainable development*'.[95] The essential point of these examples is that, while recognizing that the right to pursue economic development is an attribute of a state's sovereignty over its own natural resources and territory, it cannot lawfully be exercised without regard for the detrimental impact on the environment or on human rights. In *Pulp Mills* the Court's very limited focus was on whether Uruguay had complied with its international obligations when deciding to build the plant, and its references to integrating economic development and environmental protection have to be seen in that context. It did not attempt to decide whether a policy of building pulp mills was sustainable development in any other sense. In effect, the process of decision-making and compliance with environmental and human rights obligations,

93 UN, *Report of the WSSD*, UN Doc. A/CONF.199/20 (2002), Res. 1, at para. 5.
94 *Gabcikovo Nagymaros Dam Case* [1997] ICJ Rep 7, at para. 140. See also *Iron Rhine Case* [2005] PCA and Higgins, 'Natural Resources in the Case Law of the International Court', *in* A.E. Boyle and D. Freestone (eds), *International Law and Sustainable Development* (1999), at ch. 5.
95 *Pulp Mills on the River Uruguay Case*, [2010] ICJ Rep, at para. 177.

rather than the nature of the development itself, constitute the key legal tests of sustainable development in current international law.[96]

If the ICJ can handle questions of this kind then it might be said that it should not be beyond the capability of human rights courts also to do so. In a sense they already have: *Hatton*,[97] the case concerning night flights at Heathrow airport, is self-evidently a case about sustainable development as understood by the ICJ, albeit one in which the terms of the discussion are limited to balancing the direct impact on the health and family life of the applicants against the benefits to the community at large. Various decisions of the Inter-American Commission of Human Rights[98] and the UN Human Rights Committee[99] in cases concerning logging, oil extraction, and mining on land belonging to indigenous peoples can be viewed from the same perspective. The African Commission's decision in *Ogoniland* is by far the most important case to address the public interest in protecting the environment as such,[100] but it does so in a setting where environmental destruction had caused serious harm to the affected communities.

The decision in *Ogoniland* can be seen as a challenge to the sustainability of oil extraction in that part of Nigeria. Given the degree of environmental harm and a lack of material benefits for the Ogoni people, it is not surprising that the African Commission does not see this case simply as a failure to maintain a fair balance between public good and private rights. The decision gives some indication of how a right to a decent or satisfactory environment could be used, but its exceptional basis in Articles 21 and 24 of the African Convention

96 See Birnie, Boyle, and Redgwell, *supra* note 70, at 125-127.

97 *Hatton v. UK* [2003] ECtHR (Grand Chamber). See also *Fägerskjöld v. Sweden* [2008] ECtHR (admissibility).

98 See Maya Indigenous Community v. Belize, supra note 61, at para. 150.

99 In *Ilmari Lansman et al. v. Finland*, *supra* note 61, at para. 9.4, the Committee concluded that Finland had taken adequate measures to minimize the impact on reindeer herding (at para. 9.7). Compare *Lubicon Lake Band v. Canada* (1990) ICCPR Comm. Nº. 167/1984, at para. 32.2, where the UNHRC found that the impact of oil and gas extraction on the applicants' traditional subsistence economy constituted a violation of Art. 27.

100 *SERAC v. Nigeria*, *supra* note 3, and Shelton, *supra* note 44; Ebeku, 'The Right to a Satisfactory Environment and the African Commission', 3 *African Human Rts LJ* (2003) 149, at 163; Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter', 1 *African J Legal Studies* (2005) 129, at 139; Coomans, 'The Ogoni Case Before the ACHPR', 52 *ICLQ* (2003) 749.

has to be recalled. It is unique in adjudicating for the first time on the right of peoples to dispose freely of their own natural resources and in ordering extensive environmental clean-up measures to be taken.[101] Moreover, the rights created by the African Convention are peoples' rights, not individual rights, so the recognition of a public interest in environmental protection and sustainable development is less of an innovation. The African Convention is the only regional human rights treaty to combine economic, social, civil, and political rights and make them all justiciable before an international court.

Clearly there can be different views on what constitutes a fair balance between economic interests and individual or group rights in such cases, and any judgment is inevitably subjective. Moreover, neither environmental protection nor human rights necessarily trumps the right to economic development. In *Hatton*, the Grand Chamber's approach affords considerably greater deference towards government economic policy than at first instance, and leaves little room for the Court to substitute its own view of the extent to which the environment should be protected from development:[102] '[a]t the same time, the Court re-iterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.'[103] On this basis, decisions about where the public interest lies are mainly for politicians, not for courts, save in the most extreme cases where judicial review is easy to justify. That conclusion is not inconsistent with the *Ogoniland Case*, where the problems were undoubtedly of a more extreme kind. But *Ogoniland* shows that the right to a decent environment can be useful at the extremes,[104] which is why the debate becomes relevant to climate change.

Any comparison between *Hatton* and the *Ogoniland Case* will inevitably point to the more conservative approach of European law. But would we want other human rights courts deciding where the

101 Although Art. 1(2) of the 1966 ICCPR also recognizes the right of peoples 'freely [to] dispose of their natural wealth and resources', it is not justiciable by the HRC under the procedure for individual complaints laid down in the Optional Protocol: see *Lubicon Lake Band v. Canada, supra* note 99, at para. 32.1.

102 [2003] ECtHR (Grand Chamber), at paras 97-104.

103 *Ibid*., at para. 97.

104 *Supra* note 100.

appropriate balance between economic and environmental objectives should lie? Should we let judges determine whether to allow the construction of coal-fired power stations instead of extending schemes for generating renewable energy? *Hatton* may suggest that, except at the extremes, human rights courts are not usually the best bodies to perform this balancing task, rather than national or international political institutions. Even if European human rights law did endorse the right to a decent environment, in whatever form, it seems unlikely that the outcome of *Hatton* would differ. On any view the balance would in principle be for governments to determine, and on the facts of that case any court or tribunal would probably have upheld the government's approach. This does not provide a good basis for tackling government policy on climate change from a human rights perspective.

As I have argued elsewhere,[105] the distinction between *Hatton* and *Taskin* is important in this context. *Hatton* shows understandable reluctance to allow the European Court of Human Rights to become a forum for appeals against the policy judgements of governments, provided they do not disproportionately affect individual rights. *Taskin* shows greater willingness to insist that decisions made by public authorities follow proper procedures involving adequate information, public participation, and access to judicial review. This remains a tenable and democratically defensible distinction. One would expect most judges of the European Court of Human Rights to be comfortable with it.

However, if we do take the view that judges are not the right people to decide what constitutes a decent or satisfactory environment, is there then no role for international human rights law in this debate? The obvious alternative would be to follow the logic of the ICESCR and revert to the UN human rights institutions and treaty bodies and allow them, rather than courts, to oversee the expansion of the corpus of economic and social rights to include a right to a decent environment. That would give the UN Committee on Economic, Social and Cultural Rights a mandate to review the scope of the Covenant in relation to the environment.[106] It would

105 Birnie, Boyle and Redgwell, *supra* note 70, at 296.

106 The Committee is composed of independent experts and was established by ECOSOC Res. 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to it in Part IV of the Covenant. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (1998), at ch. 2.

allow the balance between environmental protection and economic development to be argued in an inter-governmental forum, through a 'constructive dialogue' with states parties. Although the current UN monitoring process has 'built-in defects', including poor reporting and excessive deference to states,[107] two additional mechanisms now exist through which compliance can be scrutinized. First, as we noted earlier, the High Commissioner for Human Rights has power to appoint special *rapporteurs* to report on environmental conditions in individual countries or on specific topics.[108] Secondly, in 2009 an optional protocol for individual complaints under the Covenant was opened for signature.[109] Sceptics often question the value of all these monitoring processes, but if they do have value then the environment should be a larger part of the process.

Potentially, therefore, the ICESCR model could provide a mechanism for balancing environmental claims against competing economic objectives if the Covenant were to be amended in appropriate terms. While this would not expand the role of courts, it would expand the corpus of human rights law in a manner that fits comfortably into the existing system. It would modernize the Covenant, while also giving it greater coherence and consistency with contemporary international environmental law and policy. In that form it could give human rights law and the UN Committee on Economic and Social Rights something to contribute to the global challenge of climate change, and might help to counteract the evident inaction of states revealed by the Copenhagen and Cancun negotiations. It is this conclusion which most forcefully undermines the argument that a right to a decent environment is redundant and that general international environmental law is better placed to regulate global environmental problems.[110] What may have been persuasive in 1996 now looks increasingly threadbare, given the unimpressive record of too many states parties to the UN Convention

107 Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform', *in* Alston and Crawford, *supra* note 58, at 129.

108 *Supra* notes 29–30.

109 UNGA Res. A/RES/63/117, 10 Dec. 2008.

110 Contrast the arguments I advanced in Boyle and Anderson, *supra* note 2, at ch. 3.

on Climate Change.[111] Unrestrained carbon emissions are not a recipe for a decent environment of any kind.[112]

Incorporating a right to a decent environment in the ICESCR will not save the global climate by itself, but it may add to political pressure on governments to move further and faster towards goals already enshrined in the UN Framework Convention on Climate Change (UNFCCC) and in the commitments undertaken at Cancun in 2011. In common with the UNFCCC, this kind of human rights approach to climate change would recognize that the only viable perspective is a global one, focused not on the rights of individuals, or peoples, or states, but of humanity as whole. It would reconceptualize in the language of economic and social rights the idea of the environment as a common good or common concern of humanity. That would indeed mark '*[l]e passage d'un droit international de bon voisinage plutôt bilateral, territorial et fondé sur la reciprocité des droits et obligations, à un droit international plutôt multilateral, global, dans le cadre duquel les obligations sont souscrites au nom d'un intérêt commun*'.[113]

5. HUMAN RIGHTS, TRANSBOUNDARY POLLUTION AND CLIMATE CHANGE

Does existing human rights law have any role in tackling transboundary pollution or global climate change? The simple, sceptical, answer is no, but only if we choose to locate the *lex specialis* in the customary international law on prevention and control of transboundary harm,[114] or in global regulatory agreements such as the UNFCCC, with its associated protocols, non-binding accords,

111 See Boyle, 'The Challenge of Climate Change: International Law Perspectives', in S. Kingston (ed.), *European Perspectives on Environmental Law and Governance* (2012).

112 See IPCC, Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Summary (Geneva, 2011). The full report will be published in 2012.

113 Y. Kerbrat, S. Maljean-Dubois, and R. Mehdi (eds), *Le Droit International Face aux Enjeux Environnementaux* (2010), at 17 (footnotes omitted).

114 1992 Rio Declaration on Environment and Development, Principle 2; 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Report of the ILC 53rd Session*, GAOR, A/56/10 (2001); 1982 UN Convention on the Law of the Sea, Arts 192–222; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, at para. 29; *Pulp Mills, supra* note 95, at paras 101, 187–197; *Advisory Opinion on Responsibilities and Obligations of States with Respect to Activities in the Area* [2011] ITLOS, at paras 111–131.

and decisions of the parties.[115] On this view the problem is properly addressed by international law at an interstate level, not at the level of human rights law. However, a more nuanced approach to such arguments is evident in the case law, and it is far from clear that the *lex specialis* principle operates in this way.[116] A mutually exclusive relationship between human rights law and general international law on transboundary and global environmental protection is consistent neither with the evolution of international environmental law as a whole nor with contemporary developments in international human rights law.

First, it harks back to the classical era when humans, whether at home or abroad, were still viewed as objects of international law, not as subjects meriting their own rights. It is unnecessary here to recall this debate, save only to remember that even today only governments can bring claims against another state for violations of general international law.[117] If human rights law has no application to environmentally harmful activities in one state that directly impact on humans in other states, then whatever right they may have to be protected from transboundary harm will be exercisable only by the state acting on their behalf. But, regardless of legal theory, real-world problems of pollution and the unsustainable use of renewable resources that are the core of most environmental problems do not suddenly stop at national borders, nor do they have any less impact on those who live beyond the border. Some of these problems may indeed be only transboundary in scale, like localized air pollution, affecting only two or three states or a particular region. But the climate system, forests and terrestrial ecosystems, and the marine environment are inevitably shared elements of a global ecological system – a fact recognized by the development of global

115 In particular the 1997 Kyoto Protocol, the 2001 Marrakesh Accords, the 2010 Copenhagen Accords, the 2011 Cancun Agreements, and decisions adopted by the conference of the parties at Durban in 2011, on all of which see UNFCCC website, available at http://unfccc.int.

116 See Nuclear Weapons Advisory Opinion, supra note 114, at paras 25–34; I. Sinclair, Vienna Convention on the Law of Treaties (1982), 96; J. Pauwelyn, Conflict of Norms in International Law (2003), at 385–416; ILC, Report of the Study Group on Fragmentation of International Law, A/CN.4/L.682 (2006), at paras 56–122.

117 See ILC Draft Articles on Diplomatic Protection, with Commentaries, 2006 II *Yrbk ILC*, Part Two, commentary to Art. 1. See also Gaja, 'The Position of Individuals in International Law: An ILC Perspective', 21 *EJIL* (2010) 11; Clapham, 'The Role of the Individual in International Law', 21 *EJIL* (2010) 25.

environmental agreements and the evolution of concepts such as the sustainable use of natural resources, inter-generational equity, and common concern of humankind.[118] In the terminology of the law of state responsibility, much of the law relating to these global environmental problems – like climate change – falls squarely into the category of obligations owed to the international community as a whole.[119] So, of course, does international human rights law.[120]

Secondly, one significant trend of international environmental policy over the past 30 years, pursued initially in isolation from international human rights law but now in essence derived from it, has been the attempt to ensure non-discriminatory treatment, including access to justice and effective remedies, for those individuals or communities who are directly affected by transboundary pollution and environmental problems.[121] If nuisances do not stop at borders it makes little sense to treat the victims differently depending on where they happen to live. Making national remedies available to transboundary victims in these circumstances is consistent with the view that there are significant advantages in avoiding resort to interstate remedies for the resolution of transboundary environmental disputes wherever possible.[122] In this broader sense, transboundary claimants can be empowered to act as part of the enforcement structure of international environmental law by giving

118 See 1992 Rio Declaration on Environment and Development, and Birnie, Boyle and Redgwell, *supra* note 2, at ch. 3.

119 ILC, 2001 Articles on State Responsibility, Arts 42 and 48, and commentary *in* J. Crawford (ed.), *The ILC's Articles on State Responsibility* (2002), at 254-260, 276-280.

120 Barcelona Traction Light and Power Company Limited (Belgium v. Spain) [1970] ICJ Rep 3, at paras 33-34.

121 Elaborated in OECD Council Recommendations C (74) 224 (1974); C(76) 55(1976); C (77) 28 (1977); C (78) 77 (1978); C (79) 116 (1979), reproduced in OECD, *OECD and the Environment* (1986). See generally OECD, *Legal Aspects of Transfrontier Pollution* (1977); Smets, 'Le principe de non-discrimination en matière de protection de l'environnement', *Revue Européenne de l'Environnement* (2000), 1; Birnie, Boyle, and Redgwell, *supra* note 2, at 304-311.

122 A. Levin, *Protecting the Human Environment* (1977), at 31–38; Sand, 'The Settlement of Disputes in the Field of the International Law of the Environment', in OECD, *supra* note 121, at146; Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment', 144 *Recueil des Cours* (1975) 139, at 224. Handl, 'Environmental Security and Global Change: The Challenge to International Law', 1 *Yrbk Int'l Environmental L* (1990), 18ff.; Boyle, 'Globalising Environmental Liability: the Interplay of National and International Law', 17 *J Environmental L* (2005) 3.

them access to the same information, decision-making processes, and legal procedures as nationals. The Aarhus Convention represents one element of this development, an element now firmly established within the pantheon of human rights law by the ECHR.[123] This development shows how victims of transboundary pollution already have rights in international law which they can exercise within the legal system of the polluting state; what remains uncertain is whether they also have human rights exercisable against the polluting state.

How far a state must respect the human rights of persons in other countries thus becomes an important question once we start to ask whether we can view climate change and transboundary pollution in human rights terms. That is the debate initiated by the UNHRC's characterization of climate change as a human rights issue.[124] It is also posed by the *Aerial Spraying Case*, initiated by Ecuador in 2007 following alleged cross-border spraying of herbicides by Colombian aircraft during anti-narcotic operations.[125] Ecuador argued, *inter alia*, that the resulting pollution violated the human rights of indigenous people in Ecuador whose health, crops, and livestock had suffered.[126]

The extra-territorial application of human rights law is not itself novel, but it has normally arisen in the context of occupied territory or cross-border activities by state agents.[127] Although the ICCPR

123 *Supra*, sect. 3.

124 UNHRC res. 10/4 (2009, *supra* note 14, sect. 2.

125 The case will be heard by the ICJ in 2013. The author is counsel for Ecuador, but the views expressed here are entirely his own.

126 See Ecuador's ICJ application and UNHRC, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (Rodolfo Stavenhagen): Mission to Ecuador, 25 April–4 May 2006, UN Doc A/HRC/4/32/Add.2, 28 Dec. 2006; UNHRC, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Paul Hunt): Preliminary Note on Mission to Ecuador and Colombia, Addendum, UN Doc A/HRC/7/11/Add.3, 4 Mar. 2007.

127 See Meron, 'Extraterritoriality of Human Rights', 89 *AJIL* (1995) 78; Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), at 73; Cerna, 'Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law' (WP Nº. 6, Center for Human Rights and Global Justice, 2006); Loucaides, 'Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the *Bankovic* Case' [2006] *European Human Rts L Rev* 391; Wilde, 'The "Legal Space" or "Espace Juridique" of the ECHR: Is it Relevant to Extraterritorial State Action?', *European Human Rts L Rev* (2005) 115; Gondek, 'Extraterritorial Application of the ECHR: Territorial Focus in an Age of

requires a state party only to secure the relevant rights and freedoms for everyone within its territory or subject to its jurisdiction,[128] in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ noted that:

> while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions.[129]

The ICESCR makes no reference to territory or jurisdiction, but it too was interpreted by the Court as applying extraterritorially to occupied territory.[130]

The IACHR has followed the ICJ's fairly broad interpretation of 'jurisdiction' in its reading of Article 1 of the American Convention,[131] and in cases concerning the American Declaration of Human Rights.[132] The case law on Article 1 of the European Convention is more cautiously worded, and extra-territorial application is ostensibly exceptional,[133] but it has nevertheless been applied in cases involving

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Globalisation', 52 *Netherlands Int'l L Rev* (2005) 349; King, 'The Extraterritorial Human Rights Obligations of States', 9 *Human Rs L Rev* (2009) 521; M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011).

128 1966 ICCPR, Art. 2. Art. 1 of the AmCHR and Art. 1 of the ECHR make no reference to territory, but require parties to ensure to everyone 'subject to' or 'within' their jurisdiction the rights set out therein. See generally O. De Schutter, *International Human Rights Law* (2010), at 142-179.

129 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion ('Palestine Wall Case')* [2004] ICJ Rep 136, at para. 109. See also General Comment Nº. 31 adopted by the UN Committee for Human Rights, UN Doc. HRI/GEN/1/Rev. 7, 192, at 194 ff, para. 10.

130 Palestine Wall Case, supra note 129, at para. 112. See also the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures Order [2008] ICJ Rep 386, at para. 109.

131 *Ecuador v. Colombia (Admissibility)* [2010] IACHR Report Nº. 112/10, at paras 89–100.

132 *Alejandre, Costa, de la Pena y Morales v. Republica de Cuba* [1999] IACHR Report Nº. 86/99, at para. 23; *Coard v. United States* [1999] IACHR Report 109/99, at para. 37.

133 See *Bankovic v Belgium and Ors* [2001] ECtHR 333, at paras 59–82 where the Court found that aerial bombardment did not bring the applicants within the jurisdiction or control of the respondent states.

foreign arrests, military operations abroad, and occupation of foreign territory.[134]

The ratio of these and other similar cases is that where a state exercises control over territory or persons abroad, human rights obligations will follow. As the IACHR explained in a case involving the shooting down of civilian aircraft over the high seas:

> In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and nondiscrimination, 'without distinction as to race, nationality, creed, or sex.' Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.[135]

In *Al-Skeini* the European Court reiterated that '[t]he Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.'[136] It held the Convention applicable to deaths caused by the British Army during its occupation of Iraq.

None of these cases is environmental, but they give a good indication of the way international courts have approached the extra-territorial application of all the main human rights treaties. We

134 See *Al-Skeini v. United Kingdom* [2011] ECtHR, at paras 130–142; *Öcalan v. Turkey,* 41 EHRR (2005) 985, at para. 91; *Ilascu v. Moldova and Russia,* 40 EHRR (2005) 46, at paras 310-319, 376-394; *Issa et al. v. Turkey,* 41 EHRR (2004) 567, at para. 71; *Cyprus v. Turkey,* 35 EHRR (2002) 30, at para. 78.

135 *Alejandre, Costa, de la Pena y Morales v. Republica de Cuba* [1999] IACHR Report Nº. 86/99, at para. 23 (footnotes omitted).

136 *Al-Skeini v. United Kingdom* [2011] ECtHR, at para. 136.

also know from the human rights case law reviewed earlier in this article that a failure by the state to regulate or control environmental nuisances within its own territory may interfere with human rights.[137] How then should we answer the question whether the obligation to protect human rights from such environmental nuisances also applies extraterritorially? Can we conclude that the transboundary victims of nuisances with extraterritorial effects are within the 'jurisdiction' of the respondent state when the enjoyment of their human rights is affected? There are no precedents directly in point, but a good case can nevertheless be made for the extraterritorial application of human rights treaties to environmental nuisances. Given the failure of much of the literature to deal with this question in any depth (or even to ask it), it is worth doing so here.

First, the human rights case law is not consistent in its treatment of extra-territorial harm. At one extreme, the UN Human Rights Committee observed in *Delia Saldias de López v. Uruguay*, 'It would be *unconscionable* to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[138] On this view any harmful effect on human rights anywhere is potentially within the 'jurisdiction' of the respondent state, insofar as courts have emphasized authority or control over the person rather than simply focusing on control of territory.[139] Nevertheless, that view was rejected in *Bankovic*, where the ECHR held that '[t]he Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. ... The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to

137 See the cases cited *supra*, in note 9.

138 (1981) ICCPR Comm. Nº. 52/1979, at para. 12.3, referring to Art. 2 of the ICCPR. See also *Lilian Celiberti de Casariego v. Uruguay*, ICCPR Comm. Nº. 56/1979 (1981).

139 See in particular King, 'The Extraterritorial Human Rights Obligations of States', 9 *Human Rts L Rev* (2009) 521; Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *Netherlands Int'l L Rev* (2005) 349, at 375.

"jurisdiction".'[140] However, *Bankovic* has not been followed in later cases,[141] nor is it supported by case law under other human rights treaties,[142] and it appears to be a decision particular to its own unusual circumstances.[143] Moreover, it is far removed on its facts from transboundary pollution cases.

Secondly, while it is less plausible to say that the polluting state 'controls' the territory of the state affected by pollution,[144] it is entirely plausible to conclude that the victims of transboundary pollution fall within the 'jurisdiction' of the polluting state – in the most straightforward sense of legal jurisdiction. The jurisdiction of national courts to hear cases involving transboundary harm to extraterritorial plaintiffs is recognized in private international law and in environmental liability conventions.[145] As we noted at the beginning of this section, in such cases the Aarhus Convention and earlier OECD practice require the polluting state to make provision for non-discriminatory access to justice in its own legal system. Aarhus applies in general terms to the 'the public' or 'the public concerned', without distinguishing between those inside the state and others beyond its borders.[146] Article 3(9), the non-discrimination

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140 *Bankovic v. Belgium, supra* note 133, at para. 75.

141 *Supra* note 134.

142 *Supra* notes 131–132.

143 See in particular Gondek, *supra* note 139, at 377; Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action? [2005] *European Human Rts L Rev* 115, at 120–124.

144 Significant transboundary pollution is arguably a violation of the permanent sovereignty of a state (and its people) over its own natural resources, and in a serious case might amount to a *de facto* expropriation: see the preamble to the 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Report of the ILC on its 53rd Session*, GAOR, A/56/10 (2001), and *SERAC v. Nigeria, supra* note 3, at para. 55.

145 See EC Council Reg, 44/2001 on Jurisdiction and Judgments, OJ (2001) L12/1, Art. 5; 2004 Kiev Protocol on Civil Liability and Compensation, Art. 13; 1993 Convention on Civil Liability for Damage to the Environment, Art. 19; 1997 Protocol to the Vienna Convention on Civil Liability for Nuclear Damage, Art. XI; 2004 Protocol to the Paris Convention on Third Party Liability in the Field of Nuclear Energy, Art. 13. See generally C. McLachlan and P. Nygh (eds), *Transnational Tort Litigation* (1996), especially chs 1, 4, and 12.

146 Art. 2(5). See UNECE, Compliance Committee, *Bystre Deep-water Navigation Canal – Findings and Recommendation with Regard to Compliance by Ukraine* (Comms. ACCC/C/2004/01 & 03) ECE/MP.PP/C.1/2005/2/Add. 3 (14 Mar. 2005), at paras 26–28; UNECE, *The Aarhus Convention – An Implementation Guide* (2000), at 41.

Article, requires that 'the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.' The principle of non-discrimination has also been adopted by the International Law Commission in its articles on transboundary harm,[147] by the UNECE in its environmental conventions,[148] and by MERCOSUR.[149] The IACtHR has held that 'the fundamental principle of equality and non-discrimination constitute a part of general international law'.[150] There is little point in requiring that national remedies be made available to transboundary claimants if they cannot also resort to international or regional human rights law when necessary to compel the polluting state to enforce its own court orders or laws or to assess and take adequate account of the harmful effects of activities which it authorizes and regulates. That is exactly how domestic claimants have successfully used human rights law in environmental cases.[151]

147 *Supra* note 144. Art. 15 prohibits discrimination based on nationality, residence, or place of injury in granting access to judicial or other procedures, or compensation, in cases of significant transboundary harm: see *ILC Report* (2001) GAOR A/56/10, at 427–429. See to the same effect the ILC's 2006 Principles on Allocation of Loss, Principle 8(2), and the 1997 UN Convention on International Watercourses, Art. 32.

148 In addition to the Aarhus Convention, it is listed in the preamble to the 1992 Convention on the Transboundary Effects of Industrial Accidents among 'principles of international law and custom'. See also 1991 Convention on Environmental Impact Assessment in a Transboundary Context, Art. 2(6); 1992 Convention on the Transboundary Effects of Industrial Accidents, Art. 9.

149 1992 Las Leñas Protocol on Jurisdictional Cooperation and Assistance, ch III, Art. 3. The position in NAFTA is less clear. Transboundary plaintiffs appear to have equality of standing under some US environmental statutes: see Trans Alaska Pipeline Authorisation Act, 43 USC, § 1635(c)(1) of which allows 'any person or entity, public or private, *including those resident in Canada*' to invoke the Act's liability provisions. Art. 6 of the 1993 North American Agreement on Environmental Co-operation, which provides for 'interested persons' to have access to legal remedies for violation of environmental laws, may also apply to transboundary litigants. See generally Hsu and Parrish, 'Litigating Canada–U.S. Transboundary Harm', 48 *Virginia J Int'l L* (2007) 1.

150 See *Juridical Situation and Rights of Undocumented Migrants* (17 Sept. 2003), IACtHR, OC-18/03, at para. 83.

151 *Supra*, section 1.

Moreover, where it is possible to take effective measures to prevent or mitigate transboundary harm to human rights then the argument that the state has no obligation to do so merely because the harm is extra-territorial is not a compelling one. On the contrary, the non-discrimination principle requires the polluting state to treat extra-territorial nuisances no differently from domestic nuisances.[152] To deny transboundary pollution victims the protection afforded by human rights treaties when otherwise appropriate would for all these reasons be hard to reconcile with standards of equality of access to justice and non-discriminatory treatment required by these precedents.

On that basis a state which fails to control harmful activities within its own territory which cause or risk causing foreseeable environmental harm extraterritorially does owe certain human rights obligations to those affected, because they are within its jurisdiction and control, even if they are not within its territory. It is most likely to violate the human rights of those affected extra-territorially if it does not permit them equal access to environmental information and participation in EIA permitting procedures, or if it denies access to adequate and effective remedies within its own legal system.[153] Moreover, in keeping with the principle of non-discrimination, the environmental impact of activities in one country on the right to life, private life, or property in other countries should be taken into account and given due weight in the decision-making process.[154] There is no principled basis for suggesting that the outcome of cases such as *Hatton* should depend on whether those affected by excessive noise or any other environmental problem are in the same country or

152 See OECD Council Recommendations and the authors cited *supra*, in note 120, and Knox, 'Myth and Reality of Transboundary Environmental Impact Assessment', 96 *AJIL* (2002) 291.

153 See ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Report of the ILC 2006*, GAOR A/61/10, at paras 51–67. Principle 6(1) sets out the core obligation: '[s]tates shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control'. See also Arts 3(9) and 9(4), 1998 Aarhus Convention.

154 As they would have to be in transboundary environmental impact assessments: see 1991 Espoo Convention on EIA in a Transboundary Context, Art. 3(8).

in other countries.[155] It seems entirely consistent with the case law and the 'living instrument' conception of human rights treaties to conclude that a state party must balance the rights of persons in other states against its own economic benefit, and must adopt and enforce environmental protection laws for their benefit, as well as for the protection of its own population. The same proposition applies just as much to other human rights treaties as to the European Convention.

However, even if this reasoning is correct in cases of transboundary pollution affecting individuals in a neighbouring state, it does not follow that it will be equally valid in cases of global environmental harm, such as climate change. Here the obvious problems are the multiplicity of states contributing to the problem and the difficulty of showing any direct connection to the victims. The inhabitants of sinking islands in the South Seas may justifiably complain of human rights violations, but who is responsible? Those states like the UK, US, and Germany whose historic emissions have unforeseeably caused the problem? Those states like China and India whose current emissions are foreseeably making matters worse? Or those states like the US or Canada which have opted out of Kyoto and failed to take adequate measures to limit further emissions so as to stabilize global temperatures at 1990 levels? Or the governments of the Association of Small Island States, which may have conceded far too much when ratifying the Kyoto Protocol or in subsequent climate negotiations? It is much harder to frame such a problem in terms of jurisdiction or control over persons or territory as required by the human rights case law. It is also harder to contend that any of these governments have failed to strike the right balance between their own state's economic development and the right to life or private life in other states when they have either complied with or are exempt from greenhouse gas emissions reduction targets established by Kyoto and agreed by the international community as a whole.[156] Inadequately controlled transboundary pollution is clearly a breach of general international law,[157] and as I have argued here may also

155 ILA, Committee on Transnational Enforcement of Environmental Law, Final Report, Rule 2, and commentary, *Report of 72nd Conference* (2006).

156 Greenhouse gas emissions reduction targets under Kyoto apply only to Annex I developed state parties, not to developing countries, including China, India, and Brazil. Compare 1997 Kyoto Protocol, Arts 2-9, which apply to annex I parties, and Art. 10, which applies to all parties.

157 *Pulp Mills Case*, *supra* note 95, at paras 101, 187.

be a breach of human rights law. However, given the terms of the Kyoto Protocol and subsequent voluntary agreements it is far from clear that inadequately controlled climate change violates any treaty obligations or general international law.[158] In those circumstances the argument that it nevertheless violates existing human rights law is far harder to make.

At this point it may be better to accept, as the UNHRC appears to have done, that existing human rights law is not the right medium for addressing the shared problem of climate change and that further negotiations through the UNFCCC process are the only realistic answer, however unsatisfactory that might be. If it wants to take climate change seriously then it must find a better way of giving human rights concerns greater weight within the UNFCCC negotiating process, and, as we saw in the previous section, that can best be achieved by using the ICESCR and the notion of a right to a decent environment to pressurize governments.

6. CONCLUSIONS

Articulating a right to a decent or healthy environment within the context of economic, social, and cultural rights is not inherently problematic. Clarifying the existence of such a right would entail giving greater weight to the global public interest in protecting the environment and promoting sustainable development, but this could be achieved without doing damage to the fabric of human rights law, and in a manner which fully respects the wide margin of appreciation that states are entitled to exercise when balancing economic, environmental, and social policy objectives. It would build on existing precedents under the ICESCR, and reflect international policy on sustainable development endorsed at Rio in 1992 and in subsequent international conferences. The further elaboration of procedural rights, based on the Aarhus Convention, would facilitate the implementation of such a right, and give greater prominence globally to the role of NGOs in public interest litigation and advocacy. These two developments go hand in hand. They are not a necessary part of any declaration or protocol on human rights and the environment, but they do represent a logical extension of existing policies and would represent a real exercise in progressive development of the law. A declaration or protocol on human rights and the environment thus makes sense provided it brings together

158 *Supra*, note 111.

existing civil, political, economic, and social rights in one coherent whole, while at the same time reconceptualizing in the language of economic and social rights the idea of the environment as a common good. It would, in other words, recognize the global environment as a public interest that states have a responsibility to protect, even if they only implement that responsibility progressively and insofar as resources allow.

Using existing human rights law to grapple with climate change is more challenging. Giving human rights extraterritorial scope in environmental cases is not the problematic issue, however. As we have seen, the argument that transboundary victims come within the jurisdiction or control of the polluting state can be made, is consistent with existing human rights law, and is supported by developments in international environmental law. If that is correct then a state does have to take account of transboundary environmental impacts on human rights and it is obliged to facilitate access to remedies and other procedures. But climate change is a global problem. It cannot easily be addressed by the simple process of giving existing human rights law transboundary effect. It affects many states and much of humanity. Its causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims. Moreover, much of the economic policy which drives greenhouse gas emissions worldwide is presently lawful and consistent with the terms of the UNFCCC and the Kyoto Protocol. It is no more likely to be derailed by human rights litigation based on ICCPR rights than the UK's policy on Heathrow airport in the *Hatton Case*. The response of human rights law – if it is to have one – needs to be in global terms, treating the global environment and climate as the common concern of humanity. That is why locating the right to a decent environment within the corpus and institutional structures of economic, social, and cultural rights makes more sense. In that context the policies of individual states on energy use, reduction of greenhouse gas emissions, land use, and deforestation could be scrutinized and balanced against the evidence of their global impact on human rights and the environment. This is not a panacea for deadlock in the UNFCCC negotiations, but it would give the rights of humanity as a whole a voice that at present is scarcely heard. Whether the UNHRC wishes to travel down this road is another question, for politicians to answer rather than lawyers, but that is where it must go if it wishes to do more than posture on climate change.

THE PARALLEL EVOLUTIONS OF INTERNATIONAL HUMAN RIGHTS PROTECTION AND OF ENVIRONMENTAL PROTECTION AND THE ABSENCE OF RESTRICTIONS UPON THE EXERCISE OF RECOGNIZED HUMAN RIGHTS(1)

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I. INTRODUCTION

The general theme chosen for consideration in the 1990 Banff Conference is a particularly suitable and most timely one: *Human Rights in the XXI Century: A Global Challenge*. Not only does it render possible to encompass the examination of a wide variety of aspects and concerns pertaining to the present state of the international protection of human rights, but it also paves the way for a projection into the future of insights and ideas which may point the way towards the enhancement of the international protection of human rights in the years that bring us into the new century. Within this general outlook, the topic which has been entrusted to us for presentation in the present Conference in Banff is a specific and so far virtually unexplored one: the parallelisms in the evolutions of two domains of protection - human rights protection and environmental protection - and the impact of their expansion upon the exercise of previously recognized human rights.

For the purpose of examination of this novel topic, we shall develop four lines of considerations: first, the identification of affinities in the parallel evolutions of human rights protection and of environmental protection; second, the identification of the wide dimension of the fundamental right to life, added to the right to health, at the basis of

1 Conceptual study originally published *in*: 13 *Revista del Instituto Interamericano de Derechos Humanos* (1991) pp. 35-76.

the *ratio legis* of international human rights law and of environmental law; third, the question of the implementation (*mise-en-oeuvre*) of the right to a healthy environment; and fourth, the expansion of human rights protection and of environmental protection in their effects upon each other and a critical appraisal of the so-called *restrictions* upon the exercise of previously recognized human rights. It is our hope that the reflections developed herein may stimulate or pave the way for further attention to, and research on, the subject, conductive to a better understanding of the proper sense of the expansion of the two domains of protection and to the enrichment and strengthening of the international protection of human rights.

2. THE GROWTH OF HUMAN RIGHTS PROTECTION AND OF ENVIRONMENTAL PROTECTION: FROM INTERNATIONALIZATION TO GLOBALIZATION

2.1. The Internationalization of Human Rights Protection and of Environmental Protection

The parallel evolutions of human rights protection and environmental protection disclose some affinities, which should not pass unnoticed. They both witness, and precipitate, the gradual erosion of so-called domestic jurisdiction. The treatment by the State of its own nationals becomes a matter of international concern. Conservation of the environment and control of pollution become likewise a matter of international concern. There occurs a process of *internationalization* of both human rights protection and environmental protection, the former as from the 1948 Universal Declaration on Human Rights, the latter -years later- as from the 1972 Stockholm Declaration on the Human Environment.

With regard to human rights protection, eighteen years after the adoption of the 1948 Universal Declaration the International Bill of Human Rights was completed with the adoption of the two U.N. Covenants, on Civil and Political (and Optional Protocol), and on Economic, Social and Cultural Rights (1966), respectively. The normative corpus of international human rights law is today a vast one, comprising a multiplicity of treaties and instruments, at both global and regional levels, with varying ambits of application and covering the protection of human rights of various kinds and in distinct domains of human activity.

As for environmental protection, the years following the Stockholm Declaration likewise witnessed a multiplicity of international instruments on the matter, equally at both global and regional levels. It is estimated that nowadays there are more than 300 multilateral treaties and around 900 bilateral treaties providing for the protection and conservation of the biosphere, to which over texts from international organizations can be added[2]. This considerable growth of international regulation in the present domain has, by and large, followed a *sectorial* approach, leading to the celebration of conventions turned to certain sectors or areas, or concrete situations (e.g., oceans, continental waters, atmosphere, wild life). In sum, international regulation in the domain of environmental protection has taken place in the form of *responses* to specific challenges.

The same appears to have taken place in the field of human rights protection, where we witness a multiplicity of international instruments: parallel to general human rights treaties (such as the two U.N. Covenants on Human Rights and three regional -European, American and African- Conventions), there are Conventions turned to concrete situations (e.g., prevention of discrimination, prevention and punishment of torture and ill-treatment), to specific human conditions (e.g., refugee status, nationality and statelessness), and to certain groups in special need of protection (e.g., workers' rights, women's rights, protection of the child, protection of the elderly, protection of the disadvantaged). In sum, human rights instruments have grown, at normative and procedural levels, likewise as responses to violations of human rights of various kinds.

This being so, it is not surprising that certain gaps may appear, as awareness grows as to the increasing needs of protection. An example of such gap, in the field of human rights protection, can be found in our days, *e.g.*, in the protection to be extended to certain vulnerable groups, in particular indigenous populations. Another example of such gap, in the area of environmental protection, can nowadays be found *e.g.*, in the needed enhancement of international regulation on climate change and protection of the atmosphere.

A significant task for the near future - if not for the present - will precisely consist in ensuring the proper *co-ordination* of multiple

2 Reference can further be made domestic legislation on the matter in virtually all States: it is estimated that domestic legislative instruments reach today a total of 30,000 A.C. Kiss, *Droit international de l'environment*, Paris, Pédone, 1989, p. 46.

instruments, which have grown in the last decades, at global and regional levels, pursuant to the "sectorial" approach (*supra*), in the domains of human rights protection[3] as well as environmental protection. Beyond the internationalization of human rights protection and of environmental protection in the pattern above referred to, it was soon realized that, in each of the two domains of protection, there existed an inter-relatedness among the distinct sectors object of regulation.

2.2. The Globalization of Human Rights Protection and Environment Protection

The awareness of this inter-relatedness has decisively contributed to evolution, in recent years, from the internationalization to the globalization of human rights protections as well as of environmental protection. As far as human rights protection is concerned, two decades after the adoption of the 1948 Universal Declaration of Human Rights the 1968 Teheran Conference on Human Rights, in a global reassessment of the mater, proclaimed the *indivisibility* of all human rights (civil and political, as well as economic, social and cultural rights). This was followed by the landmark resolution 32/130, adopted by the U.N. General Assembly in 1977, where it stated that human rights questions were to be examined globally.

That resolution endorsed the assertion of the 1968 Teheran Proclamation of the indivisibility and interdependence of all human rights, from a globalist perspective, and drew attention to the priority to be accorded the search for solutions to massive and flagrant violations of human rights[4]. Three decades after the adoption of the 1948 Universal Declaration, the U.N. General Assembly, bearing in mind the fundamental changes undergone by so-called international society -decolonization, capacity of massive destruction, population growth, environmental conditions, energy consumption, amongst others- by its resolution 32/130 endeavoured to overcome the old categorizations of rights and to proceed to an needed global analysis of existing problems in the field of human rights.

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3 C.f. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 21-435.

4 Th. Van Boven, "United Nations Policies and Strategies: Global Perspective?", *Human Rights: Thirty Years after the Universal Declaration* (ed. B.G. Ramcharan), The Hague, M. Nijhoff, 1979, pp. 88-89 and *cf.* pp. 89-91.

Such new global outlook and conception of the indivisibility of human rights, rendered possible by the U.N. Charter itself, and externalized in G.A. resolution 32/130 of 1977, contributed to drawing closer attention in particular to the rights pertaining to human collectivities and the measure of their implementation. The matter was re-taken by G.A. resolutions 39/145, of 1984, and 41/117, of 1986, which reiterated the inter-relatedness of all human rights, whereby the protection of one category of rights should not exempt States from safeguarding the other rights. Thus, human rights instruments turned to the protection of certain categories of rights, or of certain rights in given situations, or of rights of certain groups in special need of protection, are to be properly approached on the understanding that they are complementary to general human rights treaties. Multiple human rights instruments re-inforce each other, enhance the degree of the protection due, and disclose and overwhelming identity of purpose.

In the domain of environmental protection, the presence -despite the "sector by sector" regulation- of "transversal" issues and rules contributed to the globalist approach. It was reckoned, *e.g.*, that more and more often certain activities and products may cause harmful effects in any environment (*e.g.*, toxic or dangerous substances, toxic or dangerous wastes, ionizing radiations, and radioactive wastes); in fact, the problem of dangerous substances is present in the whole of *sectorial* regulation, thus pointing to globalization and generating a "réglementation se superposant aux différents secteurs"[5].

Already in 1974, two years after the adoption of the Stockholm Declaration, the U.N. Charter on Economic Rights and Duties of States warned that the protection and preservation of the environment for present and future generations were the responsibility of *all* States (Article 30). And in 1980, the U.N. General Assembly proclaimed the historical responsibility of States for the preservation of nature on behalf of present and future generations[6]. While in the past States tended to regard the regulation of pollution by sectors as a national or local issue, more recently they have realized that some environmental problems and concerns are essentially global in scope[7]. In its resolution 44/228, of 22 December 1989, whereby it decided to convene a U.N. Conference on Environment and

5 A. Ch. Kiss, *op. cit. supra* n. (1), pp. 275-276 and 46, and *cf.* pp. 93, 106 and 204.
6 *Cit. in ibid.*, pp. 38-39.
7 "Formal and informal linkages" across nations and States have contributed to this new perception; R.W. Hahn and K.R. Richards, "The Internationalization of

Development in 1992, the U.N. General Assembly recognized that the global character of environmental problems required action at all levels (global, regional and national), involving the commitment and participation of all countries; the resolution further affirmed that the protection and enhancement of the environment were major issues that affected the well-being of peoples, and singled out, as one of the environmental issues of major concern, the "protection of human health conditions and improvement of the quality of life" (§ 12 (i)).

The global character of environmental issues is reflected in the question, *e.g.*, of conservation of biological diversity; it is further illustrated, in particular, by the problems linked to atmospheric pollution (such as depletion of the ozone layer and global climate change). Those problems, initially thought of as being essentially local or even transboundary, were to disclose "*une portée pratiquement illimitée dans l'espace*"[8]. The threat of damage to many nations resulting from global warming, for example, is a major problem the cause of which would hardly be traceable to a single State or group of States, thus calling for a new approach on the basis of strategies of prevention and adaptation and considerable international cooperation[9]. Thus, the U.N. General Assembly, by resolution 43/53, of 6 December 1988, recognized that climate change is a common concern of mankind, and determined that action should be promptly taken to deal with it within a global framework.

Likewise, the Intergovernment Panel on Climate Change (IPCC), set up by the WMO and UNEP, has indicated, as one of the possible elements for inclusion in a future framework Convention on Climate Changee[10], the recognition that climate change is a common concern of mankind, affecting humanity as a whole, and to be thus approached within a global framework[11]. The 1989 Hague Declaration on the Atmosphere insists on the search for urgent and global solutions to the problems of the warming of the atmosphere and the deterioration of the ozone layer. In the same line, the 1989

Environmental Regulation", 30 *Harvard International Law Journal* (1989) pp. 421, 423 and 444-445.

8 A. C. Kiss, *op. cit. supra* n. (1), p. 212.

9 V. P. Nanda, "Global Warming and International Environmental Law - A Preliminary Inquiry", 30 *Harvard International Law Journal* (1989) pp. 380-385.

10 *Cf*. UNEP Governing Council Decision 15/36, of 25 May 1989.

11 WNO/UNEP, IPCC Working Group III (*Response Strategies*) -*Legal Measures: Report of Topic Coordinators,* Geneva/Nairobi, 1989, p. III (mimeographed, internal circulation).

International Meeting of Legal and Policy Experts, held in Ottawa, in its report stated *inter alia* that the atmosphere constitutes a "common resource of vital interest to mankind"[12].

And still in 1989 (November), the Ministerial Conference on Atmospheric Pollution and Climate Change, held in Noordwijk, The Netherlands, with the participation of 67 countries, considered the elements of a future framework climate change Convention (to be further elaborated by the IPCC) and reasserted the principle of shared responsibility of all States. The 1989 Noordwijk Declaration on Climate Change pursued a globalist approach (Cf. §§ 8-9) and expressly stated that "climate change is a common concern of mankind" (§ 7)[13]. In sum, recent trends in environmental protection as well as in human rights protection (*supra*) disclose a clear and progressive tendency from internationalization towards globalization.

2.3. The Globalization of Protection and *Erga Omnes* Obligations

The globalization of human rights protection and of environmental protection can also be attested from a distinct approach, namely, that of the emergence of *erga omnes* obligations and the consequent decline and end of reciprocity. In the field of human rights protection, reciprocity is overcome and overwhelmed by the notion of collective guarantee and considerations of *ordre public*). Hence the specificity of human rights treaties.

Traces of this new philosophy are found in international humanitarian law: pursuant to common Article 1 of the 1949 Geneva Conventions, Contracting Parties are bound "to respect and to ensure respect" to the four Conventions "in all circumstances", *i.e.*, irrespective of considerations of reciprocity. Provisions with analogous effects can be found in human rights treaties (*e.g.*, U.N. Covenant on Civil and Political Rights, Article 2; European Convention on Human Rights, Article 1). Those humanitarian instruments have transcended the purely inter-state level in search of a higher degree of protection of the human person, so as to ensure the safeguard of common superior interests protected by them. Hence the universal

12 *Cf. Statement of the International Meeting of Legal and Policy Experts, Ottawa, 1989, p.2.*

13 Cf. Ministerial Conference on Pollution and Climatic Change, The *Noordwijk Declaration on Climate Change, Noordwijk,* Nov. 1989, p.4, and *cf.* pp. 1-13 (mimeographed, restricted circulation).

character of the system of protection of international humanitarian law, which creates for States obligations *erga omnes*.

The evolution of environmental protection likewise bears witness of the emergence of obligations of an objective character without reciprocal advantages for States. The 1972 Stockholm Declaration on the Human Environment refers expressly to the "common good of mankind" (Principle 18). Rules on the protection of the environment are adopted, and obligations to that effect are undertaken, in the common superior interest of mankind. This has been expressly acknowledged in some treaties in the field of the environment (*e.g.*, preambles of the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof; the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources; the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft; the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage); it is further implicit in references to "human health" in some environmental law treaties (*e.g.*, the 1985 Vienna Convention for the Protection of the Ozone Layer, preamble and Article 2; the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, preamble; Article 1 of the three marine pollution Conventions above quoted).

The evolution, from internationalization to globalization, of environmental protection, can also be detected in its spatial dimension. In the beginnings of international environmental regulation, attention was turned to environmental protection in zones under the competence of States of the territorial type. One thus spoke of control of *transboundary* or *transfrontier* pollution (a terminology reminiscent of that employed in the OECD), with an underlying emphasis on the relations between neighbouring countries or on contacts of conflicts between State sovereignties. Soon it became evident that, to face wider threats to the environment

-as in, e.g,, marine pollution, and atmospheric pollution (acid rain, depletion of the ozone layer, global warming),- it was necessary to consider also principles applicable *"urbi et orbi"*, on a global scale, not only in zones where State interests were immediately affected (transboundary pollution), but also in other areas where State interests appeared not so visibly affected (*e.g,* protection of the atmosphere and of the marine environment). In this common international law of the environment, principles of a global character are to apply on the territory of States irrespective of any transboundary or transfrontier effect, and are to govern zones which are not under any national territorial competence[14].

In this connection, the Brundtland Commission, reporting to the U.N. General Assembly in 1987, dedicated a whole chapter to the management, in the "common interest", of the so-called "global commons", *i.e.*, those zones falling outside or beyond national jurisdictions[15]. Likewise, the Centre for Studies and Research in International Law and Relations of the Hague Academy of International Law, dwelling upon the issue of transfrontier pollution and international law in its 1985 session, singled out the gradual evolution from a transboundary or "transterritorial" to a global perspective of the preservation of the environment (and action in favour of resources of the common heritage of mankind)[16].

The international law no longer exclusively State-oriented can be seen from reiterated references to "mankind", not only in doctrinal writings[17], but also and significantly in various international instruments, possibly pointing towards an international law of mankind, pursuing preservation of the environment and sustainable

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14 A. Ch. Kiss, *Droit international de l'environment,* Paris, Pédone, 1989, pp. 93, 67-68, 70-72 and 8; L.A. Teclaff, "The Impact of Environmental Concern on the Development of International Law", *International Environmental Law* (ed. L.A. Teclaff and A.E. Utton), N.Y., Praeger, 1987, p. 251; and *cf.* Ian Brownlie, "A Survey of International Customary Rules Environmental Protection", in *ibid*, p.5.

15 World Commission on Environment and Development, *Our Common Future, Oxford, University Press, 1987*, chapter 10 ("Managing the Commons"), pp. 261-289.

16 P.M. Dupuy, "Bilan de recherches de la section de lange fracaise du Centre d'Etude et de Recherche de l'Académie", *La pollution transfrontière et le droit international* - 1985. La Haye, Sijhoff/Académie de Droit International, 1986, pp. 68-70, 65-66 and 81.

17 *Cf.*, e.g., C.W. Jenks, *The Common Law of Mankind,* London, Stevens, 1958, pp. 1-442; R.J. Dupuy, *La communauté internationale entre le mythe et l'histoire,* Paris, Economica/UNESCO, 1986, pp. 11-182; among others.

development on behalf of present and future generations. Thus, the notion of cultural heritage of mankind can be found, *e.g.*, in the UNESCO Conventions for the Protection of Cultural Property in the Event of Armed Conflict (1954) and for the Protection of the World Cultural and Natural Heritage (1974). The legal principle of the common heritage of mankind has found expression in the realms of the law of the sea (1982 U.N. Convention on the Law of the Sea, Part XI, especially Articles 136-145 and 311(6); 1970 U.N. Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction) and of the law of outer space (1979 Treaty Governing the Activities of States on the Moon and Other Celestial Bodies, Article 11; and *cf.* 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies; Article I[18]. The reconsideration of the basic postulates of international law bearing in mind the superior common interest of mankind has been the object of attention of general works on the subject at doctrinal level (*e.g.*, Jenks, Dupuy)[19].

Despite semantic variations in international instruments on environmental protection when referring to mankind, a common denominator underlying them all appears to be the common interest of mankind. There seems to be occurring lately an evolution from the notion of common heritage of mankind (as emerged in the contexts of the law of the sea and space law) to that of common concern of mankind. The latter has been the object of consideration by the UNEP Group of Legal Experts, which convened in Malta on 13-15 December 1990, in order to examine the implications of the concept of "common concern of mankind" on global environmental issues. In fact, it is not at all casual that the U.N. General Assembly resolution 43/53, of 6 December 1988, introduced the recognition that climate change was a "common concern" of mankind, since, in the wording of its first operative paragraph, climate was "an essential condition which sustains life on earth".

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18 N.J. Schrijver, "Permanent Sovereignty over Natural Resources versus the Common Heritage of Mankind: Complementary or Contradictory Principles of International Economic Law?", *International Law and Development* (ed. P. De Waart, P. Peters and E. Denters), Dordrecht, Nijhoff/Kluwer, 1988, pp. 95-96, 98 and 101.

19 *Cf.* references in n. (16), *supra*.

Such essential or fundamental condition is inextricably linked to the new idea of "commonness". The newly proposed notion is inspired in considerations of international *ordre public*. It appears as a derivative of the earlier "common heritage" approach, meant to shift emphasis from the sharing of benefits from exploitation of environmental wealths to fair or equitable sharing of burdens in environmental protection, and the needed concerted actions to that effect with a social and a temporal dimensions[20]. It could hardly be doubted, as UNEP itself has acknowledged, that environmental protection is "decisively linked" to the "human rights issue"[21], to the very fulfilment of the fundamental right to life in its wide dimension (right to live -*cf.* section III, *infra*).

Resort to the very notion of mankind, human kind, immediately brings into the fore, or places the whole discussion within, the human rights framework, - and this should be properly emphasized, it should not be left implicit or neglected as allegedly redundant. Just as law, or the rule of law itself, does not operate in a vacuum, humankind, the humankind is neither a social nor a legal abstraction: it is composed of human collectivities, of all human beings of flesh and bone, living in human societies.

If it is conceded that, if and once the concept of common concern of mankind becomes widely and unequivocally accepted, rights and obligations are bound to flow from it, then one is led to consider as tis manifestation or even materialization the right to a healthy environment: within the ambit of the *droit de l'humanité*, the common concern of the human kind finds expression in the exercise of the recognized right to a healthy environment, in all its dimensions (individual, groupal, social or collective, and inter-generational- *cf.* section V- *infra*), precisely as mankind is not a social or legal abstraction and is formed by a multitude of human beings living in societies and extended in time. The human rights framework is ineluctably present in the consideration of the regime of protection of the human environment in all its aspects; we are here ultimately confronted with the crucial question of survival of

20 On this last point, *Cf.* UNEP/Executive Director and Secretariat, *Note to the Group of Legal Experts to Examine the Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues,* Malta Meeting, 13-15 December 1990, document UNEP/ELIU/WG.1/1/2, pp. 1-2, §4, AND CF, pp. 4-5, §§ 8-9 (mimeographed, internal circulation).

21 *Ibid*., p. 14 § 22.

the human kind, with the assertion -in face of threats to the human environment- of the fundamental human right to live.

Just a couple of decades ago there were questions which were "withdrawn" from the domestic jurisdiction of States to become matters of *international* concern (essentially, in cases pertaining to human rights protection and self-determination of peoples)[22], there are nowadays global issues such as climate change which are being erected as *common* concern of mankind. Here, again, the contribution of human rights protection and environmental protection heralds the end of reciprocity and the emergence of *erga omnes* obligations.

The prohibition of the invocation of reciprocity as an excuse for non-compliance of *erga omnes* obligations is confirmed in unequivocal terms by the 1969 Vienna Convention on the Law of Treaties: in providing for the conditions in which a breach of a treaty may bring about its suspension or termination, the Vienna Convention (Article 60 (5)) expressly excepts "provisions relating to the protection of the human person contained in treaties of a humanitarian character". This provision pierces a domain of international law -the law of treaties- traditionally so markedly infiltrated by the voluntarism of States, and constitutes a clause of safeguard or defense of the human beings. Thus, the contemporary law of treaties itself, as attested by Article 60 (5) of the Vienna Convention, discards the principle of reciprocity in the implementation of treaties of a humanitarian character. The obligations enshrined therein generate effects *erga omnes*. The overcoming of reciprocity in human rights protection and in environmental protection (for the safeguard of an increasingly wider circle of beneficiaries, human beings and ultimately mankind), for a higher degree of the protection due, and for the gradual strengthening of the mechanisms of supervision, in the defense of common superior interests. Yet another affinity, in the recent developments of human rights protection and environmental protection which has not been sufficiently examined so far and to which we shall now turn, lies in the incidence of the temporal dimension in both domains of protection.

22 A. A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 International and Comparative Law Quarterly (1976) pp. 723, 731, 737, 742, 761-762 and 765.

3. FURTHER AFFINITIES IN THE EVOLUTIONS OF HUMAN RIGHTS PROTECTION AND OF ENVIRONMENTAL PROTECTION

3.1. Protection of the Human Person and Environmental Protection: Mutual Concerns

Just as concern for human rights protection can be found in the realm of international environmental law (Preamble and Principle 1 of the 1972 Stockholm Declaration on the Human Environment, Preamble and Principles 6 and 23 of the 1982 World Charter for Nature, Principles 1 and 20 proposed by the World Commission in its 1987 report[23], concern for environmental protection can also be found in the express recognition of the right to a healthy environment in two recent human rights instruments, namely: the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Article 11), and the 1981 African Charter on Human and Peoples' Rights (Article 11), and the 1981 African Charter on Human and Peoples' Rights (Article 24); in the former, it is recognized as a right of "everyone" (§1), to be protected by the States Parties (§ 2), whereas in the latter it is acknowledged as a peoples right[24].

Concern for the protection of the environment can nowadays be likewise found in the realm of international humanitarian law, namely: Articles 35(3) and 55 of the 1977 Additional Protocol I to the 1949 Geneva Conventions (prohibition of methods or means of warfare severely damaging the environment), added to the 1977 U.N. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, and to the 1982 World Charter for Nature (paragraphs 5 and 20), among other provisions[25]. Likewise, recent developments in international refugee law are worthy of attention, such as the possible assimilation of victims of environmental disasters to protected [displaced] persons under refugee law (*e.g.*, the 1984 Cartagena Declaration on Refugees,

23 *Cf.* A.A. Cançado Trindade, "The Contribution of International Human Rights Law to Environmental Protection, with Special References to Global Environmental Change", in *International Law and Global Environmental Change: New Dimensions* (ed. E. Brown Weiss), United Nations University (UNU) Project, 1991-1992, 93pp. (in print).

24 Cf. *ibid*. (in print).

25 *Cf. ibid*.

recommending for use in Central America an expanded concept of refugee)[26].

Furthermore, the protection of vulnerable groups (*e.g.*, indigenous populations, ethnic and religious and linguistic minorities, mentally and physically handicapped persons) appears today at the confluence of international human rights law and international environmental law: as we have indicated in another study, concern for the protection of vulnerable groups can nowadays be found in international instruments and initiatives pertaining to both human rights protection and environmental protection, where the issue has been approached on the basis of both human and environmental considerations[27].

3.2. Incidence of the Temporal Dimension in Environmental Protection and in Human Rights Protection

The Temporal dimension, so noticeable in the field of environmental protection, is likewise present in other domains of international law (*e.g.*, law of treaties, peaceful settlement of international disputes, international economic law, law of the sea, law of outer space, State succession, etc.). The notion of time, the element of foreseeability, inhere in legal science as such. The predominantly *preventive* character of the normative corpus on environmental protection, stressed time and time again[28], and reiterated in clear and emphatic terms in the reference to the temporal dimension in the 1990 Ministerial Declaration of the II World Climate Conference (paragraph 7), is also present in the field of human rights protection.

Its incidence can be detected at distinct stages or levels, starting with the *travaux préparatoires*, the underlying conceptions and the adopted texts of human rights instruments (*e.g.*, the three recent Conventions -the Inter-American, the U.N. and the European- against Torture, of an essentially preventive character; the 1948 Convention against Genocide, the 1973 Convention against *Apartheid*, besides international instruments turned to the prevention of discrimination

26 *Cf. ibid*.
27 *Cf.* references and sources in A.A. Cançado Trindade, "The Contribution...", op. cit. *supra* n. (22), 93pp. (in print).
28 *Cf. ibid*. (in print).

of distinct kinds)[29] The temporal dimension is further present in international refugee law (*e.g.*, the elements for the very definition of "refugee" under the 1951 Convention and the 1967 Protocol on the Status of Refugees, namely, the well-founded fear of persecution, the threats or risks persecutions, -besides the recent U.N. "early warning" efforts of prevention or forecasting of refugee flows)[30]. Secondly, the incidence of the temporal dimension can also be detected in the "evolutionary" *interpretation* of human rights treaties, which has ensured that they remain living instruments: there has been occurring a dynamic process of evolution of international human rights law through interpretation[31].

And thirdly, also in respect of the *application* of human rights treaties, the practice of international supervisory organs (*e.g.*, at global level, that of the Human Rights Committee under the Covenant on Civil and Political Rights and its Optional Protocol), affords illustrations of the temporal dimension in human rights protection. Thus, the *jurisprudence constante* of the European Commission and Court of Human Rights under the European Convention on Human Rights has in recent years upheld, in numerous cases, the notion of *potential* or *prospective* victims, *i.e.*, victims claiming a valid potential personal interest under the Convention, thus enhancing the condition of individual applicants[32]. Likewise, the Inter-American Court of Human Rights, in its judgements of 1988 in two of the three *Honduran* cases where it found a breach of the American Convention (*Velasquez Rodriguez* and *Godinez Cruz* cases), stressed the States' duty of due diligence to prevent violations of protected human rights[33].

In fact, the incidence of the temporal dimension can be detected not only in the interpretation and application of norms pertaining to guaranteed rights but also in the conditions of their exercise (as in, *e.g.*, public emergencies); it can further be detected in the protection not only of civil and political rights, but also -and perhaps even more pronounced- of economic, social and cultural rights (*e.g.*,

29 *Ibid*.
30 *Ibid*.
31 A. A. Cançado Trindade, "Co-existence and Co-ordination...", *op. cit. supra* n. (2), pp. 91-112.
32 *Ibid*., pp. 243-299.
33 *Cf.* A.A. Cançado Trindade, "The Contribution...", *op. cit. supra* n. (22) (in print).

right to education, right to cultural integrity), or else of the right to development and the right to a healthy environment, -extending in time[34]. Manifestations of the temporal dimension become quite concrete in particular precisely in the field of human rights protection. Where they do not appear as soft law. Here, more clearly than in other chapters or fields of international law, the evolving jurisprudence (e.g., on the notion of potential victims, on the duty of prevention of violations of human rights) may serve of inspiration also for environmental protection.

4. THE RIGHTS TO LIFE AND TO HEALTH AT THE BASIS OF THE *RATIO LEGIS* OF INTERNATIONAL HUMAN RIGHTS LAW AND OF ENVIRONMENTAL LAW

4.1. The Fundamental Right to Life in Its Wide Dimension

The right to life is nowadays universally acknowledged as a basic or fundamental human right. It is basic or fundamental because "the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights"[35]. As indicated by the Inter-American Court of Human Rights in its Advisory Opinion on *Restrictions to the Death Penalty* (1983), the human right to life encompasses a "substantive principle" whereby every human being has an inalienable right to have his life respected, and a "procedural principle" whereby no human being shall be arbitrarily deprived of his life[36].

The Human Rights Committee, operating under the U.N. Covenant on Civil and Political Rights (and Optional Protocol), qualifying the human right to life as the "supreme right of the human being", has warned that fundamental human right *ne peut pas être entendu de façon restricive* and its protection *exige que les Etats adoptent des mesures positives*[37]. The Inter-American Commission on Human Rights, likewise, has drawn attention to the binding character of the right to life[38]. In its recent resolution

34 *Ibid.* (in print).

35 F. Przetacznik, "The Right to Life as a Basic Human Right", 9*Revue des droits de l'homme/Human Rights Journal* (1976) pp. 589 and 603.

36 I.A. Court H.R., Advisory Opinion OC-3/83, of 08 September 1983, Series A, nº. 3.

37 *Cit. in* J.G.C. Van Aggelen, *Le rôle des organisations internationales dans la protection du droit à la vie,* Bruxelles Story-Scientia, 1986, p. 23.

38 *Cit. in ibid*., p. 38.

nº. 3/87, on case nº. 9647, concerning the United States, the Inter-American Commission, after identifying a norm of *jus cogens* which "prohibits the State execution of children", warned against "the arbitrary deprivation of life" on the basis of a patchwork scheme of legislation which subjects the severity of the punishment (of the offender) to the "fortuitous element of where the crime took place"[39].

Under international human rights instruments, the assertion of the inherent right to life of every human being is accompanied by an assertion of the legal protection of that basic human right and of the *negative* obligation not to deprive arbitrarily of one's life. (*e.g.*, U.N. Covenant on Civil and Political Rights, Article 6(1); European Convention on Human Rights, Article 2; American Convention on Human Rights, Article 4(1); African Character on Human and Peoples´ Rights, Article 4)[40]. But this negative obligation is accompanied by the *positive* obligation to take all appropriate measures to protect and preserve human life. This has been acknowledged by the European Commission of Human Rights, whose case-law has evolved to the point of holding (Association X versus United Kingdom case, 1978) that Article 2 of the European Convention on Human Rights imposed on States also a wider and positive obligation *de prende des mesures adéquates pour protéger la vie*[41].

Taken in its wide and proper dimension, the fundamental right to life comprises the right of every human being not to be deprived of his life (*right to life*) and the right of every human being to have the appropriate means of subsistence and a decent standard of life (preservation of life, *right of living*). As well pointed out by Przetacznik, "the former belongs to the area of civil and political rights, the latter to that of economic, social and cultural rights"[42]. The fundamental right to life, thus properly understood, affords and eloquent illustration of the indivisibility and inter-relatedness of all human rights[43].

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39 OAS, *Annual Report of the Inter-American Commission on Human Rights* - 1986-1987, pp. 170 and 172-173.

40 Th. Desch, "The Concept and Dimensions of the Right to Life (As Defined in International Standards and in International and Comparative Jurisprudence)", 36 *Osterreichische Zeitschrift für Offentliches Recht und Völkerrecht* (1985) pp. 86 and 99.

41 *Cit. in*: J.G.C. Van Aggelen, *op. cit supra* n. (36), p.32.

42 F. Przetacznik, *op. cit. supra* n. (34), p. 603, e *cf.* p. 586.

43 On the right to life bearing witness of the indivisibility of all human rights, *cf.* W.P. Gormley, "The Right to a Safe and Decent Environment", 20 *Indian Journal*

In fact, some members of the Human Rights Committee have expressed the view that Article 6 of the U.N. Covenant on Civil and Political Rights requires the State

> to take *positive measures* to ensure the right to life, including steps to reduce the infant mortality rate, prevent industrial accidents, and protect the environment (...)[44].

Taking the essential requirements of the right of living (*supra*) as a corollary of the right to life, Desch argued that inequitable distribution of food or medicaments by public authorities, or even the toleration of malnutrition or failure to reduce infant mortality would constitute violations of Article 6 of the Covenant if there results an arbitrary deprivation of life[45].

During the drafting of the 1948 Universal Declaration of Human Rights, attempts were made to make its Article 3, which proclaims the right to life, more precise[46]. A number of issues was the object of discussion in the drafting of corresponding provisions on the right to life of human rights treaties[47], but it was the views and decisions more recently rendered by international supervisory organs that have gradually given more precision to the right to life as enshrined in the respective human rights treaties (*cf. supra*). Even those who insist on regarding the right to life strictly as a civil right[48] cannot fail to admit that, ultimately, without an adequate standard of living (as recognized, *e.g.,* in Articles 11-12 of the U.N. Covenant on Economic, Social

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of International Law (1988) pp. 23-24.

44 *Cit. in*: Th. Desch, *op. cit. supra* n. (39), p.101.

45 *Ibid.,* p. 101.

46 *Cf.* H. Kanger, *Human Rights in the U.N. Declaration*, Uppsala/Stockholm, Almqvist & Wiksell, 1984, pp. 81-82.

47 On the legislative history of Article 6 of the U.N. Covenant on Civil and Political Rights, *cf.* [B.G. Ramcharan] "The Drafting History of Article 6 of the International Covenant on Civil and Political Rights", *in The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/Kluwer, 1985, pp. 42-56; on the legislative history of Article 2 of the European Convention on Human Rights, *cf.* B.G. Ramcharan, "The Drafting History of Article 2 of the European Convention on Human Rights" *in ibid*, pp. 57-61; and on the legislative history of Article 4 (and antecedents) of the American Convention on Human Rights, *cf.* J. Colon-Collazo, "A Legislative History of the Right to Life in the Inter-American Legal System", *in ibid.,* pp. 33-41.

48 *Cf.*, to this effect, the analysis by Y. Dinstein, "The Right to Life, Physical Integrity, and Liberty", *The International Bill of Rights* (ed. L. Henkin, N.Y., Columbia University Press, 1981, pp. 114-137.

and Cultural Rights, following Article 25(1) of the 1948 Universal Declaration) the right to life could not possibly be realized in its full sense[49] (*e.g.*, in its close relationships with the right to health and medical care, the right to food, and the right to housing[50]. Thus, both the U.N. General Assembly (resolution 37/189A, of 1982) and the U.N. Commission on Human Rights (resolutions 1982/7, of 1982, and 1982/43, *cf.* 1983) have unequivocally taken the firm view that *all individuals and all peoples* have an *inherent* right to life, and that the safeguarding of this *foremost right* is an essential condition for the environment of the entire range of civil and political, as well as economic, social and cultural rights[51].

Two points are deserving of particular emphasis here. First, it has not passed unnoticed that the provision of the U.N. Covenant on Civil and Political Rights on the fundamental and inherent right to life (Article 6(1)) is "the only Article of the Covenant where the inherency of a right is expressly referred to"[52]. Secondly, the United Nations has formed its conviction that not only all individuals but also all *peoples* have an inherent right to life (*supra*). This brings to the fore the safeguard of the right to life of all persons as well as human collectivities, with special attention to the requirements of survival (as component of the right to life) of vulnerable groups (*e.g.*, the dispossessed and deprived, disabled or handicapped persons, children and the elderly, ethnic minorities, indigenous populations, migrant workers - *cf.* section III, *supra*)[53].

From this perspective, the right to a healthy environment and the right to peace appear as extensions or corollaries of the right to life[54]. The fundamental character of the right to life renders inadequate narrow approaches to it in our days; under the right to life, in its modern and proper sense, not only is protection against any arbitrary deprivation of life upheld, but furthermore States are under the duty

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49 Th. Van Bove, *People Matter - Views on International Human Rights Policy,* Amsterdam, Meulenhoff, 1982, p. 77.

50 On this latter, *cf.* S. Leckie, "The U.N. Committee on Economic, Social and Cultura Rights and the Right to Adequate Housing: Towards an Appropriate Approach", 11 *Human Rights Quarterly* (1989) pp. 522-560.

51 *Cit.* in B.G. Ramcharan, "The Right to Life", *30 Netherlands International Law Review* (1983) p. 301.

52 *Ibid.,* p. 316.

53 *Cf. ibid.,* p. 305, and *cf.* p. 306; and Th. Van Boven, *op. cit. supra* n. (48), pp. 179 and 181-183.

54 B.G. Ramcharan, *op. cit. supra* n. (5), pp. 303 and 308-310.

"to pursue policies which are designed to ensure access to the means of survival"[55] for all individuals and all peoples. To this effect, States are under the obligation to avoid serious environmental hazards or risks to life, and to set into motion "monitoring and early warning systems" to detect such serious environmental hazards or risks and "urgent action systems" to deal with such threats[56].

In the same line, in the I European Conference on the Environment and Human Rights (Strasbourg, 1979), the point was made that mankind needed to protect itself against its own threats to the environment, in particular when those threats had negative repercussions on the conditions of existence - life itself physical and mental health, the well-being of present and future generations[57]. In a way, it was the right to life itself, in its wide dimension, which entailed the needed recognition of the right to a healthy environment; this latter appears as "le droit à des conditions de vie qui assurent la santé physique, morale, mentale et sociale, la vie elle-même, ainsi que le bien-être des génerations présentes et futures"[58]. In other words, the right to a healthy environment safeguards human life itself under two aspects, namely, the physical existence and health of human beings, and the dignity of the existence, the quality of life which renders it worth living[59]. The right to a healthy and the right to an adequate or sufficient standard of living, and has furthermore a wide *temporal* dimension: as, "en matière d`environneement certaines atteintes à environnement ne produisent d'effets sur la vie et la santé de l'homme qu'á long terme, (...) la reconnaissance d'un droit à l'environnement (...) devrait donc admettre une notion large des atteintes"[60].

Thus, the wide dimension of the right to life and the right to a healthy environment entails the consequent wider characterization

55 *Ibid*., p. 302.

56 *Ibid.*, pp. 304 and 329. Views reproduced in B.G. Ramcharan, "The Concept and Dimensions of the Right to Life", *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/Kluwer, 1985, pp. 1-32.

57 P. Kromarek, "Le droit à un *environnement* équilibré et sain, considéré comme un droit del l'homme: sa mise-en-oeuvre nationale, européenne et internationale", I *Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, pp. 2-3, 31 and 34 (mimeographed, restricted circulation).

58 *Ibid.*, pp. 13 and 5 (emphasis added).

59 *Ibid.*, p.12.

60 *Ibid.*, pp. 43 and 21.

of attempts or threats against those rights, which in turn calls for a higher degree of their protection. An example of those threats is provided by, *e.g,* the effects of global warming on human health: skin cancer, retinal eye damage, cataracts and eventual blindness, neurological damage, lowered resistance to infections, alteration of the immunological system (through damaged immune cells); in sum, depletion of the ozone layer may result in substantial injury to human health as well as the environment (harm to terrestrial plants, destruction of the zooplankton, a key link in the food chain)[61], thus disclosing the needed convergence of human health protection and environmental protection.

In the realm of international environmental law, the 1989 Hague Declaration on the Atmosphere, for example, states that "the right *to live* is the right from which all other rights stem" (§1), and adds that "the right *to live* in dignity in a viable global environment" entails the duty of the "community of nations" *vis-à-vis* "present and future generations" to do "all that can be done to preserve the quality of the atmosphere" (§ 5). The use of the expression "the right *to live*" (rather than right *to life*) seems well in keeping with the understanding that the right to life entails negative as well as positive obligations as to preservation of human life (*cf. supra*). The *Institut de Droit International,* while drafting its Resolution on Transboundary Air Pollution (Session of Cairo, 1987), was attentive to include therein provisions referring to the protect life and human health[62].

Together with the right to a healthy environment, the right to peace appears also as a necessary prolongation or corollary of the right to life. In fact, both the Inter-American Commission on Human Rights[63] and the U.N. General Assembly[64] have attentive to address the requirements of *survival* as component of the right to life. In this connection, in its general comment 14 (23), of 1985, in Article

61 J.T.B. Tripp, "The UNEP Montreal Protocol: Industrialized and Developing Countries Sharing the Responsibility for Protecting the Stratospheric Ozone Layer", 20 *New York University Journal of International Law and Politics* (1988) p. 734; Ch. B. Davidson, "The Montreal Protocol: The First Step Toward Protecting the Global Ozone Layer", in *ibid.,* pp. 807-809.

62 *Cf.* preamble and Articles 10(2) and 11; text in: 62 *Annuaire de l'Institut de Droit International* (1987) II, pp. 204-207-208 and 211.

63 *Cf.* Comisión Interamericana de Derechos Humanos, *Diez Años de Actividades* - 1971-1981, Washington, Secretaría General de la OEA, 1982, pp. 338-339, 321 and 329-330.

64 B.G. Ramcharan, *op. cit. supra* n. (50), p. 303.

6 (on the right to life) of the U.N. Covenant on Civil and Political Rights, the Human Rights Committee, after recalling its earlier general comment 6(16), of 1982, on Article 6(1) of the Covenant -to the effect that the right to life, as enunciated therein, is "the supreme right from which no derogation is permitted even in time of public emergency",- went on to relate the current proliferation of weapons of mass destruction to "the supreme duty of States to prevent wars". The Committee associated itself with the growing concern, expressed during successive sessions of the U.N. General Assembly by representatives from all geographical regions, at what represented one of the "greatest threats to the right to life which confronts mankind today". In the words of the Committee, "the very existence and gravity of this threat generate a climate of suspicion and fear between States, which is in itself antagonist to the promotion of universal respect for and observance of human rights" in accordance with the U.N. Charter and the U.N. Covenants on Human Rights[65]. The Committee, accordingly, "in the interest of mankind", called upon "all States, whether Parties, to take urgent steps, unilaterally and by agreement, to rid the world of this menace[66]."

The maintenance of peace is an imperative for the preservation of human life; the Final Acta of 1968 Teheran Conference on Human Rights contains several references to the relationship of observance of human rights and maintenance of peace[67]. In this connection, reference can further be made to the preambles of the two 1966 U.N. Covenants on Human Rights. More recently the "right to peace" has formed the object of a number of U.N. resolutions, which relate it to disarmament and détente, thus disclosing the temporal dimension of the underlying duty of *prevention* of conflicts[68] (*e.g., inter alia*, G.A. resolutions 33/73, of 1978, and 34/88 of 1979). The States' duty to co-exist in peace and to achiever disarmament is acknowledged in the 1974 Charter on Economic Rights and Duties of States (Articles 26 and 15, respectively).

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65 U.N. *Report of the Human Rights Committee,* G.A.O.R. 40th Session (1985), suppl. nº. 40-(A/40/40), p. 162.

66 *Ibid.*, p. 162.

67 *Cf.* U.N., Final Act of the International Conference on Human Rights (1968), U.N. doc. A/CONF. 32/41, N.Y., U.N., 1968, pp. 4, 6, 9, 14 and 36.

68 *Cf.* J.M. Becet and D. Colard, *Les droits de l'homme,* Paris, Economica 1982, pp. 128-131.

The right to peace entails as a corollary the "right to disarmament"[69]; attention has in this regard been drawn to the fact that limitations or violations of human rights are often associated with the outbreak of conflicts, the process of militarization and the expenditure on arms[70], especially nuclear weapons and other weapons of mass-destruction[71], which have led and may unfortunately still lead to arbitrary deprivation of human life. The conception of "sustainable development", as propounded by the Brundtland Commission, points to the ineluctable relationship between the rights to a healthy environment, to peace and to development[72].

The relationship between the right to life and the right to development as a human right becomes clearer as one moves from the traditional, narrow approach to the right to life (as strictly a civil right) into the wider and modern approach to it, as encompassing also the minimum conditions for an adequate and dignified standard of living (*cf. supra*). Then the interrelatedness of the right to life and the right to development as a human rights becomes self-evident, as this latter purports to demand all possible endeavours to overcome obstacles (of destitution and underdevelopment) preventing the fulfilment of basic human needs[73]. Not surprisingly, the U.N. Working Group of Governmental Experts on the Right to Development recommended in 1984 *inter alia* that particular attention be paid to the basic needs and aspirations of vulnerable or disadvantaged and discriminated groups[74].

In sum, the basic right to life, encompassing the right of living, entails negative as well as positive obligations in favour of

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69 To this effect, *cf. ibid.*, pp. 129-131; Ph. Alston, *op. cit. infra* n. (69), pp. 324-325 and 329-330.

70 Ph. Alston, "Peace, Disarmament and Human Rights", *Armenent, Développement, Droits de l'homme, Désarmement* (Colloque à l'UNESCO, 1982) (ed. G. Fischer), Paris/Bruxelles, Bruylant, 1984, pp. 325-330.

71 *Cf.* discussion in, e.g., A.A. Tikhonov, "The Inter-relationship between the Right to Life and the Right to Peace; Nuclear Weapons and Other Weapons of Mass-Destruction and the Right to Life", *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/Kluwer, 1985, pp. 97-113.

72 *Cf.* World Commission on Environment and Development, *Our Common Future,* Oxford, University Press, 1987, pp. 19 and 290-3, and *cf.* in particular pp. 294-300 on conflicts as a "cause of unsustainable development".

73 P.J.I.M. De Waart, "The Inter-Relationship between the Right to Life and the Right to Development", *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/Kluwer, 1985, pp. 89 and 91-92.

74 *Cit in ibid.*, p. 91.

preservation of human life. Its enjoyment is a precondition of the enjoyment of other human rights. It belongs at a time to the realm of civil and political right and to that of economic, social and cultural rights, thus illustrating the indivisibility of all human rights. It establishes a "link" between the domains of international human rights law and environmental law. It inheres in all individuals and all peoples, with special attention to the requirements of survival. It has as extensions or corollaries the right to a healthy environment and the right to peace (and disarmament). It is closely related, in its wide dimension, to the right to development as a human right (right to live with fulfilment of basic human needs). And it lies at the basis of the ultimate ratio *legis* of the domains of international human rights law and environmental law, turned to the protection and survival of the human person and mankind.

4.2. The Right to Health as the Starting-Point towards the Right to a Healthy Environment

Like the right to life (right of living, *supra*), the right to health entails *negative* as well as *positive* obligations. In fact, the right to health is inextricably interwoven with the right to life itself, and exercise of freedom. The right to life implies the *negative* obligation not to practice any act which can endanger one's health, thus linking this basic right to the right to physical and mental integrity and to the prohibition of torture and of cruel, inhuman or degrading treatment (as recognized and provided for in the U.N. Covenant on Civil and Political Rights, Article 7; the European Convention on Human Rights, Article 3; the American Convention on Human Rights, Articles 4 and 5). But this duty of abstention (so crucial, *e.g.*, in the treatment of detainees and prisoners) is accompanied by the positive obligation to take all appropriate measures to protect and preserve human health (including measures of prevention of diseases).

Such positive obligation (as recognized and provided for in, e.g., the U.N. Covenant on Economic, Social and Cultural Rights, Article 12, and the European Social Charter, Article 11, besides WHO and ILO resolutions on specific aspects), linking the right to life to the right to an adequate standard of life[75], disclose the fact that the right

75 As proclaimed by the 1948 Universal Declaration of Human Rights, Article 25(1). On the "negative" and "positive" aspects of the right to health, *cf.* M. Bothe, "Les concepts fondamentaux du droit à la santé: le point de vue juridique", *Le droit*

to health, in its proper and wide dimension, partakes the nature of at a time an individual and social right. Belonging, like the right to life, to the realm of basic or fundamental rights, the right to health is an individual right in that it requires the protection of the physical and mental integrity of the individual and his dignity; and it is also a social right in that it imposes on the State and society the collective responsibility for the protection of the health of the citizenry and the prevention and treatment of diseases[76]. The right to health, thus properly understood, affords, like the right to life, a vivid illustration of the indivisibility and inter-relatedness of all human rights.

4.3. The Right to a Healthy Environment as an Extension of the Right to Health

The right to life in its "positive" aspect (*supra*) found expression, at global level, in Article 12 of the U.N. Covenant on Economic, Social and Cultural Rights; that provision, in laying down the guidelines for the implementation of the right to health, singled out, *inter alia* ("b"), "the improvement of all aspects of environmental and industrial hygiene". The way seemed thereby paved for the future recognition of the right to a healthy environment (*infra*).

This point was object of attention at the 1978 Colloquy of the Hague Academy of International Law on "The Right to Health as a Human Right", where the issue of the human right to environmental salubrity was raised. On the occasion, after warning that the degradation of the environment constituted nowadays a *menace collective à la santé des hommes*[77], P.M. Dupuy pertinently advocated the needed assertion or proclamation of the human right to environmental salubrity as the "supreme guarantee" of the right to health[78]. Pondering that the environment ought to be protected "*en fonction de l'ensemble des intérêts de la collectivité*", he justified:

à la santé en tanomme - Colloque 1978 (Académie de Droit International de la Haye), The Hague, Sijthoff, 1979, pp. 14-29; Scalabrino-Spadea, "Le droit à la santé. Inventaire de normes et principes de droit international", in *Le médecin face aux droits de l'homme,* Padova, Cedam, 1990, pp. 97-98.

76 R. Roemer, "El Derecho a la Atención de la Salud", in OMS, *El Derecho a la Salud en las Américas* (ed. H.L. Fuenzalida-Puelma and S.S. Connor), Washington, OPAS, publ. nº. 509, p.16.

77 P.M. Dupuy, *op. cit.* infra nº. (78), p.406 and *cf.* p. 351.

78 *Ibid.,* p. 412, and *cf.* p. 409.

> Il nous paraît que la chance fournie par l'affirmation d'un droit à la salubrité du milieu est justement de donner l'occasion à l' "environnement" de cesser d'être d'abord perçu en termes économiques, ainsi qu'un bien susceptible d'exploitation, afin d'appraître au moins autant comme un patrimoine de l'individu, necessaire e à l'épanouissement de son droit fondamental a la vie, et donc à la santé[79].

The protection of the whole of the biosphere as such entails "indirectly but necessarily" the protection of human beings, in so far as the object of environmental law and hence of the right to a healthy environment is "protèger les humains en leur assurant un milieu de vie adéquate"[80]. The right to a healthy environment, in the perspicatious observation by Kiss, "completes" other recognized human rights also from another point of view, namely,

> Il contribue à établir une égalité entre citoyens ou, du moins, à atténuer les inégalités dans leurs conditions matérielles. On sait que les inégalités entre humains de conditions sociales différentes sont accentuées par la dégradation de l'environnement: les moyens matériels dont disposent les mieux nantis leur permettent d'échapper à l'air pollué, aux milieux dégradés et de se créer un cadre de vie sain et équilibré, alors que les plus démunis n'ont guère de telles possibilités et doivent accepter de vivre dans des agglomérations devenues inhumaines, voire des bidonvilles, et de supporter les pollutions. L'exigence d'un environnement sain équilibré devient ainsi en même temps un moyen de mettre en oevre d'autres droits reconnus à la personne humaine. Mais, par ses objectifs miemes, le droit à l'environnement apporte aussi une dimension supplémentaire aux droits de l'homme dans leur ensemble[81].

The interrelatedness between environmental protection and the safeguard of the right to health is clearly evidence in the implementation of Article 11 (on the right to protection of health) of the 1961 European Social Charter. The Committee of Independent

79 P.M. Dupuy, "Le droit à la santé et la protection de l'environnement", *Le droit à la santé... Colloque..., cit. supra* n. (74), p. 410.
80 A. Ch. Kiss, "Le droit à la qualité de l'environnement: un droit de l'homme?", *in Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N. Duplé), Vieux-Montréal (Quebec), Ed. Québec/Amérique, 1988, pp. 69-70.
81 *Ibid.*, p.71.

Experts, operating under the Charter, has in recent years been attentive, in the consideration of national reports, to measures taken at domestic level, pursuant to Article 11 the Charter, to prevent, limit or control pollution[82]. With regard to the removal of causes of ill-health (Article 11(1)), the Committee has concentrated on measures taken to prevent or reduce pollution of the atmosphere[83]. Thus, in the consideration of a French report, the Committee took note a "the intention of the public authorities to achieve a 50% reduction in sulphur dioxide emissions into the atmosphere during the period 1980-90"[84]; and in the consideration of the latest Danish report, the Committee noted the measures taken to reduce air pollution, in particular that "emissions of nitrogen oxide into the atmosphere was to be reduced by 50% before 2005 and of sulphur dioxide by 40% before 1995"[85].

The collection *Case Law on the European Social Charter* contains other pertinent indications. The Committee of Independent Experts has manifested its wish to find in forthcoming national reports information, under Article 11 of the Charter, on "the measures taken to reduce to release of sulphur dioxide and other acid pollutants in the atmosphere"[86]. The Committee has called for amplified measures for control of environmental pollution[87]. The Committee has further expressed the opinion the States bound by Article 11 of the Charter should be considered as fulfilling their obligations in that respect if they provide evidence of the existence of a medical and health system comprising *inter alia* "general measures aimed in particular at the prevention of air and water pollution, protection from radio-

82 *Cf., e.g.,* Council of Europe/European Social Charter, *Committee of Independent Experts - Conclusions* IX-2, Strasbourg, C.E., 1986, p. 71 (Austrian and Cypriot reports); *Ibid.,* Conclusions XI-1, Strasbourg, C.E., 1989, p.119 (Swedish and British reports).

83 E.g., German Italian reports, *in ibid.,* Conclusions IX-2, cit. *supra* n. (81), pp. 71-72.

84 *In ibid.,* pp. 71-72.

85 *In ibid., Conclusions XI-1,* cit. *supra* n. (81), p.118.

86 Council of Europe/European Social Charter, *Case Law on the European Social Charter Supplement,* Strasbourg, C.E., 1982, p. 37.

87 Council of Europe/European Social Charter, *Case Law on the European Social Charter,* Strasbourg, C.E., 1982, p. 105.

active substances, noise abatement, the food control environmental hygiene, and the control of alcoholism and drugs"[88].

An attempt has in fact been made, in the European continent, to extend the protection of the rights to life and health so as to include well-being, under the realm of the European Convention of Human Rights itself: prior to the convening of the 1973 European Ministerial Conference on Human Rights to that effect was prepared by H. Stelger. The Draft Protocol, containing two articles, provides for the protectionh of life and health as ecompassing well-being (Article 1(1)) and admits limitations on the right to a healthy environment (Article 1(2)); it further provides for the protection of individuals against the acts of other private persons (Article 2(1) and (2)). This point (*Drittwirkung*), though giving rise to much debate and controversy, has been touched upon by the European Commission of Human Rights, which, in its 1979 report in the *Young, James and Webster cases,*admitted that the European Convention contained provisions that "non seulement protègent l'individu contre l'Etat, mais aussi obligent l'Etat à protéger l'individu contre les agissements d'autrui"[89]. Although Steiger's proposed Draft Protocol, purporting to place under the machinery of implementation of the European Convention the provisions above referred to (Article 1 and 2), was not at the time accepted by member States, it remains the sole existing proposal on the matter (in so far as the European Convention system is concerned) and its underlying ideas deserve today further and deeper consideration[90] (*cf. infra*). Though the question remains an

88 *Ibid.,* p. 104. On the protection of health vis-à-vis the environment under Article 11 of the European Social Charter, *cf.* further: Council of Europe doc. 6030, of 22.03.1989, p.9; C.E.; *Comité Gouvernemental de la Charte Sociale Européenne 10 rapport* (1989), p.28 (control of atmospheric pollution); Conseil de l'Europe/Charte Sociale Européenne, *Comité d'Experts Indépendants - Conclusions X-2*, Strasbourg, C.E., 1988, pp. 111-112 (reduction of atmospheric pollution); Council of Europe / European Socialk Charter, *Committee of Independent Experts - Conclusions X-1*, Strasbourg, C.E., 1987, 108 (reduction of atmospheric pollution, air and water pollution control).

89 *Cit. in* J.P. Jacqué, "La protection du droit à l'environnement au niveau européen ou régional", *in Environnement et droits de l'homme* (ed. P. Kromarek), Paris, UNESCO, 1987, pp. 74-75, and *cf.* pp. 72-73. And, on Steiger's proposed Draft Protocol, *cf.* W.P. Gormley, *Human Rights and Environment: The Need for International Cooperation,* Ley-den, Sijthoff, 1976, pp. 90-95; P.M. Dupuy, *op. cit. supra* n. (78), pp. 408-413.

90 W.P. Gormley, *op. cit. supra* n. (88), pp. 112-113; J.P. Jacqué, *op. cit. supra* n. (88), pp. 73 and 75-76; P.M. Dupuy, op. cit *supra* n. (78), pp. 412-413. For the complete

open one, there has however been express recognition of the right to a healthy environment in more recent human rights instruments, as we have already seen (*cf.* section III, *supra*).

5. THE QUESTION OF THE IMPLEMENTATION (*MISE EN OEUVRE)* OF THE RIGHT TO A HEALTHY ENVIRONMENT

5.1. The Issue of Justiciability

It can hardly be doubted that the appropriate formulation of a right may facilitate its implementation. But given that certain concepts escape any scientific definition, it becomes necessary to relate them to a given context for the sake of normative precision and effective implementation (*mise-en-oeuvre*); thus, *e.g.*, the term "environment" may be taken to cover from the immediate physical *milieu* surrounding the individual concerned to the whole of the biosphere, and it may thus be necessary to add qualifications to the term[91]. In the implementation of any right, one can hardly make abstraction of the context in which it is invoked and applied: relating it to the context becomes necessary for its vindications in the *cas d'espèce*[92].

This applied not only to the right to a healthy environment, but also to any other "category" of rights. But such "new" rights as the right to a healthy environment and the right to development present admittedly a greater challenge when one comes to implementation: while many of the previously crystallized civil and political, and economic, social and cultural rights had at a much earlier stage found expression also in domestic law and had been formally recognized in national constitutions and other legislation, the above-mentioned "new" rights, on their turn, were still "maturing" in their process of transformation into law, were "conceived directly in international forums" (such as the United Nations system), and had "not had the

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text of Steiger's 1973 proposed Draft Protocol, *cf.* Working Group for Environmental Law (Bonn - *rapporteur,* H. Steiger), "The Right to a Humane Environment/Das Recht auf eine menschenwürdige Umwelt", *in* Beiträge zur Umweltgestaltung (Heft A 13), Berlin, Erich Schmidt Verlag, 1973, pp. 27-54.

91 A. Ch. Kiss, "La mise-en-oeuvre du droit à l'environnement: problematique et moyens", *II Conférence européenne sur l'environnement et les droits de l'homme*, Salzburg, Institute for European Environmental Policy, 1980, p. 4 (mimeographed, restricted circulation).

92 *Ibid.*, p. 5.

benefit of careful prior scrutiny at the national level[93]. Many rights, whether classified as civil and political, or else as economic, social and cultural rights, "can only be defined with specificity when located in a given context"[94].

While the element of *formal justiciability* is taken as an "indispensable attribute" of a right in positivist thinking[95], international human rights law has distinctly considered that "an international system for the 'supervision' of States' compliance with international human rights obligations is sufficient to satisfy the requirement of 'enforceability'"[96]. In short, international human rights law has "clearly adopted the notions of 'implementation' and 'supervision' as its touchstones, rather than those of justiciability or enforceability"[97]. International human rights law counts largely on means of implementation other than the purely judicial one[98]; besides recourse to such judicial organs as the European and the Inter-American Courts of Human Rights, there occurs most often resort to various other means -non-friendly settlement, conciliation, fact-finding)[99].

Formal justiciability or enforceability is by no means a definitive criterion to ascertain the existence of a right under international human rights law. The fact that many recognized human rights have not yet achieved a level of elaboration so as to render them justiciable does not mean that those rights simply do not exist: enforceability

93 Ph. Alston, "Conjuring up New Human Rights: A Proposal for Quality Control", 78 *American Journal of International Law* (1984) p. 614.

94 For example, "it would not seem inherently more difficult for a particular society to define a 'right to take part to conduct of public affairs' (a political right)". Ph. Alston, "Making Space for New Human Rights: The Case of the Right to Development", 1 *Harvard Human Rights Yearbook* (1988) p.35.

95 *Ibid.*, p. 33.

96 *Ibid.*, p. 38.

97 *Ibid.*, p. 35.

98 K. Vasak, "Pour les droits de l'homme de la troisiéme génération: les droits de solidarité", *Résumés des Cours de l'Institut International des Droits de l'Homme* (X Session d'Enseignement, 1979), Strasbourg, IIDH, 1979, p.6 (mimeographed).

99 For a recent study of the operation of international mechanisms of human rights protection, *cf.* A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 21-435.

is not be confounded with existence itself of a right[100]. Attention is to be focused on the *nature* of obligations; it is certain that, for example, obligations under the U.N. Covenant on Economic, Social and Cultural Rights were elaborated in such a way (*e.g.*, the basic provisions of Articles 2 and 11) that they "cannot easily be made justiciable (manageable by third-party judicial settlement). Nevertheless, the obligations exist and can in no way be neglected"[101].

One is to reckon, in sum, as far as the issue of justiciability is concerned, that there are rights which simply cannot be properly vindicated before a tribunal by their active subjects (*titulaires*). In the case specifically of the right to healthy environment, however, if, as pertinently pointed out by this latter is interpreted not as the -virtually impossible- right to an ideal environment but rather as the right to the conservation -*i.e.*, protection and improvement- of the environment, it can then be implemented like any other *individual* right. It is then taken as a "procedural" right, the right to a due process before a competent organ, and thus assimilated to any other right guaranteed to individuals and groups of individuals. This right entails, as corollaries, the right of the individual concered *to be informed* of projects and decisions which could threaten the environment (the protection of which counting on preventive measures), and the right of the individual concerned *to participate* in the taking of decisions which may affect the environment (active sharing of responsibilities in the management of the interests of the whole collectivity)[102]. To

100 A. Eide, "Realization of Social and Economic Rights and the Minimun Threshold Approach", *10 Human Rights Law Journal* (1989) pp. 36 and 38.

101 *Ibid.*, p. 41.

102 A. Ch. Kiss, "Le droit à la qualité de l'environnement: un droit de l'homme?", *Le à qualité de l'environnement: un droit en devenir, un droit à definir* (ed. N.Duplé), Vieux-Montreal/Quebec, Ed. Québec/Amérique, 1988, pp. 69-87. As the environment is a common good ("le bien de tous"), "l'ensenble du corps social aussi bien que les groupes ou que les individus qui le composent sont appelés à participer à sa gestion et à sa protection"; P. Kromarek, "Le droit à un environment équilibré et sain, considéré comme un droit del l'homme: sa mise-en-oeuvre nationale, européenne et internationale", *I Conférence européenne sur l'environnement et les droits de l'homme,* Strasbourg, Institute for European Environmentak Policy, 1979, p.15 (mimeographed, restricted circulation). On the remedies (in domestic comparative law) for the exercise of the right of information and the right of participation, *cf.* L.P. Suetens, "La protection du droit à l'information et du droit de participation: les recours", *II Conférence européenne sur l'environnement et les droits de l'homme,* Salzburg, Institute for European Environmental Policy, 1980, pp. 1-13 (mimeographed, restricted circulation); and, on private recourses for

such rights to information and to participation one can add the *right to available and effective domestic remedies*. And it should not in this connection be overlooked that some economic and social rights were made enforceable in domestic law once their component parts were "formulated in a sufficiently precise and detailed manner"[103].

Focussing on the *subjects* of the right to healthy environment, we see first that it has an individual dimension, as it can be implemented, as just indicated, like other human rights. But the beneficiaries of the right to a healthy environment are not only individuals, but also groups, associations, human collectivities, and indeed, the whole of mankind. Hence its collective dimension as well. The right to healthy environment, like the right to development, discloses an individual and a collective dimension at a time. If the subject is an individual or a private group, the legal relationship is exhausted in the relation between the individual (or group of individuals) and the State; but if we have in mind humankind as a whole, the legal relationship is not exhausted in that relation. This is probably why the distinction between individual and collective dimensions is often resorted to.

If we focus on *implementation*, it is conceded that all rights, whether "individual" or "collective", are exercised in a societal context, having all a "social" dimension in that sense, since their vindication requires the intervention - in varying degrees - of public authority for them to be exercised. There is, however, yet another approach, which can shed some light on the problem at issue: to focus on the object of protection. Taking as such an *object* a common good, a *bien commun* such as the human environment, not only are we thereby provided with objective criteria to approach the subject, but also we can better grasp the proper meaning of "collective" rights.

Such rights pertain at a time to each member as well as to all members of a given human collectivity, the object of protection being the same, a common good (*bien commun*) such as the human environment, so that the observance of such rights benefits at a time each member and all members of the human collectivity, and

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environmental harm (in domestic comparative law), *cf.* S.C. McCaffrey and R.E. Lutz (eds.), *Environmental Pollution and Individual Rights: An International Symposium*, Deventer, Kluwer, 1978, pp. XVII-XXIII and 3-162. On the "procedural" conception of the right to the conservation of the environment, *cf.* A. Ch. Kiss "Peut-on parler d'un droit à l'environnement?", *Le droit et l'environnement - Actes des Journées de l'Environnement du C.N.R.S.* (1988) pp. 309-317.

103 A. Eide, *op. cit. supra* n. (99), p.36.

the violation of such rights affects or harms at a time each member and all members of the human collectivity at issue. This reflects the essence of "collective" rights, such as the right to a healthy environment in so far as the object of *protection* is concerned.

The multi-faceted nature of the right to healthy environment becomes thus clearer: the right to a healthy environment has individual and collective dimensions -being at a time an "individual" and a "collective" right- in so far its *subjects or beneficiaries* are concerned. Its "social" dimension becomes manifest in so far as its *implementation* is concerned (given the complexity of the legal relations involved). And it clearly appears in its "collective" dimension in so far as *object* of protection is concerned (*a bien commun*, *the human environment*).

This matter has not been sufficiently studied to date, and considerable in-depth reflection and research are required to clarify the issues surrounding the implementation of the right to a healthy environment and the very conceptual universe in which it rests. In so far as the subjects of the relationships involved are concerned, one has moved from the individuals and groups to the whole of mankind, and in this wide range of *titulaires* one has also spoken of *generational* rights (rights of future generations - *cf. supra*). In so far as the methods of protection are concerned, it still has to be carefully explored to what extent can the mechanisms of protection evolved under international human rights law) essentially the petitioning, the reporting and the fact-finding systems)[104] be utilized also in the realm of environmental protection.

It seems that the experience accumulated in this respect in the last decades in human rights protection can, if properly asessed, be of assistance to the development of methods of environmental protection. Some inspiration can indeed be derived from the experience of application of mechanisms of international implementation of human rights for the improvement of international implementation of instruments on environmental protection. It is, in this connection, reassuring to note that the conclusions of a recent Forum on International Law of the Environment, held in Siena,

104 On their functioning and co-ordination, *cf.* A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 13-435.

Italy, in April 1990, recognize *inter alia* that "certain procedures used for the protection of human rights could serve as models in the field of the protection of the environment"[105]. Likewise, expert writing on international environmental law has suggested that U.N. international environmental organs could be given "powers similar to those" of the U.N. Committee on Economic, Social and Cultural Rights "to study and comment on reports submitted by States since the right to a good environment is similar to and partakes of all the difficulties and drawbacks of social and economic rights"[106]. Such acknowledgements are quite understanding and beneficial to environmental protection, given the fact that human rights protection antedates in time and the experience with the implementation of the latter can be of use and value to the implementation of the former.

5.2. The Issue of Protection *Erga Omnes*: "*Drittwirkung*"

In the fields of both human rights protection and environmental protection there occur variations in the obligations: some norms are susceptible of direct applicability, others are rather programatic in *nature*. Attention ought thus to be turned to the nature of the obligations. An important issue, in this connection, is that of the *erga omnes* protection of certain guaranteed rights, which raises the issue of third-party applicability of conventional provisions. This issue, called *Drittwirkung* in German legal literature, can be examined in the domains of both human rights protection and environmental protection.

In the former, *Drittwirkung* is still evolving in, *e.g.*, the case-law under the European Convention on Human Rights[107] (*infra*). Bearing in mind the considerable variety of rights guaranteed under human rights treaties, there are provisions in these latter which seem to indicate that at least some of the rights are susceptible of

105 *Conclusion of the Siena Forum on International law of the Environment* (April 1990), p.8, § 23 in fine (mimeographed, restricted circulation)

106 L.A. Teclaff, "The Impact of Environmental Concern on the Development of International Law" *in International Environmental Law* (ed. L.A. Teclaf and A.E. Utton), N.Y., Praeger, 1975, p. 252.

107 *Cf.* A.Z. Drzemczewski, *European Human Rights Convention in Domestic Law - A Comparative Study,* Oxford, University Press, 1983, ch.8, pp. 199-228; and *cf.* J. Rivero, "La protection des droits de l'homme dans les rapports entre personnes privées", *René Cassin Amicorum Discipulorumque Liber*, vol. III, Paris, Pédone, 1971, pp. 311ss.

third-party applicability (*Drittwirkung*). Thus, Article 2(1) (d) of the U.N. Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination "by any persons, group or organization". By Article 2(1) of the U.N. Covenant on Civil and Political Rights States Parties undertake not only "to respect" but also "to ensure" to all individuals subject to their jurisdictions the right guaranteed under the Covenant, -what may be interpreted as at least the States Parties' duty of due diligence to prevent deprivation or violation of the rights of the Covenant (right to privacy) would cover protection of the individual against interference by public authorities as well as private organizations or individuals[108]. In addition, Article 29 the Universal Declaration of Human Rights refers to "everyone's duties to the community".

The European Convention on Human Rights, in its turn, states in Article 17 that nothing in the Convention may be interpreted as implying "for any State, group or person", any right to engage in any activity or perform any act aimed at the destruction of the guaranteed rights. Articles 8-11 indicate that account is to be taken of the protection of other people's rights; and from Article 2, whereby "everyone's right to life is protected by law", it may be inferred the State's duty of due diligence of prevention and of making its violation a punishable offence[109]. It can in fact be forcefully added that the supreme values underlying fundamental human rights are such that they deserve and require protection *erga omnes*, against any encroachment, by public or private bodies or by any individual[110].

Even though the issue of *Drittwirkung* was not considered when the European Convention was drafted, the subject-matter of the Convention lends itself to *Drittwirkung*, in the sense that some of the recognized rights deserve protection against public authorities as well as private individuals, and States have to secure everyone - in the relations between individuals - against violations of guaranteed

108 Y. Dinstein, "The Right to Life, Physical Integrity, and Liberty", *in The International Bill of Rights* (ed. L. Henkin), N. Y., Columbia University Press, 1981, p.119; Jan De Meyer *op. cit. infra.* n. (109), pp. 35-37.

109 E.A. Alkema, *op. cit. infra.* n. (109), pp. 35-37.

110 E.A. Alkema, "The Third-Party Applicability or 'Drittwirkung' of the European Convention on Human Rights", *in Protecting Human Rights: The European Dimension - Studies in Honour of G.J. Wiarda* (ed. F. Matscher and H. Petzold), Köln, C. Heymanns, 1988, pp. 33-34.

rights by other individuals[111]. Thus, *e.g.*, with regard to the right to privacy (Article 8 of the Convention, on respect for private life), there is need to protect this right also in the relation between individuals (persons, groups, institutions, besides States). Situations have in fact occurred in practice where the State may be involved in the relations between individuals (*e.g.*, custody of a child, clandestine recording of a conversation by a private individual with the help of the police)[112]. Certain human rights have validity *erga omnes*, in that they are recognized in relation to the State but also and necessarily "in relation to other persons, groups or institutions which might prevent the exercise thereof"[113].

Thus, a human rights violation by individuals or private groups can be sanctioned indirectly, when the State fails, in "its duty to provide due protection", to take the necessary steps to prevent or punish the offence[114]. Article 8 of the European Convention pertinently illustrates the "absolute effect" of that right to privacy, the need for its protection *erga omnes*, against frequent interferences or violations not only by public authorities but also by private persons or the mass media[115].

In the same line, it has been forcefully argued that the right to a healthy environment ought to be "opposable aux tiers, avoir un effet direct à leur égard", ought to be opposable "aux particuliers de façon à assurer la protection des intérêts des individus et des groupes en matière d'environment"[116]. *Drittwirkung* amounts to the situation whereby everyone is beneficiary of that right and everyone has duties *vis-à-vis* the whole community; *tout le monde est béneficiaire de*

111 This had led one to speak of a sort of "indirect *Drittwirkung*", since "it is realized *via* an obligation of the State". P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights,* Deventer, Kluwer, 1984, pp. 14-18.

112 Jan De Meyer, "The Right to Respect for Private and Family Life, Home and Communications in Relations between Individuals, and the Resulting Obligations for States Parties to the Convention", *in* A.H. Robertson (ed.), *Privacy and Human Rights,* Manchester, University Press, 1973, pp. 267-269.

113 *Ibid.,* p. 271, and *cf.* p. 272.

114 *Ibid.,* p. 273.

115 *Ibid.,* pp. 274-275.

116 P. Kromarek, "Le droit à un environnement équilibré et sain, considéré comme un droit del l'homme: sa mise-en-oeuvre nationale, européenne et internationale", *in I Conférence euroéenne sur l'environnement et les droits de l'homme,* Strasbourg, Institute for European Environmental Policy, 1979, p. 38(mimeographed), restricted circulation).

ce droit, mais en même temps tout le monde assume aussi des obligations de son fait: Etat, collectivités, individus"[117].

6. THE RIGHT TO A HEALTHY ENVIRONMENT AND THE ABSENCE OF RESTRICTIONS IN THE EXPANSION OF HUMAN RIGHTS PROTECTION AND OF ENVIRONMENTAL PROTECTION

6.1. No Restrictions Ensuing from the Co-existence of International Instruments on Human Rights Protection

In the field of the international protection of human rights, restrictions are not to be inferred from the possible effects of multiple co-existing instruments of human rights protection upon each other: on the contrary, in the present context, international law has been made use of in order to improve and strengthen the degree of protection of recognized rights. In fact, the interpretation and application of certain provisions of one human rights instruments have at times been resorted to as orientation for the interpretation of corresponding provisions of other -usually newer- human rights instruments[118].

Normative advances in one human rights treaty may indeed have a direct impact upon the application of other human rights treaties, to the effect of enlarging or strengthening the States Parties' obligations of protection and restricting the possible invocation or application of restrictions to the exercise of recognized rights. Multiple human rights instruments appear complementary to each other; and their complementarity reflects the specificity of the international protection of human rights, a domain of international law characterized as being essentially a *droit de protection*. Where

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117 A. Ch., "Le droit à la qualité de l'environnement: un droit de l'homme?", *in Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N. Duplé), Vieux-Montréal/Québec, Ed. Québec/Amérique, 1988, p.80, and *cf*. p. 83. - "En ce qui concerne le droit à l'environnement, tout le monde est 'créancier' et 'débiteur' en même temps: Etat, collectivités, individus". A. Ch. Kiss, "La mise en oeuvre du droit à l'environnement: problematique et moyens", ***in*** *II Conférence européenne sur "Environnement et droit de l'homme"*, Salzburg, Institut pour une Politique Européenne de l'Environnement, 1980, p. 80, and *cf.* pp. 6-9 (mimeographed, restricted circulation).

118 A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 401 and 101, and *cf.* p.104.

States have undertaken obligations under multiple co-existing instruments of human rights protection, it may be taken to have been the intention to accord individuals a more extended and effective protection. In sum, there is here a clear trend towards the expansion and enhancement of the degree and extend of protection of rights recognized under co-existing human rights instruments[119].

6.2. No Restrictions Ensuing from the Co-Existence of International Instruments on Environmental Protection

Likewise, in the field of international environmental law, restrictions are not to be implied from the possible effects upon each other of multiple co-existing instruments on environmental protection. To this effect in its well-known 1987 report, the World Commission on Environment and Development, in propounding the elaboration of a Universal Declaration and Convention on Environmental Protection and Sustainable Development, stressed the need "consolidate and extend relevant legal principles" on the matter in order "to guide State behaviour in the transition to sustainable development", and warned that multiple co-existing as well as new international conventions and agreements in the area were to *strengthen and extend* environmental protection"[120]. As in human rights protection (*supra*), there is no room for [implied] restrictions in the present domain of environmental protection either.

Having thus considered the point at issue from the perspective, on the one hand, of the effects of human rights instruments upon each other, and, on the other hand, of the effects of environmental protection instruments upon each other, we have found no room for the incidence of restrictions, as those instruments, in one and the other domain, were meant to re-inforce each other and strengthen the degree of protection due. It now remains to examine the point at issue from the perspective of the effects of norms or instruments of human rights protection and of environmental protection *inter se*, or, more precisely, of the effects of the recognition of the right to a healthy environment upon the *corpus* of human rights already recognized.

119 *Ibid.*, pp. 110, 121-122 and 125.

120 World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987, pp. 332-333.

6.3. No Restrictions Ensuing from the Expansion of Systems of Protection (As Evidenced by the Recognition of the Right to a Healthy Environment) in Their Effects upon Each Other

A fairly recent trend of thought has visualized in the emergence of environmental policies of States the incidence of *restrictions* upon the exercise of certain recognized human rights. It has further justified these latter to the effect of protecting the environment. It has suggested that, while some of the more classical civil and political rights are not apparently affected, certain economic and social rights are susceptible of suffering restrictions. As examples, reference has been made to the rights of free circulation, of choice of residence, and to property, in face of protected areas or zones; the right to work, in face of anti-pollution measures; the right to equality, in face of disparities in administrative measures as to the environment; the freedom of association, in face of measures against noise pollution; the right for family, in face of birth-control measures; the rights to development and to leisure, in face of measures for conservation of nature[121].

This approach, it is submitted, is inadequate and short-sighted, even though it cannot fail to admit that the right to a healthy environment comes ultimately to guarantee and re-inforce such basic rights as the right to life and the right to health[122]. In historical perspective, the emergence of new rights has generated the need of their "adaptation" to the *corpus* of rights already recognized. Thus, *e.g.*, economic, social and cultural rights had an impact on classical civil and political rights, and what appeared to be restrictions to the exercise of these latter amounted rather to conditions of the effective exercise of the former, of the new rights[123]. And this helped to enlarge the scope of protection of human rights. In the same way, it became

121 *Cf.* F. Doré, "Conséquences des exigences d'un environnement équilibré et sain sur la définition, la port'ée et les limitation des différents droits de l'homme - Rapport intructif", *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, pp. 3-5, 7-12 and 14 (mimeographed, restricted circulation); and *cf.* F. Doré [Interventions] *in ibid.*, pp.25-27 and 37-38 (mimeographed, restricted circulation).

122 *Cf.* F. Doré, "Conséquences des exigences ...", *op. cit. supra* n. (120), pp. 16-19; F. Doré, [Intervention] *in op. cit. supra* n. (120), p. 27.

123 *Cf.*, to this effect, A.Ch. Kiss [Intervention], *in I Conférence européenne sur l'environnement et les droit de l'homme*, Strasbourg, Institute for European Environment Policy, 1979, pp. 43-45; and *in Résumé des débats, ibid.*, p. 20 (mimeographed, restricted circulation).

clear that the exercise of recognized rights was to take place bearing in mind the exigencies of *ordre public* or the general welfare[124]. The apparent restrictions amounted rather to adjustments to render effective new rights[125] and thus to strengthen the degree of the protection due. From this perspective, it becomes clearer that the right to a healthy environment, once asserted as a *human right*, rather then entailing restrictions to the exercise of other rights, comes to enrich the *corpus* of recognized human rights[126].

Hence the appropriateness of the anthropocentric outlook and the need to place the theme of the environment within a human rights framework. There is no antagonism between international human rights law and environmental law, and the latter helps to clarify the social framework within which all rights are inserted[127]. The recognition of the right to a healthy environment enriches and reinforces existing human rights and discloses other rights in new dimensions, *e.g.,* the much-needed right of citizen participation, which, in turn, requires the effectiveness of the rights to information and to education (in environmental matters)[128].

6.4. The Recognition of the Right to a Healthy Environment and the Consequent Enhancement, Rather than Restriction, of Pre-Existing Rights

International human rights law, in short, is unequivocal in indicating that limitations or restrictions to the exercise of guaranteed rights are to be restrictively interpreted. this ensues, to begin with, from interpretative principles enshrined in human rights treaties themselves (*e.g.*, U.N. Covenant on Civil and Political Rights, Article

124 P. Kromarek, "Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme: sa mise-en-oeuvre nationale, européenne et internationale", *in I Conférence européenne ..., cit supra* n. (122), p. 26 (mimeographed, restricted circulation).

125 M. Ali Mekouar, "Le droit à l'environnement dans ses rapports avec les autres droits del l'homme", *Environnement et droits de l'homme* (ed. P. Kromarek), Paris UNESCO, 1987, pp. 95-96.

126 *Cf.* to this effect, K. Vasak, [Interventions], *in I Conférence européenne ..., op. cit. supra* n. (122), pp. 68-69; and *in Résumé des débats, ibid.,* p. 22 (mimeographed, restricted circulation).

127 *I Conférence européenne..., cit supra* n. (122), *Conclusions,* pp. 72-73 (mimeographed, restricted circulation).

128 *Ibid.,* p. 73; and *cf*. F. Doré, "Conséquences des exigences...", *op. cit. supra* n. (12), pp. 21-22 (mimeographed, restricted circulation).

5(1), American Convention on Human Rights, Article 29), discarding a restrictive interpretation of human rights obligations. As we have upheld in our lectures at the Hague Academy of International Law in 1987, the *restrictive interpretation of restrictions* to the exercise of recognized rights is sanctioned by the application of the test of primacy of the most favourable norm to the alleged victim in respect of the same rights guaranteed by two or more human rights treaties to which the State concerned is a Party, thus discarding undue limitations or restrictions to the exercise of a given right (recognized in another treaty to a lesser extent)[129].

The international supervisory organs themselves have delivered pertinent warnings to that effect. To recall but a few significant ones: the European Court of Human Rights maintained in its Judgment in the *Golder versus United Kingdom* case (1975) that there was no room for implied limitations under the European Convention on Human Rights; the same was upheld by the Inter-American Court of Human Rights in its Advisory Opinions in the cases of *Compulsory Membership in an Association of Journalist* (1985) and of the *Word "Law" in Article 30 of the American Convention on Human Rights* (1986); likewise, in its Report of 1987 on a recent case concerning the observance by the Federal Republic of Germany of the 1958 ILO Discrimination (Employment and Occupation) Convention (no. 111), the Commission of Inquiry (appointed under Article 26 of the ILO Constitution) clarified that no implied exceptions were admissible under ILO Convention no.111[130].

The gradual recognition of "new" human rights cannot possibly have the effect of lowering the degree of protection accorded to existing rights. The emergence of "new" human rights cannot possibly undermine the protection extended to pre-existing rights. That would simply go against the course of historical evolution of the process of expansion of international human rights law; which has consistently pointed towards the enlargement, improvement and strengthening of the degree and extent of protection of recognized rights. In sum, the only permissible limits to the exercise of recognized rights are those expressly provided for under human rights treaties themselves (in whichever form, namely, as limitations

129 A.A. Cançado Trindade, "Co-existence and Co-ordination...", *op. cit. supra* n. (117), p. 104, and *cf.* pp. 104-108.

130 Cases *cit in ibid.,* pp. 106-107 and 116.

or restrictions, or as exceptions, or as derogations, or as reservations); such limits are to be restrictively interpreted, bearing always in mind the accomplishment of the object and purpose of those treaties.

It is to be regretted that the recognition of the right to a healthy environment has led some to the misunderstanding that it might clash with other rights, or the object of these latter. This can only result from an inadequately fragmented or atomized outlook of the *corpus* of international human rights law. Instead, human rights are indivisible and the mechanisms devoted to their protection complement each other, so as to expand and strengthen the degree of the protection due. Rights belonging to distinct "categories" have more in common than one may *prima facie* assume, let alone the fact of their being inter-related.

The emergence of "new" rights is followed by their "adaptation" to the *corpus* of existing rights and their means of implementation. No restrictions on existing rights can be justified by the recognition of "new" rights, as these cannot possibly have been articulated to lower the prevailing degree of protection. Rights belonging to such distinct domains as the civil and political, or the economic, social and cultural, have found their way to co-existence. Likewise, as regards newly-emerged rights, what may at first sight appear as restrictions on pre-existing rights, are in reality not more than needed adjustments entailed by the "new" rights[131].

Given the continuing expansion of international human rights law and the multiplicity of co-existing rights, it may well happen that in given circumstances "priorities may have to be set and limited resources devoted to fulfilling one right which is at more risk or more significant in the circumstances than another"[132]. And this does not mean that the other rights are restricted or contradicted or ignored; there is a balance between the various recognized rights, set by the human rights treaties and instruments themselves, which, *e.g.*, define or indicate the considerations or circumstances relevant to restrictions or limitations on the recognized rights, including in

131 M. Ali Mekouar, "Le droit à l'environnement dans ses rapports avec les autres droits de l'homme", Environnement et droit de l'homme (ed. P. Kromarek), Paris UNESCO, 1987, p. 96, and *cf.* pp. 94-95.

132 J. Crawford, "The Rights of Peoples: Some Conclusions", *The Rights of People* (ed. J. Crawford), Oxford, Clarendon Press, 1988, p. 167.

times of public emergency[133]. And restrictions, as already pointed out, are to be restrictively interpreted.

A key role is here reserved to the international supervisory organs themselves. This issue of the balancing between rights may arise not only with regard to such "new" rights as the right to a healthy environment, but also between any other right (*e.g.*, reconciling the right to freedom of expression and the right to privacy, the freedoms of association and of movement, the right to property and certain social rights, etc.)[134]. Furthermore, the recognition of such "new" rights as the right to a healthy environment can only have the effect not of restricting, but rather of complementing, enriching and enhancing pre-existing rights (*e.g.*, the right to work, the freedom of movement, the right to education, the right to participation, the right to information, etc)[135].

One last remark remains to be made on the matter at issue. It should not pass unnoticed that rights which are at the basis of the *ratio legis* of both environmental protection and human rights protection -such as the right to life and the right not to be subjected to inhumane or degrading treatment- are asserted by human rights treaties[136] as non-derogable. They admit no restrictions whatsoever; they are truly fundamental rights. As for the other recognized rights, in the "balancing" between them dictated by circumstances, "new" rights such as the right to a healthy environment have emerged ultimately to enhance rather than to restrict them, in the same way as they enhance the fundamental non-derogable rights.

133 *Ibid.*, pp. 167-168.

134 *Cf. ibid.*, p.168.

135 M. Ali Mekouar, *op. cit. supra* n. (124), pp. 96-100 and 103-104.

136 E.g., U.N. Covenant on Civil and Political Rights, Article 4(2); European Convention on Human Rights, Article 15(2); American Convention on Human Rights, Article 27.

CLIMATE CHANGE REPARATIONS AND THE LAW AND PRACTICE OF STATE RESPONSIBILITY

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Climate change is possibly the greatest harm ever caused by human beings to other human beings–possibly threatening our very existence as a civilization and as a species.[2] In recent years, international negotiations, advocacy, and academic research have taken a renewed interest in the relevance of the concept of responsibility in this context, specifically in the relation between industrial states and the developing states most vulnerable to climate change.[3] In particular, discussions on possible "means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change" were initiated by the 2007 "Bali Action Plan";[4] the Warsaw International Mechanism for Loss and Damage was established in 2014.[5] As the quest for a comprehensive climate

1 The ideas leading to this paper developed during a visiting doctoral fellowship at the Faculty of Law of the University of Tel Aviv in the winter of 2014–15, as part of the Global Trust "Sovereigns as Trustees of Humanity" Project. I greatly benefited from comments from, among others, Eyal Benvenisti, Aravind Ganesh, Ayelet Banai, Mikko Rajavuori, Mirjam Streng,Myriam Feinberg, Natalie Davidson, and Sivan Shlomo Agon.

2 See generally, Intergovernmental Panel on Climate Change, Climate Change 2013: The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge: Cambridge University Press, 2014) [IPCC 2013].

3 See Benoit MAYER, "Conceiving the Rationale for International Climate Law" (forthcoming) Climatic Change.

4 Decision 1/CP.13 [Thirteen Decision of the First Conference of the Parties to the UN Framework Convention on Climate Change], "Bali Action Plan" (2007), para. (1)(c)(iii).

5 Decision 2/CP. 19, "Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts" (2014), para. 1 [Warsaw International Mechanism].

change agreement (where all states would commit to specific commitments) gives a stronger bargaining power to developing states, the demand of the populations most affected by climate change but least responsible for causing it can no longer remain unheard.

International law scholarship certainly has a role to play in this debate. Because international law is essentially a "promise of justice",[6] the moral dimensions of climate change cannot be ignored–in particular as those nations and individuals who benefit the least from industrialization and development are often the most affected by the adverse impacts of climate change.[7] Beyond the scope of positive rules, there exist general principles underpinning international law, such as the principle of responsibility and some principles governing remedial obligations, from which legitimate expectations arise as to the outcomes of political negotiations, and which therefore should not arbitrarily be disregarded when responses to new issues such as climate change are being imagined. Only if it appears fair to most peoples around the globe can a global climate agreement trigger the costly measures necessary to mitigate climate change.[8] International law, despite all its flaws and biases, is certainly a strong reflection of broadly accepted moral principles.

Besides, the failure of states to agree on climate change responses in line with general principles of international law would significantly impede the promotion of the rule of law in international relations and trust in international institutions, as it would demonstrate that some (powerful) states can get away with knowingly causing the greatest harm to global commons. As the adverse impacts of climate change are becoming more discernible and far-reaching, a constant haggling of national mitigation commitments would increasingly become an embarrassment for international law–showing just too clearly the incapacity of international law to fulfil its promise of justice when the interests of powerful industrial nations are at stake.

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6 Martti KOSKENNIEMI, "What Is International Law for?" in Malcolm D. EVANS, ed., International Law (Oxford: Oxford University Press, 2010), 32 at 32.

7 See generally, International Panel on Climate Change, Climate Change 2014: Impacts, Adaptation, and Vulnerability: Volume 1, Global and Sectoral Aspects, Working Group II Contribution to the IPCC Fifth Assessment Report (Cambridge: Cambridge University Press, 2014) [IPCC 2014].

8 This is one of the main conclusions of a workshop convened by the secretariat of the UN Framework Convention on Climate Change (UNFCCC) in 2010. See UNFCCC, "Report on the Workshop on Equitable Access to Sustainable Development", FCCC/AWGLCA/2012/INF.3/Rev.1 (2012), para. 71.

An argument has been made elsewhere[9] according to which industrial states (in particular)[10] are responsible, under international law, for their failure to prevent excessive greenhouse gas (GHG) emissions within their jurisdiction. This argument can be based on a breach of the "no harm" principle, from which arises an obligation for states to prevent activities within their jurisdiction that cause cross-boundary environmental damage.[11] The injury caused by this internationally wrongful act is most persuasively conceived of as an injury to the global atmospheric commons–or, in the terms of the

9 Benoit MAYER, "State Responsibility and Climate Change Governance: A Light through the Storm" (2014) 13 Chinese JIL 539. See also Christina VOIGT, "State Responsibility for Climate Change Damages" (2008) 77 Nordic JIL 1; Roda VERHEYEN and Peter RODERICK, "Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage" (2008) WWF UK.

10 Emerging economies such as China or Brazil account for steadily increasing GHG emissions, although per capita emissions in these countries remain currently several times inferior to the per capita emissions of the US, Australia, Canada, or the EU. The gap is wider when stocks of historical per capita emissions are considered. Data on greenhouse gas emissions per country can be accessed, for instance, from the World Resources Institute's Climate Data Explorer, online: <http://cait2.wri.org>.

11 See in particular, Trail Smelter (United States v. Canada), Decision of 11 March 1941, [1941] III Reports of International Arbitral Awards 1907 at 1965; Declaration of the United Nations Conference on the Human Environment, UN Doc. A/Conf.48/14/Rev.1 (1972), principle 21 [Stockholm Declaration]; Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) (1992), principle 2 [Rio Declaration]; The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 29; Iron Rhine Arbitration (Belgium v. Netherlands), Decision of 24 May 2005, [2005] XXVII Reports of International Arbitral Awards 35 at para. 222; Pulp Mills on the River Uruguay (Argentina v. Uruguay), [2010] I.C.J. Rep. 14 at para. 101; Philippe SANDS and Jacqueline PEEL, Principles of International Environmental Law (Cambridge: Cambridge University Press, 2012) at 196. Alternative arguments could invoke the failure of a state to comply with its obligations under diverse relevant treaties, including not only the UN Framework Convention on Climate Change, 14 June 1992, 1771 U.N.T.S. 107 (entered into force 21 March 1994) [UNFCCC], and the Kyoto Protocol to the UNFCCC, 11 December 1997, 2303 U.N.T.S. 148 (entered into force 16 February 2005) [Kyoto Protocol]), but also, among others, the Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 U.N.T.S. 3 (entered into force 1 January 1989); the Convention on Long-Range Trans-boundary Air Pollution, 13 November 1979, 1302 U.N.T.S. 217 (entered into force 16March 1983), and its eight protocols; the ASEAN Agreement on Trans-boundary Haze Pollution, 10 June 2002 (entered into force 25 November 2003); and the UN Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3 (entered into force 16 November 1994), part XII.

UN Framework Convention on Climate Change, as a "dangerous anthropogenic interference with the climate system".[12] The International Law Commission (ILC) recognized that breaches to obligations owed to the international community as a whole could also give rise to an obligation to pay reparations.[13] Although there is no clear precedent on this, it seems possible to assume, in line with the state-centred nature of international law, that compensation should accordingly be paid to the states representing the populations most affected by the injury caused to the global commons.[14]

However, one cannot ignore the formidable institutional and political obstacles to the implementation of this legal argument.[15] A jurisdictional finding of the responsibility of industrial states is unlikely because of the consensual nature of international adjudication,[16] the geopolitical settings whereby the states most affected by climate change are also those with the least diplomatic power,[17] and the fragmentation of responsibility between multiple

12 UNFCCC, supra note 10, art. 2. See also the second recital of the UNFCCC, "[a]cknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind".

13 Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N.G.A. Res. 56/8 (2001) [Draft Articles on State Responsibility], art. 42(2) and commentary under art. 42, para. 12 ("In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution."). In the context of climate change, restitution would be materially impossible as it would involve, at least, removing phenomenal quantities of GHG from the atmosphere.

14 See Mayer, supra note 8, paras. 42–3; Benoit MAYER, "Whose 'Loss and Damage'? Promoting the Agency of Beneficiary States" (2014) 4 Climate Law 267.

15 See Mayer, supra note 8, paras. 27–31, 52–63.

16 See e.g. Statute of the International Court of Justice, 26 June 1945, [1946] U.K.T.S. 67 (entered into force 24 October 1945), art. 36.

17 Political pressure has already been applied on developing states against legitimate calls for responsibility. For instance, Palau (a small island developing state with a population of about 20,000), which initiated a campaign for the UN General Assembly to request an advisory opinion from the ICJ, had to back out when the US threatened to interrupt the provision of development aid. See e.g. Stuart BECK and Elizabeth BURLESON, "Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations" (2014) 3 Transnational Environmental Law 17 at 26. Likewise, Tuvalu, another small island developing state (population 10,000) highly dependent on international aid, has not carried out its repeated threats to seek the responsibility of Australia or the US before an international jurisdiction.

industrial states.[18] Even if the responsibility of industrial states, or of some of them, was asserted in a contentious case or (perhaps slightly more likely) through an advisory opinion, absent diplomatic power and effective counter-measures on the side of those most affected by climate change, compliance would entirely depend on the goodwill of political leaders within industrial states.

More fundamentally, political hurdles impede our admission of the responsibility of industrial states for climate change. While climate scepticism is overrepresented in the media,[19] the very abstract concept of an alteration of the probability of particular weather patterns (rather than the occurrence of a particular weather event) is not easily communicable in the sort of simple political discourses on the basis of which liberal democracies make collective decisions. Because it "lacks a sense of urgency",[20] climate change, as "creeping normalcy",[21] has not triggered wide mobilization in support of immediate action.

This paper questions the nature of climate change reparations on the basis of customary international law. It contends that climate change reparations need to be designed with a particular sensitivity to the unprecedented nature of climate change, but that

18 A decision on an apportionment of responsibility, in a contentious case, could be precluded by the Monetary Gold principle, in application of which the ICJ has refused to determine the responsibility of a state if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness" of the conduct of a third state. East Timor (Portugal v. Australia), [1995] I.C.J. Rep. 90 at para. 35; Monetary Gold Removed from Rome in 1943 (Italy v. France), [1954] I.C.J. Rep. 19 at 32. See also, however, Certain Phosphate Lands in Nauru (Nauru v. Australia), Judgment of 26 June 1992 on preliminary objections, [1992] I.C.C. Rep. 240 at 259–60.

19 See Maxwell BOYKOFF and Jules BOYKOFF, "Climate Change and Journalistic Norms: A Case-Study of US Mass-Media Coverage" (2007) 38 Geoforum 1190 at 1190, observing the media's frequent "adherence to first-order journalistic norms–personalization, dramatization and novelty". See also, generally, Maxwell BOYKOFF and Jules BOYKOFF, "Balance as Bias: Global Warming and the US Prestige Press" (2004) 14 Global Environmental Change 133.

20 Anthony LEISEROWITZ, "Climate Change Risk Perception and Policy Preferences: The Role of Affect, Imagery, and Values" (2006) 77 Climatic Change 45 at 64. See also Elke WEBER, "Experience-Based and Description-Based Perceptions of Long-Term Risk: Why Global Warming Does Not Scare Us (Yet)" (2006) 77 Climatic Change 103; Harry COLLINS and Robert EVANS, Rethinking Expertise (Chicago: University of Chicago Press, 2007) at 2 (discussing "science's … short-term political impotence").

21 Jared DIAMOND, Collapse: How Societies Choose to Fail or Succeed (New York: Penguin, 2011) at 425.

it should also take stock of relevant analogies with state practice in some relevant fields. Accordingly, it opposes a strict application of certain provisions of the law of state responsibility as codified by the International Law Commission. Whereas Article 31(1) of the Draft Articles on State Responsibility assesses that a "responsible State is under an obligation to make full reparation for the injury caused by the international wrongful act",[22] this paper argues that climate change reparations need not (and certainly cannot) be "full" reparations.

Thus, the argument of this paper is two-faceted. On the one hand, it develops new reflections on climate change reparations which, hopefully, will resonate with ongoing debates on "loss and damage" associated with climate change impacts in developing countries and with other discussions within the climate regime, as part of a wider project of highlighting the long-overseen relevance of international law to the governance of climate change. On the other hand, based on the example of climate change reparations, it suggests a reflection on the nature of remedial obligations, involving a criticism of the general character of Article 31(1) of the Draft Articles on State Responsibility, by showing that states have sometimes consensually rejected full reparation on the basis of certain equitable considerations.

The concept of "climate change reparations" used in this paper hints at an analogy with war reparations, a field where, ever since the devastating experience of the Versailles Treaty,[23] it appeared that full reparation could be politically toxic. Beyond war reparations or mass atrocities more generally, states have also agreed to less than full reparations in the settlement of trade disputes or in relation to the takings of foreign properties, as well as when loss and damage arise from hazardous activities. The relevance of these different fields cannot be dismissed simply on the ground that they would constitute a lex specialis derogating to the general law of state responsibility: the general practice of states in these fields reflects the consistent recognition of certain transversal justifications for a diminution of reparation.

Consistently, in the context of climate change, a diminution of industrial states' remedial obligations could be justified on the basis

22 Draft Articles on State Responsibility, supra note 12, art. 31(1).

23 Versailles Treaty, 28 June 1919, [1919] U.K.T.S. 4 (Cmd 153) (entered into force 20 January 1920), art. 232.

of the limited financial capacity of the responsible states, the indirect nature of the injury, the significant disproportion between the injury and the wrongfulness of the act, and the limitation of collective responsibility as a form of "rough" justice in the cases of large injuries. More pragmatically, a prompt admission of responsibility accompanied by a limited payment of reparations would create some political impetus and facilitate efforts to cease excessive wrongful acts, hopefully before current, growing, GHG emissions trigger an irremediable and cataclysmic change in our climate.

The remainder of this paper is structured as follows. Section I provides a general overview of current debates on climate change reparations, as the political context is useful in conceiving the rationale for, and hence the nature of, climate change reparations. Section II retraces the timid recognition of less than full reparation across different fields of international law, with regard to war reparations, trade disputes, expropriations, and hazardous activities. Section III identifies systematically four justifications for a diminution of climate change reparations by analogy with the general practice of states in these different fields. Section IV ponders the implications of less than full climate change reparations for climate change governance as well as international law in general. Section V concludes.

1. SITUATING CLIMATE CHANGE REPARATIONS

In order to situate climate change reparations in the context of climate change negotiations, this section introduces general reflections on climate change and responsibility (A), recounts the recent breakthrough of the concept of "loss and damage" (B), before defining the rationale for climate change reparations (C).

A. Climate Change and Responsibility

The idea of a responsibility for environmental damages is certainly not new. Its conceptual roots can be drawn from the Roman maxim "sic utere tuo ut alienum non laedas" ("Use your own property in such a way that you do not injure other people's"), to which domestic provisions on nuisance (in common law) or neighbourhood disturbances (in civil law) relate closely. The Trail Smelter arbitral award stated that: "under the principle of international law … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another

or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."[24] The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, the 1992 Rio Declaration on Environment and Development, as well as a number of other international instruments, jurisdictional decisions, and teachings of the most highly qualified publicists have confirmed that states have an obligation to ensure that activities within their jurisdiction do not cause damage beyond this jurisdiction (the no-harm principle).[25]

Adopted at The Earth Summit in Rio de Janeiro in June 1992, the UN Framework Convention on Climate Change (UNFCC) recalled the no-harm principle,[26] noting also that "the largest share of historical and current global GHG emissions has originated in developed countries".[27] However, this preambular reference to the no-harm principle was obscured by the recognition of a new and somewhat mysterious principle of "common but differentiated responsibilities",[28] in application of which "the developed country Parties should take the lead in combating climate change and the adverse effects thereof".[29] The nature of the principle of common but differentiated responsibilities remained unclear: while it may seem to hint at the causal responsibility of industrial states (as an application of the no-harm principle), developed states have argued that it only "highlights the special leadership role of developed countries, based on [their] industrial development, [their] experience with environmental protection policies and actions, and [their] wealth, technical expertise and capabilities".[30] As a reflection of the limits of this constructive ambiguity, the UNFCCC contained only limited ambition on North-South finance.[31] Over the last two decades, climate finance has invariably concentrated on climate change mitigation (i.e. the

24 Trail Smelter, supra note 10.
25 See generally the sources cited supra note 10.
26 UNFCCC, supra note 10, 9th recital.
27 Ibid., 4th recital.
28 Ibid., 7th recital, arts. 3(1), 4(1).
29 Ibid., art. 3(1).
30 Written statement of the United States on principle 2 of the Rio Declaration, in UN Conference on Environment and Development, UN Doc. A/CONF.151/26 vol. II (1992) at 17–18.
31 UNFCCC, supra note 10, art. 4(4): "The developed country Parties and other developed Parties included in annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in

limitation and reduction of GHG emissions and the enhancement of GHG sinks and reservoirs), rather than adaptation (i.e. adjustments in response to the effects or impacts of climate change).[32] Most of the burden of adapting to the adverse impacts of climate change has remained on the states directly affected, in particular developing states that had only marginally benefited from industrialization.[33]

Overall, words such as "reparation" and "compensation" have remained political non-starters for the representatives of industrial nations,[34] which have engaged in a systematic effort to derail any principled discussion of the ethical or legal dimensions of climate change. Developed states have thus rejected any discussion on the principles that should guide climate governance, from the early negotiations of the UNFCCC[35] to the proposal of India to initiate a dialogue on equity in 2011.[36] The same year, the US used the leverage of its international aid to development and blocked the campaign of Palau, at the UN General Assembly, to request an advisory opinion of the International Court of Justice (ICJ) on the legal aspects of climate change.[37]

Likewise, from 2011 to 2013, developed states representatives at the Sixth Committee of the UN General Assembly fiercely opposed the inclusion of a topic on the "protection of the atmosphere" within the long-term work programme of the International Law

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meeting costs of adaptation to those adverse effects." This language is different from "meeting the costs of adaptation".

32 See in particular, Barbara BUCHNER et al., Global Landscape of Climate Finance 2014 (San Francisco: Climate Policy Initiative, 2014); UNFCCC Standing Committee on Finance, 2014 Biennial Assessment and Overview of Climate Finance Flows (Bonn: UNFCCC, 2014).

33 See generally, United Nations Environmental Programme (UNEP), The Adaptation Gap Report 2014: A Preliminary Assessment Report (Nairobi: UNEP, 2014).

34 See e.g. Koko WARNER and Sumaya Ahmed ZAKIELDEEN, Loss and Damage Due to Climate Change: An Overview of the UNFCCC Negotiations (Oxford: European Capacity Building Initiative, 2012) at 3.

35 See e.g. Daniel BODANSKY, "The United Nations Framework Convention on Climate Change: A Commentary" (1993) 18 Yale Journal of International Law 451 at 501.

36 See UNFCCC, Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, Part One: Proceedings, FCCC/CP/2011/9, paras. 13–18.

37 Beck and Burleson, supra note 16 at 26.

Commission (ILC),[38] on the (surprising) ground that the existing political process of negotiations were "relatively effective",[39] had "provided sufficient general guidance to States",[40] and "was already well-served by established legal arrangements".[41] The ILC could only initiate the study of the topic after a costly political compromise that excluded virtually any possible substance from its consideration: it was not only prevented from interfering with negotiations on climate change, but also from dealing with the "liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights".[42] By evading any substantive discussion within the ILC, developed states ensured that climate change governance would follow a political logic where power dominates, rather than the guidance of general principles of law and justice.

B. The Recent Breakthrough of the Concept of Loss and Damage

Despite the hostility of developed states to any discussion of the ethical or legal aspects of climate change, arguments for climate change responsibility have repeatedly been made by the representatives of the most vulnerable states. In 1991, the Alliance of Small Island States (AOSIS) proposed to the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change the establishment

38 International Law Commission, Report of the Sixty-third session (2011), para. 365 and Annex II, Protection of the atmosphere, by Mr Shinya Murase.

39 Statement of Mr Simonoff (United States), in the Summary Records of the 20th meeting of the Sixth Committee of the UN General Assembly in its 66th session, UN Doc. A/C.6/66/SR.20 (2011) at para. 15.

40 Statement of Mr Buchwald (United States), in the Summary Records of the 19th meeting of the Sixth Committee of the UN General Assembly in its 67th session, UN Doc. A/C.6/67/SR.19 (2012) at para. 118.

41 Statement of Mr Macleod (United Kingdom), in the Summary Records of the 18th meeting of the Sixth Committee of the UN General Assembly in its 68th session, UN Doc. A/C.6/68/SR.18 (2013) at para. 21.

42 ShinyaMurase, First Report on the Protection of the Atmosphere, UNDoc. A/CN.4/667 (2014) at para. 5. This compromise also provides that "[t]he outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein". Mr Sinhaseni (Thailand) questioned the 6th Committee: "What would be left for the Commission to work on that might be of use to the international community?" See Summary Records of the 19th meeting of the Sixth Committee of the UN General Assembly in its 68th session, UN Doc. A/C.6/68/SR.19 (2013) at para. 27.

of an international insurance mechanism whose revenues would be drawn "from mandatory sources" in developed states, and which would be used "to compensate the most vulnerable small island and low-lying coastal developing countries".[43] While this submission was limited to "loss and damage resulting from sea level rise",[44] it recognized that similar mechanisms could eventually be established to cover other adverse impacts that could be attributed to climate change.[45] The proposal was given little consideration at the time because, as an observer noted, the most vulnerable states "had [little] to offer the developed world in exchange for financial transfers".[46]

The concept of loss and damage came back to the fore in recent years, as developed states were increasingly ready to make some concessions in exchange for mitigation commitments on the part of emerging economies.[47] In 2007, as part of an "enhanced action on adaptation", the Bali Action Plan invited consideration of "means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change".[48] The discussions initially took place within the Ad Hoc Working Group on Long-term Cooperative

43 Submission by Vanuatu on behalf of AOSIS, "Draft annex relating to Article 23 (Insurance) for inclusion in the revised single text on elements relating to mechanisms (A/AC.237/WG.II/Misc.13) submitted by the Co-Chairmen of Working Group II" (1991), reproduced in Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, 4th session, "Elements Relating to Mechanisms", UN Doc. A/AC.237/WG.II/CRP.8 (1991) 2 at 2, para. 1(5).

44 Ibid.

45 Ibid., at 7 (para. a) and 9 (para. i).

46 Bodansky, supra note 34 at 528.

47 A non-negligible, although purely discursive concession was made when developed states agreed to a text attributing their leading role, resulting from the principle of common but differentiated responsibilities, "to [their] historical responsibility" for climate change. Decision 1/CP.16, "The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention" (2010), 2nd recital before para. 36 [Cancun Agreements]. The UNFCCC had noted the historical contribution of developed nations, but it had not made any explicit link with the principle of common but differentiated responsibilities.

48 "Bali Action Plan", supra note 3 at para. 1(c)(iii). The provision in a preliminary draft extended to all "vulnerable developing countries". See Draft decision 1/CP.13: Consolidated text prepared by the co-facilitators on agenda item 4 (Report of the co-facilitators of the dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention), FCCC/CP/2007/CRP.1 (2007), at para. 1(c)(iii).

Action under the Convention,[49] where the concept soon appeared to be sidelined in the arduous negotiations focusing for the greatest part on climate change mitigation. Consistent with their opposition to a recognition of responsibility, some developed states attempted to "avoid discussions related to proposals around compensation for loss and damage"[50] by proposing an alternative focus on risk management, in particular through risk-sharing mechanisms and disaster risk reduction strategies.

After three years and little progress, the 2010 Cancun Agreements established a "work programme", assigned to the Subsidiary Body for Implementation, in order, again, "to consider, including through workshops and expert meetings, as appropriate, approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change".[51] The Cancun Agreements also clarified that this work programme would cover "the impacts related to extreme weather events and slow onset events",[52] such as "sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity and desertification".[53] The following year, the Durban conference defined three thematic areas for this work programme in order to identify possible measures to be taken under the Convention.[54]

While developed states continued to oppose any reference to "redress" or "compensation",[55] they came slowly to admit that

49 "Bali Action Plan", supra note 3 at para. 1 (chapeau).

50 Warner and Zakieldeen, supra note 33 at 4.

51 Cancun Agreements, supra note 46, para. 26. The work programme was conducted within the Subsidiary Body for Implementation [SBI].

52 Ibid., para. 25.

53 Ibid., para. 25, note 3.

54 UNFCCC, Decision 7/CP.7, "Funding Under the Convention" (2001). These thematic areas are: (1) "Assessing the risk of loss and damage … and the current knowledge of the same", (2) developing "a range of approaches to address loss and damage", and (3) defining "the role of the Convention".

55 A draft decision text adopted at the 37th session of the SBI included multiple references to compensation. See UNFCCC SBI, "Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity, Draft conclusions proposed by the Chair", FCCC/SBI/2012/L.44 (2012), Annex. Yet, Decision 3/CP.18, adopted on the basis of this draft, contains no reference to compensation. See UNFCCC, Decision 3/CP.18, "Approaches to address loss and damage associated with climate change impacts in developing

addressing loss and damage requires some financial measures. The 18th Conference of the Parties to the UNFCCC in Doha in 2012 agreed that negotiations on loss and damage under the Convention should be concerned, among other things, with "enhancing action and support, including finance, technology and capacity building".[56] The following year, the 19th Conference of the Parties established the Warsaw International Mechanism for loss and damage[57] and, in the same decision, it "request[ed] developed country Parties to provide developing country Parties with finance, technology and capacity-building".[58] More recently, financial matters were listed among the questions to be dealt with through a two-year work plan of the Warsaw international mechanism approved by the 20th Conference of the Parties held in Lima in 2014.[59] The Warsaw international mechanism is set to be reviewed at the 22nd Conference of the Parties in 2016.[60] While Article 8 of the Paris Agreement will recall the importance of minimizing and addressing loss and damage, the accompanying decision adopted by the 21st Conference of the Parties states that it "does not involve or provide a basis for any liability or compensation".[61]

Like the principle of common but differentiated responsibilities, the concept of loss and damage could only break through climate change negotiations on the basis of a constructive ambiguity. On the one hand, some developing countries have promoted the concept of loss and damage on the agenda of climate change negotiations

countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity" (2012) [Approaches to address loss and damage]. Discussions on compensatory financial mechanisms remain generally sidelined in the work programme on loss and damage. See e.g. "Report on the expert meeting to consider future needs, including capacity needs associated with possible approaches to address slow onset events", Note by the Secretariat, FCCC/SBI/2013/INF.14 (16 October 2013), where a compensatory financial mechanism is addressed in no more than one single sub-paragraph (para. 32(b)).

56 Approaches to address loss and damage, supra note 54, para. 5(c).

57 Warsaw International Mechanism, supra note 4, para. 1.

58 Ibid., para. 14.

59 "Initial two-year work plan of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts", *in* Annex II of the Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, FCCC/SB/2014/4 (2014).

60 Warsaw International Mechanism, supra note 4, paras. 9 and 10.

61 UNFCCC, Decision 1/CP. 21, "Adoption of the Paris Agreement", para. 52.

in order to raise awareness of the adverse consequences of climate change in developing countries and to call for some form of reparation. On the other hand, developed states have generally tried to confine the discussion to ways to reduce or avoid loss and damage, for instance through disaster risk reduction.[62] As such, the vision of loss and damage promoted by developed states essentially replicates ongoing discussions on climate change adaptation with, at most, an increased emphasis on building resilience.[63]

C. The Rationale for Climate Change Reparations

Claims for the responsibility of industrial nations for causing climate change have often been denounced as the "fanatic" attitude of fund-thirsty nations,[64] or as attempts to solve global inequalities instead of "just" addressing climate change.[65] Yet, instead of an aim of its own, the advocates of climate change reparations often promote climate change reparations as an instrument to foster climate change mitigation and, perhaps, adaptation. In other words, the proponents of climate change reparations do not wish for huge financial penalties as compensation for the harm already inflicted

62 See generally, Warner and Zakieldeen, supra note 33.

63 Thus, developed states have sometimes criticized the concept of loss and damage as duplicative of existing efforts on climate change adaptation. See, for instance, Submission of Norway, "Work programme on approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity" (2 October 2012), reproduced as Paper 2 in UNFCCC Secretariat, "Views and information from Parties and relevant organizations on the possible elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16", FCCC/SBI/2012/MISC.14, 13 at 14.While the Bali Action Plan (supra note 3) and the Cancun Agreements (supra note 46) included loss and damage as part of "enhanced action on adaptation", developing states have constantly claimed that loss and damage should constitute a third pillar beyond mitigation and adaptation. See e.g. "Warsaw establishes international mechanism for loss and damage" (November–December 2013) 279/280 Third World Resurgence 15–18.

64 See, for instance, US Senate, 105th Cong., 143 Cong. Rec. S8117 (25 July 1997) (debates on the adoption of the Byrd-Hagel Resolution).

65 Thus, Posner and Weisbach criticize those who "treat climate negotiations as an opportunity to solve some of the world's most serious problems–the admittedly unfair distribution of wealth across northern and southern countries, the lingering harms of the legacy of colonialism, and so forth". See Eric A. POSNER and David A. WEISBACH, Climate Change Justice (Princeton: Princeton University Press, 2010) at 5.

on them as much as they desire that relevant measures be taken promptly to cease the infliction of similar harms.

Climate change reparations could help foster efforts to mitigate climate change in different ways. By internalizing the negative externalities of GHG emissions in the application of the nascent polluter-pays principle,[66] they would incentivize a reduction of GHG emissions in industrial nations. Beyond this economic incentive, climate change reparations could constitute a political impetus in favour of climate change mitigation. They would in particular build domestic political support for adequate climate change policies by providing an assessment of the overall impacts of climate change and by informing domestic constituencies. Although advocacy for climate change reparations will not constrain any state to any course of action, it establishes solid cognitive bases on which ethical discourses for climate change mitigation could be constructed. Perhaps most importantly, climate change reparations also need to reaffirm the rule of law by sanctioning the breach of an international obligation, in order to foster compliance in international relations. By contrast, the purely restitutive function of climate change reparations–as an attempt to repair an actual injury–is arguably not, and should not be, the first priority of its advocates.

Climate change reparations need to be designed so that they can fulfil their instrumental and somewhat pragmatic function of promoting climate change mitigation. In this regard, any demand for full reparation is an impediment to the argument for climate change reparation, as it is likely to trigger blank rejection on the part of industrial states. Most obviously, full reparation is unlikely to be politically acceptable on the part of industrial states. Full reparation could fuel political support for climate change denial, an easier stand for many economic lobbies and even industrial states' politicians when the stakes are simply too high to conceive of any possible compromise. Even if it could be imposed, full reparation would risk creating animosity among nations and, in any case, diverting much-needed resources for climate change mitigation policies in industrial nations.

Most importantly, full reparation is not necessary in order to incentivize adequate climate change mitigation. Imposing

66 The polluter-pays principle is not recognized as such in international law as it is in certain domestic laws. See, for instance, Sands and Peel, supra note 10 at 228–33.

reparations for past emissions will have little direct consequences on the present conduct of industrial states, except perhaps through diffuse deterrence. Full reparation is not necessary to constitute an appropriate incentive for climate change mitigation, not even regarding current GHG emissions. The economic theory of marginal utility suggests that what determines states' conduct is not the mean cost imposed on all GHG emissions, but the marginal cost of additional GHG emissions–the sanction that would be imposed on that state for the last, avoidable unit of GHG emissions. In more concrete terms, this suggests that the most efficient system of reparations would consist in high sanctions on marginal emissions whose payment could be avoided by taking realistic measures within a given timeframe.[67]

2. THE TIMID RECOGNITION OF LESS THAN FULL REPARATION IN INTERNATIONAL LAW

Climate change is not the only situation where full reparation does not appear as an opportune settlement of claims for responsibility. Even though Article 31(1) of the Draft Articles on State Responsibility affirms a general obligation of a responsible state to make full reparation, debates within the International Law Commission recognized the possibility of a diminution of reparations in certain situations (A). A brief review of state practice in several fields suggests elements of a recognition of less than full reparation in customary international law (B).

A. The Position of the International Law Commission

Article 31 of the Draft Articles on State Responsibility asserts that a responsible state is under the obligation to "make full reparation for the injury caused by the internationally wrongful act".[68] Provisions of the Draft Articles on State Responsibility exclude excessive forms of restitution[69] and satisfaction,[70] but they do not

67 This suggests solutions similar to the "grandfathering" of GHG emissions rights.

68 Draft Articles on State Responsibility, supra note 12 at 31.

69 See ibid., art. 35(2), excluding restitution when it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation".

70 See ibid., art. 37(3), excluding satisfaction when it would "be out of proportion to the injury" or if it would "take a form humiliating to the responsible State".

limit the obligation of a state to make full reparation, in particular through compensation. This clear and unqualified support for full reparation concealed a more lively debate, during the discussion of the topic by the International Law Commission, about what constitutes a just and adequate remedy. In 1959, when the ILC was still focused on state responsibility in the context of the takings of foreign property, Special Rapporteur García Amador recognized "cases and situations in which compensation which does not cover the full value of the expropriated property must be regarded as valid and effective".[71] At the occasion of a more structured debate on secondary obligations in the mid-1990s, some ILC members contended that "insistence on full reparation could be fraught with consequences for developing nations",[72] especially those with limited financial capacities. Igor Lukashuk argued that "[t]he sad experience of the Versailles settlement which had become one of the causes of the later war had shown that [full restitution] was often impossible and even undesirable", suggesting that "a system of partial restitution" could be preferable in certain circumstances.[73]

In accordance with such suggestions, in the document adopted in a first reading in 1996, Draft Article 42(3) precluded measures of reparation that would "result in depriving the population of a State of its own means of subsistence",[74] thus paraphrasing a provision of the International Covenant on Economic, Social and Cultural Rights.[75] In the Commentary, the ILC acknowledged this limitation

71 F.V. Garcia-Amador, Fourth report on State Responsibility, in (1959) Yearbook of the International Law Commission, vol. II.1, at para. 89.

72 Statement of S. Rao, in Summary Records of the 2314th meeting of the International Law Commission, UN Doc. A/CN.4/SR.2314 (1993), at para. 78.

73 Summary Records of the 2392th meeting of the International Law Commission, UN Doc. A/CN.4/SR.2392 (1995), at para. 31 (using the word "restitution" in the general sense of "reparation"). See also the statement of C. Tomuschat, in ibid. at para. 37; statement of A. Mahiou, in Summary Records of the 2314th meeting of the International Law Commission, UN Doc. A/CN.4/SR.2314 (1996), at para. 19; Summary Records of the 2454th meeting of the International Law Commission, UN Doc. A/CN.4/SR.1454 (1996), at para. 19.

74 Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted in first reading (1996) Yearbook of the International Law Commission, vol. II.2, at 58 [First Reading of the Draft Articles on State Responsibility].

75 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), art. 1(2): "In no case may a people be deprived of its own means of subsistence."

as the application of "a legal principle of general application".[76] This provision, however, was deleted during the second reading. States, in their comments on the first reading, had viewed the phrasing of this provision as too vague, hence likely to create "avenues for abuses"[77] or a "pretext by the wrongdoing State to refuse full reparation".[78] Some states had, however, clearly supported certain limitations to the obligation to make full reparation, suggesting a more precise provision on the conditions for diminution of reparations instead of the mere deletion of Draft Article 42(3).[79]

The decision of the International Law Commission to delete Draft Article 42(3) in the second reading, and not to try to revise it, certainly had much to do with the legitimate desire of this institution to bring to an end the long-lived project on state responsibility by avoiding difficult issues that appeared of limited direct relevance.[80] Considering the question in practical terms, special rapporteur James Crawford noted that "there was no reason to fear that the requirement to [make full reparation] would deprive [the responsible] State of its own means of subsistence".[81] As he contended, "[v]astly greater liabilities of States in the context of international debt arrangements were settled every year than ever arose from compensation payments".[82] Some members disagreed, in

76 First Reading of the Draft Articles on State Responsibility, supra note 73, commentary under art. 42, para. 8(a).

77 "Comments and observations received by Governments" (1998) Yearbook of the International Law Commission, vol. II.1, 81, at 146 (United States).

78 "Comments and observations received by Governments" (1999) Yearbook of the International Law Commission, vol. II.1, 101, at 108 (Japan).

79 See, in particular, "Comments and observations received by Governments" (1998), supra note 76 at 145–6 (United Kingdom); "Comments and observations received from Government" (2001) Yearbook of the International Law Commission, vol. II.1, 33, at 61–2 (Poland).

80 Thus, the reports of the brief discussions of the question reflect a focus on the necessity of any limitation to the obligation to make full reparation, given the general nature of the project on the responsibility of states and the difficulty in defining a precise limitation to the obligation to make full reparation. See, in particular, the statement of James Crawford in the Summary Records of the 2613th meeting of the International Law Commission (2000), at para. 17.

81 Ibid., para. 18.

82 Ibid. See also James Crawford's Third Report on State Responsibility (2000) Yearbook of the International Law Commission, vol. II.1, at 3, para. 42: "there is no history of orders for restitution in the narrow sense, or of the award of damages by way of satisfaction, which have threatened to deprive a people of its own means of subsistence".

particular Raoul Goco and P.S. Rao, who suggested that any reference to "full" reparation was unnecessary: reparation should, as Rao submitted, just be "as complete as possible" in view of the particular circumstances of each case.[83]

B. Less Than Full Reparation in Customary International Law

In several fields of international relations, less than full reparation has been either accepted, or even actively promoted, as a just and adequate remedy. The recognition of less than full reparation in four particular fields is briefly described: wars and other mass atrocities (1), trade measures (2), expropriations (3), and hazardous activities (4).

1. Wars and other mass atrocities

War reparations is an obvious case where less than full reparation is the norm. The Versailles Treaty of 1919,[84]83 collectively remembered as one of the causes leading to World War II, serves as the example that confirms the rule–the demonstration that war reparations must not be full reparations.[85] Very limited reparations were requested from the defeated parties after World War II;[86] to the contrary, in fact, as Germany soon received substantial financial aid from the US under the Marshal Plan. When Germany engaged voluntarily in negotiations with Israel and non-governmental Jewish organizations, no serious demand was made for full reparation;[87] the resulting agreement recognized the determination of the German

83 See the Summary Records of the 2615th meeting of the International Law Commission (2000), at paras. 52, 55.

84 Versailles Treaty, 28 June 1919, [1919] U.K.T.S. 4 (Cmd 153) (entered into force on 20 January 1920), art. 232.

85 Christian TOMUSCHAT, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law" (2001) 281 Collected Courses of the Hague Academy of International Law at 293.

86 See, in particular, Treaty of Peace with Japan, 8 September 1951, 136 U.N.T.S. 45 (entered into force 5 August 1952), art. 14(1).

87 See, for instance, M. SHARETT, 14 March 1951, cited in N. SAGI, German Reparations: A History of the Negotiations (New York: Magnes Press, 1980), at 55, requesting a sum estimated to represent a quarter of the property that was seized.

government "to make good the material damage" caused by the Shoah (the Holocaust).[88]

Despite numerous conflicts since 1945, there is little practice of reparations being paid at all in such contexts. Christine Gray noted that, in most cases where the UN General Assembly or UN Security Council condemned mass atrocities, no measure of reparation was indicated–partly because of uncertainties as to the scope of remedial obligations, and partly because of a more pragmatic emphasis on cessation and guarantees of non-repetition rather than reparation.[89] As she notes, "[t]he future conduct of the wrongdoing state is often more important to its victim that any award of compensation for past unlawful action".[90]

The reparations imposed by the UN Security Council upon Iraq for its invasion of Kuwait in 1990 is an interesting exception to the general lenience of states regarding war reparations. This reparations scheme, administered by the UN Compensation Commission, was, however, strongly criticized by the doctrine.[91] It was interpreted by international jurisdictions as an exception justified only in relation to "breaches of international law of unusual seriousness and extent".[92] And yet, even in this case, the overall amount of reparation was limited to thirty percent of the annual value of exports of petroleum and petroleum products from Iraq, a threshold determined by the UN Secretary General on the basis of a rough assessment of "the requirement of the people of Iraq, Iraq's payment capacity … and the needs of the Iraqi economy".[93]

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88 Bilateral agreement between Germany and Israel, signed in Luxembourg on 10 December 1952, 162 U.N. T.S. 206 (entered into force 27 March 1953), 1st and 2nd recitals [Luxembourg Agreement].

89 C.D. GRAY, Judicial Remedies in International Law (Oxford: Clarendon Press, 1987) at 216–17.

90 Ibid., at 217. Gray notes that the president of Guinea once set aside considerations of the UN Security Council to require Portugal to take some measures of reparation, on the motive that only independence could be an appropriate measure of reparation. See ibid. and (1971) UN Monthly Chronicle No 1, para. 18.

91 See, for instance, the discussion in Andrea GATTINI, "The UN Compensation Commission: Old Rules, New Procedures on War Reparations" (2002) 13 European Journal of International Law 161.

92 Eritrea-Ethiopia Claims Commission, Decision number 7 of 27 July 2007, providing guidance relating jus ad bellum liability, XXVI Reports of International Arbitral Awards 10, at 19, para. 29.

93 Note of the Secretary-General, UN Doc. S/22559 (1991), at para. 7. See also U.N.S.C. Res. 705 (1991), para. 2.

More recently, the 2000 Algiers Agreement established the Eritrea-Ethiopia Claims Commission (EECC), an arbitral tribunal tasked with asserting reciprocal reparation claims arising from the armed conflict between these two countries.[94] The two states had very limited payment capacities and they were claiming massive reparations: Ethiopia's initial claims for damages, nearly US$15 billion, was several folds higher than Eritrea's yearly national product.[95] In this context, the EECC briefly contemplated "to limit its compensation awards in some manner to ensure that the ultimate financial burden imposed on a Party would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people's basic needs".[96] The EECC did not eventually need to limit its compensation awards following its finding of relatively limited and largely balanced damages, resulting only in a net payment by Ethiopia of about US$10 million.

2. Trade measures

Likewise, in the pursuit of their international commercial relations, states have generally agreed that full reparation was neither their normal practice, nor even a desirable outcome. The "first objective" of dispute settlement in international trade law, according to the World Trade Organization's (WTO's) Dispute Settlement Understanding, "is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements".[97] Accordingly, upon finding a domestic measure inconsistent with an international trade agreement, a Panel or the Appellate Body shall only "recommend that the Member concerned bring the measure into conformity".[98] International trade law does not generally deal with the injuries

94 Agreement between the Eritrea and Ethiopia, 12 December 2000, 2138 U.N.T.S. 94, art. 5 [Algiers Agreement].

95 See Eritrea-Ethiopia Claims Commission, decision of 17 August 2009, Final Award: Eritrea's Damages Claims, decision of 17 August 2009, XXVI Reports of International Arbitral Awards 505, at 522, para. 18.

96 Ibid., at para. 22.

97 Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, 1869 U.N. T.S. 401 (entered into force 1 January 1995), art. 3(7) [DSU].

98 Ibid., art. 19(1). See also Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, 28 November 1979, GATT Doc L/4907, at 210.

resulting from such breaches of trade obligations, and the term "compensation" is used to mean "temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time".[99]

A handful of isolated panel decisions concerning cases of anti-dumping or countervailing duties have, however, recommended the restitution of the duties wrongfully levied,[100] the last of which (and the only one under the WTO) being the Australia-Automotive Leather II (Article 21.5-United States) case in 2000.[101] In the latter case, the retrospective measures, which had not been requested, were vehemently criticized by states' representatives at the occasion of the adoption of the Panel report,[102] on the grounds that retrospective measures were not only inconsistent with relevant treaty provisions,[103] but also "contrary to GATT/WTO custom and practice".[104] As the claimant itself, the US, noted, there was "a legitimate basis for not requiring the repayment of recurring subsidies that had been granted in the past", in particular the understanding that "termination of the recurring subsidies programme ha[ve] an enforcement effect that [is] sufficient to accomplish the objective"[105] of the dispute settlement.

3. Expropriations

Whether or not takings of foreign properties are to be considered a "wrongful" act, they have led to similar discussions as to the nature of the compensation obligations of the expropriating state. A broad consensus emerged over the last half century, according to which less

99 DSU, supra note 96, art. 22(1).

100 See M. MATSUSHITA, T. SCHOENBAUM, and P.C. MAVROIDIS, The World Trade Organization: Law, Practice, and Policy (Oxford: Oxford University Press, 2003) at 78; P. GRANÉ, "Remedies Under WTO Law" (2001) 4 Journal of International Economic Law 755.

101 WTO, Australia-Automotive Leather II (Art 21.5), decision of 21 January 2000, WT/DS126RW, para. 6.42. The Panel's decision was not based on art. 19(1) DSU, but on a similar provision: art. 4.7 of the Agreement on Subsidies and Countervailing Measure, 15 April 1994, 1867 U.N.T.S. 14.

102 See Minutes of Meeting of the WTO Dispute Settlement Body on 11 February 2000, WT/DSB/M/75, at 5. The report was criticized by representatives of the United States, Australia, Brazil, Canada, Japan, Malaysia, and the European Union; Hong Kong was the only party supporting its conclusion.

103 Ibid., at 8 (Japan).

104 Ibid., at 7 (Canada).

105 Ibid., at 9 (United States).

than full compensation might be justified in large programmes of nationalization. Thus, long deliberations in the UN General Assembly defined, in elusive terms, a duty to pay "appropriate compensation … in accordance with international law".[106] Likewise, the Institute de Droit International alluded to "an appropriate balance [to] be assured between the interests of the investor and the public purposes of the State".[107] The American Law Institute's second restatement of the foreign relations law of the US acknowledged the existence of certain "special circumstances, which it left undefined, that could justify a derogation to full compensation in cases of expropriation.[108]

Clearly, these observations do not support the existence of an obligation to make full reparation in cases of expropriation. A summary review of pre-twentieth-century arbitral litigation evidences a startling gap between claims for compensation and awards, suggesting that full compensation was not the practice.[109] As M. Sornarajah noted, "[t]here is no indication in modern practice of full compensation ever having been paid as compensation for nationalization".[110] Since World War II, most investment disputes have indeed been settled through lump-sum agreements providing only partial compensation.[111] This practice of lump-sum agreements, however, reflects the possibility for states–including expropriating states that have no direct material interests, but only reputational interests in negotiating–to come to a mutually beneficial agreement.

106 U.N.G.A. Res. 1803 (XVII) (1962), part I, para. 4.

107 Institute de Droit International, Tokyo Res. 2013/1, "Legal Aspects of Recourse to Arbitration by an Investor against the Authorities of the Host State under Inter-State Treaties", art. 14(2).

108 American Law Institute, Second Restatement of the Foreign Relations Lawof the United States, para. 188(2): "In the absence of the conditions specified in Subsection (1), compensation must nevertheless be equivalent to full value unless special circumstances make such requirement unreasonable." See also ibid., Explanatory Note (c): "The law is not settled as to what special circumstances may make the requirement of full value unreasonable."

109 J.M. SWEENEY, "The Restatement of the Foreign Relations Law of the United States and the Responsibility of States for Injury to Aliens" (1964) 16 Syracuse Law Review 762, at 766.

110 M. SORNARAJAH, The International Law on Foreign Investment (Cambridge: Cambridge University Press, 2010) at 417.

111 See generally, Richard B. LILLICH and Burns H. WESTON, International Claims: Their Settlement by Lump Sum Agreements (Charlottesville: University Press of Virginia, 1975); Burns H. WESTON, David J. BEDERMAN, and Richard B. LILLICH, International Claims: Their Settlement by Lump Sum Agreements, 1975–1995 (Ardsley: Martinus Nijhoff, 1999).

4. Hazardous activities

Of a more direct relevance to climate change reparations is the general reluctance to apply full reparations–or, sometimes, any reparations at all–in relation to transboundary harms arising out of hazardous activities. One of the greatest industrial disasters of the twentieth century, the Chernobyl nuclear accident, led to no claims for reparations, the general understanding being that "priority should be given, in the wake [of the accident], to endeavours of another nature".[112]

More generally, the International Law Commission could only affirm a general obligation of responsible states to make full reparation after having differentiated the topic of state responsibility from that of state "liability" for the injurious consequences arising out of hazardous activities.[113] The latter topic included not only ultra-hazardous activities involving a low probability of causing disastrous transboundary harm, but also activities highly likely to cause significant transboundary harm[114] – showing that the line between state liability and state responsibility is sometimes particularly thin, to say the least.[115] Yet, the ILC identified radically different secondary obligations in both topics, putting clearly more emphasis

112 Correspondence with the Swedish embassy in London, 10 December 1987, cited in Philippe SANDS, Chernobyl: Transboundary Nuclear Air Pollution–The Legal Materials (Cambridge: Cambridge University Press, 1988), at 27. See also Alexander KISS, "L'accident the Tchernobyl et ses consequences au point de vue du droit international" (1986) 32, Annuaire français de droit international 139 at 151-2.
113 (1973) Yearbook of the International Law Commission, vol. II, at 169, para. 39.
114 Prevention of Transboundary Harm from Hazardous Activities, (2001) Yearbook of the International Law Commission, vol. II.2, 146, art. 2(a); Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, in (2006) Yearbook of the International Law Commission, vol. II.2, 110, commentary under art. 1, at para. 2 [Draft principles on the allocation of loss].
115 For instance, the International Law Commission has analyzed the Trail Smelter case both as a breach of an obligation from which the responsibility of a state can arise and as the archetypical case of international liability for injurious consequences arising out of acts not prohibited by international law. Regarding the former, see Draft Articles on State Responsibility, supra note 12, commentary under art. 14, at para. 14. Concerning the latter, see the report of the working group on international liability for injurious consequences arising out of acts not prohibited by international law, in (1996) Yearbook of the International Law Commission, vol. II.2, 100 (Annex I), at 103, general commentary, para. 2 [1996 report on international liability]; Draft principles on the allocation of loss, supra note 113 at 122, commentary under art. 2, at para. 1.

on prevention and harm mitigation than on reparation proper with regard to state liability.[116]

When it did address reparation, the International Law Commission only recognized an obligation for the liable state to provide "prompt and adequate"[117] compensation, clarifying that this meant that the reparation should not be "grossly disproportionate to the damage actually suffered, even if it is less than full".[118] A previous working draft of the ILC elaborated on the "principle that the victim of harm should not be left to bear the entire loss",[119] here again clearly recognizing the existence of "circumstances in which the victim of significant transboundary harm may have to bear some loss".[120] As will be further discussed below, the degree of "culpability" of the liable state is certainly an element to take into account in assessing the level of reparations. As Phoebe Okowa noted, reparation must "take into account the gravity of the wrongful act, the importance of the obligation breached, and the degree of fault or the wilful intent of the wrongdoer".[121]

3. JUSTIFICATIONS FOR A DIMINUTION OF CLIMATE CHANGE REPARATIONS

Without developing a systematic doctrine of less than full reparation in international law in this paper, this section aims at identifying the relevant elements of justification for a diminution of climate change reparations on the basis of the analogues presented above. It suggests that a diminution of climate change reparations could possibly be justified by the limited capacity of responsible states to pay (A), the complex and indirect causal link between excessive GHG emissions and the impacts of climate change (B), the disproportion between the injury and the perceived wrongfulness of excessive GHG emissions (C), and the limits of the theory of collective responsibility (D).

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116 See Prevention of Transboundary Harm from Hazardous Activities, supra note 113 at 146; Draft principles on the allocation of loss, supra note 113, principle 3(b).

117 Draft principles on the allocation of loss, supra note 113, principle 4.

118 Ibid., commentary under principle 4, para. 8.

119 1996 report on international liability, supra note 114, art. 21.

120 Ibid., commentary on art. 21, para. 4.

121 Phoebe N. OKOWA, State Responsibility for Transboundary Air Pollution in International Law (Oxford: Oxford University Press, 2000) at 209.

A. Capacity of the Responsible State to Pay

As mentioned above, the International Law Commission accepted, during the first reading of its project on state responsibility, that reparation shall "[i]n no case…result in depriving the population of a State of its own means of subsistence".[122]

This provision was only removed in the second reading because it was perceived as prone to favour abusive claims and generally irrelevant to the cases typically brought before international jurisdictions.[123] But beyond international jurisdictions, international law also has a role to play in guiding political negotiations and in framing collective expectations.

The general practice of states, in particular with regard to war reparations or to the transboundary harms arising out of hazardous activities, indicates a concern not to impose full reparation when this would exceed the payment capacity of a state.[124] Simply delaying the payment of full reparation based on a plea of necessity or force majeure[125] is not enough in cases where it represents a great proportion of, or even several times, the gross domestic product of the responsible state.[126] As Christian Tomuschat noted in his course in the Hague Academy of International Law in 2001, "large-scale damage requires other rules than individual cases of wrongdoing".[127]

It may appear counter-intuitive for industrial states, which developed at the expenses of the global environment, to claim an inability to pay full reparation to least developed states that are severely affected by the adverse impacts of climate change. After all, the recognition of the capacity to pay as a justification for a diminution of reparation was mostly thought of as a defence that

122 First Reading of the Draft Articles on State Responsibility, supra note 73 at 58, art. 42(3).

123 See supra notes 79–81 and accompanying text.

124 Such grounds for a diminution of a payment were recognized, just a few years after the adoption of Draft Articles on State Responsibility, by the Eritrea-Ethiopia Claims Commissions; see supra note 94.

125 See James Crawford's Third Report on State Responsibility, supra note 81 at para. 41, referring to Russian Indemnity (1912) XI Reports of International Arbitral Awards 421, at 443. This case, however, related to a transient inability to pay.

126 See e.g. supra note 94.

127 Tomuschat, supra note 84 at 293. Tomuschat further noted that, in the determination of war reparations, "account was always taken of the actual capacity to pay".

developing countries could use against developed ones.[128] However, given the tremendous variability in diverse assessments of the injuries caused by climate change, which are largely contingent on value-loaded assessment (e.g. the discounting rate applicable to future harms),[129] the recognition of the capacity of responsible states to pay full reparation should at least serve as a safeguard against excessive claims. The payment capacity of industrial states is not unlimited.

The capacity-to-pay criterion should not be approached as a clear-cut threshold, a test determining whether or not a state is capable of paying reparations in full. In fact, the need for the responsible state to keep sufficient resources to protect the human rights of its population is virtually unlimited.[130] Yet, protection resources have a diminishing marginal utility: the first resources are essential to protect the most basic needs of the population, whereas additional resources are less immediately necessary. Therefore, consideration of the capacity of industrial states to pay climate change reparations requires an appropriate balancing of interests, which should also take the protection needs of the affected states into account.

Beyond the capacity of industrial states to pay, the capacity of international institutions to make them pay also deserves careful consideration, including from a (pragmatic) legal perspective. It could be counter-productive, and hence undesirable, for a court to "grant vain and useless relief".[131] In sensitive political contexts where the conduct of the responsible state leaves no doubt that this state will not comply with a judgment requiring full reparation, international jurisdictions might have sensible thoughts about providing a mutually acceptable settlement that stops short of full reparation.[132]

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128 See, for instance, supra note 71.

129 See, in particular, William D. NORDHAUS, "A Review of the Stern Review on the Economics of Climate Change" (2007) 45 Journal of Economic Literature 686.

130 International Covenant on Economic, Social and Cultural Rights, supra note 74, art. 2.1.

131 Williams v. Garner, 268 So. 2d. 56 (U.S., La. App. 1st Cir. 1972) at 61.

132 Such considerations are perhaps the explanation for a surprising reasoning of the ICJ regarding the remedial obligations of Serbia, in the case regarding the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), Judgment of 26 February 2007, [2007] I.C.J. Rep. 43, para. 462–5. See discussions in Christian TOMUSCHAT, "Reparation in Cases of Genocide" (2007) 5 Journal of International Criminal Justice 905; Marko MILANOVIĆ, "State Responsibility for Genocide: A Follow-Up" (2007) 18 European

When there is only a tiny political window to bend the conduct of states continually failing to limit domestic GHG emissions and thus causing great and possibly existential harm to the global environment, priority should arguably be the prevention of further harm through climate change mitigation rather than the imposition of expensive reparations. While trembling at the idea of tarnishing the apparent independence of international law from power, international lawyers should not suggest full reparations when the most likely consequence of this suggestion would be to sever international relations, derail ongoing negotiations, and possibly hinder international co-operation on climate change mitigation, thus defeating the primary purposes of international law.[133]

B. Indirect Causation of Individual Harms

Clear evidence shows that certain extreme weather events have become more frequent in many regions of the world,[134] and that such trends will increase in the future.[135] Yet, it remains problematic to attribute any concrete loss and damage to climate change because any given weather event could possibly "have occurred by chance in an unperturbed climate".[136] In particular, it is virtually impossible to make a clear distinction between "human-caused weather" and "tough-luck weather".[137] Tools are being developed for a statistical attribution of weather events to climate change (i.e. by estimating the increased likelihood of such events),[138] but this is difficult to

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Journal of International Law 669 at 691 (noting that it would have been "far, far better for the Court to provide no explanation at all as to why it was not awarding compensation in this concrete case than for it to give the particular justification that it did").

133 See, in particular, Charter of the United Nations, 26 June 1945, 892 U.N.T.S. 119 (entered into force 24 October 1945), art. 1.

134 IPCC, Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change (New York: Cambridge University Press, 2012) at 8 [SREX]. See also "Summary for Policymakers", in IPCC, supra note 1, 3 at 5.

135 See SREX, ibid., at 13; "Summary for Policymakers", ibid., at 20.

136 Dáithí A. STONE and Myles R. ALLEN, "The End-to-End Attribution Problem: From Emissions to Impacts" (2005) 71(3) Climatic Change 303.

137 Mike HULME, Saffron J. O'NEILL, and Suraje DESSAI, "Is Weather Event Attribution Necessary for Adaptation Funding?" (2011) 334 Science 764 at 764.

138 See e.g. Pardeep PALL et al., "Anthropogenic Greenhouse Gas Contribution to Flood Risk in England and Wales in Autumn 2000" (2011) 470 Nature 382 at 382,

reconcile with the binary causal attribution generally assumed by the law of state responsibility. Article 31 of the Draft Articles on State Responsibility defined the obligation to make full reparation in relation to the "injury caused by the internationally wrongful act",[139] which it explained as an exclusion of damage "that is too 'remote' or 'consequential' to be subject of reparation".[140]

Slow-onset environmental changes such as sea-level rise could be more directly attributed to climate change. In any case, however, the actual loss and damage suffered by a population largely depend on social factors, in particular the physical exposure of the population to the environmental event[141] and their vulnerability to this event.[142] In a developing world with a growing population, the scientific community has expressed high confidence that "increasing exposure of people and economic assets have been the major cause of long-term increases in economic losses from weather- and climate-related disasters".[143] No clear influence of climate change on loss and damage from disasters could generally be demonstrated over the past decades,[144] and some studies suggest that the statistical "signal" of climate change could generally remain concealed behind more important changes in exposure and vulnerability in the decades to come.[145]

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proposing a "probabilistic event attribution framework"; HUGGEL et al., "Loss and Damage Attribution" (2013) 3 Nature Climate Change 694; Myles ALLEN et al., "Scientific Challenges in the Attribution of Harm to Human Influence on Climate" (2006) 155 University of Pennsylvania Law Review 1353. For a critique of this methodology, see, in particular, Hulme et al., supra note 136.

139 Draft Articles on State Responsibility, supra note 12, art. 31(1).

140 Ibid., commentary under art. 31, para. 10.

141 Exposure can be defined as "[t]he presence of people, livelihoods, species or ecosystems, environmental functions, services, and resources, infrastructure, or economic, social, or cultural assets in places and settings that could be adversely affected". See "Summary for Policymakers", in IPCC 2014, supra note 6 at 5.

142 Vulnerability is "[t]he propensity or predisposition to be adversely affected". It "encompasses a variety of concepts and elements including sensitivity or susceptibility to harm and lack of capacity to cope and adapt". See ibid.

143 See "Summary for Policymakers", IPCC 2013, supra note 1 at 9. See also Huggel et al., supra note 137 at 695.

144 "Summary for Policymakers", IPCC 2013, supra note 1 at 9; Laurens M. BOUWER, "Have Disaster Losses Increased Due to Anthropogenic Climate Change?" (2010) 92 Bulletin of the American Meteorological Society 39.

145 See, in particular, Laurens M. BOUWER, "Projections of Future Extreme Weather Losses Under Changes in Climate and Exposure" (2013) 33 Risk Analysis 915, noting that "the signal from anthropogenic climate change is likely to be lost among the other causes for changes in risk, at least during the period until 2040".

A pragmatic interpretation of the law of state responsibility suggests that neither full reparation for all weather-related or climate-related loss and damage, nor no reparation at all, would be an adequate remedy for the indirect impacts of climate change.[146] A parallel can be drawn with precedents where partial reparation was indicated for indirect or not fully foreseeable injuries. Thus, in the 1928 Naulilaa case, an Arbitral Panel considered that Germany should have anticipated that its attack on some Portuguese colonies would likely expose Portugal to further turmoil in an unstable colonial context, although Germany could not have foreseen the nature and extent of the turmoil that would unfold. On this basis, the Panel condemned Germany to the payment of an "equitable additional compensation"[147] established ex aequo et bono.[148] Likewise, the settlement of international disputes through diplomatic negotiations has often led to the conclusion of lumpsum agreements representing, in most cases, only a tiny fraction of complex injuries.[149]

C. Disproportion of the Injury to the "Culpability" of the Responsible State

International law remedies aim at sanctioning a violation of an international obligation and at repairing the resulting injury. International law remedies need to fulfil these two functions concomitantly rather than alternatively.[150] Thus, punitive damages–whereby remedies would impose a sanction beyond the reparation

146 Precedents in international law, varying between a requirement of "direct", "foreseeable", or "proximate" causal relation, leave ample room for such a pragmatic interpretation. In fact, the ILC itself stated that "the question of remoteness of damage is not a part of the law which can be satisfactorily solved by search for a single verbal formula". Draft Articles on State Responsibility, supra note 12, commentary under art. 31, at para. 10.

147 Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (Portuval v. Germany), decision of 31 July 1928, II Reports of International Arbitral Awards 1011, 1032–3 [translated by the author].

148 Ibid., decision of 30 June 1930, II Reports of International Arbitral 1035, at 1074.

149 See Section III.C.

150 See Draft Articles on State Responsibility, supra note 12, commentary under art. 36, para. 3, noting that the prevailing view is that "the consequences of an internationally wrongful act cannot be limited either to reparation or to a 'sanction'". See also R. AGO, "Le délit international" (1939) 68 Collected Courses of the Hague Academy of International Law 417 at 430–40.

of the injury–have generally been rejected in international law.[151] Likewise, less than full reparation should arguably be indicated when there is a gross disproportion between the degree of "culpability" of the responsible state and the extent of the injury–that is to say, in cases where a "less culpable" (e.g. inadvertent) conduct causes large-scale injuries.[152] In such cases, a complete transfer of the burden of the injury onto the responsible state could appear excessive[153] and politically unacceptable, hence unlikely to be enforced, and resort is necessary to an equitable distribution of the burden of the injury between responsible and injured states.

In this sense, Phoebe Okowa suggested in her authoritative study of state responsibility for transboundary air pollution that "pecuniary compensation should in addition to repairing the harm done take into account the gravity of the wrongful act, the importance of the obligation breached, and the degree of fault or willful intent of the wrongdoer".[154] Similar considerations were instrumental in the decision of the International Law Commission to single out the question of state "liability" for the harms arising out of hazardous activities, and to define a regime of less than full reparation.[155] When the working group of the ILC proposed a list of relevant elements on the basis of which the nature and extent of reparations could be negotiated, it put a certain emphasis on the "culpability" of the liable state–for instance whether the liable state had taken appropriate

151 See, in particular, Draft Articles on State Responsibility, supra note 12, commentary under art. 36, para. 4; James CRAWFORD, State Responsibility: The General Part (Cambridge: Cambridge University Press, 2013) at 523–6; Inter-American Court ofHuman Rights, Velásquez Rodríguez Case, Judgment of 21 July 1989 on compensatory damages, Series C, Nº. 7, at para. 38.

152 See e.g. the statement of P.S. RAO in the Summary Records of the 2399th meeting of the International Law Commission, UN Doc. A/CN.4/SR.2399 (1995), at para. 24.

153 Tomuschat, supra note 84 at 296–7.

154 Okowa, supra note 120 at 209.

155 See supra notes 116-17 and accompanying text. Nothing would have prevented the ILC from approaching the strict liability regime regulating hazardous activities as primary rules (an obligation of result to prevent a disaster from occurring) subject, in case of breach (i.e. the occurrence of a disaster), to the general regime of state responsibility. See, in this sense, the statement of S. Fomba in the Summary Records of the 2414th meeting of the International Law Commission, UN Doc. A/CN.4/SR.2414 (1995), at para. 36; and the statement of Bennouna in the Summary Records of the 2450th meeting of the International Law Commission, UN Doc. A/CN.4/SR.2450 (1996), at paras. 28–9, 33.

prevention measures and measures to minimize the harm, including through providing assistance to the affected states, and whether it had shared the benefits drawn from the hazardous activity with other states.[156] The degree of "culpability" of the responsible state was also taken into account in other fields, and could, for instance, contribute to explaining the limitation of reparations for breaches of trade commitments (to which less moral significance is attached than, say, to human rights obligations).[157]

This line of argument applies most straightforwardly to historical GHG emissions, in particular those predating the emergence of a scientific consensus on the anthropogenic causes of climate change. Here again, no clear line can be drawn as scientific evidence accumulated progressively, from the early 1960s until the early 1990s.[158] Adopted in 1992, the UN Framework Convention on Climate Change recognizes a clear general scientific consensus that human activities would have consequences, possibly disastrous, on the climate system.[159] There is a compelling argument for discounting reparations for the adverse consequences caused by excessive GHG emissions before the emergence of this scientific consensus, in particular before the appearance of any scientific evidence at all. No wrong can reasonably be found when large amounts of GHG were emitted without any possible knowledge of the harmful consequences, when the dominant worldview considered nature as fundamentally inalterable. For this historical period before the emergence of scientific evidence of anthropogenic climate change, reparations could only

156 1996 report on international liability, supra note 114, art. 22.

157 See also, more generally, the statement of P.S. Rao in the Summary Records of the 2615th meeting of the International Law Commission, UN Doc A/CN.4/SR.2615 (2000), at para. 55, arguing that "intentional wrongs and other aspects" need to be factored into the determination of reparation in each particular case.

158 Charles Keeling detected a rise in the atmospheric concentration of carbon dioxide in 1960, thus confirming the possibility of earlier theories (some from the nineteenth century) of an anthropogenic increase of the greenhouse effect that would alter climatic conditions. In 1979, a US National Academy of Sciences report considered anthropogenic climate change as highly credible. See generally, Spencer WEART, The Discovery of Global Warming, 2nd ed. (Cambridge, MA: Harvard University Press, 2008).

159 See UNFCCC, 3rd recital, noting that: "human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind."

be justified, perhaps, on the equitable ground of unjust enrichment. However, as a scientific consensus was emerging about anthropogenic climate change, interference with the climate system ceased to be purely accidental; it became at best inadvertent, negligent, and arguably now grossly negligent. Therefore, as a consequence of scientific progress, a greater degree of "culpability" should be attached to present emissions than to past ones, and a diminution of climate change reparations can more readily be justified in relation to past GHG emissions than to present ones.

"Culpability", moreover, is largely a function of public perception. An additional line of arguments for a diminution of climate change reparations relates to the fact that no state is completely "innocent".[160] Some states produce more GHG than others, but this has much more to do with differences of development level than to a systematic engagement with the protection of the global environment. It is overwhelmingly considered as a desirable public policy objective for a state to develop its industrial sector, which almost inevitably results in large-scale GHG emissions. Substantive efforts have, however, been made to reduce the carbon intensity of such activities, and some differences exist among developed states, but, for now at least, efforts appear much more clearly in the trends (a diminution or a limitation of the increase of GHG emissions in states making costly efforts to mitigate climate change) than in absolute levels of emissions. This suggests that, if climate change reparations are mostly designed to provide a political or economic signal for climate change mitigation, and if that is yet to be politically acceptable, it is more important to attach consequences to the evolution of GHG emissions than to the absolute levels of emissions in each state.

D. Limits of Collective Responsibility

Instances of large reparations also raise questions relating to the limits of the liability of a state–that is, fundamentally, of a

160 By analogy, Pierre-Marie Dupuy once suggested that the limitation of international responsibility for catastrophic damages arising out of hazardous activities was related to a "a diffuse feeling of shameful solidarity between states in front of the degradation of a human environment to which they all contribute" [translated by the author]. Pierre-Marie DUPUY, "L'État et la reparation des dommages catastrophiques" *in* Francesco FRANCIONI and Tullio SCOVAZZI, eds., International Responsibility for Environmental Harm (London: Graham and Trotman, 1991), 125 at 142.

people–for the deeds of a government, past or incumbent. The legal personality of the state is a legal fiction: the actions and omissions attributed to "the state" always result from the decisions of a small group of individuals assumed to act on behalf of a people, who have a responsibility to ensure that "the state" respects "its" obligations under international law.[161] In order to avoid abusive claims that could nullify the very foundation of international law, the legal fiction of the state needs to result in a very strong presumption that the conduct of a government acts on behalf of its state, and that the acts of the government engage the responsibility of the state. In this sense, it is understood that the conduct of a state organ or agent can be attributed to a state notwithstanding the possibility of an excess of authority under domestic laws[162] or an international criminal responsibility of the individual under international law,[163] provided only that this organ or agent acted in its official quality.

Nevertheless, it is sometimes necessary to look beyond the legal fiction of the personality of the state, in particular when reparation would otherwise have grossly excessive consequences on the individuals. While collective responsibility is an acceptable form of "rough" justice when the stakes are small, it becomes obviously unfair when it is extended to system-wide violations, whether the latter are inadvertent, negligent, or even when they result from the willful action of a state's government. The limitations of war reparations since the Versailles Treaty, in particular, reflect a sense

161 See, in particular, Philip ALLOTT, "State Responsibility and the Unmaking of International Law" (1988) 29 Harvard International Law Journal 1 at 14, arguing that "[t]he wrongful act of a State is the wrongful act of one set of human beings in relation to another set of human beings". See also the Judgment of the International Military Tribunal, in Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, vol. 1 (1947) at 223, noting that "[c]rimes against humanity are committed by men, not by abstract entities".

162 See Draft Articles on State Responsibility, supra note 12, art. 7.

163 See, in particular, the Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002), art. 25(4); Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra note 131 at 43, para. 173. See also A. CASSESE, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case" (2002) 13 European Journal of International Law 853 at 864; A. NOLLKAEMPER, "Concurrence Between Individual Responsibility and State Responsibility in International Law" (2003) 52 International and Comparative Law Quarterly 615.

that it is not desirable to push the legal fiction of the personality of the state so far as to impose the payment of reparations on the population of devastated states (as a people often suffers when its government wrongfully engages in a war), or to condemn this state to protracted payments of reparations that will affect yet unborn generations.[164] Beside the moral aspects, the experience of the Versailles Treaty shows that such a rigid application of the principle of state responsibility can be politically toxic, with adverse impacts on domestic public order as well as on international peace and security.

These reflections are perhaps best theorized in relation to a constitutive limitation of the mandate of any government, under the social contract, to represent its people and to commit itself to particular obligations toward other peoples.[165] Through the recognition of the international criminal responsibility of individuals,[166] the rejection of the concept of international crimes of states,[167] and the research of targeted or "smart" economic sanctions that impact a government without affecting its population,[168] state practice and the legal doctrine have increasingly turned to acknowledge the possibility for international institutions to look beyond the fiction of state responsibility when ascribing responsibilities for breaches of international obligations. International law has recognized that the social contract through which governments arise does not transfer absolute powers upon the latter; limitations of governmental powers include respect for human dignity[169] as well as environmental

164 See Section II.B.2.

165 In contrast to the excess of authority of a state organ or state agent (which does not prevent the attribution of a conduct to the state), the circumstances discussed here relate to an excess of power by a government as a whole. The case-law and doctrine developed in relation to the former do not automatically apply to the latter.

166 See, in particular, Draft Articles on State Responsibility, supra note 12, art. 58; and generally Rome Statute, supra note 162.

167 See discussion in James Crawford's First Report on State Responsibility, (1998) Yearbook of the International Law Commission, vol. I.1, at 9–24, paras. 43–95. See also XXII Trial of the Major War Criminals before the International Military Tribunal, Nuremberg at 466: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

168 See e.g. D.W. DREZNER, "Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice" (2011) 13 International Studies Review 96.

169 See generally, Universal Declaration of Human Rights, GA Res. 217(III); International Covenant on Economic, Social and Cultural Rights, supra note 74;

sustainability.[170] Accordingly, a government cannot be deemed to have received an unlimited mandate to commit the worst crimes or to damage the environment of present and future generations, while sending the bill to its people–including to yet unborn generations–without providing them with any equivalent benefits.

A diminution of climate change reparations could be justified on such grounds, especially in relation to past emissions. The current and future generations of developed states' citizens assume no control for the failure of the past governments of their state to regulate GHG emissions.[171] Current and future generations may benefit from the development achieved by their ancestors, but this benefit often extends beyond national borders in complex ways that are difficult to assess. Likewise, future generations of citizens in industrial states should not be required to pay full reparation on the ground of current emissions, unless and inasmuch as they can be shown to receive a distinct benefit from present emissions in their state. By contrast, collective responsibility applies more readily in relation to present emissions and present generations. It remains true, however, that a great proportion of current GHG emissions are path-dependent: they are considerably influenced by decisions made years or decades before, for instance regarding transport or energy infrastructures.[172] More clearly than past emissions, current emissions can credibly be assumed to benefit current generations at least at the collective level (e.g. through domestic production), and the imposition of a correlative collective cost could therefore be justified.

A symmetrical issue appears, however, at the stage of compensating harms that, for the most, will be suffered by yet

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International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

170 See e.g. Rio Declaration, supra note 10; Stockholm Declaration, supra note 10; UNFCCC, supra note 10.

171 This is certainly the basis for Posner and Weisbach's assertion that collective responsibility for climate change can only rely on "collectivist habits of thinking that do not survive scrutiny". See Posner and Weisbach, supra note 64 at 116.

172 See, for instance, Marc FLEURBAEY et al., "Sustainable Development and Equity" *in* O. EDENHOFER et al., eds., Climate Change 2014: Mitigation of Climate Change, Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge: Cambridge University Press, 2015) 283 at 312–13.

unborn generations.[173] This raises questions relating to the limitation of the legal personality of the state, specifically its ability to represent unborn generations of nationals over decades, centuries, and millennia. Related intractable issues were raised by economists about a possible discount rate to apply in order to assess the present value of future injuries.[174] Arguably, only part of the injury can be compensated to the government of affected states, based on a role of promoting at least the possibility of the existence of future generations and, perhaps, what can reasonably be assumed to be the interests of these future generations. An argument could consistently be made according to which reparations should not be used exclusively for the benefit of current generations, but also with great concern for sustainable development policies, such as environmental protection, assumed to be in the interest of future generations.

Although certain limitations of collective responsibility should be admitted for past, system-wide, wrongful conduct, all forms of collective responsibility do not fade away. The experience of reparations for wars and other mass atrocities suggests that current generations retain some responsibility for what was done in their name,[175] as the strong presumption of the government's legitimacy cannot disappear without leaving any trace, and, in some cases, because of some possible benefits drawn by the people as a result of the conduct.[176] However, remedial obligations in such circumstances

173 Even if all anthropogenic GHG emissions ceased today (extremely unlikely because of paths accepted by our generation that almost necessarily engage next generations to keep on with unsustainable practices), the climate would continue to change for many centuries until a new global equilibrium could be reached. Continuing sea-level rise in the coming centuries will, for instance, almost inevitably flood most of the cultural heritage of mankind. See, for instance, Deliang BRUAER et al., "Introduction", IPCC, supra note 1, 119 at 128-9.

174 See Nordhaus, supra note 128.

175 See Statement of Chancellor Konrad Adenauer to the Bundestag on 27 September 1951 concerning the attitude of the German Federal Republic toward the Jews, reproduced in C.C. SCHWEITZER, ed., Politics and Government in Germany, 1944–1994: Basic Documents (Providence: Berghahn, 1995), at 123: "The unmentionable crimes committed in the name of the German people demand a moral and material restitution" [emphasis added]. Adenauer thus insisted that these crimes were committed despite the opposition of the majority of the Germany people.

176 This would apply for instance to confiscation of the Amerindian or Palestinian lands, from which peoples draw a benefit even in the absence of any personal responsibility.

are of a different nature than in classical cases of the responsibility of a people for the acts and omissions of the government acting in the pursuit of its interests. Rather than an obligation to make full reparation, the responsibility of a people for the illegitimate conduct of its government needs to be tailored through specific negotiations, taking into account the urgency of guarantees of cessation and non-repetition, the requirement that the people of the responsible state draws no unjust benefit from the wrongful act, as well as, more pragmatically, the need to restore constructive and friendly relations between peoples. In this regard, reparations may take multiple forms, including not only material compensation, but also–and overall–symbolic measures such as an apologetic policy of acknowledgment, memory, and commemoration.[177]

4. IMPLICATIONS FOR CLIMATE CHANGE GOVERNANCE AND GENERAL INTERNATIONAL LAW

The above considerations of complementary justifications for a diminution of climate change reparations have implications not only for climate change governance (A), but also for our conception of remedial obligations in general international law (B).

A. Implications for Climate Change Governance

As argued above, there are strong legal arguments for a diminution of climate change reparations. First, climate change reparations should be assessed on the basis of a balancing of the interests of the states affected by climate change, of the responsible states, and of the good administration of justice. Second, given the complexities in assessing and valuing the injury caused by excessive GHG emissions, climate change reparations could only be established ex aequo et bono through some kind of lump-sum agreement, rather than on the basis of a detailed assessment of the injury. Third, an argument could be made for a diminution of reparations due in relation to historical emissions, on the ground of the limited "culpability" of polluting states at a time when there was only limited evidence of the adverse consequences of excessive GHG emissions. Fourth, the fiction that the state is responsible for the deeds of its government

177 See generally, Elazar BARKAN, The Guilt of Nations: Restitution and Negotiating Historical Injustices (New York: Norton, 2000). A parallel can be drawn with measures promoting education on climate change. See infra note 184.

should not stretch to suggest excessive consequences on individuals, in particular through requiring that a people pays full reparation for historical wrongs resulting in mass injuries through instalments over a long period of time.

From the perspective of historical emissions, this suggests significant diminution of climate change reparations, especially if no distinct present benefit can be identified for the responsible state or its population.[178] But these considerations also plead for a diminution of climate change reparations on the ground of the continuing failure of states to prevent excessive GHG emissions. The level of climate change reparations should not be asserted solely on the ground of the injury, but also in relation to the need for sanction and by taking the situation of the responsible states duly into account. The indirect nature of the harm caused through excessive GHG emissions and the widespread failure of states to prevent such emissions suggest that full reparation would be disproportionate to the "culpability" attached to states' wrongful conduct.

Climate change reparations should therefore be significantly lower than the valuation of the harm that it causes. Nevertheless, climate change reparations should not be reduced to a trivial payment of "environmental indulgences" through an institutional practice of "selling rights to destroy nature".[179] Rather, climate change reparations should constitute a sufficient incentive for urgent climate change mitigation policies. It is thus necessary, at the very least and in very abstract terms, that the cost immediately imposed on a state for its failure to prevent marginal GHG emissions exceeds the interest that it attaches to these marginal GHG emissions, so that each state is incentivized to reduce its GHG emissions.[180] This does not suggest a full application of the polluter-pays principle, but only its application at the margins in order to foster any possible reductions that a state can realistically realize within any given period of time.

178 Limitations of reparations for historical emissions could also partly be justified in relation to the characterization of states' obligations under the no-harm principle. If the no-harm principle only gives rise to a due diligence obligation, state responsibility should not arise in relation to excessive GHG emissions which predate the emergence of a scientific consensus on the anthropogenic cause of climate change. See discussion in Mayer, supra note 8, para. 25.

179 Robert E. GOODIN, "Selling Environmental Indulgences" (1994) 47 Kyklos 573 at 575.

180 This might appear as an extraordinarily unambitious objective, except that it is already well beyond the current agreements or negotiations.

Moreover, climate change reparations need to be politically negotiated. Adjudication at the international level is unlikely, and, even if it occurred and led to a finding on reparations, compliance would be contingent on the goodwill of responsible states. The negotiation of climate change reparations needs to take place in highly unfavourable geopolitical settings, where the responsible states tend also to be the strongest diplomatic powers, while the states most affected are among the weakest nations. These geopolitical settings do not mean that climate change reparations are doomed: on the contrary, the experience of spontaneous reparations schemes for mass atrocities[181] and the theories of "policy entrepreneurship"[182] or "norm entrepreneurship"[183] all suggest that it is possible for relatively weak but astute and well-organized advocacy coalitions to successfully claim for just and strong causes. If climate change reparations are to contribute to fostering efforts to avoid cataclysmic climatic change, however, timing is clearly of the essence. The current workstream on loss and damage could initiate such considerations within the climate regime, although any idea of reparation has continuously faced the fierce opposition of industrial states.

In order to facilitate the prompt negotiation of climate change reparations, one needs to identify possible areas of trade-offs and conceivable second-best deals. Climate change reparations have a restitutive function consisting in repairing a harm caused through a wrongful act (i.e. the impacts of anthropogenic climate change, resulting from excessive GHG emissions), and an instrumental function of promoting the cessation of the continuing wrong (the failure of numerous states to prevent excessive GHG emissions). As

181 See, for instance, Luxembourg Agreement, supra note 87; and, more generally, Barkan, supra note 176.

182 Caner BAKIR, "Policy Entrepreneurship and Institutional Change: Multilevel Governance of Central Banking Reform" (2009) 22 Governance 571; Michael MINTROM and Phillipa NORMAN, "Policy Entrepreneurship and Policy Change" (2009) 37 Policy Studies Journal 649.

183 Martha FINNEMORE and Kathryn SIKKINK, "International Norm Dynamics and Political Change" (1998) 52 International Organization 887; Ian JOHNSTONE, "The Secretary-General as Norm Entrepreneur" in Simon CHESTERMAN, ed., Secretary or General: The UN Secretary-General in World Politics (Cambridge: Cambridge University Press, 2007), 123; Lesley WEXLER, "The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty" (2003) 20 Arizona Journal of International and Comparative Law 561.

argued above, the instrumental function is by far the most urgent: from a pragmatic perspective, it is more crucial to prevent further harm than to advocate for compensation for the harm already caused.[184] The most urgent remedy to a creeping crisis such as climate change should ensure or incentivize the prompt cessation of the harmful conduct, namely through climate change mitigation. A second-best climate change reparations regime should accordingly seek to provide an adequate economic and political signal for climate change mitigation policies, while avoiding as far as possible imposing additional costs onto the states most affected by climate change. It should only extend to providing material reparations as far as necessary in order to constitute an incentive for climate change mitigation.

Beyond material reparations, however, significant measures of satisfaction should constitute an integral part of any climate change reparations regime in order to reinforce a political signal for climate change mitigation. Symbolic measures such as a clear acknowledgment of responsibility, an apologetic attitude of relevant states officials, and a policy of memory–including through education to climate change,[185] efforts to raise public awareness, or even, for instance, the construction of museums–could play a great role in triggering a necessary questioning of the unsustainable development model that led virtually every state to fail to take adequate measures to protect the global environment. Material reparation and symbolic measures would be mutually reinforcing, as symbolic measures would be perceived as insincere if they were not accompanied by some measure of material reparations, while material reparations alone might not provide a sufficiently clear political signal without some symbolic expression.

B. Implications for General International Law

The previous reflection should also question the way reparations are thought of in general international law. More specifically, it suggests that there are exceptions to the general norm, identified by the International Law Commission, according to which "[t]

184 See Section II.C.

185 See e.g. UNFCCC, supra note 10, art. 6(a)(i); Kyoto Protocol, supra note 10, art. 10(e); and decision 19/CP.20, "The Lima Ministerial Declaration on Education and Awareness-raising" (2014).

he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[186] These exceptions are not by nature confined to leges speciales applicable to distinct fields: they are of a general nature, applying to analogous situations across diverse fields of international law. These exceptions include the "legal principle of general application", as identified by the ILC itself in its first reading of the Draft Articles on State Responsibility, according to which measures of reparation should not "result in depriving the population of a State of its own means of subsistence".[187] But beyond the capacity of the responsible state to pay, a diminution of reparation could also be justified on grounds such as the indirect nature of the injury, the significant disproportion between the injury and the wrongfulness of the act, or the limitation of collective responsibility as a form of "rough" justice in cases of large injuries.

In addition, the example of climate change shows that technological advances as well as our improving understanding of complex causal relations make it increasingly likely that mere inadvertence or possibly willful commission of mass atrocities are identified as the cause of catastrophic loss and damage, which challenges the assertion of a one-size-fits-all obligation to make full reparation. It is important that international law and its doctrine be prepared to deal with such cases. International jurisdictions should be given a certain leeway for an equitable assertion of remedial obligations, taking account not only of the extent of the injury, but also of the resources and the "culpability" of the responsible state, and of the opportunity of imposing costly reparations onto the population of that state, given its particular political circumstances. Moreover, as international law also plays a role as a source of legitimacy in international relations, the affirmation of an unconditional obligation to make full reparations could encourage claims that are morally excessive or politically unrealistic, and in any case unlikely to be met. In fine, these claims are most likely going to lead to severe international tensions between nations and hinder international negotiations, thus defeating the main purposes of international law.[188]

186 Draft Articles on State Responsibility, supra note 12, art. 31(1).

187 First Reading of the Draft Articles on State Responsibility, supra note 73, commentary under art. 48, at para. 8(a).

188 See, in particular, UN Charter, supra note 132, art. 1.

In a somewhat philosophical sense, one may actually doubt whether any reparation can be full, at least when the injury is not limited to purely material, fungible goods. Loss of lives, environmental damage, or loss of unique or irreplaceable properties can simply not be fully made up for.[189] In this perspective, reparation is rarely, if ever, able to "wipe out all the consequences of the illegal act"[190] or to make the injured party "whole";[191] rather, its objective is essentially to minimize the damage caused[192] and to deter further breaches of international law. As Dinah Shelton once argued, notions such as full reparation "do not facilitate decision making by tribunals or claims practice of parties because they are too general to provide practical guidance".[193] The nature of remedial obligations relates not only to the ambit of reparation, but also to its form. The assertions of remedial obligations should not be limited to an automatic assessment of the possibility of restitution, compensation, or measures of satisfaction, or to the determination of the quantum of reparations based on the valuation of the injury: it requires a more flexible decision based on a careful and detailed appraisal of the case.

5. CONCLUSION

Responsibility and reparation in international law fulfil two concomitant functions: addressing an injury and sanctioning a wrongful act.[194] The principles recognized in positive international law, including the principle that a responsible state is obligated to make full reparation, were identified by international jurisdiction, often in cases regarding a relatively minor injury that could have

189 See e.g. B.E. ALLEN, "The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons from Arbitral Practitioners" *in* M.E. SCHNEIDER and J. KNOLL, eds., Performance as a Remedy: Non-Monetary Relief in International Arbitration (Huntington: Swiss Arbitration Association and Juris, 2011), 281 at 299; Summary Records of the 2399th meeting of the International Law Commission, UN Doc. A/CN.4/SR.2399 (1995), at para. 24.

190 Factory at Chorzów, P.C.I.J. Ser. A Nº. 17, at 47.

191 Opinion in the Lusitania Cases, decision of 1 November 1923, VII Reports of International Arbitral Awards 32, 39: "The remedy should be commensurate with the loss, so that the injured party may be made whole."

192 See S. SHARPE, "The Idea of Reparation" *in* G. JOHNSTONE and D.W. van NEES, eds., Handbook of Restorative Justice (Cullompton: Willan, 2007), at 26.

193 D. SHELTON, "Righting Wrongs: Reparations in the Articles on State Responsibility" (2002) 96 American Journal of International Law 833 at 845.

194 See supra note 149.

significant consequences, in particular in the symbolic sphere, in the relation between states. In turn, efforts at codifying the law of state responsibility, in particular in the work of the International Law Commission, often took the limited practice of international jurisdiction as the basis on which to develop rules of general applicability.

Thus, relatively little importance was given to the need for different rules to apply to atypical cases, such as those involving large-scale damage,[195] especially when they resulted from mere negligence as opposed to willful acts, or when the responsible state was unable or otherwise unlikely to make full reparation. International jurisdictions were not always insensitive to the dangers of indicating measures of reparations that would probably not be complied with, and which could fuel geopolitical tensions, but they often preferred to disguise such considerations on other grounds.[196] As technological advances make claims for large-scale reparations increasingly likely, doctrinal theories need to be developed regarding the limitation of the obligation to make full reparation.

Discussions on the nature of climate change reparations are prone to contribute to such doctrinal developments. Full reparation, in the context of climate change, is not only politically unrealistic and possibly toxic to friendly relations among nations. In addition, the indeterminacy of applicable remedial obligations and the spectre of demands for full or otherwise expansive reparation schemes have literally blocked any explicit recognition of responsibility by industrial states. Because the risks of admitting responsibility were too high, Western leaders have often turned to an attitude of denial–denying either any scientific evidence of anthropogenic climate change, or (hardly more subtly) any form of "fanatic" finger-pointing[197] and any ground for specific obligations of industrial states in relation to climate change.

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195 See, however, Tomuschat, supra note 84 at 293. Tomuschat noted that, in the determination of war reparations, "account was always taken of the actual capacity to pay".

196 On the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide, see supra note 131.

197 US Senate, 105th Cong., 143 Cong. Rec. S8117 (25 July 1997). Senator Byrd also proclaimed: "the time for pointing fingers is over." The present paper is an argument about how to bring the time for pointing fingers to an end, through a reasonable offer of reparations.

As the concept of loss and damage is gaining momentum in international climate change negotiations, and negotiating powers are shifting in favour of emerging economies and developing states generally, a window of opportunity might be opening for industrial states to acknowledge their responsibilities and to grant some form of reparation, thus providing a strong economic and political signal for climate change mitigation. In this process, however, the relevance of the international legal principle of responsibility in the context of climate change can only be advanced on the basis of a nuanced understanding of the applicable remedial obligations, admitting valid grounds for a reasonable diminution of reparations. Concerning a continuing wrongful act with the most alarming consequences for civilization and mankind, climate change reparations should first and foremost be designed to provide a strong incentive in favour of a prompt reduction of GHG emissions.

SUSTAINABILITY, HUMAN RIGHTS AND ENVIRONMENTAL JUSTICE: CRITICAL CONNECTIONS FOR CONTEMPORARY SOCIAL WORK

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INTRODUCTION

The 2001 United Nations annual report on "The State of World Population" focuses on population and environmental change. It begins with a fascinating analogy regarding preserved footprints of early human ancestors found near a remote lake in Tanzania. These footprints are a geological marvel, made over three and a half million years ago, when few humanoids roamed the planet and their survival was far from certain. The report goes on to note that, at present, our human footprint affects every part of the planet. Over the course of a very short history, humans have spread to every ecosystem on the planet, altered the balance of nature, changed the world's climate, and threatened the sustainability of Earth itself. The greatest challenge facing humanity in the 21st century is to address the resultant ecological calamity before we destroy the very environment that sustains us.

Social work has a vital role to play in shaping an effective global response to the environmental crisis and to the human rights issues that accompany it. The profession is uniquely situated to face these challenges due to its historic focus on a social systems theoretical perspective, as well as its advocacy-based and action-oriented framework for practice. Unfortunately, social work has traditionally focused on the primacy of social relationships in our pursuit of social and economic justice. Tempering the negative effects of modernity, capitalism, and globalization, with their rapid rate of uncontrolled growth, and resulting environmental consequences, will require an unprecedented level of international cooperation. Effective solutions will be predicated on an understanding of and commitment to

universal human rights (Hawkins, 2009). To be relevant in the contemporary world, social work must move beyond our traditional focus on social and economic justice. We must actively advocate for environmental justice and pursue sustainable development so that all people can live in a clean, safe, and healthy environment.

It is important for social workers to understand the language used to discuss concepts that are quite similar and closely related, yet distinctly different. The over-arching movement for change goes by many names, such as environmentalism, ecology, conservation, sustainability, stewardship, sustainable development, environmental justice, environmental human rights, eco-justice, and eco-efficiency. Sustainability is a very broad term, which generally refers to the process whereby humanity is able to meet current needs while maintaining the ability of future generations to meet their needs. This process is closely linked to the environmental movement, which has gained worldwide momentum over the past fifty years, as well as deep a concern for social justice and regard for spirituality. In the late 1960s, the United Nations (UN), which is the primary advocacy body for the world's most poor and vulnerable people, began to formulate policy in terms of sustainable development, described as encompassing equally social, economic, and environmental justice. It specifically addresses how resources can be equitably distributed for the benefit of all people, as opposed to current models of consumption, which so disproportionately benefit already affluent societies. The environmental justice movement argues that it is a human right of all individuals to live in a clean, safe, and healthy environment. This position emphasizes that the world's poorest and most oppressed people often live in the most toxic environments, which can further impeded their social and economic development. The UN has a well-established framework for human rights and sustainable development, which are linked through the goal of environmental justice. In turn, the sustainability movement has been an effective mobilizing tool in advocating for environmental justice.

While the profession of social work has a long-standing tradition of advocating for social and economic justice, the interconnected concepts of sustainability, sustainable development, environmentalism, human rights, and environmental justice have yet to be fully incorporated into the core knowledge and value base of social work education and practice. The profession must

acknowledge the severity of both the environmental and human rights crisis facing the world and convey this content to our students. Social work practitioners must pursue a policy of enhancing environmental justice and human rights given the extensive inequity in living conditions across the world. The profession must prepare students for effective practice at the global level such that, while still advocating for the environmental human rights of all people, it can also actively advocate for the environment itself.

SOCIAL WORK AND A "NEW" ECOLOGICAL PARADIGM

The distinguishing theoretical orientation of social work among the helping professions is the singular emphasis placed on the crucial role of the environment in human functioning. While social work is a very broad and complex profession, it is generally unified through the theoretical foundation of systems/ecological theory. This emphasis is most notably evident in the curriculum area of Human Behavior and the Social Environment (HBSE), which focuses specifically on the interrelationships of people within their environment. Social work has focused almost exclusively, however, on the social environment with relative neglect of the critical role of the natural environment on human functioning (Besthorn, 2003; Rotabi, 2007). A quick perusal of popular HBSE texts used in the U.S. provides anecdotal evidence to support this long-standing theoretical focus (e.g., Ashford, LeCroy & Lortie, 2006; Zastrow & Kirst-Ashman, 2007; Hutchison, 2008), although Van Wormer, Besthorn and Keefe (2007) is a notable exception. Coates (2003) observes that, as a result of this one-dimensional focus, "... the environmental crisis has remained largely outside of social work discourse, and the profession has instead played a largely mitigating role in addressing social problems ... without a critique of fundamental assumptions" (p. 39).

This split in social work theory reflects the larger dualism found in Western culture. This worldview is predicated on fundamental distinctions, such as mind vs. body, culture vs. nature, and human vs. non-human. The consequences of this worldview tends to be focused on exploitation of nature, resource extraction, efficiency management, and a belief that technology can solve all problems (Lopez & Luiggi, 2008). As such, the only viable solution to the environmental crisis is to adapt a worldview that is holistic and relational, that moves from control to participation, and that

respects the whole community of life. Coates (2003) addresses the need for a new ecological paradigm in social work, which emphasizes a core theme that environmental exploitation results from the same pressures that create social injustice.

The planet cannot sustain current levels of human consumption. Global consumptive patterns became unsustainable in the mid-1980s, when human demand for resources exceeded Earth's ability to regenerate. This non-sustainable pattern varies enormously in terms of consumption levels between economically developed and economically developing countries. For example, if all nations were to match the current levels of consumption in the U.S. then it is estimated that the Earth could sustain only one-half billion people; while at current Mexican levels the Earth could sustain 20 billion people; and at current African levels, 40 billion people (http://www.ecofuture.org/). The social work focus on the social environment has the unintended effect of diminishing the significance of the natural environment on human welfare, especially for the poorest and most vulnerable, who typically inhabit degraded environments and also have less social and political power. It should be noted that environmental inequity also exists within industrialized countries, with poorer segments of the population disproportionately living in environmentally degraded conditions. Therefore, working toward a sustainable future is hampered by the overwhelming influence of economic forces, which puts greater value on profit than on ecological or social well-being.

The Earth's resources are finite, and humanity is at a critical juncture. Human population, pollution, and consumption continue to grow at an alarming pace. Human population exceeded six billion in 1999, and it could exceed 11 billion by 2050 (UN Population Report, 1999). Rapid urbanization is creating many new challenges; in 2008, more people lived in urban rather than rural areas (UN Population Report, 2008). According to the most recent Footprint Analysis conducted by Redefining Progress, "humanity is exceeding its ecological limits by 39% ... we would need to have over one-third more than the present bio capacity of Earth to maintain the same level of prosperity for future generations" (http://www.redefiningprogress.org/). The future looks very bleak unless humanity, particularly affluent societies, can learn to live within their means. "Moderate UN scenarios suggest that if current population and consumption trends

continue, then by the mid-2030s, we will need the equivalent of two Earths to support us" (http://www.footprintnetwork.org/). Even more alarming, "If everyone lived the lifestyle of the average American, we would need five planets" (http://www.redefiningprogress.org/).

The consequences of failing to recognize this ecological crisis and to respond to it accordingly will result in the destruction of the very environment that sustains human life. The time has come for social work to bridge this epistemological divide and to transform professional education and practice from "anthropocentric" to "ecocentric." There are many social work educators who have already begun to envision this paradigm shift. Besthorn and Saleebey (2003) and Muldoon (2006) contend that the social work curriculum should specifically include content on the natural environment. Coates (2003) examines the theoretical roots of modern anthropomorphic social work and outlines a path toward transforming current policy and practice to a "mutually beneficial community-focused one." Bartlett (2003) details an undergraduate level course that links environmentalism and social welfare. Mary (2008) echoes much of this earlier literature and proposes a unified model of sustainable social work which calls for expanding the mission and value base of the profession in order to pursue sustainable policy and practice. Jones (2010) presents a teaching model based on transformative learning theory that engages students in a process of reflection, dialog, and action with regard to ecological issues.

Clearly, the profession must join the call to action for a new ecological paradigm. Integrating content on the natural environment is particularly relevant at this time when the profession is becoming more globalized, and global society is realizing that environmental interdependence extends beyond national boundaries. Further, we must recognize the implicit connections between sustainability and human rights, so that we can envision not only a worldwide culture of environmental sustainability, but one that is fair and just to all.

SOCIAL WORK AND HUMAN RIGHTS

From its inception, social work has had an international perspective, although individual countries have typically focused on domestic issues. This narrowed field of interest needs to shift if the profession is to be more effective in addressing the many pressing problems facing humanity today. There is an emerging emphasis

for incorporating international content into social work education (e.g., Hokenstad & Midgley, 1997; Healy, 2001; Ramanthan & Link, 2004; Lyons, Manion & Carlsen, 2006; Mapp, 2008).

A critical component of a legitimate international perspective is the recognition of the pivotal role of human rights. Human rights lie at the very heart of social work. In the U.S., both the Council on Social Work Education (CSWE) and the National Association of Social Workers (NASW) call for social work education to include content on human rights (Reichert, 2006). According to Lundy and van Wormer (2007), while the NASW Code of Ethics does not specifically address human rights, the Canadian Association of Social Workers (CASW) Code of Ethics does (including reference to the Universal Declaration of Human Rights). The International Federation of Social Workers' 1996 International Policy on Human Rights states that human rights and social justice are fundamental to social work (http://www.ifsw.org/).

The United Nations Charter (1945) and the Universal Declaration of Human Rights (UDHR) created a vision for global justice. The UDHR was unanimously approved in 1948 and became the clear international standard articulating what constitutes basic human rights (i.e. human rights are not merely a desire or a privilege). It was the first document of its kind and the first international statement to use the term human rights. The historical importance of the UDHR cannot be overstated. It is a very straight forward document, containing a preamble and thirty articles. This is the most translated document in the world, available in 360 languages, and the full text is easily accessible via the UN website.

The United Nations has ratified seven subsequent documents clarifying and expanding upon these universal human rights. These include: Convention against Genocide (1948); Conventions on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) (also known as the Geneva Convention); International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); International Covenant on Civil and Political Rights (ICCPR) (1976); Convention for the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture (1985); and, Convention on the Rights of the Child (1989). Taken together, these documents comprise the United Nations "Agreements on Human Rights." In 1966, the "International Bill of

Human Rights" was formulated and consists of the UDHR, ICESCR, and ICCPR (http://www.pdhre.org/).

There were several criticisms of the UDHR at the time that it was ratified. For example, it was championed by Western nations that were also colonial powers. Further, there has been ongoing debate about the concepts of universalism versus cultural relativism. Ife and Fiske (2006) argue that the principle of universality does not necessarily negate what is culturally appropriate; rather, universality refers to an overarching value of human worth which orients cultural appropriateness.

There is a long-standing gulf between the ideal of humanism and the reality of continued inequality. Bagaric and Dimopoulos (2005) note that the past century witnessed a proliferation of human rights discourse, laws, and instruments, yet these efforts have been largely ineffectual in that they have bypassed most of the world's population. Douzinas (2006) observes that, paradoxically, despite good intentions, the triumph of humanitarianism has been drowned in human disaster. Of particular current relevance, Article 18 of the UDHR addresses religious freedom and expression, which lies at the fault line of many contemporary global conflicts.

Human rights are typically defined as universal and indivisible. As such, all humans are entitled to every basic right by virtue of their humanity. These rights apply regardless of one's nationality, culture, political or economic system, religion, or any other qualifier. A declaration, unlike a treaty or convention, imposes no obligation on a ratifying government to fulfill the principles contained within the document. There is an extensive scholarly literature that examines the many aspects of human rights, and there are several noteworthy resources focused specifically on social work (e.g., Ife, 2008; Mapp, 2008; Reichert, 2003, 2006; Wronka, 2008). It is instructive to note, however, that the current literature on human rights, including social work, makes little or no mention of environmental justice.

SUSTAINABILITY, SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL JUSTICE

The world has changed substantially since 1948. Some human rights advocates call for amending the UDHR so that environmental justice will be addressed equally with social, political, cultural, and economic rights (e.g., Davies, 2008). Others argue that Article

28 could be interpreted to address international environmental concerns. This Article states, "Everyone is entitled to a social and international order in which rights and freedoms set forth in the Declaration can be fully realized." As such, collective rights (also known as solidarity or third-generation rights) pertain to world-wide problems that require international collaboration, such as environmental treaties to address global warming (Reichert, 2003). While human rights are a statement of principle, they must be ensured through political or legal action. Anderson (1996) observes that the past century witnessed an unprecedented increase in legal claims for both human rights and environmental rights. Yet, human and environmental abuses persist and, in many respects, are getting worse. "The need for stronger international norms protecting human rights to a safe and sound environment … needs to be included as a component of environmental protocols" (Adeola, 2000, p. 686).

Sustainable development is not to be confused with social development, although the concepts are highly compatible. "Social development consists of interventions aimed at providing the conditions whereby human beings change existing social relations by using resources to express their creativity and grow to their full potential" (Dominelli, 1997, p. 75). The central feature of social development is the contention that economic growth alone is not enough to provide for basic human needs. People also require effective social programs in order to substantially improve their lives. Sustainable development is a broad socio-political movement that aims to achieve an ongoing balance in the global ecosystem between the Earth, people, and the entire web of life. Thus, the global economic system, contemporary social problems, and the ecological crisis are linked. Speaking in terms of sustainable growth, Hoff (1997) writes that, "the critical condition of the planet and the impoverishment and destitution of an increasing proportion of the world's population are rooted in a global economic system devoted to profit, growth, and monopolization of resources by fewer and fewer players–namely transnational corporations and the international financial systems that support them" (p. 35). Sustainable development particularly calls for economic and social policy that meets the needs of all people, rather than concentrating wealth in a few countries and producing luxury goods for the affluent, while most of the rest of the world's people live in varying degrees poverty. Hoff also notes that extreme wealth and extreme poverty are similar in that they both degrade the environment, except in different

ways. A sustainable approach to development encompasses social development and is rooted in human rights; and, confronts social and economic inequities both within and between countries.

The United Nations speaks in terms of sustainable development and environmental justice, although these two terms are not interchangeable. As previously mentioned, sustainable development is broadly defined by the UN as the social, economic, and environmental process of balancing production and consumption so as to meet current needs while preserving Earth's resources for future generations. In the past, the UN definition of sustainable development comprised social and economic justice. Now, it also includes environmental justice. Environmental justice refers to the right of current and future generations to a clean, healthy, and safe environment. Hancock (2003) defines "environmental human rights" as the human right to live in an environment free from toxic pollution and to exercise control over local natural resources. "Although countries may never agree on a definition of environmental justice, there is global agreement on protecting the basic human rights that make environmental justice possible" (Sachs and Peterson, 1995, p. 1). Sachs (1996) calls for recognition that the poorest people pay the greatest cost for ecological damage, including loss of access to natural resources. Therefore, securing environmental justice as a human right must be clearly emphasized.

The UN has specifically pursued environmental justice as a human right through several highly significant conferences. The first UN global environmental conference that addressed human rights was the UN Conference on the Human Environment held in Stockholm in 1972. The Conference is regarded as the beginning of the global environmental movement. The Declaration on the Human Environment (referred to as the Stockholm Declaration) was a seminal document in that it was the first official UN statement which recognized the right to a healthy environment. It led to the formation of the UN Environmental Program (http://www.un.unep.org/).

The Stockholm Declaration was never formally ratified into international law, yet it was a significant step in creating the linkage between social and economic justice on the one hand and environmental justice on the other. It established a reciprocal understanding, recognizing that social and economic justice are not possible if the Earth is destroyed, and that environmental

justice is not possible if people do not have social and economic power. It reinforced the idea that economics, politics, culture, and sustainability are intricately intertwined.

The next major UN environmental event that addressed human rights was the UN Conference on Environment and Development, also known as the Earth Summit, which was held in Rio de Janeiro in 1992. Its goal was to seek strategies for pursuing economic development while stopping escalating pollution of the planet and destruction of natural ecosystems. The Summit's central theme was that "poverty as well as excessive consumption by affluent populations place damaging stress on the environment" (http://www.un.org/). As a result, "eco-efficiency" needed to become a guiding principle for governments and businesses regarding production, alternative energy, public transportation, and water scarcity.

The Earth Summit was the culmination of an ongoing process initiated at the Stockholm Conference twenty years earlier. It produced several key environmental documents, two of which are specifically relevant to environmental justice: Agenda 21 and the Rio Declaration on Environment and Development. The Rio Declaration is an important statement on sustainability and set forth numerous principles to guide worldwide sustainable development. Its stated purpose was to build upon the Stockholm Declaration, establish new and equitable global partnerships, work toward international agreements, and protect the integrity of the global environmental and developmental system (http://www.un.org/). Agenda 21 entails a wide-ranging blueprint for action to achieve sustainable development worldwide and established the UN Commission on Sustainable Development. Of note, "The Earth Summit influenced all subsequent UN conferences which have examined the relationship between human rights, population, social development, women, and human settlements -- and the need for environmentally sustainable development" (http://www.un.org/).

The next major UN meeting specifically relevant to environmental justice was the World Summit on Sustainable Development held in Johannesburg, South Africa in 2002. It convened ten years after the Earth Summit, so it is also referred to as Earth Summit II. It produced the Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation, which reaffirmed previous UN environmental agreements and called for enhanced international cooperation. The introduction to the Johannesburg Declaration

states that respect for human rights, fundamental freedoms, and cultural diversity are essential for achieving sustainable development and ensuring that it benefits all people equally. The document goes on to address the specific targets for achieving environmental justice: poverty eradication, changing unsustainable patterns of consumption and production, protecting and managing the natural resource base of economic and social development, globalization, and specific geographic concerns.

The Johannesburg Plan focuses less on actual environmental issues and more on sustainable human development. It emphasizes a balance between social, economic, and environmental justice. The agreement focuses particularly on "the worldwide conditions that pose severe threats to the sustainable development of marginalized peoples, which include: chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis" (http://www.un.org/documents). The Plan recognizes that the planet is at a critical point, with the interaction of widening social and economic inequity and the need to improve living conditions for the extremely poor weighed against the increasing rate of environmental degradation, most notably climate change.

ENVIRONMENTAL JUSTICE AND HUMAN RIGHTS

Another major UN initiative related to sustainable development is the Millennium Project, a massive global human rights campaign. The Millennium Summit was held in New York in 2000, following a decade of preparatory conferences and summits. Representatives from 189 countries and leading development institutions have adopted the UN Millennium Declaration (http://www.un.org/). The Declaration laid out fundamental values regarded as essential to international relations in the twenty-first century: freedom, equality, solidarity, tolerance, respect for nature, and shared responsibility. It also addressed peace and disarmament; development and poverty eradication; protecting the environment; human rights; democracy and good government; protecting the vulnerable; meeting the special needs of Africa; and, strengthening the United Nations. The

Millennium Development Goals (MDGs) target eight specific areas for change by 2015: 1) poverty and hunger, 2) primary education, 3) gender equality, 4) child mortality, 5) maternal health, 6) disease (especially HIV/AIDS and malaria), 7) environmental sustainability, and 8) responsibility of developed countries toward developing countries. The MDGs were endorsed at the World Summit on Sustainable Development (Earth Summit II) in 2002.

The MDGs recognize explicitly the interdependence between growth, poverty, and sustainable development. Goal 7 directly addresses the need to ensure environmental sustainability through four specific targets: integrate the principles of sustainable development into governmental policies and programs, reduce biodiversity loss, halve the proportion of the population without access to safe drinking water and basic sanitation, and achieve a significant improvement in the lives of at least 100 million slum dwellers (The Millennium Development Goals Report, 2008). The statistics are daunting. For example, although there is not yet a global water shortage, almost half of the world's population faces a scarcity of water and water use has grown at twice the rate of the population for the past century. More than one-sixth of the world's population does not have access to safe drinking water. Although there has been a marked improvement in sanitation worldwide, in developing regions, nearly one in four people use no form of sanitation and another fifteen percent lack access to hygienic facilities. These problems are especially severe for rural dwellers, particularly in sub-Sahara Africa, but they also extend into urban slums. Slum conditions are defined as lack of improved sanitation, water facilities, durable housing, and sufficient living area. "In 2005, slightly more than one-third of the urban population in developing regions lived in slum conditions; in sub-Saharan Africa, the proportion was over sixty percent" (p. 43).

Several of the other MDGs are clearly linked to Goal 7. For example, people living in extreme hunger and poverty (Goal 1) depend more directly on a healthy ecosystem, have insecure rights to resources and inadequate access to information, lack participation in decision-making, and are more vulnerable to natural disasters. Universal primary education (Goal 2) is linked to sustainable development since the heavy household responsibilities of families living in poverty often prevents their children, especially girls, from attending school. In turn, school is the most critical avenue for empowering the future generation

to pursue their rights as well as educating them in the principles of sustainability. Gender equality (Goal 3) addresses environmental justice since females are over-burdened with collecting water and fuel, have limited input in decision-making, and often lack access to land ownership or resources. Child mortality (Goal 4) is highest among children under the age of five due to lack of sanitary living conditions, unclean water, and indoor air pollution. Maternal health (Goal 5) is damaged due to indoor air pollution, the excessive burden of carrying water and collecting fuel, increased incidence of malaria due to deforestation and water mismanagement, and vulnerability to man-made natural disasters.

The MDGs are closely linked to the professional mission of social work, especially the call for advocacy and action toward securing universal human rights. The most recent 2009 MDG Report documented substantial progress related to the four goals of poverty reduction, universal primary education, reduced child mortality, and some aspects of environmental sustainability (e.g., ozone depletion) (http://www.un.org/). However, the recent global economic recession has reversed much of this progress. The report notes that environmental justice has especially lost ground. While almost every region improved the living conditions of the urban poor, progress in barely keeping pace with rapid growth of slum areas. It indicates that efforts to preserve the natural resource base are not forceful enough, especially regarding climate change, fisheries, forest, and water. The report concludes that, while we are the first generation that has the ability to eliminate poverty, apparently, we lack the resolve to do so.

There are other programs under other auspices in the UN that are related to environmental justice. The Division for the Advancement of Women held the Fourth World Conference on Women in Beijing in 1995. One of their twelve Strategic Objectives pertained to "Women and the Environment." The Platforms for Action included a detailed discussion and three action steps directed at involving women in environmental decision-making at all levels, integrating gender concerns and perspectives in policies and programs for sustainable development, and strengthening or establishing mechanisms across levels to assess the impact of development and environmental policies on women (http://www.un.org/). The World Health Organization (WHO) adopted a General Comment on the Rights to Health in 2000, which affirm health as a basic human right (http://www.who.org/).

This document states that this right extends not only to health care but also to the determinants of health, such as clean water, adequate sanitation, safe food, housing and working conditions, and access to education and information, including sexual and reproductive health. Environmental justice is at the center of a human right to health, since medical care (treatment) has far less of an impact on population well-being than social and environmental factors.

Despite the tremendous efforts of the UN and advocacy groups from around the world, progress toward environmental justice has been slow. Adebowale et al. (2001) argues that, despite these international efforts, environmental problems continue to worsen since implementing "soft laws" have largely failed, globalization has intensified, and resource depletion continues at an unsustainable rate. They conclude that existing human rights approaches are inadequate (since environmental rights are not directly addressed) and argue for explicit, stronger international agreements. In the current climate of global capitalism, concern for human safety and environmental protection are consistently subjugated to economic growth and the maintenance of inefficient patterns of production and consumption. Hancock (2003) claims that this double standard accommodates the destructive forces of capitalism, which perpetuates systematic environmental degradation and human rights violations.

SOCIAL WORK AND ENVIRONMENTAL JUSTICE

The linkages between social work and human rights are explicit. Taylor (2000) argues social development is a prerequisite for social justice. Mapp (2008) notes that "a lack of social development creates situations in which violations of human rights can thrive" (p. 23) and specifies three main interrelated barriers to human freedom: poverty, discrimination, and lack of education. Reichert (2006) cautions that social workers often fail to see how human rights are closely linked to social work policies and practices. She identifies six primary interventions to foster basic human rights: challenging oppression, empowerment, strengths perspective, ethnic-sensitive practice, feminist practice, and cultural competence.

Social work educators have also called for the need to address environmental justice as a critical component of social and economic justice. McKinnon (2008) urges that, "social work has the opportunity to be part of the solution rather than an uninvolved

bystander to the emerging environmental predicaments" (p. 266). While the human rights movement has a clear record of actively advocating for environmental justice, social work education (at least in the U.S.) has failed to incorporate this perspective into the curriculum. While human rights are typically discussed in terms of "spatial" relationships regarding the obligations of nations or communities to each other, the new discourse on sustainability represents a "temporal" extension to future generations (Ife, 2008).

In this global era, social work students must be assisted to engage in an informed discussion of the universal aspects of human rights and environmental justice. They must be helped to gain awareness about the pressing problems of inequality around the world (especially for children) and to identify sustainable solutions to the very real environmental crisis facing humanity today. The concept of sustainability has "long been familiar to many workers engaged in social and community development programmes" (Lyons, Manion & Carlsen, 2006, p. 191). Acquiring a knowledge base that links social work practice with universal human rights, environmental justice, and sustainable development will help them to envision the world as a more just and humane place.

A paradigm shift is occurring around the world regarding sustainability and environmental justice. It has not reached a critical mass necessary for global change, since humanity has yet to respond effectively. Social work, as the helping profession that traditionally focused on linkages across systems, must actively join this movement if we are to stay relevant in the contemporary global 21st century. Our professional mission of advocating for and acting toward social and economic justice must be expanded to include environmental justice. We must overcome any remaining xenophobia and extend this commitment to the entire world, as the ecological crisis does not respect national boundaries and affluent countries have an obligation to help the disadvantaged everywhere. It is incumbent upon social work education to prepare students for this challenge, and for social work practitioners to embrace sustainability. Our very survival, and the survival of future generations, depend upon it.

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BRIEF NOTES ON ENVIRONMENTAL REFUGEES AND THEIR CHALLENGE IN CONTEMPORANEITY

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1. INTRODUCTION

Invited to give a lecture on "Refuge and Environment"[1] in Santiago de Chile, in November 2016, at the "IV International Course 2016 - Human Rights and Police Function, Immigration Overview, Trafficking of Persons, Refugees, from a Gender Perspective", organized by the Investigations Police of Chile and the Inter-American Institute of Human Rights, which was attended by police officers from several Latin American countries, I pointed out that, as I was preparing to speak to them, I returned to a distant past, to the period in which I had been acting unofficially as a representative of the Office of the United States High Commissioner for Refugees

1 Environment. "Natural environment on which depend all living species of the earth, including humanity, and which is formed by the biosphere together with all its renewable and nonrenewable resources. It is the common heritage of present and future human generations, and its preservation at the service of sustainable development is the subject and object of the youngest branch of international public law: international environmental law. This new theme is closely related to the protection of human rights because environmental conservation in a sustainable development perspective conditions the quality of life of individuals, peoples and the whole humanity, to the point that the practice of fundamental freedoms depends on the good administration of the ordinary house. Its most relevant aspects are atmospheric and maritime contamination beyond the border, the risks of nuclear energy, protection of the Antartica, the preservation of flora and fauna, and the management of industrial garbage and waste. The reception of the environmental issue by the *jus gentium* begins with the Declaration on the Environment, adopted by the Stockholm Conference and approved by the United Nations General Assembly ... (In Hernando Valencia Villa, *Diccionario Espada de Derechos Humanos*, with a preface by Baltasar Garzón, Publisher Espasa Calpe, Madrid, 2003, pp. 292-293).

UNHCR[2], in Fortaleza, Ceará, Brazil, and regularly received, in my office, at the State Attorney General's Office, dozens of foreigners, mostly Africans, willing to obtain refugee status. It was a very rich experience, a unique work that I performed at the request of the lawyer Jaime Ruiz de Santiago, one of the most illustrious officials of the High Commissioner's Office, where he remained for twenty-five years, leaving the trail of his talent and his enlightened love for humanity.

In this article, in which I try to reproduce part of the Chilean lecture, I do not bring finished answers to the innumerable doubts, disagreements, controversies and perplexities that emerge in a territory in formation, little explored, that suggests many more questions than answers and whose extension is impossible to cover in the narrow boundaries of this text.

What I will seek, by avoiding historical digressions, doctrinal positions, jurisprudential reviews, as well as more detailed distinctions between refugees (whose concept is discussed below), economic emigrants (those who move away from their homes voluntarily, in search of better conditions of life, and can return without suffering persecution), asylum-seekers (limited to political issues), stateless people (those who have lost their nationality for different reasons, including the disappearance of the State), etc., is to transmit to you, readers, the crucial aspects of this matter, which are broadened in our society at risk, with the perception that, in the vocabulary used to deal with this issue, involving thousands of citizens belonging to a category outside the international legal order, key words and

2 UNHCR (United Nations High Commissioner for Refugees). "It corresponds to the specialized agency of that body which provides assistance and protection to persons who have to leave their national territory of origin or residence to seek asylum in another State, due to armed conflict, political persecution or authoritarian regimes. Created in 1949, UNHCR deals with refugees and stateless persons through the implementation of two main instruments: the 1951 Convention on the Status of Refugees and its 1967 Protocol. For some time this agency's focus was on those individuals and groups who crossed an international border in search of protection for their lives and freedoms, leaving millions of internally displaced persons (IDPs) defenseless, forced to flee to other parts of their own country, in what constitutes one of the most challenging human rights problems in the world in regions such as the Balkan Peninsula or the Great Lakes of Central Africa and in countries such as Afghanistan, Colombia and Sudan. However, pressure from the human rights community and the victims themselves, UNHCR has begun to deal with forced displacement as a new form of refuge. "(Idem, pp. 4-5)

expressions stand out and can never be forgotten, such as justice, dignity, ethics, solidarity, cooperation and culture of peace.

2. FUNDAMENTAL POINTS

Many points must be presented as a preamble and foundation of the ideas and considerations that are imposed in the study of a subject so relevant in our contemporaneity.

2.1 The concept of refugee

In accordance with the 1951 Geneva Convention on the Status of Refugees (the most important of all international instruments in this area), as amended by the Protocol of 1967, the term "refugee" applies to every person: "who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The Protocol has removed the geographical and temporary limitation of the original text and innovated in its Preamble, when referring to the possibility of new categories of non-conventional refugees.

2.2. The concept of environmental refugee

The expression was created in the 1970s by Lester Brown and gained notoriety in 1985 with the Environmental Refugees report written by Egyptian professor Essam Ei-Hinnawi from the Egyptian National Research Centre in Cairo and presented to the United Nations Environment Program, at the United Nations Conference in Nairobi, Africa. According to that report, environmental refugees are "those who have been forced out of their traditional habitat temporarily or permanently due to an environmental change (natural and / or man-made) that put in danger the existence and / or affects the quality of their lives, also adding that "environmental change" must be understood as any physical, chemical and / or biological change in

the ecosystem that "modifies" it temporarily or permanently and is inappropriate to human life.

There is no consensus on the best designation of environmental refugees, a rejected expression, for instance by the UNHCR and the International Organization for Migration (IOM), which prefer to say "environmentally displaced persons" (to indicate "those displaced in their own country or have moved through international borders due to the degradation, deterioration or destruction of the environment.[3] "Many scholars are also in favor of a conceptual expansion, that is, a broad concept.

2.3. The categories of environmental refugees

There are three categories, according to Ei-Hinnawi: "those who have been temporarily displaced by environmental pressures such as an earthquake or a cyclone and are likely to return to their original habitat; those who have been permanently displaced due to permanent changes in their habitat, such as dams or lakes; and those who have moved permanently, seeking a better quality of life because their original habitat is unable to provide them with their

3 "Nowadays, UNHCR considers that the use of such terminology could undermine the international legal regime for the protection of refugees, whose rights and obligations are clearly defined and understood. Nor would it be useful to create confusion by suggesting a link between the impact of climate change, environmental degradation, migration and persecution, which is the primary reason why a refugee flees from his or her country of origin and seeks international protection. While environmental factors may contribute to cross-border movements, they cannot, however, be considered as a reason to grant refugee status under international refugee law. However, UNHCR recognizes that there are indeed certain groups of migrants currently outside the scope of international protection, in need of humanitarian assistance and/or other assistance. Some States and some NGOs have suggested amending the 1951 Refugee Convention and expressly expanding it to include people who have been displaced across borders as a result of long-term climate change or sudden natural disasters. UNHCR considers that any initiative to change this definition would risk the negotiation of the 1951 Convention, which would not be justified by current needs. In addition, in the current political environment, it may lead to a reduction of refugee protection norms and even undermine the whole regime of international refugee protection. "(GUTERRES, António, en *Cambio climático, desastres naturales y desplazamiento humano: la perspectiva del ACNUR*, document from UNHCR/ACNUR, available on the Internet). See also: BORRÀS PENTINAT, Susana, *Aproximación al concepto de refugiado ambiental: origen y regulación jurídica internacional*, available on the Internet.

minimal needs due to the progressive degradation of basic natural resources.[4]

Karla Hatrick ranks them based on five main causes: degradation of arable land (which can also be a consequence), environmental disasters, destruction of the environment by war, involuntary displacement in the form of resettlement and climate change, generated, for instance, by the emission of greenhouse gases to the atmosphere, derived from the anthropogenic actions.[5]

Authors refer to two groups: a) those who are forced to leave their homes due to floods (temporary or permanent), drought and desertification; and those who are induced by economic development, victims of human accidents that give rise to the environmental exodus; And (b) those who leave their countries because of conflicts that began with environmental issues and then became political

4 EL-HINNAWI, E., Environmental Refugees, United Nations Environment Program, 1985.

5 DERANI, Cristiane, Environmental Refugee, in Human Rights Dictionary, Available in:
Http://www.esmpu.gov.br/dicionario/tiki-index.php?page=Refugiado+Ambiental. Add this note of António Guterres from the United Nations High Commissioner for Refugees: "These five scenarios provide a good starting point for analyzing the nature of the displacement and assessing the protection and assistance needs of those affected: a) hydrometeorological disasters (Floods / typhoons / cyclones, landslides, etc.); Areas designated by governments as high risk and dangerous to be inhabitted; (C) environmental degradation and slow onset of disasters (e.g. reduction of water availability, desertification, recurrent floods, salinization of coastal areas, etc.); D) the case of the sinking of small island states, and e) armed conflicts caused by the reduction of natural resources (e.g. water, land, food) due to climate change. "(En *Cambio climático, desastres naturales y desplazamiento humano; la perspectiva del ACNUR*, document from UNHCR/ACNUR, available on the Internet). A timely note: "... it is feasible to provide an openness to the recognition of a regulation of environmental or climatic refugees from the national or regional level. This is the case, for example, of Australia, which has several agreements with the countries of Southeast Asian archipelago, and where it was proposed the creation of a purely environmental right of asylum. Likewise, in Africa there is a Refugee Law regulation established in the 1969 African Union Convention, which raises the grounds for recognizing refugee status, including those who have been [...] victims of [...] events that particularly disturb the public order in all or part of its national territory. "This extension of the conventional notion of refugee opens the door to the exploitation of the term climate refugees, and promotes the study and regulation of an ecological public order" (SÁNCHEZ-ARÉVALO, Clara Rodríguez-Ovejero, *Concepto y Problemática Jurídica de los Refugiados Ambientales*, Pontifical University Comillas, Madrid, 2015, available on the internet.

conflicts and therefore do not fall within the concept of refugee of the 1951 Convention.

2.4. Difference between refugees and environmental displaced persons

There is no way to confuse the concept of environmental refugees with those of environmental displaced persons who remain within their country, without crossing the international frontier.

Hernando Valencia Villa, in his "Diccionario Espasa de Derechos Humanos", in clarifying the meaning of internal displacement, says: "Violent migratory phenomenon in which thousands of individuals are forced to abandon their ancestral lands or habitual places of residence and work to settle in other regions of the same national territory."[6]

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6 VALENCIA VILLA, Hernando. *Diccionario Espada de Derechos Humanos*. Preface by Baltasar Garzón. Publisher Espasa Calpe, Madrid, 2003, p. 143. It should be read alike: "These internally displaced persons will have to receive protection and assistance in accordance with the 1998 Internal Displacement Principles. Although not legally binding, this document has an important practical value for the control of Treatment of internally displaced persons by collecting their rights as well as the obligations of governments and insurgent forces at all stages of displacement, including the prevention of arbitrary or illegal displacement, lay the foundation for their protection and assistance, and provide guarantees for their return, resettlement and reintegration in safe conditions. The 1998 Internally Displaced Principle defines the term "internal displacement" as: "(...) persons or groups of persons who have been compelled or forced to escape or to flee their home or place of habitual residence, in particular as a result of or to avoid the effects of armed conflict, widespread violence, human rights violations or natural or man-made disasters, and which have not crossed an internationally recognized state border'. These Principles reflect and are consistent with international human rights and humanitarian law and the analogous law related to refugees. "Further on, in the same text:" At the regional level,developments in Africa are particularly noteworthy with regard to the protection of internally displaced persons. The member states of the International Conference on the Great Lakes Region have already adopted a Protocol on the Protection and Assistance of Internally Displaced Persons, which entered into force in June 2008 and which, with the accession of Sudan, has nine States Parties. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009 also protects internally displaced persons. In Europe, the Parliamentary Assembly of the Council of Europe recently adopted its important resolution 1877 (2009) on "The forgotten peoples of Europe: protecting the fundamental rights of long-term displaced persons" (BORRÀS PENTINAT, Susana, *Dossier: Refugiados Ambientales: El Estatuto Jurídico de Protección Internacional de los Refugiados Ambientales*, Rev. Inter. Mob. Hum., Brasília, Year XIX, n. 36, January/June 2011).

Who does not remember New Orleans, Louisiana, United States, in August 2005, when about one million citizens, faced with a flood caused by the terrifying Hurricane Katrina, which caused enormous material damage, moved to other parts of the country? A typical case of internal mobilization. I was there in November 2016, and I was able to see the fantastic reconstruction of the city.

Many other examples could be displayed to identify the distinctive features of environmental shifts, which vary according to the vulnerability of certain areas and take into account the possible relocation in other geographical spaces.

2.5. UNHCR and the Status of Environmental Refugees

Although UNHCR confirms the seriousness of the problem, it does not recognize the status of "environmental refugees" nor has taken the initiative to revise its mandate because, in its view, the term is not correct, since it does not fit the refugee definition (for it requires: to be outside one's country of origin; the State of origin to be unable to provide protection or facilitate one's return; this incapacity to be attributed to an inevitable reason that causes the displacement; and this cause to be based on reasons of race, nationality, membership of a social group or political opinion). Furthermore, it adds that a change in the Convention, the Great Charter of the Refugee in this sense could weaken it or create new difficulties for its application.

The existence of a legal gap is unequivocal, since international law does not recognize them as refugees, since the Geneva Convention and its 1967 New York Protocol, as pointed out, indicate restrictively the factors that can trigger those forced human movements, then defining a person as a refugee. Thus, those refugees, whose situation is not the same as those who flee from conflict, are not foreseen in the legislation and are on the margins of international protection; in such context, are not also under the tutelage of the High Commissioner.

2.6. Protection of environmental refugees

Since their lack of defense is inadmissible, they must be protected by international instruments for the protection of the human person, with the aim of avoiding individual or collective threats or violations of their human rights, while preserving their guarantees, always with a human-centered approach.

This is the reading taken from countless regional and international declarations, conferences, conventions and reports on the subject, being understood that the Convention and its Protocol could be reformulated to include any person who moves in a forced, regardless of the reasons that cause those human movements, which would fill the legal gap referred to above and ensure, for example, UNHCR's role in supporting refugees forced by the environment.

3. THE MAGNITUDE OF THE PROBLEM

A study presented in 2014 at the Faculty of Political Science and International Relations of the National University of Rosario, province of Santa Fe, Argentina, in which the cases of Haiti (number 168 in the Human Development Index) and Japan (rank number 20) were analyzed, shows that "those inhabitants of countries whose HDI was low at the time of the catastrophe tend to become environmental refugees, and in countries with high HDI, citizens choose internal displacements"[7], having in their favor the protection provided by the 1998 Guiding Principles on Internal Displacement.

The perception of the magnitude of the problem, increasingly common and visible on our planet, grows without any doubt. It is necessary to take into account that those people do not leave their homes voluntarily, for convenience, political persecution or economic motivation, but because of extreme events, sometimes of global and transnational proportions, generally associated with climate changes; therefore, they are situations in which the watchword is survival, given the impossibility of continuing to live in the affected area.

UNHCR foresees that between 200 and 250 million young people and adults will become eco-refugees due to climate change over the next 30 years. A similar view is that of the Intergovernmental Panel on Climate Change, set up by the World Meteorological Organization (WMO) and the aforementioned United Nations Environment Program (UNEP), for which the *réfugiès de l'environement* will soon be in higher numbers than the political refugees.

Reports from governmental and intergovernmental organizations show this humanitarian tragedy, whose growing dimension has certainly hindered the eight Millennium Development Goals (eradicating extreme poverty and hunger, achieving universal primary

7 AGOSTINA, Cipollene, ¿Refugiados o desplazados *medioambientales*? *Los casos de Haití y Japón*, available on the Internet.

education, promoting gender equality and women's empowerment, reducing child mortality, improving maternal health, combating HIV / AIDS, malaria and other diseases, ensuring environmental sustainability, building a global partnership for development) were not achieved until 2015 by the 188 UN nations.

Those reports identify two types of disasters in this framework: natural and non-natural (with their cohort of refugees and environmental displaced persons):

> Events such as floods, eruptions, tsunamis, earthquakes, hurricanes, landslides can turn into disasters when they exceed certain limits. Among the most recent and famous are: the 2004 tsunami in Asian and African countries; the Tropical Cyclone Nargis in Burma in 2008, which gave rise to 800,000 displaced people; The catastrophic earthquake in Haiti, one of the world's poorest countries, in 2010, which killed 316,000 people, 350,000 were injured and approximately 1.5 million were homeless; and Hurricane Matthew, also in Haiti, which caused more than 800 deaths and thousands of displaced people in 2016.
>
> In turn, unnatural disasters include: the Chernobyl accident, the Vladimir Ilitch Lenin nuclear power plant (the most serious on the 7th International Scale of Nuclear Accidents, such as Fukushima I in Japan, 2011) in April 1986 in the city of Pripyat, now Ukraine, which generated more refugees than the sum of wars and armed conflicts, according to the report "Climate Change and Forced Migration Scenarios"; the poison gas (methyl isocyanate) leak in December 1984 in Bhopal, India, at the chemical pesticide plant of North American company, Union Carbide (its assets were then partly bought out by Dow Chemical company), which caused the death by poisoning of 30,000 people and the forced displacement of thousands of others, since it became impossible to continue living there.

For many, the capital crisis in the future will be environmental, and what we see nowadays is only a small tip of an iceberg. We cannot even figure out what awaits us, and the catalog of the factors that cause the increasing drama is extensive.

Susana Borràs Pentinat, in *Refugiados ambientales: el nuevo desafío del derecho internacional del medio ambiente*, comments the following:

> Ecological deterioration (droughts, pests, natural disasters, industrial and nuclear accidents, deforestation, global warming and other environmental threats) accompanies starvation and armed conflicts, which have enormous environmental repercussions (bombing, crop destruction, use of chemical weapons, etc.)... However, environmental refugees are not only victims of natural disasters. Often, man's hand is to blame for environmental exodus, whose victims do not usually receive any aid let alone indeminities... Behind those accidents of great relevance that touch the international community, there are everyday cases of environmental destruction that compel thousands of people to move from their places of origin. Oil spills or chemical substances in rivers or on coasts that affect the survival of the inhabitants, destroy their habitat, their basic eating habits, and turn them into refugees are very common. Forest deforestation or desertification also forces many communities and families to leave their homes and turns them into homeless peasants in search of a habitable place.[8]

Among so many factors, some related to one another, let us mention the following, as mere examples, with no expectation of exhausting a list of brutal amplitude.[8]

3.1 The rise of the sea level

It is well known that the rise of the sea determines (and has determined) the disappearance of islands and entire cities, especially in the Pacific Ocean, whose level is rising extremely fast. Some examples are the Fiji Islands (without land borders, close to Australia and New Zealand, mountainous terrain whose coasts and alluvial lands are threatened by the rise of the ocean), the Marshall Islands (an island republic, made up of two archipelagos, whose average altitude varies from three to four meters), the Tonga Islands (of volcanic origin, to the south of Samoa, known as Friendly Islands, the Carteret Islands (belonging to Papua New Guinea, small and low, only one and a half meter high), The Tuvalu Islands (between Hawaii and Australia, one of the smallest countries in the world, with a maximum of five meters above sea level, much of which is submerged during high tides), and Kiribati (an island country, located in northeastern Australia , which will cease to exist within three or four decades; two of its islands have already disappeared altogether).

8 In *Journal of Law*, vol. XIX, n. 2, December 2016, pp. 85-108.

In the Indian Ocean, Ghoramara (the Indian state of West Bengal, which has lost half its surface in the last twenty-five years), the Maldives (located in South India, which average about two meters high), and the Seychelles (a tropical paradise, northeast of the island of Madagascar, the smallest African country, and the second highest HDI of the continent) are equally in danger of extinction, and will be completely under water.

In the near future, almost all of those islands, intensely vulnerable to global warming, will melt, swallowed by the waters, and in some cases the relocation of their inhabitants in other regions is planned and already scheduled.

The island of Kiribati, for example, was in the headlines of the international press for another reason: one of its citizens, Ioane Teitiota, 39, had his claim for the climate refugee status denied before the Immigration Court after his work visa expired in New Zealand in 2010. The family was deported from New Zealand in 2015, making it clear that the principle of humanity was not considered in the judicial decision. In fact, until now, no claim of such nature has been accepted, anywhere.

As Jane McAdam said once: "Up to the present date, there has been a small number of cases in Australia and New Zealand, where people in Tuvalu and Kiribati have argued that they should be protected as refugees due to the impacts of climate change. All of them have failed.

Two examples illustrate the reasoning. In New Zealand, the Appeals Authority of the Refugee Statute explained that:

This is not a case in which the appellants can be said to differentially run the risk of damages equivalent to persecution because of any of those five reasons. All citizens from Tuvalu face the same environmental problems and economic hardships as in Tuvalu. Rather, the applicants are unfortunate victims, like all Tuvaluans, of the forces of nature that lead to the erosion of the coasts, and that family property becomes partially submerged by high tide.

In Australia, the Refugee Review Tribunal has stated:

> In this case, the Court does not believe that the element of an attitude or motivation can be identified in such a way that the dreaded conduct can properly be regarded as persecution due to a feature of the Convention as required... There is simply no basis for concluding that countries which may be

said to have historically been high emitters of carbon dioxide or other greenhouse gases have some element of motivation to affect lowland residents such as Kiribati, whether by race, religion, nationality, membership to a particular social group or political opinion.[9]

3.2. The floods

The marine or fluvial floods (caused by the overflow of rivers, torrents, defrost, tsunamis, hurricanes, etc.), in South, Central and North America; Africa; Europe; Asia and Oceania, often leave countless people homeless.

Recent floods such as the ones in Tabasco and Chiapas (Mexico) in 2007, as well as in other countries of the American continent, are associated with an overwhelming number of such episodes, generated by cyclones, monsoons, tornadoes, typhoons, etc., mostly in sub-Saharan Africa (Chad, Nigeria, Niger and South Sudan) and Asia (India, Pakistan, Bangladesh, China, Philippines and Thailand). Countless human beings, affected annually, are forced to migrate.

Many of those floods, particularly the coastal ones, impregnate the farmland with salt and hinder water supply, forcing the natives to leave their homes, sometimes their families, and to migrate to other regions of their country or abroad.

Flooding is also generated by the construction of dams, forcing thousands of people, without resettlement or indemnity, to move to places where they try not only to survive but also to overcome the social, psychological, and health problems that naturally arise under those circumstances.

3.3. The drought

Due to the droughts, inhabitants from several countries usually move to other places or migrate abroad. The We Are Water Foundation has compiled the following ranking of the countries that face most droughts currently: 1. Ethiopia; 2. Eritrea; 3. Somalia; 4. Sudan; 5. Uganda; 6. Afghanistan; 7. China; 8. India; 9. Iran; and 10. Morocco.

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9 In *Desplazamiento provocadopor el cambio climático y el derecho internacional*, Side event to the High Commissioner's Dialogue on protection challenges, December 8th, 2010, Palais des Nations, Geneva, available on the web.

Over the past few years, thousands have fled Syria, a country torn apart by extreme drought and armed conflict. It was a five-year drought (2006-2011) that destroyed 80% of cattle and 80% of agriculture, and caused an unprecedented exodus. In Ethiopia, the regular floods of the rivers are responsible for the displacement of thousands of natives from their homes.

The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) reports on the immense personal and property damage caused by floods related to the *El Niño* weather phenomenon (warming of the temperature of ocean waters in the Central and Eastern Pacific, increasing the rainfall and drought, with the almost inevitable consequences of malnutrition, hunger, disease, and crop devastation), driving away millions of people, with no prospect of return, in the search for a guarantee of life, that is, of survival.

3.4. Desertification

The United Nations Convention against Desertification (UNCCD), adopted in 1994, which has been joined by more than 180 countries, defines desertification as "the process of land degradation in arid, semi-arid, and dry sub-humid areas resulting from factors such as climatic variations and human activities."

Despite the fact that the statistics are never quite reliable[10], it should be added that the Norwegian Refugee Council noted that only in 2008 more than 20 million people were displaced by natural disasters caused by the rise in average temperature. It is announced that by 2020 some 135 million people might leave their land, temporarily or permanently, due to the desertification process, especially in sub-Saharan Africa.

According to the United Nations Environment Program, 35% of the surface area of the five continents corresponds to desert areas. In the case of severe desertification, the reduction in agricultural production is more than 50%, which excessively stimulates the internal and external exodus.

10 With regard to figures: we must be cautious with some of them, often alarmist, speculative, without any technical support, tending to compromise the necessary scientific rigor that must always prevail in those cases.

4. THE ROLE DEVELOPED BY GOVERNMENTS

Governments must pay attention to this drama of colossal proportions and be involved in the search for new laws and migratory agreements that allow environmental refugees to receive help to assure them their unavailable rights.

It may be the case that those governments should promote new bilateral or multilateral agreements in the context of broad international cooperation (and division of responsibilities) to address the problem, whether preventive or not. Only effective mutual collaboration between nations, with certain legal parameters added, can effectively protect environmental refugees.

The recipient countries (host areas) undertake to guarantee the protection of the human rights of ecological refugees, who live in the areas of departure, origin or expulsion, without discrimination of any kind. However, a question arises as to the reaction of those states of destiny in the face of great natural disasters that produce thousands of refugees, who go to their frontiers (due to their forces of attraction) at the very same moment when those same countries can be or are being victims of such misfortunes (impulse forces).

It is credible to imagine that many countries do not know how to react properly, no matter their selfless spirit, when such refugees exacerbate pressure on their own (sanitary, educational, food, etc.) resources. That could cause serious and violent conflicts. Water, especially drinking water, for instance, is becoming increasingly scarce and its sharing will represent, in an uncertain future, a serious difficulty for such refugees.

If it is correct to assert that prevention (mapping of regions most prone to environmental disasters, awareness of the imminence of certain disasters, and investments in, for example, sustainable growth, renewable energy and clean and innovative technologies) and mitigation of tragedies (whether silent or not) can be a way of ensuring the survival of millions of people, it is also essential to underline the need to seek support from governments, which would, for example, anticipating those predictable movements, deploy national disaster management offices, stimulate the creation of early warning systems, set up compensation funds, and rescue regions or countries receiving refugees in order to reduce the impact of the refuge and relieve the weakness of the areas exposed to environmental threats.

5. FINAL CONSIDERATIONS

The situation of the environmental refugee is an environmental problem, but also a legal one. The industrialized countries, which show no interest in reducing gas emissions, can be regarded in some ways as persecutors, since they are responsible for climate changes that cause the refugee problem in more vulnerable countries, with greater risk (fragile ecosystems), generally less developed.

Of particular concern is the widespread hatred in Europe, against migrants and refugees, by the richer countries. Deplorable, for revealing a progressive and deep hostility towards them, by stimulating hate speech on fertile ground, since the victims nourish a ceremonial fear of retaliation, have no confidence in the authorities, and are sure that they will be able to change very little.

The response to this drama and the lack of legal recognition (the lack of legal protection) would also go through the creation of a new instrument, a new Statute, a new and independent Convention, another specific Protocol to the United Nations Framework Convention on Climate Change[11], or any other more vigorous protection than the existing one, capable of providing a similar protection, it should be said, complementary, to the other refugees.

In this context, it is vital to promote a political debate involving stakeholders from different instances and stimulate a dialogue between government and civil society, with the understanding that it is a human rights issue in the first place.

One question stands out: What expectation should we have in the new times, when discriminatory rhetoric and ignominious hostility prevail? There is a worldwide concern about the importance and enforcement of the Paris Agreement[12], now rejected by Donald Trump (on the grounds that it threatens Yankee interests, corporate competitiveness, employment of US citizens), with unpredictable consequences, whether in American territory, or all around the world.

We are facing a universal humanitarian challenge. The debate is served.

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11 Adopted in New York on May 9th, 1992; Entered into force on March 21st, 1994. In 1997, the Kyoto Protocol was incorporated into the UNFCCC.

12 Signed by 195 Nations in 2015, its goal is to reduce emissions of gases that cause global warming. The exit from the United States is regrettable (although around 20 states have expressed their rejection to the decision of Donald Trump), since the country had committed to diminish, until 2025, a high percentage of its greenhouse gas emissions.

'DYNAMIC DIFFERENTIATION': THE PRINCIPLES OF CBDR-RC, PROGRESSION AND HIGHEST POSSIBLE AMBITION IN THE PARIS AGREEMENT

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1. INTRODUCTION

Traditionally, international law is defined by the sovereign equality of states, which aims to guarantee that all states have equal rights and obligations.[1] Yet, states differ significantly. Based on the concepts of cooperation, effectiveness and solidarity,[2] those differences must be taken into account in order to create a fair international legal order.[3] Differential treatment – or differentiation between states – has therefore become an important feature of international law.[4] The idea is to bring about practical, rather than formal, equality

1 M. Koskenniemi, The Politics of International Law (Bloomsbury, 2011); J. Crawford, 'Sovereignty as a Legal Value', *in* J. Crawford & M. Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), pp. 117–33, at 117.

2 L. Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006).

3 A.-M. Slaughter, *A New World Order (Princeton University Press*, 2004); D. Held & A. Kaya, *Global Inequality: Patterns and Explanations* (Oxford University Press, 2007); D. Held, *Cosmopolitanism: Ideals and Realities* (Polity Press, 2010).

4 Examples of differentiation in international law abound: it can be reflected as special decision-making rights (e.g., the veto power for permanent members of the United Nations (UN) Security Council; or for the 'consultative parties' of the Antarctic Treaty); as specific obligations according to different country categories (e.g., the distinction between 'nuclear weapon countries' and 'non-nuclear weapon countries' in the Nuclear Non-Proliferation Treaty); or as preferential rights (such as the 'special and differential treatment' provisions of the World Trade Organization (WTO) agreements).

among de facto unequal states and to increase participation in and the effectiveness of international agreements.[5]

In international environmental law, differentiation has assumed pivotal, almost defining characteristics, placing heavier burdens on developed countries while providing for differential (and preferential) treatment of developing countries. This has been expressed – for example, in Principle 7 of the 1992 Rio Declaration – as 'common but differentiated responsibilities', which establishes an obligation on all states to cooperate towards environmental integrity, while acknowledging that developed countries have a greater responsibility as a result of the pressure their societies have placed on the global environment and of their assumed greater economic and technological capabilities.[6] In this sense, differentiation is expected to bridge the gap between the formal equality of states under international law and the deep inequalities in wealth, power and responsibility that divide them.[7]

These factors have led to procedurally more demanding and substantively stronger obligations on developed countries, with developing countries having more flexible or fewer obligations. They have also led to obligations of developed countries to provide implementation assistance, finance, technology and know-how to developing countries. In this way, 'positive discrimination' in favour of developing countries has led to asymmetric environmental obligations coupled with arrangements and mechanisms which institutionalize this categorization.

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5 C. Voigt, 'Equity in the 2015 Climate Agreement: Lessons from Differential Treatment in Multilateral Environmental Agreements' (2014) 4(1–2) *Climate Law*, pp. 50-69.

6 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command': Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), 12 Aug. 1992, Principle 7, available at http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163.

7 J. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015).

As a growing number of developing countries become industrialized and increase their pressure on the global environment along with their capabilities, the expectation grows that they also assume greater responsibilities in international environmental law. The question is thus how to design legal instruments that can reflect the different 'situations' of states in an equitable and dynamic fashion, as they develop over time. The experience from 1992 to 2016 tells us that such differentiation cannot be static; it needs to allow the structure and content of international agreements to evolve dynamically.[8]

2. CLIMATE CHANGE AS A GLOBAL COMMONS PROBLEM

In order to understand the complexity of differentiation in the climate context, it is important to recall that climate change has the characteristics of a 'global commons problem'. Greenhouse gases (GHGs) accumulate over time and mix globally in the atmosphere. Emissions by any state contribute to the problem and can affect all other states. No individual state has the capacity to single-handedly achieve effective mitigation; nor does it have incentives to act unless other states also take action – otherwise it would bear a larger relative cost. As in a 'prisoner's dilemma' involving 197 prisoners, therefore, participation of all states is necessary for effective and fair cooperation.

Furthermore, climate change results from the stock of accumulated concentrations of GHGs in the atmosphere. The largest contribution to observed warming and positive radiative forcing is caused by the increase in the atmospheric concentration of GHGs, in particular carbon dioxide (CO2), since 1750.[9] CO2 emissions can remain in the atmosphere for hundreds or even thousands of years and have a cumulative effect on temperature increase. However, the past and future contributions of countries to the accumulation of GHGs in the atmosphere are different; countries also face varying challenges and circumstances, and have different capacities to

8 G. Ulfstein & C. Voigt, 'Rethinking the Legal Form and Architecture of a New Climate Agreement', *in* C. Todd, J. Hovi & D. McEvoy (eds), *Toward a New Climate Agreement: Conflict, Resolution and Governance* (Routledge, 2014), pp. 183–98, at 191.

9 Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers', *in* T. Stocker et al. (eds), Climate Change 2013: Report of the IPCC (*Cambridge University Press*, 2013), pp. 3–29, at 15.

address mitigation and adaptation. Climate change therefore raises issues of equity, justice and fairness on a global scale.[10]

As with any commons problem, the solution lies in collective action.[11] Effective international cooperation relies on workable notions of equitable burden and effort sharing. In the context of climate change, these notions are even more important given that states are not equal, and significant asymmetries and inequalities exist. The Intergovernmental Panel on Climate Change (IPCC) identifies four categories of inequality: (i) asymmetry in contribution to climate change (past and present); (ii) vulnerability to the impacts of climate change; (iii) capacity to mitigate the problem; and (iv) power to decide on solutions.[12] Scholarship suggests that outcomes seen as equitable can lead to more effective cooperation.[13] With respect to climate change, it has long been noted that a regime that many members find inequitable or unfair will face severe challenges to its adoption or be vulnerable to festering tensions that jeopardize its effectiveness.[14]

Different principles could come into play to address these issues.[15] Some of them relate to theoretical notions of distributive justice, such as causal and moral responsibility. The former refers to the responsibility for contributing to climate change via emissions of

10 IPCC, 'Summary for Policymakers', *in* O. Edenhofer et al., Climate Change 2014: Mitigation of Climate Change – Contribution of Working Group III to the Fifth Assessment Report of the IPCC (Cambridge University Press, 2014), pp. 1–30, at 5.

11 E. Ostrøm, Governing the Commons: The Evolution of Institutions for Collective Action (Cambridge University Press, 1990); see also E. Ostrøm, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change (2010) 20(4) Global Environmental Change, pp. 550-7.

12 M. Fleurbaey & S. Kartha, 'Sustainable Development and Equity', *in* Edenhofer et al., n. 10 above, Ch. 4, pp. 283–350, at 295.

13 With regard to effective climate mitigation action, Young has identified three general conditions for equitable burden sharing under which the successful formation and eventual effectiveness of a collective action regime may hinge: (i) the absence of actors who are powerful enough to coercively impose their preferred burden-sharing arrangements; (ii) the inapplicability of standard utilitarian methods of calculating costs and benefits; and (iii) the fact that regime effectiveness depends on a long-term commitment of members to implement its terms: O. Young, 'Does Fairness Matter in International Environmental Governance? Creating an Effective and Equitable Climate Regime', *in* Todd, Hovi & McEvoy, n. 8 above, pp. 16–28.

14 Fleurbaey & Kartha, n. 12 above, p. 295.

15 For an overview see C. Kolstad & K. Urama, 'Social, Economic, and Ethical Concepts and Methods', in Edenhofer et al., n. 10 above, pp. 207–82, at 215–9.

GHGs, the latter to the responsibility for solving the problem – noting that these two aspects are not always connected. Other principles invoke compensatory justice, such as the polluter-pays principle, the community-pays principle or the beneficiary-pays principle; and a third set involves procedural justice based on the way in which outcomes are brought about. Applied ethics hold persons (or states) responsible for harm or risks they knowingly impose or could have reasonably foreseen and, in certain cases, regardless of whether they could have been foreseen. However, there is no scientific or ethical foundation for prioritizing one equity principle over another.[16]

What can be concluded from all this is that, while effectiveness depends on participation, participation in turn depends on states' own perception of fairness and equity with regard to other states' contributions towards addressing the problem – and therein lies the fundamental importance of finding a workable solution for differentiation in the climate regime.

3. DIFFERENTIATION IN THE UNFCCC AND THE KYOTO PROTOCOL

In the United Nations Framework Convention on Climate Change (UNFCCC),[17] differentiation between the parties is based on the principle of 'common but differentiated responsibilities and respective capabilities' (CBDR-RC), along with an acknowledgement that developed countries should take the lead in the joint effort to combat climate change and its adverse effects.[18] Based on the premise that climate change is a common concern of humankind which requires the widest possible cooperation by all countries, the UNFCCC recognizes different contributions to environmental harm ('causality'), as well as different capacities to take mitigation measures ('capability'). Accordingly, the UNFCCC has addressed differentiation not only by enshrining CBDR-RC in its principles,

16 Fleurbaey & Kartha, n. 12 above, pp. 318–9.

17 New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at https://unfccc.int.

18 Art. 3.1 UNFCCC, ibid.: 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof'.

but also by establishing more demanding and substantively stronger obligations for those parties explicitly listed in its Annexes.[19]

All parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, have the common obligation under Article 4.1 UNFCCC to, inter alia, take measures to address GHG emissions and facilitate adaptation, conserve sinks and reservoirs, as well as prepare and update national GHG inventories. Article 4.2 commits parties included in Annex I (developed country parties and those with economies in transition) to adopt policies and measures to limit emissions and protect and enhance sinks and reservoirs. It is further understood that these policies and measures will demonstrate that developed countries are taking the lead in modifying emissions trends consistent with the objective of the UNFCCC. In a similar manner, Article 12 further elaborates on the reporting obligations assumed by all parties and establishes more specific and detailed obligations for developed countries, as well as additional time for developing countries' initial national communication.

Under Article 4.3 UNFCCC, those developed countries listed in Annex II have further assumed the obligation to provide finance and technology to developing countries. This is complemented by Article 4.7, which establishes a relationship between the fulfilment of developing countries' commitments and the obligations of developed countries to provide finance and technology. Several parties have narrowly interpreted this relationship as a conditionality (developing countries would take action only if provided with means of implementation), whereas other parties understand 'the extent to which' as creating a degree of effectiveness (developing countries would be able to be more effective in the context of support).

Throughout the implementation of the Convention, this 'positive discrimination' in favour of developing countries has led to what has been referred to as 'bifurcated' obligations and processes, coupled with several institutional arrangements for capacity building,

19 L. Rajamani, 'The Doctrinal Basis for and Boundaries of Differential Treatment in International Environmental Law', *in Rajamani*, n. 2 above, pp. 129-75.

transfer of financial resources and technology, and assistance to developing countries.[20]

The Kyoto Protocol to the UNFCCC[21] took this approach even further. Based on an interpretation of the UNFCCC that relied almost exclusively on the historical and then (in 1997) current responsibility of developed countries,[22] the Berlin Mandate for negotiating the Kyoto Protocol stated explicitly that the instrument would 'not introduce any new commitments for Parties not included in Annex I'. Its priority would be to 'strengthen the commitments' of Annex I Parties.[23] Accordingly, the Kyoto Protocol established quantified emissions limitation and reduction obligations only for those Annex I Parties listed in its Annex B.[24] It created a strict 'binary'[25] differentiation system, where only developed country parties and countries with economies in transition assumed legally binding, quantified, absolute economy-wide mitigation commitments, while developing country parties were exempted from doing so. In this sense, the Kyoto Protocol is mainly and foremost an operationalization of Article 4.2 UNFCCC. Its focus is the establishment of individual quantified obligations of result (QELROs) only for those parties who, under the UNFCCC, had an obligation to limit their emissions, that is, Annex I Parties.

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20 There are other forms of category-based differentiation under the UNFCCC, such as the flexibility given to 'economies in transition' under Art. 4.2, and the 9 types of developing country that have specific needs listed in Art. 4.8.

21 Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at http://unfccc.int/resource/docs/convkp/kpeng.pdf.

22 P. Pauw et al., 'Different Perspectives on Differentiated Responsibilities', *Deutsches Institut für Entwicklungspolitik, Discussion Paper* 6/2014, available at https://www.die-gdi.de/uploads/media/DP_6.2014.pdf.

23 Decision 1/CP.1, 'The Berlin Mandate: Review of the Adequacy of Art. 4, paras 2(a) and (b), including Proposals related to a Protocol and Decisions on Follow-up', UN Doc. FCCC/CP/1995/7/Add.1, 6 June 1995, paras 2(a) and (b). The Berlin Mandate was the outcome of the review referred to in Art. 4.2(d) UNFCCC.

24 Kyoto Protocol, n. 21 above, Art. 3 in conjunction with Annex B.

25 The authors note that 'bifurcated' and 'binary' have been widely used as synonyms in the negotiations for the Paris Agreement (n. 27 below). For the sake of precision and recognizing that developing countries also have obligations under the UNFCCC, it is useful to distinguish these terms. This article refers to 'binary' as a differentiation approach that sets an obligation or process for a category of countries and exempts the other category (like '1' and '0' in a binary system); while 'bifurcated' refers to differentiation that sets different obligations or processes for each category.

Between 2007 and 2012, the decisions adopted under the Ad-Hoc Working Group for Long-Term Cooperative Action (AWG-LCA) significantly raised the level of climate action. In parallel with the Kyoto Protocol, the AWG-LCA offered a political space for developing countries and non-Kyoto parties to negotiate their participation in the global response to climate change. This process generated several developments in the implementation of the UNFCCC and its institutional framework – most notably the creation of the Green Climate Fund.[26] The approach to differentiation under the AWGLCA, nevertheless, followed strictly the approach under the UNFCCC and its Annexes.

4. DIFFERENTIATION IN THE NEGOTIATION HISTORY OF THE PARIS AGREEMENT

The negotiating mandate for the Paris Agreement[27] was to 'develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties'.[28] While the Durban mandate of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) itself did not contain any references to developed or developing countries, the phrase 'under the Convention' made clear that the new agreement had to be seen in the context and against the normative background of the UNFCCC, including its basis for differentiation: the CBDR-RC principle. At the same time, the phrase 'applicable to all' indicated the need to increase the collective level of ambition and ensure the highest possible mitigation efforts by all parties.[29]

'Bifurcated' or 'binary' differentiation, however, proved to be a contentious issue in the negotiations for the Paris Agreement. On the one hand, there was a general understanding that the immense climate challenges can be tackled only by global, cooperative large-

26 Decision 1/CP.16, 'The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention', UN Doc. FCCC/CP/2010/7/Add.1, 15 Mar. 2011, para. 102.

27 Paris Agreement, Paris (France), 13 Dec. 2015, not yet in force (in UNFCCC Secretariat, Report of the Conference of the Parties on its Twenty-First Session, Addendum, UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016).

28 Decision 1/CP.17, 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action', UN Doc. FCCC/CP/2011/9/Add.1, 15 Mar. 2012, para 2.

29 Ibid., paras 6 and 7.

scale remedial action to include key agents, most notably the United States (US) and China. The former was not a party to the Kyoto Protocol; the latter did not have mitigation obligations under the Protocol. The characteristic of climate change as a global commons problem necessarily requires the participation of key actors in the global response in order to ensure participation by other relevant states.

On the other hand, the responsibilities of states, their development stages and factual circumstances differ considerably. Country categories such as 'developed' and 'developing' are no longer homogeneous, but marked by stark internal differences as well as dynamic changes.

By the time parties started negotiating under the ADP mandate, the strict antagonistic dividing line between developed and developing countries had, in effect, resulted in a stalemate that prevented meaningful mitigation action. Developing countries invoked CBDR-RC as a 'firewall', while developed countries demanded that developing countries assume mitigation targets as a precondition to further mitigation actions of their own.[30]

To resolve this challenge, differentiation in the context of the Paris Agreement needed not only to build on the existing approach, but also to reform by adopting a more nuanced, diversified way of differential treatment.[31] The Paris Agreement, therefore, had to strike a very careful balance between raising ambition and ensuring universal participation on the one hand, and equitable differentiation on the other.[32] It had to address the tension of being guided by the principles of the UNFCCC, while reflecting those very principles in a constructive and dynamic fashion that not only leads to broader but also to deeper participation (that is, higher ambition).

The tension between 'under the Convention' and 'applicable to all' remained unresolved until the very end of the negotiations. It manifested itself mainly as two distinct and antagonistic positions: those who argued for a diverse 'spectrum' of 'self-differentiated'

30 The negotiations during the second commitment period of the Kyoto Protocol, the Bali Action Plan (Decision 1/CP.13, UN Doc. FCCC/CP/2007/6/Add.1, 14 Mar. 2008) and the conditionalities expressed in the Copenhagen pledges clearly illustrate this point.

31 Voigt, n. 5 above, p. 50; and Ulfstein & Voigt, n. 8 above, p. 191.

32 H. Winkler & L. Rajamani, 'CBDR&RC in a Regime Applicable to All' (2013) 14(1) *Climate Policy*, pp. 102–21, at 103.

commitments, and those who defended strict abidance with the principles, provisions and the structure (the Annexes) of the UNFCCC.

It is possible to point to some specific moments that marked the evolution of the differentiation debate in the ADP. The nationally determined contributions (NDCs) approach that was agreed at the 19th Conference of the Parties (COP-19) in Warsaw (Poland) in 2013, as a result of the 'self-determined' approach already initiated by the Copenhagen pledges,[33] established that parties would choose their level of effort, providing comfort that no country would be required to do more than it was ready to do. However, this failed to address the matter of equitable effort sharing. Several parties feared that other countries could backtrack from previously assumed commitments, while others were concerned that the overall level of ambition would be neither adequate nor fair. In the light of the ascendance of a bottom-up approach to international cooperation through NDCs and the increased fluidity of commitments, differentiation was therefore seen as a vital corrective concept to ensure that distributive fairness remained part of the international climate change agenda.

In the run-up to COP-20 in Lima (Peru) in 2014, differentiation became a central issue of the negotiations. Brazil was one of the most vocal countries in this debate, eventually making a submission based on the so-called 'concentric circles' approach to differentiation.[34] The proposal called for a set of more stringent obligations for developed countries, particularly by assuming economy-wide, absolute mitigation targets, while ensuring that developing country parties also move in the same direction over time and with flexibility. Brazil was neither the only nor the first country to call for different types of mitigation commitment for developed and developing countries; it had already been a practice under the AWG-LCA.[35] The Brazilian

33 D. Bodansky, 'Reflections on the Paris Conference', Opinio Juris, 15 Dec. 2015, available at http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference.

34 Brazil was not the only country to propose specific concepts to address differentiation. Other proposals included New Zealand's 'bounded flexibility' and Switzerland's 'circumstance-based' proposal: see the submissions available at http://unfccc.int/documentation/submissions_from_parties/items/5900.php.

35 The Copenhagen Accord established 'targets' for Annex I Parties and 'actions' for developing countries, while the Cancun Agreements further elaborated this by requesting developed countries to raise the ambition of their 'quantified economy-wide emission reduction targets', and developing countries to put forward their 'nationally appropriate mitigation actions' (NAMAs).

proposal, however, had at least two innovative aspects. It associated the type of target in the NDCs with the idea of progression at each regular review of the Agreement. This added a dynamic aspect to differentiation. More importantly, while building on the categories of 'developed' and 'developing' countries that characterize the climate change regime, the proposal provided a visual image of differentiation that moved away from a bifurcated or binary approach and could eventually lead to common types of mitigation efforts for all parties.[36]

Decision 1/CP.20, adopted in Lima (Peru) in December 2014,[37] is key to understanding how differentiation came to be treated in the Paris Agreement. Its paragraph 3 underscored the parties' 'commitment to reaching an ambitious agreement in 2015 that reflects the principle of CBDR-RC, in light of different national circumstances'. The language drew from the US-China joint announcement of November 2014, which represented an unprecedented approximation between the world's top two emitters.[38] It was the first time that a decision under the ADP mentioned CBDR-RC. The qualifier 'in light of different national circumstances', which was the way that the principle would be reflected in the Paris Agreement, had broad implications, including a change of course from a strict, explicit differentiation expressed in annexes.

In Lima, another relevant development in respect of differentiation emerged in the context of finance. Less recalled, but almost equally important, is the last sentence of paragraph 4 of Decision 1/CP.20, recognizing 'complementary support by other Parties' – that is, those that are not developed countries. It indicated then that developing countries could have a role to play in the provision of support and mobilization of climate finance.

The negotiation meetings that preceded COP-21 in Paris (France), in 2015, slowly consolidated the notion that differentiation

36 The image of the concentric circles may also have originated through some subconscious process – the COP-20 logo consisted of several concentric circles, the seats at the main plenary in Bonn (the former German Parliament) are also roughly arranged in circles, causing ADP co-chair Kishan Kumarsingh to joke that 'we are now seeing circles everywhere!'.

37 Decision 1/CP.20, 'Lima Call for Climate Action', UN Doc. FCCC/CP/2014/10/Add.1, 2 Feb. 2015.

38 White House, Office of the Press Secretary, 'U.S.-China Joint Announcement on Climate Change', Beijing (China), 12 Nov. 2014, available at https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change.

would be addressed in a context-specific manner appropriate to each element of the Agreement, rather than by a dichotomy that cuts across all sections.[39] The understanding evolved that certain differentiating parameters (or 'modulators', as they were referred to by negotiators) could inform the implementation of the provisions of the Agreement.[40] Finally, during the second week of COP-21, when parties assembled no longer under the ADP but as the Comité de Paris, the Agreement took form under the authority and diplomatic craftsmanship of the French presidency after week-long minister-led informal consultations.

5. THE PARIS AGREEMENT

5.1. Reflecting the Principle of CBDR-RC in the Light of Different National Circumstances

The Paris Agreement clearly recognizes the normative legacy of the UNFCCC. It is guided by principles of the Convention, including equity and CBDR-RC,[41] and will reflect them throughout its implementation in the light of different national circumstances.[42] The approach to differentiation under the Paris Agreement is far more diversified than it is under the UNFCCC. While categories of countries, such as 'developed' and 'developing', are still relevant, these categories are nowhere defined; nor does the Agreement make any reference to the Annexes of the UNFCCC. This is a big shift. The Paris Agreement aims to reflect the responsibilities, capacities, and circumstances of all parties.[43] As will be shown, differentiation is

39 'Practical application of differentiation will vary depending on the element of the agreement (mitigation, adaptation, support, transparency)': First Informal Ministerial Consultations to Prepare COP21, Paris (France), 20–21 July 2015: Aide-Mémoire Produced by France and Peru, Paris (France), 31 July 2015, available at http://www.actu-environnement.com/media/pdf/news-25145-note-france-perou. pdf.

40 See the handout by the facilitator of the informal meeting on 'differentiation' for the facilitated group on mitigation: Annex I of ADP 2.10 Working Document (version of 8 Sept. 2015 at 18:00h), available at http://unfccc.int/files/bodies/awg/application/pdf/adp2-10_8sep2015t1500_cwd.pdf.

41 Paris Agreement, n. 27 above, Annex, Preamble, para. 3.

42 Ibid., Annex, Art. 2.2.

43 It is worth noting that the category 'economies in transition' is not referred to in any provision of the Agreement or the accompanying decision. This is clearly an example of how differentiation can evolve in response to changing circumstances – countries that formerly belonged to the Soviet Republic are now either part of the

operationalized in several ways, some explicit, some more implicit, balancing different considerations for each element of the Agreement.

From the outset, Article 2.2 restated the Lima language that the Agreement 'will be implemented to reflect equity and the principle of CBDR-RC, in the light of different national circumstances'.[44] The overall approach to differentiation, therefore, is not premised on 'causality' alone, but on an amalgamation of country-specific responsibilities, capabilities and circumstances – and serving the purpose of the Agreement to keep temperature increases well below 2 degrees Celsius (2ºC).

The qualifier 'in the light of different national circumstances' introduces a dynamic and flexible element to interpreting both responsibilities and capabilities, broadening the parameters for differentiation.[45] It allows for a much more complex approach, taking into account not only a wider array of criteria – such as past and current, as well as projected, future emissions – but also financial and technical capabilities, human capacity, population size and other demographic criteria, abatement costs, opportunity costs, skills, etc.[46]

In this way, the principled-based approach to differentiation in the Paris Agreement is more nuanced, while building upon the UNFCCC.[47] The Agreement allows for the creation of an evolutionary 'policy space' under the Convention in various ways. Firstly, the references to the principle of CBDR-RC are general in character and are not explicitly linked to any article of the UNFCCC, nor its Annexes. The references in the Preamble and Articles 2.2 and 4.3 signal that the CBDR-RC principle of the UNFCCC applies in a manner that is not static, but open to change. The general, principled character is a means to adjust and adapt the parties' obligations to

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European Union or identify themselves as developing countries, with the exception of the Russian Federation, of course, which stands in a category of its own.

44 Paris Agreement, n. 27 above, Annex, Art. 2.2.

45 L. Rajamani, 'Differentiation in a 2015 Climate Agreement', Center for Climate and Energy Solutions (C2ES) *Papers*, June 2015, p. 2, available at http://www.c2es.org/docUploads/differentiation-brief-06-2015.pdf.

46 H. Winkler et al., 'What Factors Influence Mitigation Capacity' (2007) 35(1) *Energy Policy*, pp. 692-703.

47 The Agreement serves to 'enhance the implementation of the Convention' (Art. 2.1), which allows for the interpretation that the terms of the UNFCCC are not 'set in stone', but that the UNFCCC is a living document; it is not 'static' in its content but is rather, by further implementation of the Paris Agreement, evolutionary.

be responsive to an evolutionary understanding of accountability for temperature increases and also to changing political, social and economic circumstances.[48] Because responsibilities, capabilities and national circumstances not only differ significantly but are in a flux, they will have to be taken into account in a dynamic fashion.

There is, arguably, another important implication. While Article 3.1 UNFCCC expands on CBDR-RC by stating that '[a]ccordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof', to 'take the lead' now relates specifically to the type of mitigation target (that is, economy wide and absolute, in Article 4.4 of the Paris Agreement) and to the commitment of developed countries to mobilize finance (Article 9.3 of the Paris Agreement).

Secondly, the Paris Agreement does not operate with a single, across-the-board approach to differentiation based on explicit pre-set categories of countries. Many of the obligations which will become legally binding once the Agreement enters into force will apply to all parties.[49] Where references to 'developed' and 'developing' countries occur, they do not lead to a static placement of countries. Rather, the absence of annexes and of definitions of 'developed' and 'developing' allow countries to move towards greater ambition over time without the need to 'graduate' from one category to the other.

This allows for a further observation. The Kyoto Protocol operated on a stringent type of differentiation where only developed country parties included in Annex I of the UNFCCC had quantified emissions limitation and reduction commitments. The Paris Agreement leaves this track of strict, 'binary' differentiation on mitigation commitments and builds differentiation on the more open, principled-based approach of the UNFCCC. If the Kyoto Protocol can be seen as the operationalization of Article 4.2 UNFCCC, as argued above, the Paris Agreement, at least in part, could be seen to build on Article 4.1 of the Convention, which includes commitments by all parties.

48 See also T. Deleuil, 'The Common but Differentiated Responsibilities Principles: Changes in Continuity after the Durban Conference of the Parties' (2012) 3(21) *Review of European Community and International Environmental Law*, pp. 271–81.

49 Legally binding obligations for all parties are contained in Paris Agreement, n. 27 above, Arts 4.2, 4.3, 4.8, 4.9, 4.13, 7.1, 13.7.

5.2. The Principles of Highest Possible Ambition and Progression as Means to Differentiate over Time

The Paris Agreement also contains two new principles, highest possible ambition and progression to inform the level of ambition of the parties' efforts and, implicitly, the differentiated placement of countries in the overall heterogenic and diverse picture. The balance between sheer self-determination of effort and equitable effort sharing is, inter alia, struck by having each party commit to undertaking ambitious efforts, as defined in the provisions of the Agreement. With respect to mitigation, this is expanded to having an NDC which reflects its 'highest possible ambition, reflecting CBDR-RC, in the light of different national circumstances' (Article 4.3).

While this language seems unassuming at first glance, it is, in fact, a potent and powerful tool. This provision reflects an expectation that all parties will deploy their best efforts in setting their national mitigation targets and in pursuing domestic measures to achieve them. Article 4.3 is reflective of a standard of care that states now need to exercise: to strive for their highest possible ambition in a manner that their efforts reflect their common responsibilities, respective capabilities and national circumstances.[50] It is reminiscent of a due diligence standard in international law which requires governments to act in proportion to the risk at stake and to the extent of the capacity they employ.[51] With that, each and every party (once the Agreement enters into force) has committed to take all appropriate and adequate climate measures according to its responsibility and its best capabilities in order to progressively achieve the objective of the Agreement – to keep the increase in global temperature well below 2°C in order to avoid dangerous anthropogenic interference with the climate system. Highest possible ambition is responsive to states' differing responsibilities, capabilities and circumstances,

50 See, e.g., C. Voigt, 'The Paris Agreement: What is the Standard of Conduct for Parties?', *Questions of International Law*, 24 Mar. 2016, available at http://www.qil-qdi.org/paris-agreement-standardconduct-parties; and C. Voigt, 'The Potential Roles of the ICJ in Climate Change-related Claims', *in* D. Farber & M. Peeters (eds), Climate Change Law (Edward Elgar, 2016), pp. 152–66, at 159–61.

51 See, e.g., the first report of the International Law Association (ILA) Study Group on Due Diligence: D. French (Chair) & T. Stephens (Rapporteur), 'Due Diligence in International Law', 7 Mar. 2014; available at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045.

while at the same time striving to match ambition with the overall aim. It thereby combines effectiveness and fairness.

This concept represents both a formal departure from the strict and equal treatment of states, and a departure from the strict two-fold differentiation model contained in the UNFCCC and its Kyoto Protocol. Importantly, the concept is a flexible and dynamic means of differentiation which allows for the determination of what constitutes an equitable and proportionate contribution in any given case and at any given point of time.

What constitutes an equitable and proportionate effort is a (yet to be settled) debate under the UNFCCC. It is, however, worth noting that the 'nationally determined' approach of the Paris Agreement has already led to a research agenda and several tools developed by civil society to assess, assist and/or to inform countries' NDCs with regard to fairness and ambition.[52] The locus of this debate has potentially moved to the national level, during the preparation of each successive contribution. At the international level, this nationally informed understanding of 'highest possible ambition' may provide relevant inputs to the consideration of the collective level of ambition through the global stocktake which will take place every five years.

Articles 3, 4.3 and 4.4 of the Paris Agreement further establish a requirement that the efforts of all parties will represent a progression over time, meaning that every new effort will go beyond previous efforts. This is connected with another central aspect of the Agreement: the logic of regularly preparing successive contributions, informed by the outcomes of a collective assessment of progress towards the goal of the Agreement – the global stocktake defined in Article 14.

Inherent in these parameters is the understanding that both ambition and progression are reflective of and responsive to the parties' national responsibilities, capabilities and circumstances, allowing for a more diversified way of differentiation over time. This makes the due diligence-based standard of care referred to above a continuum. Parties will be required, on a regular basis through

52 See, e.g., the CAIT Equity Explorer, by the World Resources Institute (WRI), available at http://cait.wri.org/equity; and the methodology of the Climate Action Tracker, by Ecofys and Climate Analytics, available at http://climateactiontracker.org/methodology/85/Comparability-of-effort.html.

iterative processes, to revisit their actions and support and to assess their levels of ambition in accordance with their CBDR-RC, in the light of different national circumstances. This encourages an unprecedented dynamism in differentiation, which preserves the commitments of developed countries, while allowing for developing countries to assume more responsibilities – without the need to 'graduate' to another category.

5.3. Differentiation as Reflected in the Elements of the Paris Agreement Mitigation

The nuanced approach to differentiation is most evident in the mitigation provisions. Article 4 of the Paris Agreement sets common, general provisions and specifies parameters to guide developed and developing countries in their implementation, allowing more flexibility to the latter and, within these, additional flexibility to least developed countries and small island developing states.

For instance, Article 4.1 defines the global trajectory: all parties have committed to contribute to the global peaking of GHG emissions as soon as possible, reducing emissions rapidly thereafter, and achieving a balance of emissions and removals in the second half of this century. While this global trajectory applies to all parties in a joint effort, it recognizes that developing countries will take longer to peak their emissions.

Similarly, the legally binding obligation to 'prepare, communicate and maintain successive NDCs', in Article 4.2, applies to all parties. Yet, it is followed by several modulators that allow for differentiation in the content (level of ambition) and form (type of target) of NDCs. The self-determined aspect of the parties' level of effort is accompanied by obligations of conduct in Article 4, paragraphs 3 and 4.[53] All parties' NDCs will reflect their 'highest possible ambition', but such level of ambition should also reflect their respective

53 Cf. the language in Art. 4.3 and 4.4 with para. 20 of the 'Geneva Negotiating Text' (UN Doc. FCCC/ADP/2015/1, 25 Feb. 2015), proposed by Norway in ADP 2.8, Geneva (Switzerland), 8-13 Feb. 2015; paras 8 and 11 of the 20th BASIC Ministerial Meeting on Climate Change Joint Statement (New York, NY (US), 27-28 June 2015, available at http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=12378:20th-basic-ministerial-meeting-on-climate-changenew-york-27-28-june-2015-joint-statement&catid=578&lang=en&Itemid=718); as well as para. 5 of the China–France Joint Presidential Statement on Climate Change (Beijing (China), 2 Nov. 2015, available at http://www.diplomatie.gouv.fr/

responsibilities, capabilities and circumstances, as well as represent a progression in relation to the previous contribution. In terms of types of mitigation target, Article 4.4 stipulates that developed countries should continue to take the lead by undertaking economy-wide absolute targets. Developing countries should enhance their efforts and are expected to assume economy-wide targets when their circumstances allow. This is a significant evolution from the UNFCCC, which did not contain prescriptive guidance for the type of mitigation effort on the part of developing countries.

In fact, only when Article 4, paragraphs 3 and 4, are seen in conjunction, does a comprehensive picture of differentiation in the context of mitigation commitments emerge. Differentiation applies both to the content ('how much') and the form ('what') of the parties' level of effort. These two elements can be represented as axes in a Cartesian coordinate system which allows for the equitable determination of each party's contribution at any point in time (see Figure 1). Together, they provide the flexibility and fluidity necessary to capture the parties' diverse and changing realities, while aiming for an effective response to the climate challenge.

The basis for differentiation in the mitigation provisions, therefore, is a complex balance between the parties' responsibilities, capabilities and circumstances rather than any particular definition of 'developed' or 'developing' country. Consequently, this approach is fully consistent with the agreed global mitigation trajectory: all parties have an obligation to continuously contribute to achieving the temperature goal, but they should do so with their highest possible ambition, in a diversified and equitable manner, and reflecting their responsibilities, capabilities and circumstances.

Adaptation

Adaptation provisions under Article 7, on the other hand, have more general, common characteristics; there is actually no specific obligation for, or even an explicit reference to 'developed countries' in this article.[54] Nonetheless, Article 7 gives preferential treatment to developing countries and, within this group, to the most vulnerable.

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en/french-foreign-policy/climate/2015-paris-climate-conferencecop21/article/china-and-france-joint-presidential-statement-on-climate-change-beijing-02-11).

54 Art. 7.13, nevertheless, contains an indirect reference to developed countries, in the context of support.

It establishes that the implementation of the Agreement should take into account the needs of developing countries that are particularly vulnerable (Article 7.2); provide recognition and assistance to the adaptation efforts of developing countries (Articles 7.3, 7.7 and 7.13), while avoiding the creation of additional reporting burdens on developing countries (Article 7.10). The basis for differentiation under Article 7 relies mostly on parties' vulnerabilities and capabilities. The Agreement, however, does not specify which developing countries are particularly vulnerable. As any attempt to list them under the Paris Agreement has proven unfruitful, one can only assume, by way of reference, the types listed in Article 4.8 UNFCCC.

Finance

The provisions on financial support are arguably how the Paris Agreement addresses differentiation between developed and developing countries most directly and explicitly. Article 3 recognizes the need to support developing countries for the effective implementation of the Agreement. Articles 4.5 and 7.13 state that 'support shall be provided' to developing countries for their mitigation and adaptation actions, respectively. On the receiving end, therefore, the Paris Agreement clearly entitles developing countries to support. It does not, however, condition developing countries' actions on support. Rather, as Article 4.5 makes clear, enhanced support for developing countries will allow for higher ambition in their actions. Read in conjunction, Articles 3, 4.5 and 7.13 establish a strong link between support and the degree of effectiveness and ambition in the actions of developing countries. Yet, this does not exempt them from fulfilling their obligations under the Agreement.

On the giving end, Article 9 offers the most clear-cut, bifurcated version of differentiation in the Paris Agreement. Article 9.1 reaffirms developed countries' legally binding commitments under the Convention to provide financial resources to developing countries. Support from other parties is voluntary, as per Article 9.2. Proposals to commit those developing countries 'in a position to do so' or even 'willing to do so' to provide finance were flatly rejected. This, nevertheless, represents a considerable increment to previous practice under the Convention, in which developing countries simply had no formal role in climate finance or in supporting other countries; nor did they receive any recognition for doing so.

Mobilization of climate finance – a concept that is considerably broader than the provision of financial resources and includes 'a wide variety of sources, instruments and channels' – is described in Article 9.3 as a 'global effort'. It can therefore be interpreted as a common commitment of all parties. In this effort, however, developed countries should continue to take the lead.

Article 9, therefore, differentiates financial obligations under the Paris Agreement in distinctive ways. It is quite explicit and strict with regard to the provision of support, attributing a strong normative weight to developed countries' obligations, while other parties are encouraged to provide support on a voluntary basis only. However, Article 9 approaches the mobilization of climate finance in a more nuanced way, mirroring to some extent the approach used for mitigation: a provision applicable to all, accompanied by an obligation of conduct for developed countries to continue taking the lead.

Transparency

If finance is where differentiation is expressed more explicitly, transparency provisions under Article 13 are arguably where provisions for developed and developing countries converge most significantly. Since the purpose of transparency provisions is to increase trust and confidence among countries, it is arguably harder to legitimize any partner being entitled to less stringent obligations. Differentiated mitigation and financial commitments based on considerations of equity and responsibilities, capacities and circumstances may be perfectly justifiable, but all parties should report on these commitments as transparently and comprehensively as possible.

Accordingly, the 'enhanced transparency framework for action and support' established in Article 13 of the Paris Agreement sets parties' capacities as the basis for differentiation. Different types of commitment and obligation under the other provisions of the Agreement have distinct transparency requirements – for instance, as a reflection of Article 9, developed countries have mandatory reporting obligations with regard to the provision of support, while other parties only 'should' do the same (see Article 13.9). Accordingly, the technical expert review as well as the multilateral consideration of progress with respect to providing support is compulsory only for developed countries (Article 9.11). Over time, however, these

remaining elements of differentiation in the transparency framework will become less pronounced as all parties will be subject to common modalities, procedures and guidelines, as stated in Article 13.13.

In what promises to be one of the most difficult negotiations prior to the entry into force of the Agreement, these yet to be agreed common rules will express differentiation mainly by providing flexibility to those developing countries that need it in the light of their capacities.[55] An interesting feature of this particular approach is that it recognizes a preferential treatment of developing countries, but at the same time softens the strict categorization by limiting flexibility only to those developing countries that lack the capacity to implement common modalities on reporting, including those regarding the scope, frequency and level of detail.[56] In doing so, the Agreement recognizes that within the group of developing countries differences exist that lend themselves to a more heterogeneous (internal) treatment of developing countries in accordance with their capacities.

Other Provisions

The references above do not exhaust the examples of how the Paris Agreement differentiates among parties.

Differentiation can also be found in the context of the legal implications of the Agreement. For example, the mandate of the compliance and implementation committee (Article 15) states that the committee 'shall pay particular attention to the respective national capabilities and circumstances of Parties'.

The Agreement further allows implicit differentiation by using norms which accommodate a large degree of discretion. Such norms may, for example, permit the consideration of criteria, characteristics or circumstances that differ from country to country. Implicit differentiation can occur where the Agreement permits flexibility and/or discretion in the implementation, when using terms such as 'as far as possible', 'highest possible', 'best possible', 'as soon as possible' or 'where/as appropriate'. Of importance in this context is

55 To this end, Decision 1/CP.21 establishes a 'capacity-building initiative for transparency' to support developing countries in meeting enhanced transparency requirements: Decision 1/CP.21, 'Adoption of the Paris Agreement', UN Doc. FCCC/CP/2015/10/Add.1, 29 Jan. 2016, paras 85-89.

56 Decision 1/CP.21, ibid., para. 90.

that 'appropriateness' or 'possibility' or 'flexibility' are in constant flux and allow both dynamic as well as temporary differentiation.

6. SUMMARY AND REFLECTIONS

This article provides an analysis of the careful balance struck in the Paris Agreement between differentiation among parties and the need to raise collective ambition. This balance is reflected in five systemically interconnected features of the Agreement.

Firstly, the Paris Agreement adopts a more diversified way of differential treatment, allowing a wider array of parameters to be taken into account when parties determine their national contributions, while being set against the normative background of the UNFCCC. The Agreement does not define differentiation in a singular way. Rather, it approaches it in at least three complementary ways:

1. It builds upon the principled approach to differentiation as contained in the CBDR-RC principle of the UNFCCC in a more nuanced and dynamic fashion by recognizing that the (application of the) principle is responsive to differing national circumstances – that is, not tied to the Annexes.
2. Each article of the Agreement reflects differentiation in context-specific ways, ranging from universal, non-differentiated obligations, to provisions that provide for implicit differentiation through norms the application of which permits consideration of characteristics that vary from country to country, to starkly contrasted and explicit differentiation between developed and developing countries.
3. The Agreement sets out parameters that will inform parties' choices of ambition of both action and support, including the principles of progression and highest possible ambition, which consequentially also contribute to determining the differentiated commitments of parties.

Secondly, the principle of highest possible ambition establishes the standard of care now to be exercised in climate affairs. It implies a due diligence standard which requires each government to act in proportion to the risk at stake, and reflects its common but differentiated responsibilities and capabilities. Each single party has committed to taking all appropriate and adequate climate measures in order to progressively achieve the objective of the Agreement: to keep global temperature increases well below 2ºC in order to avoid

dangerous anthropogenic interference with the climate system. 'Highest possible ambition' implies recognizing states' differing national circumstances while at the same time aiming to match ambition with the overall aim, thereby combining effectiveness and fairness. The principle represents both a formal departure from the strict and equal treatment of states, and a departure from the historical, binary or bifurcated differentiation model. Importantly, the concept offers a flexible and dynamic means of differentiation by allowing the determination of what constitutes a proportionate measure in any given case and at each successive cycle of NDCs.

Thirdly, the principled-based approach to differentiation is combined with iterative processes (those presenting a successive contribution every five years, after a global stock-take), and with the establishment of an enhanced transparency framework. This, in turn, is an important ingredient to establish mutual trust. Not only will parties' NDCs change over time the 'differentiated placement' of parties, but they will do so with *repetitiveness and an unprecedented degree of transparency and openness.*

Fourthly, the characteristics above enable the Paris Agreement to create a *collective learning environment.* Collective learning might be a way to overcome the 'prisoner's dilemma' that characterizes climate change as a collective action problem. In fact, iterative, cooperative and facilitative processes have been identified as a way to address the risk of 'free riding'.[57]

The Paris Agreement has set up an architecture that promotes the evolution of voluntary, cooperative behaviour. Conditions for such evolution include transparency, trust and credibility that parties actually do what they said they would ('pledge'). According to game theory, three elements are necessary to fulfil such conditions:

1. The pledging process needs to be broken down to a series of small steps. Such a succession of pledges will increase the acceptance by parties of cooperative strategies, as they can adjust the content of their pledges in subsequent rounds.
2. Common timelines need to be established for parties to individually communicate new pledges, but also to assess collective progress towards the overall aim.

57 R. Axelrod, *The Evolution of Cooperation (Basic Books,* 1984), pp. 135-47, and Ch. 9, pp. 169-91, at 177.

3. The international regime should have a long, perhaps indefinite, time horizon, creating the conditions to 'trust, but verify' the actions of other parties over time.[58]

The Paris Agreement meets all of these conditions. The pledging of an NDC every five years, informed by the outcome of the stocktake of collective progress, allows subsequent upward enhancement of ambition in a gradual manner. There is a robust transparency system consisting of reporting and review of actions and support, which adds credibility to parties' pledges.

Fifth and finally, the Agreement creates a *reflexive approach* to parties' determination of their climate action by establishing the duty of parties to revisit their actions and periodically assess whether their levels of ambition indeed correspond with their best possible effort, reflecting their responsibilities, capabilities and circumstances. This stimulates parties to improve their response to climate change by learning about their actions and the global effort, using this information to make appropriate changes. Perhaps in these aspects lies the greatest strength of the Agreement – enabling greater political relevance and durability, as well as fairness.

In sum, this article argued that differentiation under the Paris Agreement is much more diversified and less categorical than it is under the UNFCCC's Annexes and the Kyoto Protocol. References to 'developed' and 'developing' countries are still relevant, but in a context-specific manner, rather than a 'two fold' approach. While the Agreement echoes the principle of CBDR-RC, it adds that it will be reflected 'in the light of different national circumstances'. Along with the principles of progression and highest possible ambition, this allows a dynamic upward adjustment of parties' efforts in a manner that is recognizant of the unique and changing responsibilities, capacities and circumstances of 197 diverse states at each successive cycle of NDCs. The articulation of the principles of CBDR-RC, progression and highest possible ambition at each successive NDC provides an innovative, comprehensive and dynamic way to match ambition with the overall aim of the Agreement, in a practical framework for combining effectiveness and fairness.

Differentiation under the Paris Agreement has the potential to function as a catalyst for a race to the top on climate action, rather than merely a burden-sharing concept. It must lend itself

58 Ibid.

to strengthening collective action to hold temperature increases to well below 2°C. This requires ambitious mitigation action by all parties, as well as due consideration of the issues of equity, justice and fairness that arise from the global response to climate change. Given the important role that differentiation has to play, it can be stated safely that the Paris Agreement has succeeded in using differentiation as a means for enhancing ambition, as opposed to stalemating it. Rather than setting countries apart, differentiation could become a tool for bringing countries closer together in serving the purpose of the Agreement.

A THUNDERING SILENCE: ENVIRONMENTAL RIGHTS IN THE DIALOGUE BETWEEN THE EU COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS

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The human rights protection system established under the European Convention of Human Rights (ECHR; hereinafter, the Convention) and the European Union's own human rights protection system have enjoyed a harmonious co-existence over the past decades. The Union's evolving human rights policy has received valuable input from the European Court of Human Rights' (the ECtHR) judicial record in the field of human rights protection, the Court of Justice of the EU (the CJEU) and the ECtHR having been involved in a dynamic dialogue which has become 'an increasingly important feature of European integration and governance – symbiotic interaction of fragile complexity',[1] underscored by a frequent practice of referring to each other's jurisprudence and with an overwhelming number of these references having an approving rather than disapproving tone. The judicial dialogue the CJEU and the ECtHR have been involved in belongs to the type of transnational judicial conversations that occur as a manifestation of the broader phenomenon of courts world-wide using each-other's jurisprudence,[2] underpinned by the idea of supranational courts communicating with each other through a judicial dialogue that involves judges citing each other's case law in cases before them.[3] The planned accession of the EU to the ECHR, as foreseen under Article 6(2) Treaty of the European Union (TEU) and the related Protocol 8 on the Accession of the European Union

1 Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 CMLR 629, 630-31.

2 ibid 654.

3 Cian Murphy, 'Human Rights Law and the Challenges of Explicit Judicial Dialogue' (2012) Jean Monnet Working Paper 10, 8.

to the ECHR, further adds to the significance of the judicial dialogue between the CJEU and the ECtHR. Certainly, in light of recent developments, it cannot be denied that the dialogue between the two courts currently sits in the shadow of CJEU's Opinion 2/13 where the Court ruled the accession of the EU to the ECHR as envisaged by the draft accession agreement to be liable to adversely affect the specific characteristics of EU law and its autonomy, and thus to be incompatible with the Union's primary law.[4] Without pre-judging whether Opinion 2/13 will possibly lead to a stagnation in the dialogue between the CJEU and the ECtHR or the judicial dialogue will indeed remain unaffected, the article bases its analysis upon what has thus far been accomplished through the medium of judicial dialogue between the two courts.

In the face of the dynamic inter-judicial exchange taking place between the CJEU and the ECtHR over the years, there is curiously one aspect–environmental rights[5]–with regard to which this otherwise dynamic dialogue becomes mute. This article aims to shed light on this particular instance of absence of judicial dialogue in the matter of environmental rights, looking at environmental rights in light of the distinction between procedural environmental rights, on the one hand, and substantive environmental rights, on the other.[6] The substantive right to a clean environment denotes a right to a particular or specified environmental quality.[7] The recognition of such right has been covered by a negligible number of international multilateral legal instruments.[8] Procedural environmental rights, on

4 Opinion 2/13 [2014] ECLI:EU:C:2014:2454, [200].

5 Remaining cognizant of the differentiation that exists between the ecocentric and the anthropocentric approach to environmental rights, the term 'environmental rights' used throughout this text shall refer to human rights linked to environmental protection as 'proclamations of a human right to environmental conditions of a specified quality'. See Dinah Shelton, 'Developing Substantive Environmental Rights' (2010) 1 JHRE 89, 89.

6 6 ibid 90.

7 The notion of a 'right to environment proper' appears in different versions in academic literature: 'right to a particular environmental quality', 'right to a clean environment/healthy environment/decent environment/sound environment', etc., or some variation of the former. For the purposes of this article, the 'right to clean environment' reference will be used throughout the text.

8 For example, the 1981 African Charter of Human Rights and Peoples' Rights adopted under the auspices of the former Organization of African Unity recognizes a substantive human right to the environment, providing that '[a]ll peoples shall have the right to a general satisfactory environment favorable to their development'

the other hand, have been firmly grounded in various international law instruments, the most prominent of which is the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,[9] which enshrines three types of procedural environmental rights: the right of access to environmental information, the right to participate in environmental decisionmaking and the right of access to justice in environmental matters.

The CJEU and the ECtHR have approached the field of environmental rights from their own singular perspective which has nonetheless failed to engender any dialogue between them in the form of, at the very least, an acknowledgement of each other's jurisprudence if not showing open deference thereto. The ensuing discussion will inquire into the distinguishing features of the respective approaches employed by the ECtHR and the CJEU towards environmental rights, exploring whether such variance hails from a different understanding of the concept of environmental rights. In order to address the issue of a missing dialogue between the two courts, firstly, the article will showcase the singular tendencies discernible in ECtHR's jurisprudence in the field of environmental rights juxtaposing the former to the approach applied by the CJEU to cases that involve, or touch upon, environmental rights. Therefore, in order to seek out the possible (policy or other) reasons behind the lack of judicial dialogue, as well as to offer viable options for instituting the currently missing dialogue between the courts, the findings relative to the CJEU's jurisprudence with respect to environmental rights will be measured against the standard crafted by the ECtHR in this domain, providing the background for contemplating ways in which the rights-oriented component of the CJEU's environmental

(art 24, Banjul Charter on Human and Peoples' Rights O.A.U. Doc. CAB/LEG/67/3/Rev.5). Furthermore, the 1972 Stockholm Declaration on the Human Environment, although not explicitly introducing a substantive right to clean environment, relays the crucial link between the enjoyment of human rights and the safeguarding of the human environment, stating that '[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself' (Declaration of the UN Conference on the Human Environment, 16 June 1972, 11 I.L.M. 1416).

9 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), UN ECE/CEP/43, 2161 UNTS 447 (1998).

jurisprudence could potentially stand to be reinforced by following the example of the ECtHR.

1. LACK OF DIALOGUE ON ENVIRONMENTAL RIGHTS – A DEPARTURE FROM A WELL-SETTLED PRACTICE OF JUDICIAL EXCHANGE BETWEEN THE CJEU AND THE ECTHR

The long-standing dynamic judicial interaction between the CJEU and the ECtHR is a prominent feature of the relationship between the ECHR's and the Union's human rights protection systems, marking its beginnings even before the Union's primary law formally sanctioned it, back in the 1970s with the *Nold*[10] and Hauer[11] judgments where the CJEU proclaimed its deferential approach to the human rights protection system established under the ECHR.[12] The Union's primary law codifies the legal avenues through which the judicial dialogue between the two courts is carried out. Pursuant to Articles 6(2) and (3) TEU, a commitment is undertaken for the future accession of the Union to the ECHR whereby such accession should not affect the Union's competences as defined in the Treaties whereas fundamental rights, as they are guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are accorded the status of general principles of Union law.[13] Article 52(3) of the EU Charter of Fundamental Rights provides that, to the extent that the rights enshrined therein correspond to the rights guaranteed by the ECHR, the meaning and scope of those rights are to be considered the same as those laid down by the Convention. Complementing the Article 6(2) TFEU accession commitment, Protocol (No 8) on the Accession of the European Union to the ECHR foresees that the future accession agreement should respect the specific characteristics of the

10 C-4/73 Nold [1974] ECR 491.

11 C-44/79 Hauer [1979] ECR 3727.

12 The Nold judgment provided the opportunity for the CJEU to designate the sources it draws inspiration from in the safeguarding of fundamental rights–that is, the constitutional traditions common to the Member States and international treaties for the protection of human rights which the Member States have collaborated or of which they are signatories (one of which is the ECHR), which can serve to supply guidelines to be followed within the framework of Community law [13].

13 The part of the text of art 53 of the EU Charter relevant to the relationship with the European Convention of Human Rights repeats mutatis mutandis the text of art 6(3) TEU.

Union and Union law,[14] the test that the CJEU deemed the EU draft accession agreement to the ECHR had failed to satisfy, according to its recently delivered Opinion 2/13.

Up until December 2009 when the EU Charter of Fundamental Rights (hereinafter, the EU Charter)–the Union's primary law instrument in the field of human rights protection–took effect, it was customary for the EU Court of Justice, in dealing with cases having a human rights component, to typically defer to the human rights protection system offered under the ECHR, and more particularly, the jurisprudence of the ECtHR.[15] Even today, given that in important respects the scopes of the EU Charter and the ECHR overlap, in interpreting the scope and content of the rights guaranteed under the EU Charter, the CJEU is, more often than not, led to follow the human rights protection standards forged by the Strasbourg court, bolstering its own argumentation through reliance on the relevant provisions of the ECHR and the relevant ECtHR jurisprudence.[16]

Placed against the backdrop of the intensive and fertile judicial exchange characterizing the relationship between the CJEU and the ECtHR,[17] the particular instance of a lack of dialogue in the matter of environmental rights indeed appears as a peculiarity. The following analysis will look at the manner in which each of these courts' approaches differ in light of the 'procedural environmental rights'

14 Art 1 of that Protocol.

15 For an analysis of the specific references to each other's case law, see Douglas-Scott (n 1) 640–52. For more on the human rights discourse in the EU, see Armin Von Bogdandy, 'The European Union as a Human Rights Organization?: Human Rights and the Core of the European Union' (2000) 37 CMLR 1307. For a history of the development of the Union's human rights protection framework, see Sionaidh Douglas-Scott, Constitutional Law of the European Union (Longman 2002) Chapter 13.

16 This has been reflected in the text of art 52(3) of the EU Charter of Fundamental Rights which provides that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. Some of the more recent cases to this effect include, C-419/14 WebMindLicences ECLI:EU:C:2015:332 [70-72], [77-78]; C-34/13 Kusionova ECLI:EU:C:2014:2189 [64], C-398/13 P Inuit Tapiriit Kanatami ECLI:EU:C:2015:535 [61]; C-562/13 Abdida ECLI:EU:C:2014:2453 [47],[52]; C-399/11 Melloni ECLI:EU:C:2013:107 [50]; etc.

17 On the concept of cross-fertilization of legal systems accomplished through the medium of judicial dialogue, see Francis Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' (2003) 38 TILJ 547, 550–52.

versus the 'substantive right to a clean environment' dichotomy. The intrinsic link between these two types of environmental rights has been best captured in the text of the Aarhus Convention by the stipulation that:

> '[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters(. . .)'.[18]

Effectively, the procedural rights in the Aarhus Convention, which have been established with the objective of maintaining an adequate environment for people, equally serve to reinforce and thus facilitate the substantive right to a clean environment.[19]19 Admittedly, the intrinsic link between the procedural and the substantive environmental rights notwithstanding, the endorsement of the procedural aspect cannot be considered as supplanting the substantive aspect.[20]

Before going into a more detailed analysis of the relevant case law of the two courts, it is important to recall the means the two courts have at their disposal to go into the environmental rights discourse. As concerns the ECtHR, the fact that the ECHR fails to guarantee any environmental rights has not prevented the ECtHR from producing copious jurisprudence relative to the protection of human rights linked to the environment.[21] Quite to the contrary, the ECtHR's judicial activism has proven revolutionary as by broadening the scope of certain rights guaranteed under the ECHR (right to private life and family life, the right to life, right to a fair trial, etc)

18 Art 1 of the Convention. Italics mine.

19 Ole Pedersen, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008) 21 GIELR 73, 99–100.

20 Roderic O'Gorman, 'The Case for Enshrining a Right to Environment within EU Law' (2013) 19 EPL 583, 601.

21 See, Fredin v Sweden App no 18928/91 [1994] ECHR 5; Lopez Ostra v Spain App no 16798/90 [1994] ECHR 46; Guerra v Italy App no 14967/89 [1998] ECHR 7; Tas¸kın v Turkey App no 46117/99[2004] ECHR 621; Fadeyeva v Russia App no 55723/00 [2005] ECHR 376; Tatar v Roumanie App No 67021/01 (ECHR, 27 January 2009); Hardy and Maile v United Kingdom App No 31965/07 [2012] ECHR 261; Di Sarno v Italy App No 30765/08 (ECHR, 10 January 2012); Bacila v Romania App No 19234/04 (ECHR, 30 March 2010).

the Court has been able to extend the scope of the ECHR to the domain of environmental protection, thereby effectively recognising the existence of environmental procedural rights under the ECHR system and, as will be evidenced below, to a certain limited extent, the substantive right to a clean environment.[22]

Conversely, despite the absence of recognition of any of the procedural environmental rights or the substantive right to clean environment under the EU Charter of Fundamental Rights, the Union nevertheless enjoys a comparatively better disposition for the endorsement of these environmental rights. More specifically, the former absence has been significantly offset by the Union's accession to the Aarhus Convention in 2005,[23] which has allowed for the procedural rights enshrined in the Aarhus Convention (ie the right of access to environmental information, right to participate in environmental decision-making and access to justice in environmental matters) to be adequately translated to the Union legal framework via the Union's implementing instruments,[24] as environmental procedural rights guaranteed by the Union. Likewise, in spite of the endorsement of the substantive right to clean environment being currently absent from the Union framework, the over-arching objective of achieving a high level of environmental protection figures among the general objectives pursued by the Union[25] and is realised through the mechanisms of the Union's comprehensive environmental policy which covers a broad range of environmental issues (air, biodiversity, chemicals, water, noise, soil, forests and waste, etc).[26] Reflecting the priority attached to the objective of environmental protection are the legal bases provided in the Union Treaties relevant to the Union's environmental policy which, in turn, have been strongly underpinned by the requirement

22 See, Di Sarno v Italy App No 30765/08 (ECHR, 10 January 2012); Bacila v Romania App No 19234/04 (ECHR, 30 March 2010);.

23 See Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters[2005] OJ L 124/1.

24 See Section3.

25 Art 3(3) TEU.

26 <http://ec.europa.eu/environment/index_en.htm> accessed 29 March 2016. For a succinct account of the evolution of the Union's environmental policy see Jan Jans and Hans Vedder, European Environmental Law (4th edn, Europa Law Publishing 2012) 3–12.

for 'high level of protection and improvement of the quality of the environment'.[27]

Namely, the Union's objective to strive for a 'high level of protection and improvement of the quality of the environment' as enounced in Article 3(3) TEU, appears in a textually slightly varied form in Article 37 of the EU Charter as a requirement for a high level of protection to be integrated into the Union policies and ensured in accordance with the principle of sustainable development.[28] Far from qualifying as the Union's proclamation of a rights-based approach to environmental protection, Article 37 of the EU Charter was initially considered as carrying the critical potential to act as basis for the gradual contemplation of a substantive right to environment under Union law.[29] However, being that the Explanatory Document for the EU Charter clarifies that Article 37 introduces 'principles'[30] rather than 'rights', it cannot realistically be expected that individual rights can be derived from this provision, especially since Article 52(5) of the EU Charter significantly restricts the scope of application of Article 37 and thus, this provision's legal potential. Article 52(5) stipulates that the provisions of the Charter which contain principles

27 Art 3(3) TEU.

28 Art 37 of the EU Charter practically couples together two principles: an 'enhanced' version of the integration principle which requires that a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union' and the principle of sustainable development (art 11 TFEU codifies the integration principle of the Union's environmental policy: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. For more on the integration principle, see Ludwig Kramer, EU Environmental Law (7th edn, Sweet and Maxwell 2011) 20–22; Jans and Vedder (n 27)13 ff.

29 See Pedersen (n 20) 103; Lynda Collins, 'Are We There Yet?: The Right to Environment in International and European Law' (2007) 3 JSDLP 119, 143. For a more comprehensive discussion on the status and actual and potential legal consequences of Art 37 of the EU Charter, see Elisa Morgera and Gracia Marin-Duran, 'Article 37' in Steve Peers and others (eds), The EU Charter of Fundamental Rights (Hart Publishing 2014); Elisa Morgera and Gracia Marin-Duran, 'Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection' (2013) University of Edinburgh School of Law Research Paper Series, Europa Working Paper No 2013/2.

30 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/02, 17–35; The explanatory document provides that the principles set out in art 37 have been based on art 3(3) TEU and arts 11 and 191 TFEU and that the text of the article draws on the provisions of some national constitutions.

are to be implemented by Union legislative and executive acts and by acts of Member States when they are implementing Union law. Thus provisions like Article 37 are only to be considered judicially cognizable in the interpretation of those acts and in the ruling on their legality.[31]

2. THE ENVIRONMENTAL PROTECTION JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS-THE CASE FOR/ROAD TO BECOMING AN 'ENVIRONMENTAL RIGHTS' COURT

When it comes to forging a rights-oriented approach to the field of environmental protection, the ECtHR is the judicial organ that is to be considered the frontrunner in Europe, its jurisprudence being representative of a regional court pushing the limits of its own jurisdiction in order to respond to the increasing environmental protection concerns of modern society.[32] The progressive disposition of the ECtHR is manifested via the practice of extending the scope of application of the existing Convention rights for the purpose of accommodating the environmental protection considerations, which has helped the ECtHR trail-blaze its own unique tendencies in environmental rights jurisprudence[33] and has granted the Convention the quality of a 'living instrument, to be interpreted in the light of present-day conditions'.[34] In this sense, by performing an 'evolutive' interpretation of the Convention, the ECtHR has incrementally

31 For most of the commentators, art 37 represents a missed chance at providing a full-fledged right to environment and an altogether weak provision that adds little in terms of inaugurating a substantive right to environment and merely confirms the objectives of the Community's environmental policy (see Pedersen (n 20) 103; Morgera and Marin-Duran (n 30) 984), while there are also others that view this provision quite affirmatively, as endorsing a notion of an obligation that is consistent with the substantive right to clean environment, as opposed to mere procedural rights in the environmental arena (see Collins (n 30) 143).

32 See, Council of Europe, Steering Committee for Human Rights (CDDH), Final Activity Report – Human Rights and the Environment, CDDH (2005) 016 Addendum II, 7,10.

33 See JG Merrills and AH Robertson, Human Rights in Europe: A study of the European Convention on Human Rights (Manchester University Press 2001); David Harris and others Law of the European Convention on Human Rights (OUP 2009); Dinah Shelton, 'Human Rights and the Environment: Substantive Rights' in Malgosia Fitzmaurice and others (eds), Research Handbook on International Environmental Law (Edward Elgar Publishing 2010) 275-279.

34 See Airey v. Ireland App no 6289/73 [1979] ECHR 3[26]; Loizidou v. Turkey App no 15318/89 [1995] ECHR 10, [71].

raised the level of protection of the rights and freedoms enshrined in the Convention thereby contributing to the development of a 'European public order'.[35]

The following analysis singles out the primary features of the ECtHR's jurisprudence in the domain of environmental protection by looking at the main turning points in its evolutive development. In this context, it is important to indicate that the ECtHR's jurisprudence concerning environmental rights has largely gravitated around reliance on Articles 2 (right to life), 6 (right to a fair trial) and 8 (right to respect for private and family life) of the ECHR,[36] although other articles have also been invoked by applicants (freedom of expression and the right to receive and impart information (Article 10), freedom of assembly and association (Article 11) and the right to protection of property (Article 1 of the Additional Protocol 1).[37] Of the enounced legal bases, Article 8 ECHR has been singled out as the legal basis that bears the most immediate link to environmental human rights and the objective of guaranteeing protection against environmental pollution and nuisances,[38] the ECtHR's progressive

35 Dissenting Opinion of Judges Costa, Ress, Tu¨rmen, Zupan_ci_c and Steiner in Hatton v the United Kingdom (App no 36022/97[2003] ECHR 338, point 2.

36 'Article 2 ECHR: Right to life: Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law (. . .);' and 'Article 6 ECHR: Right to a fair trial: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (. . .); and 'Article 8 ECHR: Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'.

37 Nicolas De Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' (2012) 81 NJIL 62. Also, Pedersen (n 20) 84.

38 Dissenting Opinion of Judges Costa and others (n 30).

jurisprudence in the field being seen as proof of its approval of the 'Article 8 endorsement of the right to a healthy environment'.[39]

The ECtHR's forward-looking stance has been matched by equally progressive policy statements of the Council of Europe's Parliamentary Assembly; eg the Recommendation 1130 (1990) of the Parliamentary Assembly suggested the inclusion of the right to environment in an optional protocol to the Convention[40] while the ambitiously worded Recommendation 1431 (1999) of the Parliamentary Assembly contemplated a possible amendment to the Convention so as to include the 'right to a healthy and viable environment as a basic human right', as a result of the 'growing recognition of the importance of environmental issues'. Subsequently, Recommendation 1614 (2003) on Environment and Human Rights called upon the governments of the Member States of the Council of Europe to 'recognise a human right to a healthy, viable and decent environment' which would entail the obligation for states to 'protect the environment in national laws, preferably at constitutional level'. The 2003 Recommendation marks a visible retreat in the Parliamentary Assembly's stance, as the responsibility to guarantee the right to environment is shifted to the national level rather than the ECHR level. More recently, however, in Recommendation 1885 (2009) the Parliamentary Assembly called for a right to a healthy environment to be added to the ECHR through the adoption of a new protocol to this effect to which appeal the Committee of Ministers responded by recognising the importance of a healthy environment and its relevance to the protection of human rights, albeit considering that the ECHR system already indirectly contributes to the protection of the environment through existing Convention rights and their interpretation in the evolving case law of the ECtHR so that it did not deem it 'advisable to draw up an additional protocol to the Convention in the environmental domain'.[41]

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39 ibid; Equally, it is worth noting that the ECtHR approaches environmental rights from the individual person's standpoint, short of extending the scope of this right so as to include general environmental degradation which affects the wider community or the environment per se. Hence, only individuals who have been immediately affected and their right(s) under the Convention interfered with can be beneficiaries of the right to clean environment - not the community at large or the environment as such.

40 See O'Gorman (n 21) 598.

41 Council of Europe Committee of Ministers, Reply to Parliamentary Assembly Recommendation 1885 (16 June 2010).

In order to showcase the ECtHR's both evolutive and purpose-oriented approach in the matter of environmental rights, following is a select line of cases which bear several common features. The first common thread that binds these cases is the fact that they involve industrial accidents or hazardous activities performed by either a private or public operator, in instances where State authorities had been called upon to intervene either by preventing the occurrence of the hazardous activity/accident or, ex post, to remedy the devastating effects to human health and the environment using the available national law mechanisms. The second common thread is the prevalent procedural component involving issues of provision of access to information (ie citizens being adequately informed by the national authorities) regarding the level of environmental degradation occurring and the resulting deteriorating effect on the human health, as well as/or issues regarding the opportunity for persons concerned to be involved in and influence the decision-making process preceding the activity that has a potentially devastating impact upon their situation. The third common thread shared by the cases is that they are concerned with various 'rule of law' issues, regarding the failure of States to adequately enforce their national constitutions, national laws or national judicial decisions.[42]

The Court's environmental rights case law has come a long way since the brief reference made in Fredin v Sweden[43] regarding the role played by the environment in modern society as an 'increasingly important consideration',[44] recognizing already in Lopez Ostra v Spain[45] that 'severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.'[46] Later on, in Guerra v Italy,[47] a case related to the failure of Italian authorities to implement national rules and the resulting failure to reduce the risk of accident or pollution at a chemical factory, the Court cemented the formula introduced in Lopez Ostra[48] which would become its

42 See Dinah Shelton, 'Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk' (2015) 6 JHRE 139, 145.
43 Fredin v Sweden App no 18928/91 [1994] ECHR 5.
44 [48].
45 Lopez Ostra v Spain App no 16798/90 [1994] ECHR 46.
46 [51].
47 Guerra v Italy App no 14967/89 [1998] ECHR 7.
48 [35].

recurring proviso in the environmental protection cases that ensued. In Hatton,[49] a case pertaining to the noise pollution from Heathrow Airport and the national quota system for night flying restrictions, the Court, while conceding that environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, it did not consider however it appropriate 'to adopt a special approach in this respect by reference to a special status of environmental human rights'.[50] Among other things, the case is known for the Court according a wide margin of appreciation to States in striking a fair balance between an economic interest for the state and the violation of the particular right of the applicant[51] while confirming that being directly and seriously affected by a certain type of environmental pollution is sufficient to give rise to a violation of Article 8.[52] Additionally, the Court introduced a referential formula to be applied to cases involving State decisions concerning environmental issues whereby the Court is to follow two tracks of inquiry: first, it assesses the substantive merits of the decision taken by the national authority (ie ensuring that it is in accordance with Article 8); and second, it scrutinizes the preceding decision-making process to ensure that the interests of the individual had been duly taken into consideration.[53]

The procedural track of the Court's inquiry was further enhanced in *Taskin v Turkey*,[54] concerning the Turkish authorities' decision to issue a permit to use a cyanidation operating process in a gold mine and the related decision-making process which were found to be in violation of both Article 8 and Article 6(1) of the Convention. The Court held that determining the dangerous effects of an activity to which the individuals concerned are likely to be exposed, on the basis of an environmental impact assessment procedure, is sufficient to establish a close link with the individual's private and family life for the purposes of Article 8, which in turn triggers the positive obligation of the State to take reasonable and appropriate measures

49 Hatton (n 36).
50 [122].
51 [98]; See, for further commentary on the Hatton judgment, Harris and others (n 34) 391–92; Merrills and Robertson (n 34) 156.
52 [96].
53 [99].
54 Tas¸kın v Turkey App no 46117/99 [2004] ECHR 621.

to secure the applicant's rights under Article 8(1).[55] In assessing the content and scope of the applicant's rights, the Court made reference to an array of relevant international environmental law instruments, including the Rio Declaration on Environment and Development[56] and the Aarhus Convention.[57] The far-reaching effects of the Taskin ruling are particularly laudable seeing that the Court managed to successfully bring the case within the scope of the Aarhus Convention procedural regime in a 'particularly expansive form'[58] despite the fact that Turkey was not a party to the Aarhus Convention.

Insisting on the requirement that the adverse effects of environmental pollution be significant in order to give rise to violation of Article 8, the Court proceeded with crafting the 'de minimis' rule in Fadeyeva v Russia,[59] a case involving an applicant's inability to secure through national courts the relocation of her home which was in the vicinity of a steel plant, in spite of existing national environmental laws and expert reports pointing to the exorbitant pollution levels. While affirming that the adverse effects of environmental pollution must attain a certain minimum level in order to be caught under Article 8, the Court clarified that the assessment of that minimum level should take into account all the circumstances of the case 'such as the intensity and duration of the nuisance, and its physical or mental effects'.[60] Further on, acknowledging that in order to fall within the scope of Article 8, complaints relating to environmental nuisances have to primarily show that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained,[61] the Court suggested that the assessment of the severity of the environmental conditions is largely dependent on the context and the circumstances of the case and found that the environmental pollution in question inevitably made the applicant more vulnerable to various illnesses and thus posed serious risks to her health, irrespective of the absence

55 [113]; To reinforce this argument, the Court reiterates the substantive and procedural aspect formula put forward in Hatton (n 36) [115].

56 Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (vol I); 31 ILM 874 (1992).

57 [98].

58 See Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613, 624.

59 Fadeyeva v Russia App no 55723/00 [2005] ECHR 376.

60 [69].

61 [70] emphasis added.

of any quantifiable harm to her health.[62] In Fadeyeva, despite ruling that the State had failed to strike a fair balance between the interest of the community and that of the applicant,[63] the Court yet again recalled the broad margin of appreciation enjoyed by States and the limited nature of the scope of the Court's scrutiny over whether a fair balance had been accomplished between the private interest of the applicant and the public interest. This consisted of verifying whether national authorities had committed a manifest error of appreciation in striking such balance.[64] In a move which can be read as the Court's distancing itself from potentially being given the label of an 'environmental rights' court, the ECtHR evoked the complexity of the issues involved regarding environmental protection which as such rendered its role 'primarily a subsidiary one'.[65]

Heralding a new and improved approach in the ECtHR's environmental jurisprudence, the Tatar[66] case marked a veritable turning point in the Court's responsiveness to the arguments concerning the individual's right to live in a clean environment adequate to his/her needs. The case centred on the failure of the Romanian authorities to stop the harmful activities involved in the extraction process in a gold mine disregarding a series of national impact assessments and studies pointing to thereto. It is a case where the Court relied on the precautionary principle as an environmental law principle, applicable in cases where there was a risk of an adverse effect and where, in the absence of probable causality, the very existence of a serious and substantial risk for the health and well-being of the applicants was considered sufficient to engage the responsibility of the State.[67]67 In order to substantiate its approach, the Court made reference to the European Commission's Communication on the Precautionary Principle[68] as well as case law of the CJEU relevant to the application of this principle.[69]

62 [88].
63 [132].
64 [105].
65 ibid.
66 Tatar v Roumanie App No 67021/01 (ECHR, 27 January 2009).
67 See part II.B(f) of judgment.
68 European Commission, Communication of 2 February 2000 on the Precautionary Principle, COM(2000) 1 final.
69 ibid; The Court referred the cases C-180/96 UK v Commission [1996] ECR I-3903 and C-157/96 National Farmers' Union[1998] ECR I-2211. More generally, in part II.B 'Relevant international law and practice', the Court noted the standards

Conversely, in Hardy and Maile,[70] where the planning permits granted for the operation of two liquefied natural gas terminals were challenged on the grounds that the relevant authorities had failed to properly assess the risks to the marine environment brought by the operation of the terminals, the applicants insisted that Article 8 be applied in a 'precautionary way'–namely, prior to an accident has occurred which would directly affect the applicants' private and family lives.[71] The Court, while accepting that a claim may be brought under Article 8 before actual pollution commences where the nature of the activity carries a potential risk pointing to a sufficiently close link with the applicants' private lives and homes, however did not consider it necessary to examine the applicability of the precautionary principle[72] since it judged the options made available to the public regarding access to information and participation in the decision-making as sufficient for the State to be deemed compliant with its Article 8 obligations.

Furthermore, from a substantive environmental rights perspective, the Tatar judgment is significant in that the Court managed to underscore the positive obligation for the State to take steps to protect the right to respect for the homes and the private life of the people concerned and, more generally, their right to live in a safe and healthy environment.[73] Although the fact that the Romanian Constitution guarantees the right to a healthy environment[74] may have played a role in the Court's readiness to make a bold statement of this kind, the former nevertheless represents a discernible shift in the language of the Court which opens the way for the concept of a 'right to a safe and healthy environment' to influence the ECtHR's reasoning in future cases. Subsequently, the Court returned to its former pronouncement in the Di Sarno and the Bacila cases. Di Sarno[75] pertained to a waste collection crisis which the Italian government poorly tackled by enforcing inadequate policies and were unsuccessful in ensuring the proper functioning of the waste

and principles enshrined in the Stockholm Declaration, the Rio Declaration and the Aarhus Convention.

70 Hardy and Maile v United Kingdom App No 31965/07 [2012] ECHR 261

71 [186].

72 [191-2].

73 [107].

74 See Part II.A(a) of judgment.

75 Di Sarno v Italy App No 30765/08 (ECHR, 10 January 2012).

disposal system in the Campania region, resulting in the Court finding a violation of only the substantive aspect of Article 8.[76] In this context, the Court reiterated its statement concerning the people's right to live in a safe and healthy environment,[77] only this time in the absence of any supporting reference to the Italian Constitution or other relevant provisions of Italian law to this effect, which is proof of the Court's preparedness to go beyond strictly the national regime as its point of reference thus framing the concept of the right to a clean environment in terms which transcend the national scope. Likewise, in Bacila,[78] a case concerning a Romanian factory releasing enormously high quantities of heavy metals and sulphur dioxide where the national measures did not succeed in effectively reducing the pollution to levels compatible with the wellbeing of the local population, the Court, while recognizing the interest of the national authorities to preserve the economic wellbeing of the town, nonetheless held that pursuing such interest cannot have the effect of impinging upon the 'right of the persons concerned to enjoy a balanced and healthy environment',[79] and found that the government failed to strike a fair balance between the economic wellbeing of the town and the applicant's right to respect of her home and private and family life.[80]

From the above analysis the currently valid standard devised by the ECtHR for environmental protection cases, specifically those triggering the application of Article 8 ECHR, can be discerned. This standard involves, first and foremost, the Court establishing a sufficiently close link between the environmental pollution in question and the applicant's private and family life,[81] so as to determine the actual effects upon the applicant's health and living situation or sufficiently serious risks thereof. Secondly, the Court proceeds by performing a double-track inquiry regarding the State's alleged (in)action–assessment of the substantive merits of the national authorities decisions followed by scrutinising the relevant decision-making process for the purpose of ensuring that adequate

76 [112].
77 [110].
78 Bacila v Romania App No 19234/04 (ECHR, 30 March 2010).
79 [71].
80 [72].
81 Hardy and Maile (n 65) [191]

weight has been given to the applicant's interests.[82] Finally, the Court verifies whether the State's obligation to secure the applicant's right to respect for his/her private life and home has been fulfilled by inquiring whether or not the national authorities have made a manifest error in striking a fair balance between the State's (public) and the applicant's (private) interest.[83]

It can be inferred from the previous line of cases that the ECtHR has succeeded in gradually broadening the scope of Article 8 by making it applicable not only to instances concerning the right of access to certain environmental information, but also those dealing with limited participation in decision-making in environmental matters and subsequent judicial redress.[84] Thus, compliance with Article 8 is conditioned on adequately taking into account the interests of the individuals affected during the decision-making process[85] and providing effective access to information to the concerned individuals in matters pertaining to the environment. In this sense, the Court's activist jurisprudence can be seen as managing to translate into European human rights law the procedural requirements enshrined in Principle 10 of the Rio Declaration and their legal expression in the Aarhus Convention as enforceable procedural rights.[86] Equally, as concerns the right to a clean environment as a substantive right, it is worth pointing out that while prior to the Tatar/Bacila/Di Sarno line of jurisprudence the ECtHR treated the former right as predominantly a matter of national constitutional law, by having brought the 'right to safe and healthy environment' within the context of Article 8, and thus the ECHR system, the Court has abandoned the purely procedural outlook on environmental rights and prompted an evolution in its approach which may prospectively lead to a more elaborate and more expansive recognition of the fully-fledged right to a clean environment.

82 [217].
83 [232].
84 See Pedersen (n 20) 88.
85 See Alan Boyle, 'Human Rights or Environmental Rights?: A Reassessment' (2006-2007) 18 Fordham Envtl L Rev 471, 496. Boyle suggests that the ECtHR espouses these environmental procedural rights guided mainly by the risk to life, health, private life or property involved therein, rather than as a result of a more general concern for environmental governance and transparency in the decision-making process(ibid 491).
86 ibid 498.

3. THE ROLE OF THE EU COURT OF JUSTICE IN FORGING AN EU-SPECIFIC RIGHTS-ORIENTED APPROACH TO ENVIRONMENTAL PROTECTION

The discussion will now draw on the status accorded to environmental rights in the CJEU's jurisprudence and thus under the Union legal framework, starting with the legal scope and effect enjoyed by procedural environmental rights in the CJEU's jurisprudence, followed by an examination of the potential for a future recognition of the substantive right to a clean environment under the Union framework.

3.1 The Procedural Aspect

As was mentioned above, the EU's accession to Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters as the leading international charter for environmental procedural rights has played an invaluable role in the Union's, and thus the CJEU's, acquiescence to the concept of procedural environmental rights. In the following, the status and scope accorded to the procedural environmental rights under the Union framework will be appraised in accordance with the three-pillar categorisation of procedural environmental rights established under the Aarhus Convention. From the outset, it is worth recalling that a number of Union secondary law instruments have been adopted or amended in order to transpose the three-pillar obligations set forth in the Aarhus Convention: Directive 2003/4/EC on public access to environmental information;[87] Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice;[88] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment–codified by Directive

87 Parliament and Council Directive 2003/4/EC of 28 January 2003 on public access to environmental information [2003] OJ L 41/26.

88 Parliament and Council Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice [2003] OJ L 156/17.

2011/92/EU[89] which, in turn, has been subsequently amended by Directive 2014/52/EU;[90] Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment Directive;[91] and, Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters to Community Institutions and Bodies.[92] Moreover, it is important to note that the access to justice pillar of the Aarhus Convention has not yet been fully transposed into Union law. The Union legislators failed to reach a consensus as to the final text of the proposed access to justice directive, as it fell through at the proposal stage,[93] leaving the Member States to align their legal systems with the Aarhus Convention's provisions independently and to the extent achievable.[94] The former setback has only marginally been redeemed through the insertion of access to justice provisions in the Union transposing instruments that cover the first and the second pillar of the Aarhus Convention.[95]

By virtue of the Aarhus Convention's status as source of Union law, the procedural rights established therein stand a better chance at having an adequate expression in the CJEU's jurisprudence in instances where the Court interprets and/or applies the Aarhus Convention or

89 Parliament and Council Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) [2011] OJ L 26/1.

90 Parliament and Council Directive 2014/52/EU of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1.

91 Parliament and Council Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/ 30.

92 Parliament and Council Regulation 1367/2006/EU of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L 264/13.

93 Commission, 'Commission Proposal for a Directive of the European Parliament and the Council on Access to Justice in Environmental Matters' COM (2003) 624 final.

94 See, Declaration by the European Community in accordance with Art 19 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, Annex to Council Decision 2005/370/EC.

95 See Jeremy Wates, 'The Aarhus Convention: A Driving Force for Environmental Democracy' (2005) 1 JEEPL 2, 9.

the Union transposing secondary law instruments. In keeping with the objective set out in the Aarhus Convention which is to facilitate that each Party guarantees the rights of access to information, public participation in decision-making, and access to justice in environmental matters,[96] the Union's transposing instruments adhere to the identical language of 'rights' in the environmental domain espoused by the Convention. For instance, the 2003 Environmental Information Directive sets out the objective to guarantee the right of access to environmental information held by or for public authorities and to lay down the basic terms and conditions of practical arrangements for its exercise;[97] Directive 2003/35/EC puts the Member States under an obligation to ensure that public authorities inform the public adequately of the rights they enjoy as a result of the Directive and (to an appropriate extent) provide information, guidance and advice to this end.[98] In a similar vein, the 2006 Aarhus Regulation covers the right of public access to environmental information received or produced by the Union institutions or bodies and held by them, setting out the basic terms and conditions of and practical arrangements for the exercise of that right.[99]

The rights based approach displayed in the foregoing instruments has been accordingly mirrored in the CJEU's case law, in a number of judgments where the Court affirmed the EU citizens' entitlement to avail themselves of any of the environmental procedural rights– access to information, participation in decision-making or access to courts. In Flachglas Torgau[100] the CJEU referred to the Union's obligation to align with the Aarhus Convention by 'providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of the public authorities, without that person having to show an interest'.[101] In Stichting Natuur and Mileu,[102] concerning the challenging of the decision of a national organ

96 Art 1 of Aarhus Convention (n 10).
97 Art 1(a) of Directive 2003/4/EC (n 88).
98 Concluding paragraph of art 3 of Directive 2003/4/EC (n 88).
99 Art 1(a) 'Objectives'; Further, see the reference to 'maintaining the impairment of a right' provided in art 11 of Directive 2011/92/EU (n 90).
100 Case C204/09 Flachglas Torgau GmbH [2012] ECLI:EU:C:2012:71.
101 [31]; The CJEU made the identical statement in C-279/12 Fish Legal and Emily Shirley v Information Commissioner and Others[2013] ECLI:EU:C:2013:853, [36].
102 Case C-266/09 Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden ECR [2010] ECR I-13119.

refusing to disclose certain environmental studies and reports, the Court considered that the facts at issue in the main proceedings had to be assessed by reference to the right of access to environmental information as defined by Directive 2003/4/EC,[103] while in Marie Noelle Solvay[104] it dealt with the right to effective judicial review regarding the lawfulness of the reasons for a challenged decision in relation to the decision-making process concerning the issuance of development consents, stressing that in order to secure the effective protection of a right conferred by European Union law, interested parties must also be able to defend that right under the best possible conditions.[105] In Kri_zan,[106] the Court dealt with the right to bring an action pursuant to Article 15a of Directive 96/61/EC concerning Integrated Pollution Prevention and Control (IPPC)[107] which provided that members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures so as to prevent pollution, including, where necessary, the executing of a temporary suspension of an operation permit.[108] In Gruber,[109] the Court dealt with the right of the members of the public concerned to contest decisions, acts or omissions (as envisaged by Article 11 of Directive 2011/92/EU (EIA Directive))[110] applicable in relation to an administrative decision that had declared a particular project exempt from the requirement of conducting an environmental impact assessment,[111] while Commission v UK[112] drew on the duty of national courts to ensure the full effectiveness of a judgment in the case of existence of rights claimed under European Union law, including in the area of environmental law[113] (the rights concerned being of a procedural nature).

103 [36].
104 C182/10 Marie Noelle Solvay and Others [2012] ECLI:EU:C:2012:82.
105 [59].
106 C-416/10 Kri_zan and Others, [2013] ECLI:EU:C:2013:8.
107 This article was inserted through Directive 2003/35/EC. In addition, Directive 96/61/EC has now been replaced with the Industrial Emissions Directive 2010/75/EU [2010] OJ L334/17.
108 [109].
109 C570/13 Karoline Gruber[2015]ECLI:EU:C:2015:231.
110 This article was inserted through Directive 2003/35/EC.
111 [40].
112 C-530/11 Commission v UK [2014] ECLI:EU:C:2014:67.
113 The Court made reference to the Kri_zan judgment, [107], [109].

While the foregoing cases revolved around the CJEU's interpretation and/or application of the Union acts pertinent to issues concerning procedural environmental rights, there has equally been one specific instance where the CJEU, or more particularly, its case law regarding environmental rights had been placed under scrutiny. In its Findings and Recommendations with regard to communication ACCC/C/2008/32 concerning compliance by the European Union adopted following a communication received from the non-governmental organization ClientEarth, the Aarhus Convention Compliance Committee addressed EU's failure to comply with Article 9(2) of the Aarhus Convention concerning the access to justice available to the members of the public concerned.[114] The Communication challenged the Union's restrictive rules regarding legal standing in matters related to the environment as preventing non-governmental organizations as well as individuals from having full access to challenging the decisions of the Union institutions. Reporting a general failure on the part of the Union to comply with the access to justice provisions of the Aarhus Convention,[115] the communicant maintained that the jurisprudence of the EU courts needed to be altered in order for the Union to be considered compliant with Article 9(2)-(5) of the Aarhus Convention. In response to the communication, the Compliance Committee expressed the need for a new direction in the jurisprudence of the EU Courts to be effected in order to ensure compliance with the Aarhus Convention, recommending that:

> …all relevant EU institutions within their competences take the steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters.[116]

In light of these strongly worded observations, it is clear that the Compliance Committee has called on the Union legislators to amend the Union's existent access to justice regime for environmental matters in order to enable a veritable shift in the Union Courts' jurisprudence in this regard.

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114 Findings and Recommendations with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union [2011] ECE/MP.PP/C.1/2011/4/Add.1.

115 [3].

116 [97-8].

Regarding the absence of a coherent Union access to justice regime, the CJEU has, on its own part, attempted to offset the resulting lacuna. In Lesoochran_arskezoskupenie,[117] a case that concerned the direct applicability of Article 9(3) of the Aarhus Convention before national courts, more precisely, the issue of the access to courts available to national non-governmental organisations in instances of violation of national environmental laws, the CJEU sanctioned the possibility for the Aarhus Convention provisions to produce direct effect in the domestic legal orders of Member States, contingent on the fulfilment of the criteria applicable to examining the direct effect of international agreements concluded by the Union.[118] Irrespective of the fact that the provisions of Article 9(3) of the Aarhus Convention had not yet been subject to Union regulation, the Court brought the issue within the scope of Union law by considering it as a matter of Union law which had been regulated in an international agreement concluded by the EU and Member States and concerned a field to a large extent covered by Union law.[119] While concluding that the particular provisions of Article 9(3) of the Aarhus Convention failed to satisfy the criteria for producing direct effect, the Court considered that the former provisions, although drafted in broad terms, were nonetheless intended to ensure effective environmental protection.[120] Underlining the importance of ensuring effective judicial protection in the fields covered by Union environmental law,[121] the CJEU instructed the referring national court to interpret the national procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings, to the fullest extent possible, in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the

117 C-240/09 Lesoochran_arskezoskupenie VLK v Ministerstvo_ zivotne´hoprostrediaSlovenskejrepubliky [2011] ECRI-1255.

118 [44]; The criteria to be applied in the appraisal of the direct effect are the following: '([A] provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (. . .)' [44].

119 [40-2].

120 [45-6].

121 [50].

rights conferred by EU law.[122] In this way, to the extent possible, the Court opened the possibility for national environmental protection organisations to challenge before national courts decisions taken following administrative proceedings liable to be contrary to EU environmental law,[123] thus safeguarding the right of access to justice as recognised under the Aarhus Convention by sanctioning its optimal effect in Union law and superseding restrictive national rules on legal standing.[124]

3.2 The Substantive Aspect

As a final segment of the analysis of EU law, a brief look will be had at the potential for recognising the substantive right to clean environment under the Union framework which, although not expressly recognized at the Union law or policy level, has been intimated at in several important pronouncements of the CJEU bearing on the potential to evolve into EU's own unique conceptualisation of the substantive right to a clean environment. Specifically, the contemplation of a substantive rightsoriented approach to environmental protection is not completely foreign to the Union discourse–the Conclusions of the 1990 Dublin European Council Summit had urged for more effective action by the (then) European Community and its Member States to protect the environment, where the objective of such action was conceived to be centred on guaranteeing:

> citizens the right to a clean and healthy environment, particularly in regard to - the quality of air, rivers, lakes, coastal and marine waters, the quality of food and drinking water, protection against noise, protection against contamination of

122 [51]; In the absence of EU rules governing the matter, the Court considered that it was for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in the instant case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case [47].

123 [52].

124 See Martin Hedemann-Robinson, 'EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? (Part 1)' (2014) 23 EELR 102, 113; As a follow-up to the CJEU ruling, the Slovak referring court admitted the appellant non-governmental organisation as party to the proceedings (see Mariolina Eliantonio, 'Collective Redress in Environmental Matters in the EU: A Role Model or a "Problem Child"?' (2014) 41 LIEI 257, 269).

> soil, soil erosion and desertification, preservation of habitats, flora and fauna, landscapes and other elements of the natural heritage . . . .[125]

Unfortunately, this statement was never followed up on nor was the concept of a right to a clean and healthy environment further elaborated by the Union institutions. The only exception in this regard is the 1994 Report of the European Parliament's Committee on Institutional Affairs which proposed a model constitution for the European Union which, under the title 'Human Rights guaranteed by the Union' would foresee that 'Everyone shall have the right to the protection and preservation of his natural environment'.[126]

The CJEU has intimated at the possibility for individuals to rely before national courts on substantive rights in the environmental domain which they derive from the Union environmental law, in two judgments dating from 1991. In C-361/88Commission v Germany,[127] the issue related to Germany's failure to adopt all the necessary measures to ensure the complete transposition into national law of Directive 80/779/EEC on air quality limit values and guide values for sulphur dioxide and suspended particulates.[128] The Directive lay down limit values for the concentrations of sulphur dioxide and of suspended particulates which, 'in order to protect human health in particular', must not to be exceeded within specified periods and in specified circumstances throughout the territory of the Member States.[129] The Court concluded that the former obligation had not been implemented with unquestionable binding force by Germany, or with the specificity, precision and clarity required by its case-law in order to satisfy the requirement of legal certainty[130] so that individuals can be in a position to ascertain the full extent of their rights in order to rely on them before the national courts or that those whose activities are liable to give rise to nuisances are adequately informed of the

125 Declaration by the European Council, "The Environmental Imperative" [1990] SN 60/1/90 Annex I, 24.

126 DOC EN/RR/244/244403 of 27 January 1994; Also, see Richard Macrory, 'Environmental Citizenship and the Law: Repairing the European Road' (1996) 8 JEL 219, 221.

127 Case C-361/88 Commission v Germany [1991] ECR I-2567.

128 128 Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates [1980] OJL 229/30.

129 [3].

130 [21].

extent of their obligations.[131] Furthermore, the Court considered that where a directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, as appropriate, rely on them before the national courts,[132] thus suggesting that the fact that the Directive was adopted, in particular, for the purpose of protecting human health, implied that whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights.[133] The former statement was subsequently replicated by the Court in C-59/89 Commission v Germany,[134] this time with respect to the application of the Directive 82/884/EEC setting limit value for lead in the air.[135]

Although the Court's dicta provided in the two previous cases could be construed as owning the potential to lead to a future recognition of the substantive right to environment under Union law[136]–or at least provide a solid basis for it–it remains questionable whether in reality they could indeed produce such far-reaching effect. It has been argued by some that the Court's pronouncements could plausibly be interpreted as empowering the citizens to ensure before their national courts that the air quality standards set out in the directives concerned are respected as an expression of the right to clean air belonging to the individuals affected by polluted air.[137] Unfortunately, the potential and the limits of this jurisprudence have hardly ever been tested by environmental organizations and individual citizens in subsequent cases.[138]

In *Janecek*,[139] a case from 2008, the CJEU returned to its previous statements in a somewhat diluted form. The case related

131 [20]
132 [15].
133 [16].
134 Case C-59/89 Commission v Germany [1991] ECR I-02607, [18-9].
135 Council Directive 82/884/EEC of 3 December 1982 setting limit value for lead in the air [1982] OJ L 378/15.
136 Several authors have underlined the potential of those pronouncements to create individual rights of a substantive nature (see Macrory (n 127) 221; Kramer (n 29) 134); Kramer contends that one could plausibly interpret the Court's pronouncements as empowering the citizens to ensure before their national courts that the air-quality standards set out in the directives concerned are respected, as an expression of the right to clean air to the individuals affected by polluted air.
137 See Kramer (n 29) 134.
138 ibid.
139 Case C-237/07 Dieter Janecek v Freistaat Bayern [2008] ECR I-6221.

to the possibility for individuals to require of the competent national authorities to draw up an action plan pursuant to Article 7(3) of Directive 96/62/EC on ambient air quality assessment and management,[140] in instances of risk for the limit values or alert thresholds to be exceeded. Even though the Commission's written observations had relied on the language of 'rights' acquiesced to by the Court in the two judgments of 1991,[141] the Court however did not fully return to its previous statement–it carefully steered away from the reference to the 'rights belonging to the persons concerned' and opined that in the event of a Member State's failure to observe the measures required by the directives designed to protect public health, the persons concerned must be in a position to rely on the mandatory rules provided in those directives.[142] Seemingly a slight textual difference, the shift from a language of 'rights' to a language of 'rules' decidedly points to the fact that the CJEU is currently unwilling (or, indeed unprepared) to further explore the issue of environmental substantive rights within the Union framework. Conceivably, this shift may signal abandoning of the tendency to interpret specific provisions in environmental protection directives as conferring rights on individuals, in the face of the ambiguity that surrounds the possibility for directives to produce direct effect and that, by consequence, the CJEU's focus has turned away from the notion of individual rights towards one of effectiveness.[143]

140 Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management [1996] OJ L 296/55.

141 In the observations submitted to the Court, the Commission relied on the language of rights previously endorsed by the CJEU in the two judments of 1991: '. . . whenever the exceeding of limit values was capable of endangering human health, the persons concerned were in a position to rely on those rules in order to assert their rights'[31].

142 [38].

143 See Pedersen (n 20) 102. Regarding the capability of environmental directives to produce direct effect, the chief obstacle obviously lies in the scope of the discretion enjoyed by Member States in choosing the means to achieve the objectives prescribed by the directives (see Christopher Miller, 'Environmental Rights: European Fact of English Fiction?' (1995) 22 JLS 374, 382); Considering that in order to be 'directly effective' the provision of a directive has to be precise and unconditional and must confer rights on individuals, Kramer lists examples of environmental directives that would presumably satisfy these criteria–namely, provisions laying down maximum values, maximum concentrations and limit values, prohibitions, and obligations to act (see Ludwig Kramer, 'The Implementation of Community Environmental Directives within Member States: Some Implications of the Direct Effect Doctrine' (1991) 3 JEL 39, 39 ff.).

While the previous analysis of the CJEU's case law has undisputedly confirmed CJEU's recognition of the procedural rights in the environmental domain, arguably, the Court's endorsement of the language of 'rights' in this respect cannot fully be regarded as a form of judicial activism since in a majority of the cases the former comes as a logical consequence to the rights based approach already embedded in the Union's legislation implementing the Aarhus Convention. The prevailing impression is that when the CJEU employs the language of procedural 'rights' in the environmental context, it does so in a rather matter-of-fact way, doing away with any indepth elaboration or further reflection as to the legal nature and scope of these rights, which effectively stems from the Court's perception of procedural environmental rights as a matter clearly falling within the scope of Union law and therefore, a matter that is forcibly 'unproblematic'. By juxtaposing the CJEU's endorsement of procedural environmental rights as something expressly granted under the Union's positive law to the previously elaborated ECtHR progressive approach of embracing the existence of procedural environmental rights in the absence of an expressly prescribed obligation (or mandate) to this effect under the ECHR system, what comes to the fore is the comparatively more powerful and far-reaching judicial activism exhibited by the ECtHR as a court which has, in a certain way, pushed the boundaries of its jurisdiction in order to forge a firm rights-oriented approach to environmental protection.

4. DRAWING THE CONTOURS OF A FUTURE DIALOGUE BETWEEN THE CJEU AND THE ECtHR

This article set out to examine the respective patterns of the judicial reasoning that the European Court of Human Rights and the Court of Justice of the EU employ in cases before them that involve or have a bearing on environmental rights (substantive and procedural). Its purpose was to shed light on the issue of the absence of judicial dialogue between these two courts in the matter of environmental rights, an absence that represents a departure from an otherwise cooperative disposition exhibited by these two courts in other domains linked to human rights protection.

As regards procedural environmental rights, both the ECtHR and the CJEU have been forthcoming about guaranteeing the right to environmental information, the right to participate in decision-

making on environmental matters and the right of access to courts concerning environmental matters. However, in spite of this, a conspicuous muteness in the judicial exchange between the CJEU and the ECtHR persists, with both of the courts routinely deferring to the rules and principles established by the Aarhus Convention, absent of any reference to each other's jurisprudence. Albeit, while the ECtHR has indeed made certain limited references to Union legal acts and policy documents in the field of environmental protection as well as relevant case-law of the CJEU[144], the former however does not amount to a dialogue on rights since in these instances the ECtHR has referenced particular Union rules and principles in the field of environmental protection rather than environmental rights endorsed under the Union framework. Further on, an important point of divergence between the CJEU and the ECtHR remains the substantive right to a clean environment, the two courts having tackled the absence of express reference to the right to a clean environment in their respective human rights catalogues in a different manner. Namely, the ECtHR has exhibited certain readiness to follow a progressive and dynamic trend in its jurisprudence which could in the future amount to an express recognition of the substantive right to a clean environment–albeit from a present day perspective it is not yet certain whether this overall affirmative disposition will materialize into something more. In contrast, thus far the CJEU has avoided making any explicit statements, positive or negative, with respect to recognizing the substantive right to a clean environment which shows that the CJEU is more comfortable with the language of procedural rights in the environmental domain as opposed to substantive environmental rights. Furthermore, as the analysis has shown, the CJEU's mindset in applying environmental procedural rights is predominantly centred on reliance of 'rules' and 'standards' in the environmental domain, without being sufficiently grounded on the concept of 'rights' in the environmental context.

One possible reason for the absence of a dialogue could be that the ECtHR still fails to view the CJEU as a genuinely 'environmental rights' court and therefore considers the CJEU's approach to environmental human rights to still be rather scarcely developed. Thus, from this standpoint, it seems logical that the prospective start

144 Regarding the application of the precautionary principle under the Union framework, see Di Sarno (n 76) [71-2] and part II.B(f) in Tatar (n 67).

of a judicial dialogue (should there be one) between the CJEU and ECtHR regarding environmental human rights would mainly depend on the CJEU. In the event that the CJEU concedes to initiate a dialogue with the ECtHR, the dialogue could presumably start with the CJEU performing an extension exercise analogous to the one performed by the ECtHR ie by recognizing the environmental dimension of certain human rights guaranteed under the EU Charter (right to life (Article 2 of the EU Charter); right to respect for private and family life (Article 7); right of access to documents of the institutions, bodies, offices and agencies of the Union (Article 42); right to an effective remedy and to a fair trial (Article 47));[145] followed by a broadening of the scope of the EU Charter rights so as to accommodate environmental protection requirements. The CJEU's aforementioned shift in approach can be accomplished either formally, by express deference to the ECtHR's environmental jurisprudence, or through a factual, implied endorsement of the ECtHR's approach. Certainly, as an alternative, such dialogue could also occur by way of CJEU's acknowledgment of the ECtHR's jurisprudence involving environmental rights, without necessarily having to follow the ECtHR's approach of extending the scope of existent human rights to ensure that the requirements of environmental protection have been satisfied.

All aspects considered, the general observation to be made regarding the CJEU's case law relevant to environmental rights, especially in comparison to the ECtHR devised standard for the protection of environmental rights, is that it is presently difficult to claim that the CJEU exhibits a truly comprehensive and profound understanding of the concept of 'environmental rights', taken in its entirety, and the modalities in which this concept plays out both in theory and in practice. Undoubtedly, by forging a gradual alignment with some or with all of the aspects of the ECtHR's approach to environmental rights, the CJEU's own approach stands to be ameliorated thus allowing for the Court to further improve its understanding of the concept of 'environmental rights' with the aim of fully 'internalizing' the concept and becoming more comfortable

145 It is pertinent here to be reminded of the inherent limitations of the legal scope of the EU Charter of Fundamental Rights which is that the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (art 51(1) of the Charter).

with employing the language of 'rights', alongside the language of 'rules' and 'standards', in the environmental context.

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THE CONTRIBUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE INTERPRETATION OF THE CONVENTION ON THE LAW OF THE SEA

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1. INTRODUCTION

In the contemporary world of often overlapping jurisdiction there are numerous situations where international courts and tribunals are called upon to interpret different international treaties. In this respect the so called MOX Plant case[1] which went through a great number of dispute settlement procedures is perhaps a good

1 *Ireland v. United Kingdom*. The case was related with the building and operation of the Mox Plant at Sellafield (the Irish Sea, United Kingdom) which was intended to reprocess the nuclear fuel and therefore threatened the status of sea environment. The dispute was brought before the International Tribunal for the Law of the Sea (provisional measures) and the Permanent Court of Arbitration (merits) under the United Nations Convention on the Law of the Sea, Case Nº 2002-01 <https://www.pcacases.com/web/view/100>, the OSPAR Commission under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), Award of 2 July 2003 in the Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, and the European Court of Justice, *Commission of the European Communities v. Ireland*, Case Nº C-459/03. The case was suspended and finally withdrawn from the International Tribunal for the Law of the Sea and the Permanent Court of Arbitration, also the OSPAR Commission as the European Union law established certain duties for the Member States to use remedies under the European Union law, including the dispute settlement before the Court of Justice of the European Union. The Grand Chamber of the Court of Justice ruled that "by instituting dispute-settlement proceedings against the United Kingdom of Great Britain and Northern Ireland under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield (United Kingdom), Ireland has failed to fulfil its obligations under Articles 10 EC and 292 EC and under Articles 192 EA and 193 EA". Article 292 of the then Treaty establishing the European Community (EC Treaty, now Article 344 of the Consolidated version of the Treaty on the Functioning of the European Union, C:2016:202:TOC) and Article 193 of the European Atomic Energy Community Treaty (EA Treaty, C:2016:203:TOC) establish the duty of the Member States not to submit a dispute concerning the interpretation or application of the Treaty to any

illustrative example. The interaction among the international courts that encompass the interpretation of different international treaties has been the object of the analysis by scholars who refer to this cooperation as to a 'dialogue', 'fragmentation', 'reconciliation' or simply 'competing jurisdictions'[2]. The European Court of Human Rights (ECtHR or Court) in safeguarding the standards under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is also called upon to decide cases that require the interpretation of many other international treaties, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[3]. The current analysis is devoted to this European dimension.

The rules for conduct on maritime space established under the UNCLOS form a rather complicated system entitling the coastal states, the flag states and other states to exercise jurisdiction in different situations, the rules of jurisdiction also depend on a particular maritime zone. The evolution of the law of the sea and the contemporary challenges such as military uses of the sea or sea migration reveal that despite the exhaustiveness of the UNCLOS it has always retained a rather wide space for the interpretation of its provisions. And this could be said not only about the provisions that

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method of settlement other than those provided for therein. For more information about the case see <http://www.haguejusticeportal.net/index.php?id=6164>

2 These works focus on issues of concurrent jurisdiction or, subsequently or separately, treaty interpretation. For example, Judge of the International Court of Justice Antônio Augusto Cançado Trindade refers to a jurisprudential cross-fertilization and expresses the need for a unity in law and equal justice: "It is thus to be expected that contemporary international tribunals remain increasingly aware of the case-law of each other, in their continuing performance of their common mission of imparting justice in distinct domains of international law, thus preserving its basic unity". Reflections on a century of International Justice: developments, current state and perspectives. *Teisė. Mokslo darbai*. Vilnius University, 2015, Issue 97. p. 218. Karin Oellers-Frahm deals with concurrent jurisdiction in the article "Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions", 2001 <www.mpil.de/files/pdf1/mpunyb_oellers_frahm_5.pdf>. Nikolaos Lavranos refers to "Regulating Competing Jurisdictions among International Courts and Tribunals", 2008 <http://www.zaoerv.de/68_2008/68_2008_3_a_575_622.pdf>.

3 Adopted on 10 December 1982 in Montego Bay at the Third United Nations Law of the Sea Conference, in force from 16 November 1994, also known as the 'Constitution for the Oceans', currently has 168 Member States. For more information see: UN Division for Ocean Affairs and the Law of the Sea: <http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm>

are vague or obscure but also the self-executing rules. In this respect the examples may be the right of visit on the high seas that may be exercised by a warship in established cases (piracy, slave trade, *etc.*)[4] or the right to approach the ship and to arrest the ship and the crew for the violations of a particular State's requirements applicable in its maritime zones[5]. Arrest of vessels and crews is inevitably related with the status of these serving on board and the restrictions of liberty and security of a person, the right protected under the Article 5 of the ECHR. One may also assume that sea migration raises human rights issues that could fall under the ECHR.

The Article aims at identifying the cases where the ECtHR is called upon to interpret the UNCLOS. The author seeks to briefly present a general overview of such jurisprudence, to identify the human rights that are most usually interpreted in the 'maritime cases' and to evaluate how the interpretation correlates with the case law of the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) or the Permanent Court of Arbitration (PCA). The research is conducted by applying the usual methods of analysis (systemic and comparative analysis, historical, *etc.*). The ECtHR jurisprudence forms the background of the sources used, the analysis is also based on the provisions of the ECHR and the UNCLOS, in addition, the scholars' views and insights are referred to.

2. 'MARITIME CASES' BEFORE THE ECTHR

2.1. A General Overview

ECtHR has in many cases been called upon to judge on possible human rights violations related with maritime matters, however, the search in the HUDOC database reveals that there have been some five cases before the Court so far concerned with the application and

4 UNCLOS Article 110.

5 E.g. UNCLOS Article 73, Para 1, stipulates that "[t]he coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."

interpretation of the UNCLOS[6]. Noteworthy is that the majority of them have been decided by the Grand Chamber[7]; this confirms the complexity of the issues raised. In these 'maritime cases' the Court was called upon to decide on the right of liberty and security of a person (Article 5 of the ECHR), the judgments revealed the violation of the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the ECHR), the right to an effective remedy (Article 13 of the ECHR), property rights (Article 1 Protocol 1 of the ECHR), prohibition of slavery and forced labour (Article 4 of the ECHR), prohibition of collective expulsion of aliens (Article 4 Protocol 4 of the ECHR). In the cases before the Grand Chamber the applicants complained against France, Spain, Italy and Turkey[8]. The factual background of the applications has been mainly related with different aspects of the exercise of States' jurisdiction at sea, such as arrest of vessels and crews, treatment of seafarers or sea migration[9].

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6 HUDOC is an official database of the ECtHR: <http://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}>

7 Case of *Medvedyev and others v. France*, 29 March 2010, appl. No 3394/03; Case of *Mangouras v. Spain*, 28 September 2010, appl. No 12050/04; Case of *Hirsi Jamaa and others v. Italy*, 23 February 2012, appl. No 27765/09; Case of *Islamic Republic of Iran Shipping Lines v. Turkey*, 13 December 2007, appl. No 40998/98.

8 *Ibid.*

9 E.g. the recent case *Kebe and others v. Ukraine* (12 April 2017, appl. No 12552/12) was related with the claims of three applicants who boarded a commercial vessel flying the flag of the Republic of Malta and sought asylum outside their countries of origin (Ethiopia, Eritrea). They alleged the violation of Article 3 (prohibition of torture) and Article 13 (effective remedy) of the ECHR following the ill-treatment of the Ukrainian authorities when carrying border control (they complained about the Ukrainian authorities' refusal to disembark and to accept asylum applications). The Ukraine's Government argued that the applicant had not been within the state's jurisdiction, but Malta had had *de facto* and *de jure* jurisdiction over the vessel and the first applicant. However, the Court established its jurisdiction in respect of the first applicant having noted that there was "no disagreement between the parties that Ukraine had jurisdiction to decide whether the first applicant should be granted leave to enter Ukraine from the moment the Ukrainian border guards embarked the vessel and met with the applicants" (Para 75). Although the factual background is partly contradictory (e.g. the alleged failure of the applicants to ask for asylum at the initial stages of meeting Ukrainian authorities as they perhaps might have intended to apply for asylum in another country, the problems with translation, *etc.*) the Court finally established the violation of Article 13 taken in conjunction with Article 3 of the ECHR. The Court considered that the Ukrainian authorities were or should have been aware that the applicant was an asylum-seeker who might have needed international protection, however, failed to adequately inform about asylum procedures in Ukraine and underestimated the applicant's need for international protection or assistance

Although in many cases the ECtHR examined situations related with the events that occurred in maritime context, however, it did not necessarily refer to the provisions of the UNCLOS each time. The detailed reasons for the application and interpretation of the UNCLOS or disregarding it could be a separate issue for analysis that this article is not much focused on. Still, in this respect the author would like to provide an illustration of at least one case heard by the ECtHR recently[10].

In *Bakanova v. Lithuania*[11] the widow of the Lithuanian mechanic in ship who was found dead on the morning of 24 October 2007 in his cabin in cargo ship 'Vega' near Brazil (in the Atlantic Ocean near the Brazilian port of Imbituba) sought to prove that Lithuanian authorities failed to conduct an effective investigation of the death of her husband. The case raised the issue of the interpretation of the right to life, Article 2 of the ECHR[12], and, from the law of the sea perspective, the issue of jurisdiction. The Court's reasoning much focused on the procedural issues, namely, whether the investigation by the Lithuanian authorities was adequate, however, it did not elaborate on the exercise of jurisdiction by each of the countries involved. Under a general rule of jurisdiction in the territorial sea or internal waters[13], the coastal State authorities usually do not intervene if the event on board has no consequences to the coastal State or there is no request of the flag State or other grounds[14]; although there are differences as regards administrative and criminal jurisdiction and generally and particularly in this case the territorial principle allowed exercising

(Para 104, *etc.*). Only several provisions of the UNCLOS regarding the jurisdiction (Articles 92 and 94) were referred to in this case, however, there was not a big need for the Court to elaborate on them as they establish general principles: the duty for the ship to fly under the flag of one state only, the flag state's jurisdiction on the high seas and jurisdiction in administrative, technical and social matters.

10 The case is somewhat symbolic for this journal as the factual background implies Lithuanian and Brazil reflections.

11 Application No 11167/12, judgment of 31 May 2016.

12 The applicant alleged the violation of Article 6, Para 1, and Article 13, however, the Court did not upheld the complaint.

13 Article 27 of the UNCLOS formulates rules for criminal jurisdiction on board a foreign ship passing through the territorial sea; scholars used to suggest their application in respect of internal waters also. In any case, passing through the territorial sea or calling the seaport foreign ships find themselves within the sovereignty of a coastal state.

14 E. g. such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. UNCLOS Article 27, Para 1 (d).

Brazilian jurisdiction (Brazil authorities started investigation, questioned the ship's captain and the engineer, concluded that no crime had taken place, Brazil doctor indicated acute heart attack as the cause for death, *etc*.). Lithuanian authorities also started investigation, however, much relied on the findings of the Brazilian authorities. The pre-trial investigation was discontinued and resumed several times; witnesses recalled that there had been fires and gas leaks on the board of the ship 'Vega' and the applicant pointed that her husband had never complained about the health and had no heart problems. The ECtHR referred to the Law on Maritime Shipping of the Republic of Lithuania in supporting or merely stating the flag State jurisdiction over the ship sailing its flag in administrative, labour and civil matters; however, this rule is also established in the UNCLOS[15]. Although both States had grounds for exercising jurisdiction in respect of different matters, there might have been certain gaps in cooperation: the applicant among other arguments drew attention to the facts of non-participation of Lithuanian diplomatic agents in the investigation and the delay of Lithuanian authorities in asking Brazilian authorities for legal assistance. The Court reiterated its jurisprudence that "instances of the extraterritorial exercise of jurisdiction by a state include cases involving the activities on board of ships registered in, or flying the flag of, that state."[16] Finally, the violation in the procedural aspect of Article 2 was found[17]. Thus in this case the ECtHR did not directly refer to the UNCLOS, although certain provisions thereof, namely, these regarding the exercise of jurisdiction by a flag State or coastal (port) State, could have been relied on. On the other hand, this has not prevented the Court from accomplishing its tasks in this case (the conduct of States that are not members of the Council of Europe is outside the Court's jurisdiction).

2.2 Jurisdiction-related Issues

Issues of jurisdiction in the law of the sea and International Law in general may imply rather complicated situations. Different

15 Article 94, Para 1, of the UNCLOS stipulate that "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".

16 Para 63.

17 The right to life implies a positive obligation of a state to ensure effective investigation in case a person died as a result of the use of force or in similar cases when circumstances surrounding his death are unclear or unknown.

reasons foster such developments: increasing number of international treaties and, respectively, dispute settlement mechanisms and bodies which they establish, expanding competencies of International Organisations, specific categories of disputes, *etc.* Despite the fact that the majority of the world's seas and oceans are divided into maritime zones, responsibility areas for search and rescue operations and other zones of states' responsibility, the division of powers on maritime space is seldom a simple issue. Throughout the centuries states' efforts to expand their powers in the ocean space have been quite vivid, either through the territorial claims or the exercise of jurisdiction on the high seas or otherwise. The UNCLOS formulates the grounds for the exercise of the states' jurisdiction as a rule or sometimes as a possibility. The issue of jurisdiction before the ECtHR is confined to establishing whether the applicant was within the jurisdiction of a Member State at the moment of the alleged violation[18]. If the situation is related with, e.g. the jurisdiction on the high seas, the Court may find it necessary to rely also on the UNCLOS.

In the maritime cases related with the jurisdiction on the high seas the ECtHR reaffirmed the flag State jurisdiction principle: "a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying"[19]. The Court also reminded the possibility to apply nationality principle: "nationality could be pleaded as an alternative to the principle of the flag state."[20] This reasoning corresponds to the UNCLOS rules[21] and also the provisions of the 1952 Brussels Convention[22].

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18 ECHR, Article 1, establishes the obligation of the Contracting Parties to secure rights and freedoms under the ECHR to everyone within their jurisdiction; Article 34 regulates individual applications.

19 Case of *Hirsi Jamaa and others v. Italy*, appl. No 27765/09, 23 February 2012, para 77.

20 Case of *Medvedyev and others v. France*, appl. No 3394/03, 29 March 2010, para 90.

21 Article 94, Para 1: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Article 97 establishes the flag state or nationality principle in cases of collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship.

22 1952 International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation <https://cil.nus.edu.sg/rp/il/pdf/1952%20IC%20for%20Penal%20Jurisdiction%20in%20Matters%20of%20Collision%20and%20Other%20Incidents%20of%20Navigation-

The case *Medvedyev and others v. France* revealed interesting questions as to the interpretation of jurisdiction at sea in terms of the ECHR and also the UNCLOS (also other treaties regulating the right to board and inspect a foreign ship on the high seas). The Court stated that "extraterritorial exercise of jurisdiction by a State includes cases involving the activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have clearly recognised and defined the extraterritorial exercise of jurisdiction by the relevant State."[23] It is interesting to note that in its jurisprudence the Court emphasised the importance of the degree of control among other facts relevant for establishing jurisdiction, especially when it is extraterritorial. In the case *Hirsi Jamaa and others v. Italy* it stated that "the question whether exceptional circumstances exist which require and justify a finding by the Court that the state was exercising jurisdiction extraterritorially must be determined with reference to the particular facts, for example full and exclusive control over a person or a ship"[24]. In this case the ECtHR recognised that "in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities"[25]. For the Court such exercise of control was enough to establish its jurisdiction under the ECHR, it considered the "speculation as to the nature and purpose of the intervention of the Italian ships on the high seas" to be irrelevant[26].

Providing for the flag State jurisdiction as the main rule on the high seas, the UNCLOS also grants other than the flag States the right to exercise jurisdiction in defined situations, mostly these where there is a need for international cooperation as, e. g. the fight against the sea piracy. Some of these grounds, e. g. unauthorised broadcasting or slave trading, need already to be interpreted in the

pdf.pdf>. Article 1 establishes the flag state's jurisdiction for instituting proceedings in case described by Article 97 of the UNCLOS, under Article 2 the flag state principle applies for the arrest or detention of the vessel.

23 *Supra note* 20. Para 65.

24 *Supra note* 19. Para 73.

25 *Ibid*. Para 81.

26 *Ibid*.

light of the development of the law of the sea[27]. States strive to exercise jurisdiction on the high seas also on the grounds other than these foreseen by the UNCLOS, e. g. justifying their interference by the prevention of the risk to their coast.

In *Medvedyev and others v. France* the ECtHR identified the lacuna in Article 108 and other provisions of the UNCLOS regulating jurisdiction on the high seas in comparison to the fight against illicit trafficking in drugs: "not only are the provisions concerning the fight against drug trafficking minimal – in comparison with those concerning piracy, for example, on which there are eight Articles, which lay down, *inter alia*, the principle of universal jurisdiction as an exception to the rule of the exclusive jurisdiction of the flag State – but fighting drug trafficking is not among the offences, listed in Article 110, suspicion of which gives rise to the right to board and inspect foreign vessels"[28], i.e. to exercise the right of visit. Among the grounds for the right of a warship to verify the ship's right to sail the flag (and possibly proceed with a further examination) drug trafficking is not listed, differently from other grounds allowing not only the flag State to intervene. Under the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[29] a State Party to the treaty may request permission from the flag state to board a vessel suspected of trafficking in illegal drugs[30], otherwise it is not allowed. This treaty also provides for measures of states' cooperation and obligations to criminalise such acts, to start proceedings, *etc*.

The UNCLOS rules for State interference on the high seas are based on certain rationale: each situation (crime) may require a different approach and implies a different balance between the rights

27 In comparison to the time of their adoption, such cases have lost their relevance in nowadays context or have transformed as e.g. the provisions on slave trading may be interpreted as encompassing human trafficking. Article 109 of the UNCLOS 'Unauthorised broadcasting from the high seas' in addition to flag state and state of nationality allows other states to exercise jurisdiction, e.g. the state where the transmissions are received or where the installation registered, *etc.* Article 99 'Prohibition of the transport of slaves' obliges states to take effective measures, however, does not allow the exercise of jurisdiction freely be any state as in case of piracy under Article 105.

28 *Supra note* 20. Para 85.

29 In force from 11 November 1990 <https://www.unodc.org/pdf/convention_1988_en.pdf>; <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en>

30 Article 17, Para 3.

of a flag State and other States. The grounds for interference on the high seas may be divided into these seeking justification in the need to maintain peace and security, these which aim to maintain a *bon usage* of the 'internal order' of the oceans and these which pertain to the general welfare and the *ordre public* of international community or 'external order' of the oceans[31]. The grounds for jurisdiction on the high seas have been also developed in practice. This was also noted by the ECtHR which in the case *Kebe and others v. Ukraine* "[took] note of various provisions of (customary) international maritime law which concern powers and duties of different States and other actors involved in maritime traffic", however, the Court stated it "[did] not have to decide whether and how those provisions applied in the present case, as its subject-matter [concerned] Ukraine's exercise of its sovereign powers to control the entry of aliens into its territory"[32]. Thus the ECtHR usually confines to its primary task of establishing the jurisdiction of a respondent State, party to the ECHR, and subsequently, the Court's jurisdiction.

The legal implications of the sea migration in the context of the refugee crisis which the European States have faced during the recent years, including the issue of jurisdiction, has been analysed by the ECtHR in the case of *Hirsi Jamaa and others v. Italy*[33]. A group of Somali and Eritrean nationals who left Libya with the aim of reaching the Italian coast was intercepted by Italian authorities and handed over to the Libyan authorities. Although the Government argued that the obligation to save human lives on the high seas as provided for by the UNCLOS and exercised by Italian ships had not in itself created a link between the State and the persons concerned establishing the State's jurisdiction, the Court confirmed Italy's jurisdiction: "the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel and the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities".[34] The Court noted that it was aware of the considerable difficulties related to the phenomenon of migration by sea, involving

31 PAPASTAVRIDIS, Efthymios. The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans. Hart Publishing, Oxford and Portland, Oregon, 2013, p. 29.

32 *Supra note* 9. Para 75.

33 Judgement of 23 February 2012, appl. Nº 27765/09.

34 *Ibid*. Paras 81, *etc*.

for States additional complications in controlling the borders in southern Europe; however, reminded the absolute nature of the *non-refoulement* principle and of the prohibition of torture and inhuman or degrading treatment under the Article 3 of the ECHR[35]. Therefore the violation of this provision was established as the Italian authorities knew or should have known that, as irregular migrants, the applicants would have been exposed in Libya to treatment in breach of the Convention[36]. Examining whether the transfer of the applicants amounted to the violation of the prohibition of collective expulsion of aliens the ECtHR also answered in the affirmative: it saw no obstacle to accepting that the exercise of extraterritorial jurisdiction by Italy took the form of collective expulsion (Article 4 of Protocol 4 of the ECHR). The Court added that "the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction"[37].

2.3 UNCLOS and other Sources of the Law of the Sea

With the decades from the adoption of the UNCLOS the titling it as a 'Constitution for the oceans' has been superseded by emphasizing the need of its effective implementation. On the occasion of the 30th anniversary the Secretary General of the United Nations stated: "Like a constitution, it is a firm foundation, a permanent document providing order, stability, predictability and security – all based on the rule of law"[38]. UNCLOS partly codified the customary law of the sea, retained provisions of the 1958 Geneva Conventions on the Law of the Sea[39], although certain concepts and rules are the result of a progressive development of law. The consensus reached on the text, however, may not prevent different interpretation by States.

35 *Ibid*. Para 122.
36 *Ibid*. Para 131.
37 *Ibid*. Para 178.
38 Secretary-General Urges Universal Participation in Law of the Sea Convention as General Assembly Commemorates 30-year Anniversary of 'Essential Treaty' <http://www.un.org/press/en/2012/sgsm14710.doc.htm>
39 Audiovisual Library of International Law <http://legal.un.org/avl/ha/gclos/gclos.html>

As other international courts and tribunals, scholars and judges,[40] the ECtHR emphasized that the UNCLOS is the consolidation of customary law: "the purpose of the Montego Bay Convention was, *inter alia*, to codify or consolidate the customary law of the sea…"[41]; although it recognised the lack of unity and agreement among States on certain issues: "its provisions concerning illicit traffic in narcotic drugs on the high seas reflect a lack of consensus and of clear, agreed rules and practices in the matter at the international level."[42]

The ECtHR has given substantial insights into the sources of the law of the sea: "Diplomatic notes are a source of international law comparable to a treaty or an agreement when they formalise an agreement between the authorities concerned, a common stance on a given matter or even, for example, the expression of a unilateral wish or commitment."[43] In such way reference was made to a unilateral act or diplomatic assurance as a source of law and that it may amount to an international treaty if creates binding obligations on States. In this respect, one may recall several cases where assurances given by a Prime Minister or a Foreign Minister or other diplomatic notes created binding obligations on states[44].

Today such maritime powers as the USA are not parties to the UNCLOS. The expansion of the UNCLOS' applicability would contribute to a unanimous maritime order, although part of the

40 For example, H. E. Judge Rüdiger Wolfrum, the former President of the International Tribunal for the Law of the Sea in the Statement to the International Law Commission, 31 July 2008, indicated that "the law of the sea should not be seen as an autonomous regime. It is part of general international law and numerous provisions of the Convention even constitute customary international law" <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/ilc_geneva_31.07.08_eng.pdf>

41 *Supra note* 20. Para 92.

42 *Ibid.*

43 *Ibid*. Para 96.

44 E. g., in *Nuclear Test Case (Australia v. France)* the International Court of Justice in its judgement of 20 December 1974 concluded that France, by various public statements made in 1974 (the communiqué issued by the Office of the President of the French Republic, reply (statement) by the President, Note from the French Embassy in Wellington) announced its intention to cease the atmospheric tests at sea <http://www.icj-cij.org/docket/?p1=3&p2=3&k=6b&case=59&code=nzf&p3=4>. In the *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, Judgment of 5th April 1933, PCIJ Series A/B No 53, the Permanent Court of International Justice recognised the statement made by the Norwegian Minister as binding on the country.

UNCLOS' provisions in respect of non-parties are applicable as reflecting customary international law. For example, in territorial and maritime dispute *Nicaragua v. Columbia*[45] the ICJ reiterated the Parties' mutual understanding that many provisions of the UNCLOS, including the delimitation of the continental shelf and others reflected customary law and therefore were applicable to their dispute. The ECtHR suggested that "in any event, for States that are not parties to the Montego Bay and Vienna Conventions one solution might be to conclude bilateral or multilateral agreements, with other States."[46]

Important to note is that according to the UNCLOS Article 311 and the principle *pacta tertiis nec nocent nec prosunt* (also established in Article 34 of the Vienna Convention on the Law of Treaties[47]) the relations between a State Party to the UNCLOS and a State that is not the so called Geneva Conventions on the Law of the sea should apply. However, this does not preclude the agreement of states, one of which is not yet a party to the UNCLOS, to apply particular UNCLOS provisions to their relations or dispute as customary law or the rules of progressive development of law (particularly if a specific rule of the 1958 Geneva Conventions is recognised as 'outmoded' by International Court of Justice or other international tribunal or arbitration)[48].

45 "The Parties further agree that the relevant provisions of UNCLOS concerning the baselines of a coastal State and its entitlement to maritime zones, the definition of the continental shelf and the provisions relating to the delimitation of the exclusive economic zone and the continental shelf reflect customary international law". *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. Judgement of 19 November 2012. Para 114. <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=124&code=nicol&p3=4>

46 *Supra note* 20. Para 101. By 'Vienna convention' the Court referred to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna.

47 In force from 27 January 1980. United Nations, Treaty Series, vol. 1155, 1987, p. 331.

48 E. g. Such decision was reached in Lithuania's maritime delimitation negotiations where despite the fact that the State was still not a party to the UNCLOS and therefore the 1958 Conventions should have been applicable, the parties agreed that they were to be guided by the provisions of the UNCLOS. Certain delimitation rules under the Geneva Conventions (principle of equidistance) were already recognised as leading to an unfair delimitation result.

2.4 Deprivation of Liberty

Arrest of vessels and crews is often applicable for the misconduct of foreign ships and vessels in maritime space. The application of criminal liability for violations at sea is a rather problematic and much discussed issue[49]. UNCLOS provides for certain rules, restricting the application of this most severe liability form[50]. The ECtHR noted a tendency to use criminal law as a means of enforcing the environmental obligations imposed by European and International Law[51]. Many stakeholders draw attention to the status of these on board ships, for example, the association of seafarers BIMCO[52] emphasizes the "unfair treatment of seafarers" and refers to it as a "worldwide phenomenon", International Maritime Organisation points the need of a thorough investigation and adequate approach[53].

The interaction between the courts (tribunals) in interpreting sea law sources in cases related with the arrest of vessels and crews is seen in the case *Mangouras v. Spain*, where the Court relied on the UNCLOS, EU law, the case law of ITLOS (Tribunal) and other sources. The case was related with an oil spill in the Exclusive Economic Zone of Spain caused by ship 'Prestige', flying the flag of the Bahamas, and the arrest of a seafarer and the ship's master. The Court summarized the Tribunal's jurisprudence in setting the amount of a bond and the difference in the cases heard[54]. Having

49 E.g. PEREIRA, M. Ricardo. Environmental Criminal Liability and Enforcement in European and International Law. Leiden/Boston:Brill/Nijhoff, The Netherlands, 2015.

50 UNCLOS, Para 3, Article 73: "Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment."

51 *Case of Mangouras v. Spain*, 28 September 2010, appl. No 12050/04. Para 86.

52 *Ibid*. Paras 48-51.

53 Guidelines on fair treatment of seafarers in the event of a maritime accident were adopted by the IMO's Legal Committee at its 91st session from 24 to 28 April 2006. <http://www.imo.org/fr/OurWork/Legal/JointIMOILOWorkingGroupsOnSeafarerIssues/Pages/IMOILOWGOnFairTreatmentOfSeafarers.aspx>

54 "The Tribunal, unlike the Court, is tasked with striking a balance between the competing interests of two States rather than the interests of an individual and those of a State. Secondly, the issues brought before the Tribunal concern the detention and release of both crews and vessels. Thirdly, unlike the instant case, which is about an environmental disaster, the vast majority of cases before the Tribunal concern fisheries-related violations". *Supra note* 51. Para 46.

admitted that the bail had been quite high in that case, the ECtHR upheld the domestic court's view that the divergence from the Court's jurisprudence has been satisfied "in view of the legal interest being protected, the seriousness of the offence in question and the disastrous environmental and economic consequences of the oil spill"[55] and the special consequences of the case. Therefore the deprivation of liberty was justified and no violation of the ECHR Article 5, Para 3, was found.

Assessing the deprivation of liberty through the threshold of the ECHR the Court contributed to the Tribunal's reasoning in the cases of the release of vessels and crews. The Court made the assessment subject to certain additional standards (e.g. the aim and the guarantee of Article 5 Para 3). Having reiterated that the guarantee provided for by Article 5, Para 3, of the ECHR is designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing, the Court examined the issue through the following aspects: the necessity, capacity of the accused to pay the bill, the professional environment and, in addition, "the growing and legitimate concern both in Europe and internationally in relation to environmental offences"[56].

2.5 Other Issues

The jurisprudence of the ECtHR where the reference was made to the UNCLOS also encompasses cases related with other rights, mainly, property rights and prohibition of forced labour, however, there have been only few such disputes brought before the Court so far.

In the case *Islamic Republic of Iran Shipping Lines v. Turkey* "[t]he applicant company alleged that the seizure by the Turkish authorities of the cargo aboard a Cypriot-owned vessel of which it was time charterer had constituted an unjustified control of the use of property within the meaning of Article 1 of Protocol Nº. 1."[57] The Court was called upon to analyse the alleged violation

55 *Ibid.* Para 57.

56 *Ibid*. Para 86.

57 Case of *Islamic Republic of Iran Shipping Lines v. Turkey*, 13 December 2007, appl. No 40998/98. Para 3. The ship was arrested while navigating through the straits as Turkish authorities believed that the arms cargo on board the vessel was bound for Cyprus, from where it was to be smuggled into Turkey. The crew (namely, the master, the first officer and the radio operator) were detained for 'systematic weapon smuggling'.

of property rights in the situation related with the vessel's passage through the Bosphorus. The case encompassed the issue of reliance on the UNCLOS only through the questions on the exact meaning and scope of applicable law: the 1936 Montreux Convention, rules of customary international law governing transit passage through straits and national law provisions prohibiting arms smuggling[58]. The judgement referred to the provisions of UNCLOS regulating the passage through straits[59], however, the Court considered the 1936 Montreux Convention to be a *lex specialis* as concerns the transit regime through the Bosphorus Strait[60]. The Court made the evaluation of the seizure subject to the test of proportionality and the legitimate aim and concluded that "the authorities' interference with the applicant company's rights is disproportionate and unable to strike a fair balance between the interests at stake"[61] and established the violation of Article 1, Protocol 1.

In the case *J. and others v. Austria*[62] the applicants, three nationals of the Philippines, complained that the Austrian authorities had failed to undertake effective and exhaustive investigations into their allegations that they had been the victims of human trafficking and subject to ill-treatment by the employers in Dubai who had taken them to Austria to look after their children. The applicants claimed to be the victims of the violation of Article 4 of the ECHR. The ECtHR provided a rather exhaustive analysis on human trafficking and listed UNCLOS among the treaties regulating the issue[63]. The Court provided relevant examples as to the behaviour amounting to the prohibition of forced or compulsory labour: under the European

58 *Ibid.* Para 92.

59 UNCLOS Articles 35, 37-39 (there are no specific provisions on arms smuggling by sea).

60 *Supra note* 57. Para 93.

61 *Ibid*. Paras 98, 94, 102. It was established that there had been no basis for suspecting an arms-smuggling offence or general power to seize the ship on account of a state of war between Turkey and Cyprus. The Court reminded that the interference must strike a "fair balance" between the demands of the general interest and the requirements of the protection of the individual's fundamental rights and there must be a reasonable relationship of proportionality between the means employed and the aim pursued.

62 Judgement of 17 January 2017, application No 58216/12.

63 The United Nations Convention against Transnational Organised Crime, 2000; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Palermo Protocol); The Council of Europe Convention on Action against Trafficking in Human Beings, 2005; EU Law, *etc.*

Social Charter this guarantee "may be infringed, for example, by criminal punishment of seamen who abandon their post, even when the safety of a ship or the lives or health of the people on board are not at stake"[64]. The present dispute on the alleged violation of Article 4 was mainly related with the Austria's exercise of jurisdiction. It was established that the Austrian authorities complied with their duty to protect the applicants as (potential) victims of human trafficking, despite their decision to discontinue the investigation into the applicants' case concerning the events in Austria, as they had no jurisdiction over the alleged offences committed abroad.[65] The Court thus found no violation of Article 4 of the ECHR.

3. CONCLUSION

In commemoration of the 30 years of adoption of the UNCLOS Judge of the ICJ Christopher Greenwood referred to "remarkable harmony" between the pronouncements by the ICJ, the ITLOS and Annex VII arbitration tribunals; also noted a "consistent determination to achieve a clear and coherent jurisprudence across all relevant bodies"[66]. The ICJ has really developed a rich jurisprudence in maritime cases followed by other courts and tribunals; however, the UNCLOS is already being interpreted not only by the bodies which the States select for their maritime dispute resolution under the UNCLOS Part XV, Article 287, but also other international courts such as the ECtHR.

The contribution of the ECtHR to the interpretation of the UNCLOS is specific (determined by the Court's jurisdiction) but not unexpected. In the contemporary world of a rather considerable number of dispute settlement bodies, mechanisms and expanding case law, courts and tribunals are called upon to adjudicate cases applying many different legal sources. The ECtHR, safeguarding human rights standards under the ECHR, has been more often called upon to clarify human rights issues in maritime context recently. Not in all such cases the ECtHR finds the reference to the

64 *Supra note* 62. Para 33.

65 *Ibid*. Para 118.

66 General Assembly Plenary, General Assembly Commemorates Thirtieth Anniversary of Opening for Signature of United Nations Convention on Law of the Sea, Sixty-seventh General Assembly, Plenary, 49th & 50th Meetings (AM & PM) GA/11323, 10 December 2012 <https://www.un.org/press/en/2012/ga11323.doc.htm>

UNCLOS necessary or the UNCLOS is sometimes only mentioned among the sources of relevant applicable law, however, it is not relied on in the further analysis. The cases encompassing the reference to the UNCLOS have been mainly related with different aspects of the exercise of States' jurisdiction at sea. Most often, such cases raised the issues of the deprivation of liberty, prohibition of torture and inhuman or degrading treatment, also the right to an effective remedy, prohibition of collective expulsion of aliens, on separate occasions – property rights and prohibition of forced labour. Having made the conduct at sea subject to the ECHR standards, the Court has enriched the perception of the UNCLOS and other sources of the law of the sea, applicable law, arrest of vessels and crews, jurisdiction exercised by state authorities at sea and other categories and in such way contributed to the development of the law of the sea, the interpretation of international treaties and human rights standards.

PROTECTION OF THE RIGHT TO AN ADEQUATE ENVIRONMENT THROUGH CRIMINAL LAW[1]

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ENVIRONMENT AND HUMAN RIGHTS

The intersections between environmental protection and human rights are multiple and frequent. As a fundamental basement for life on planet Earth, the environment is a decisive element in order to ensure the protection of various individual rights, both in the substantive and in the procedural field. Furthermore, the destruction of certain environmental components, as a result of environmental catastrophes or by human beings, very often causes population movements with a very negative incidence in the life and fundamental rights of the populations concerned.[2] And what about the serious violations of human rights of those activists that oppose and face policies of environmental destruction?

However, the issue of the existence of a right to an adequate environment, an internationally recognized human right, gives raise to deeper controversies and debates.

Indeed, the United Nations Conference held in Stockholm in 1972 established that every human being "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-

1 See J. L. de la Cuesta, "Protection of the Environment trough Criminal Law. Final Recommendations", *in Protection of the Environment trough Criminal Law (AIDP World Conference, Bucharest, Romania, 18th-20th May 2016),* (J.L. de la Cuesta / L. Quackelbeen / N. Persak / G. Vermeulen, eds.), *Revue Internationale de Droit Pénal,* 87(1), 2016, pp. 343-348.

2 E. C. Viano, "Il furto e la maledizione delle risorse naturali: possono esistere giustizia, equità e diritti umani nella condivisione delle risorse naturali?", en E.C. Viano / M. Monzani, *Madre Terra è stanca! Il saccheggio della natura per arricchire pochi e impoverire molti*, Limena PD, 2014, p. 91 ff.

being", an assertion that was repeated by the following conferences and other international instances.

These are, nevertheless, soft law texts, i.e. non-formally binding documents. In fact, few internationally binding instruments include similar provisions.[3] At the universal level, the 1966 International Covenant on Civil and Political Rights, states that "All peoples may, for their own ends, freely dispose of their natural wealth and resources (art. 1.2); and the 1966 International Covenant on Economic, Social and Cultural Rights refers to "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", including among the measures to be adopted by States in order to guarantee this right the "improvement of all aspects of environmental and industrial hygiene" (art. 12.2 b). Leaving aside this and the references, among war crimes, to the attacks causing serious damages to natural environment, a direct reference to environment is only to be found in the Convention on the Rights of the Child (1989; in connection with the right to health (art. 24.2 c) and in art. 4 of the 1989 Indigenous and Tribal People Convention.

Wider support can be found at regional level. The 1988 "Protocol of San Salvador", Additional Protocol to the American Convention of Human Rights in the area of economic, social and cultural rights, explicitly proclaims (art. 11): "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". The Charter of Fundamental Rights of the European Union (2000) refers to environmental protection in art. 37, which establishes that "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". Finally, the African Charter on Human and Peoples' Rights (1981) declares: "all peoples shall have the right to a general satisfactory environment favorable to their development" (art.24).

However, the absence of an explicit reference to the right to an adequate environment by the most important international and regional instruments on human rights has not been an obstacle to an indirect recognition of this right by international practice and

3 For a very interesting review, *UNEP Compendium on Human Rights and the Environment. Selected international legal materials and cases*, Nairobi, 2014.

jurisprudence,[4] due to its nature of unconditional basis for the enjoyment of other explicitly recognized rights.

Important developments have also taken place in the United Nations at this respect:[5] the establishment in 2010 of a specific mandate, prolonged in 2015: the Independent Expert on human rights and environment constitutes in this sense a very important step.

Even if his report of 2015 stated "that the time is not right for the United Nations to undertake a new treaty on this issue", considering the efforts to adopt a declaration "premature", as "it would also become a central point of attention for the period of its negotiation, which might distract from the continuing development of the norms at the national, regional and international levels".[6]

The authorized position of the Independent Expert is not endorsed by many other instances and individuals who fully support the idea of working on an international declaration and treaty to ensure that the right to an adequate environment is considered a universal human right.[7] A particularly interesting departing point in this direction could be the adoption of the Draft of the International Covenant on the Human Right to the Environment[8] published by the *Centre International de Droit Comparé de l'Environnement* (Limoges. France). The main contents of this Draft consist in the definitions of the various rights connected to the right to a healthy environment, which is put on the same footing as "the right to live in an ecologically balanced environment capable of assuring his or her health, security, and wellbeing" (art.1.a); the right to a heightened level of protection and to non-retrogression (art. 2); the right to precautionary measures (art. 3); the right to prevention (art. 4); the right to environmental assessment (art. 5); the right to reparation of

4 *Ibidem*, pp. 47 y ss. And, in particular, with regard to the European Court of Human Rights, *Environment and the European Convention on Human Rights* (2016 http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf (downloaded in May 19,2017).

5 A. Boyle, "Human Rights and the Environment: Where Next?", *The European Journal of International Law*, 23(3), p. 617 ff.

6 *Informe del Relator Especial sobre la cuestión de las obligaciones de derechos humanos relacionadas con el disfrute de un medio ambiente sin riesgos, limpio, saludable y sostenible* (A/HRC/31/53, 29.12.2015), pp. 4/19.

7 A. Boyle, "Human Rights…", *cit.*, p. 629.

8 https://cidce.org/wp-content/uploads/2017/01/Proyecto-de-Pacto-internacional-relativo-al-derecho-de-los-seres-humanos-al-ambiente_16.II_.2017_ES.pdf (downloaded in May 24, 2017).

environmental damage (art. 6); the right to education (art. 7); the right to freedom of opinion and expression about the environment (art. 8); the right to information (art. 9); the right to participation (art. 10), the right to Recourse (art. 11), the right to water (art. 12), the right to food (art. 13); the rights of indigenous peoples (art. 14); the rights of persons in disaster situations (art. 15); the rights of environmental refugees and internally displaced persons (art. 16). Such rights are to be recognized respecting the principles of fairness and solidarity (art. 17), non-discrimination (art. 18), sustainable protection (art. 19) and promoting an effective and adequate international cooperation.

ENVIRONMENTAL PROTECTION AND CRIMINAL LAW

The recognition of environment as a fundamental right would reinforce in many places the debate on the necessity and limits of environmental protection through criminal law.

This problem, that raises a lot of problematic issues –both technical and of criminal policy- and questions, is not exclusively an environmental one. Also concerning other "new rights" (to information, consumers' rights…), born in the context of Welfare States and characterized by their collective or diffuse nature,[9] criminal protection is demanded and not in a classical way but with an intensive aim of advancing the barriers of protection and ensuring a better prevention against dangers and harms.[10]

AIDP BUCHAREST WORLD CONFERENCE (2016). FINAL RECOMMENDATIONS

Organised by the International Association of Penal Law (AIDP) in collaboration with the Romanian Association of Penal Sciences, the Legal Research Institute of the Romanian Academy of Sciences and the Ecological University of Bucharest, the Second AIDP World Conference on The Protection of the Environment through Criminal Law was held in Bucharest (May 18-20, 2016).[11]

9 F. Sgubbi, "Tutela penale di 'interessi diffusi'", *La Questione Criminale*, 1975, p. 439 ff.

10 J. L. de la Cuesta, "Ecología y Derecho Penal, en A. Beristain/J. L. de la Cuesta (Comps.), *Las drogas en la sociedad actual y Nuevos horizontes en Criminología*, San Sebastián, 1985, p. 277 ff.

11 For the contributions to the World Conference, *Protection of the Environment trough Criminal Law (AIDP World Conference, Bucharest, Romania, 18th-20th May*

This was not the first time that the protection of the environment through criminal law was addressed by AIDP. On the contrary, following its tradition of tackling the new major social challenges and including them amongst its priority scientific concerns, AIDP had previously produced several documents and recommendations on the issue. In this sense, on the occasion of the Twelfth International Congress of Penal Law (Hamburg, 16 – 22 September 1979), Section II studied "The Protection of Environment through Penal Law"; and Section I of the Fifteenth International Congress of Penal Law (Rio de Janeiro, 4 – 10 September 1994) worked on "Crimes against the Environment – General Part". AIDP also presented several proposals in this field to the UN Congress held in Bahia (Brazil) in 2010.

The fact that environmental criminality is becoming more and more relevant, having already reached the fourth position amongst international illicit activities (after drug trafficking, counterfeiting, and human trafficking), together with the important developments that have taken place since the origins of environmental criminal law in the 1970s, reinforced the idea of organising an international activity in this field again in this decade.

Recent international efforts[12] also supported this decision, as they show that the protection of the environment is becoming a part of the human rights protection for which States have positive duties, not only concerning the elaboration of an effective domestic legal system to protect the environment through criminal law but also concerning the contribution to the criminal law protection of the environment at an international level.

There are still countries that rely on broad (vague) definitions and that have not introduced in their legal systems complementary sanctions and adequate elements to assure a proper environmental enforcement. However, most policy makers are increasingly conscious of the challenges to be met. They are also aware of the limits of the criminal justice system in addressing environmental crime since the criminal protection of the environment finds itself in the midst of a gradual effort, where criminal law stands as a final solution that must be adequate and proportional to the gravity of

2016), (J.L. de la Cuesta / L. Quackelbeen / N. Persak / G. Vermeulen, eds.), *Revue Internationale de Droit Pénal,* 87(1), 2016.

12 See f.i. the agreement of the UN Commission on Crime Prevention and Criminal Justice in April 2013 regarding the consideration of illegal wildlife trade as a 'serious crime' (Article 2b).

the attack against the protected interest and to the culpability of offenders as well.

The extended implementation deficit shown by most criminological studies is also to be taken into account in order to promote ways of investigation and prosecution that assure a certain success. In this sense, promoting regular scientific quantitative analyses and the establishment of good effective and harmonised systems of data collection on inspections, monitoring and the remedies applied are crucial in order to get a clearer picture of the (flows of) environmental crimes and to assure a better environmental criminal policy.

The main recommendations that resulted from the contributions and academic debates in the World Conference can be summarized as follows:

A MULTI-TIERED ENFORCEMENT APPROACH

1. The ideal enforcement scheme regarding environmental violations should combine the following in a multi-tiered approach:
    a. administrative enforcement for violations that are less serious and do not require judicial oversight.
    b civil enforcement where the law is too complex for punitive enforcement or where injunctive relief is necessary; and
    c. criminal enforcement for the most serious violations.
2. The legislative system aiming at the protection of the environment through criminal law should combine different provisions aiming at:
    a. criminalizing the (abstract and concrete) endangerment of ecological values in violation of administrative obligations; simple disobedience of administrative rules should not however constitute a criminal offence in the absence of any potential or at least hypothetical endangerment;
    b. as well as punishing, as an independent crime, the production of harmful results, irrespective of the violation of administrative obligations.
3. A multi-tiered enforcement approach to protect the environment would be enriched by evidence-based empirical studies from other related disciplines that tackle environmental crime such as environmental sciences and (green) criminology.

Environmental offences

4. Environmental crimes should receive a prominent place in the legislative framework, recognizing the importance of the protection of ecological values through criminal law either in the penal code or in a special environmental statute.
5. The legal definition of environmental crime should balance the need to encompass environmental endangerment and harm in a sufficient manner with the need to respect general principles of criminal law such as the legality and more specifically the *lex certa* principle.
6. In many legal systems, there are not significant distinctions between the acts that could result in criminal enforcement and those that could result in civil or administrative enforcement. It would be preferable that legislations provide greater clarity on which violations are criminal.

   In this sense, where prosecutorial discretion is admitted, ensuring that criminal law is reserved for the most serious violations could be achieved by requiring that one or more of the following factors are present to warrant criminal enforcement: (a) significant environmental or public health danger or harm; (b) deceptive or misleading conduct; (c) operating in a clandestine way, i.e. fully outside the regulatory system; and/or (d) repetitive or continuous violations.

   The use of these specific factors as a matter of prosecutorial discretion or to distinguish at the legislative level criminal and administrative infractions would be optimal.
7. In any case, the more serious and concrete the danger and harm to the environment and/or human health resulting from environmental crime, the less influence administrative law should have as a condition for criminal liability.

Sanctions

8. A "toolbox" of effective penalties for environmental crime should be made available, including civil and administrative sanctions (not only fines).

9. These penalties should be dissuasive and proportionate, and they should guarantee that mutual legal assistance treaties and extradition can be applied to serious violations of the environment.
10. Complementary sanctions aiming at the restoration of harm done in the past and the prevention of future harm should be envisaged in legislation and applied in practice as well.

Enforcement and prosecution

11. "Smart" enforcement tools, based, *inter alia*, on *ex ante* risk assessment and *ex post* evidence-based targeting, should be used to increase the effectiveness of enforcement efforts.
12. The establishment of databases on environmental offences and law enforcement performances would be very useful in order to ensure the predictability of the criminal repression of environmental offenses. Therefore, enforcement authorities should be obliged to collect and publish data adequately on the number (and quality) of inspections, violations and prosecutions as well as on the number of imposed remedies for environmental crime.
13. In addition to criminal, civil and administrative enforcement by the government, private citizens or environmental groups should be authorized to seek civil penalties, remedies and injunctive relief if the government fails to act to address environmental violations.
14. Citizens' lawsuits should be equally allowed under environmental laws to pursue those violations that the government does not address.
15. NGOs working in the field of environmental protection should be authorised to promote legal action in front of the court, with rights and obligations equivalent to those laid down in national criminal procedural laws for injured parties.
16. Expert evidence is crucial in prosecuting and sanctioning environmental crimes. The high technical and factual complexity of this expertise has an impact upon its costs. High costs on gathering evidence acts as a deterrent in launching criminal proceedings. In overcoming this barrier, agreements with specialized agencies or scientific institutions should be promoted. Increasing the involvement of NGOs in criminal proceedings may also contribute to the gathering of evidence.

17. Reliability of expert evidence is a major problem in the assessment of evidence in every criminal procedure. However, due to the high technical complexity of environmental crimes, this problem is intensified. General criteria /guidelines on assessing environmental evidence would be useful.
18. The establishment of judicial bodies, as well as investigation and prosecution units, specialized in the repression of environmental crime, in addition to the existing specialists empowered to carry out examination and apply administrative sanctions and also to refer the matter to the prosecution when they find criminal deeds, is to be particularly recommended.
19. The use of special investigation techniques is needed for the investigation of environmental crimes within organized crime structures. The assessment of the proportionality test for granting the use of special investigation techniques should not be exclusively based on the statutory penalty provided for the environmental crime.
20. Criminal prosecution should not disregard the reparative aspect of the environmental criminal response.

Individuals and legal entities

21. Both, corporations and individuals should be held accountable for criminal violations of environmental laws in an independent and autonomous way.

    Prosecuting corporations is necessary to address the corporate culture and organisational defects that give rise to violations and to ensure that corporate management will be involved in addressing criminal misconduct by the company.

    Prosecuting individuals is necessary to address individual misconduct and to provide the strongest deterrent to prevent future misconduct, including the possibility of imprisonment in the most serious cases.
22. Prosecutors should file criminal charges against individual corporate officers whenever possible under the governing law and, to the extent supported by evidence, at the highest possible levels within the corporation. The adoption of the responsible corporate officer doctrine is recommended. Such doctrine provides that corporate officials have a duty to act to prevent violations if they know that they are taking place and that they have the ability,

based on their position within the corporation, to prevent further violations.

23. Corporations should be liable for criminal prosecution for the acts (a) of their employees or agents; (b) committed within the scope of the employment or agency; and (c) committed for the benefit of the corporation. Where companies voluntarily disclose violations and/or cooperate during criminal investigations, they should generally receive leniency but not exoneration for their crimes.

Jurisdiction

24. States should extend their territorial jurisdiction on the basis of the effect theory at least for certain environmental offences (such as e.g. ship pollution or trans-border radiation).
25. In order to prevent and tackle delocalization by the corporation concerned to regions where lower environmental standards apply, it is recommended that States prescribe and, where opportune, enforce extraterritorial jurisdiction for environmental offences committed for the benefit of multinational enterprises that have their head office (or a relevant establishment effectively contributing to the global goals of the multinational enterprise) on their territory.
26. States should expect corporations under their jurisdiction to introduce transparent compliance mechanisms to prevent environmental offences being committed by subcontractors or suppliers in their production and supply chain, even if the latter are located abroad, and they should prescribe and enforce jurisdiction upon them for environmental offences committed by the latter.
27. It is recommended that States consider introducing, in compliance with WTO law, import bans or restrictions for goods, products or supplies that have been produced outside their territory in violation of environmental standards or norms applicable in their territory.

RECOMMENDATIONS AT THE INTERNATIONAL LEVEL

1. Due to the international dimension of environmental crimes and harms, it is recommended that States connect international

judicial cooperation in criminal matters with environmental protection by giving competence to the existing authorities (or by creating specialized judicial units), involving in their strategies the civil society (specialized NGOs, reliable business actors) and assuring the respect for the rights of suspects and victims in the international judicial cooperation mechanisms.

2. For these purposes it would be very useful to achieve a complete evaluation of the existing international instruments in order to define already existing obligations of the Member States of these conventions; it is also recommended to take stock of national legislations concerning penal law provisions on the protection of environment in order to prepare a model legislation which ensures a minimum standard of prosecution of criminal acts in this field and to prevent the existence of safe havens impeding an effective prosecution of the most serious crimes against the environment.
3. It is recommended that States and the international community elaborate a Suppression Treaty about serious violations to ecosystems and criminal justice in order to ensure the punishment of the most serious attacks against the environment that should be considered international crimes.
4. The international community and states should develop a pro-active criminal policy strategy in order to increase intelligence-led policing related to potential serious violations of ecosystems.
5. Incrimination of environmental war crimes in non-international armed conflicts and introducing universal jurisdiction on environmental war crimes are to be recommended.
6. Prosecution of ecocides by the ICC should equally be strengthened.

ENVIRONMENT AND DEVELOPMENT WITHIN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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1. INTRODUCTION

Development and protection of the environment, at first sight, may seem contradictory. Indeed, they are not rapidly reconciled. However, both concepts entail important values and goals for the international community, having even been translated into human rights language: right to development and to a healthy environment.

Despite initial contradiction, the international community has sought an approach to both concepts in which they come hand in hand, this is sustainable development. According to the Brundland Report (Our Common Future), "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[1] Through this concept development and environmental concerns become symbiotic: true development can only be achieved in an environmental sound manner and serious protection of the environment depends on a minimum level of development.

To understand well their interdependency, and overcome the simplistic view which sees these concepts solely as contradictory, one must go deeper into what development and environmental protection entails. First, development, which requires transformations of economic production and societal structure, aims to guarantee fulfilment of basic human needs and aspirations (e.g food, shelter, job, clothes) to all.[2] In this sense, development means ensuring a minimum standard of well-being to people while safeguarding future

1 Report of the World Commission on Environment and Development: Our Common Future (1987) Ch 2.

2 Ibid.

generations possibility to do the same. As the Brundland Report has explained clearly: "A world in which poverty and inequity are endemic will always be prone to ecological and other crises."[3] So, underdevelopment frequently leads to unsustainable forms of exploitation. Therefore, development also means protection of the environment.

Secondly, protection of the environment, presupposes comprehension of limits. Limits upon de exploitation of natural resources and the planet's ability to absorb impact of human activity.[4] These boundaries are not fixed and depend upon technological development.[5] As said in the above paragraph, poverty is frequently connected to unsustainable forms of exploitation. Hence, a proper protection of the environment depends on development. Here it is important to clarify a difference between what is being defined as development and ill-considered forms of investment. Unsound forms of exploitation or production might bring immediate profit, but the damages caused lead to greater costs, including financial ones.[6] Sustainable development invites one to see the environment and development in a broader scenario, considering long-term impacts.

Thus, in contemporaneity, environmental protection and development must be seeing as allies, being comprehended in a harmonious form. Nevertheless, translated as human rights, they pose challenges before traditional mechanisms of rights-implementation: the Inter-American System of Human Rights, as the European one, do not have explicit provisions on the right to development and healthy environment. Yet, since all human rights are interdependent, and human rights instruments must be interpreted in light of social changes, they have made their way into the recommendations and jurisprudence of these traditional international bodies.[7]

In this manner, this article will analyse how issues of environment and development have been dealt by the Inter-American System of Human Rights. The importance of this analyses lies on the fact that approaches studied here might inform and influence the position

3 Ibid.
4 Ibid, An Overview.
5 Ibid.
6 Ibid (n 1).
7 UN, Vienna Declaration and Programme of Action (1993); IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs,* Series C Nº. 79 (2001), para 146.

of other international human rights bodies and contribute to a more robust jurisprudence enhancing environmental protection and development.

2. DEVELOPMENT AND ENVIRONMENT AS HUMAN RIGHTS

The formulation of a right to development and healthy environment is relatively new.[8] Their definition as rights demonstrate their complex and multifaceted character and can help one to understand how traditional human rights mechanisms, such as the Inter-American Court of Human Rights (IACtHR), establishes a dialogue with them.

Regarding the right to a healthy environment, it was explicitly recognized in both the Stockholm and Rio Declarations.[9] In both documents, human beings are put in the centre of the concept: individuals have the right to a satisfactory environment since it is a condition of life with dignity and well-being.[10] As a binding source, the African Charter on Human and Peoples' Rights was the first to recognize it. Furthermore, the Charter connected the respect to an adequate environment as a precondition to ensure development, it stated: "All peoples shall have the right to a general satisfactory environment favourable to their development."[11]

Later, the San Salvador Protocol has also affirmed the right to a healthy environment and States' duties to protect and improve it.[12] Nevertheless, this provision falls outside the scope of the system of individual petitions, forcing the IACtHR to dialogue with it through rights interdependency.[13]

By its turn, the human right to development is well defined in the United Nations (UN) Declaration 41/128:

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8 Garza Hernandez, Talia. *El Derecho al Desarrollo como Finalidad del Estado y las Instituciones que Participan en el Ordenamiento Constitucional Mexicano*, Universidad Autónoma de Nuevo León (2015) 12.

9 UN, Declaration of the United Nations Conference on the Human Environment (1972), Principle 1; UN, The Rio Declaration on Environment and Development (1992), Principle 1.

10 Shelton, Dinah. Derechos ambientales y obligaciones en el sistema interamericano de derechos humanos, *Anuario de Derechos Humanos* (2010) 112.

11 AU, African Charter on Human and Peoples' Rights (1981), Art 24.

12 OAS, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988), Art 11.

13 Ibid, Art 19.6.

> The right to development is an *inalienable human right* by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy *economic, social, cultural and political development*, in which all human rights and fundamental freedoms can be fully realized. [14]

Therefore, ensuring this right encompasses guaranteeing many fundamental human rights previously affirmed in international treaties. In certain manner, the right to development is the right to live in a society in which all rights are promoted and respected.[15]

The first binding instrument which reflected the right to development was once more the African Charter.[16] In its Article 22 it affirmed peoples' right to their economic, social and cultural development, as well as to enjoy common heritage of mankind.[17] Differently from the UN definition, the Charter focus on social, economic and cultural development. Frequently, as it is going to be shown through the Inter-American practice, the right to development is focused in these set of rights.

In the Inter-American context, the preamble of the San Salvador Protocol refers to peoples' right to development.[18] Accordingly, economic, social and cultural rights must be re-affirmed in light of this right. Again, development is emphasized within the framework of economic, social and cultural rights.

In this sense, considering the definition of the right to development, and the frequent focus on economic, social and cultural aspect of it; and, the concept of a healthy environment, which is established instrumently for people's welfare, the following sections will analyse how the Inter-American Human Rights system encompasses these rights in its work despite their absence in the American Convention on Human Rights and exclusion from justiciability in the San Salvador Protocol.[19]

14 UN, Declaration on the Right to Development 41/128 (1986), Art 1 [emphasis added].
15 Ibid, preamble.
16 Ibid (n 8) 14.
17 Ibid (n 11).
18 Ibid (n 12).
19 OAS, American Convention on Human Rights (1969).

3. INTER-AMERICAN HUMAN RIGHTS SYSTEM: APPROACHES TO ENVIRONMENT

The Inter-American Court and Commission of Human Rights have been able to affirm States duties towards the protection and improvement of the environment despite the absence of a clear reference to it in most binding Inter-American sources.[20]

In most cases, the unsound exploitation of resources, which in itself harms the right to a health environment, also gives rise to other specific violations of human rights (e.g. right to life, property, information).[21] These last ones are directly addressed by the Commission and Court, while the environmental part features as context. In other words, both Inter-American bodies deal with environmental concerns as an instrument of protection of rights. Regarding the individual petitions, this is a logic approach, since, as already explained, the direct right to a health environment in the San Salvador Protocol is out of their realm. Nevertheless, according to Article 19.7 of the cited Protocol, the Commission is authorized to formulate, in its reports, pertinent observations and recommendations of all rights affirmed under the Protocol.[22] However, in practice, it maintains the indirect perspective.

For the Commission, environmental deterioration that harms human health, perhaps up to a threatening point, runs counter human dignity, which is the foundation of the rights to life and personal integrity:

> Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.[23]

Even before the affirmation of a right to a health environment in the San Salvador Protocol, the Commission had accessed human

20 Ibid (n 10) 113.
21 Ibid 115.
22 Ibid (n 12) Art 19.7.
23 IACHR, The Human Rights Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities (1997), Ch VIII.

rights violations in Cuba derived from environmental degradation.[24] In its report, they asserted the dependency of human health with an adequate environment, recommending the State to take measures to decontaminate the land, water and air.[25]

In a report on the situation of human rights in Ecuador the Commission has developed important standards to deal with environmental degradation driven violations.[26] In this circumstance, there were deforestation, erosion processes, overexploitation of resources and high levels of environment contamination.[27] Hence, the right to life and personal integrity, as affirmed in Articles 4 and 5 of the American Convention, were violated.[28] According to the Commission's report, the grave environmental contamination gives rise to States' obligation to prevent and redress.[29] These duties are found upon Article 2 which demands States to give domestic effect to the rights set in the Convention, including measures beyond enacting legislation.[30] Citing directly the right to a health environment the Commission added: "Where the right to life, to health and *to live in a healthy environment* is already protected by law, the Convention requires that the law be effectively applied and enforced."[31]

The successful application of the above rights requires the existence of effective measures aiming to enhance people's ability to safeguard and claim their rights.[32] Additionally, States must act to guarantee rights even in relation to violations committed by private parties.[33] In this sense, environmental degradation may also be connected to violation of procedural rights.[34] Individuals having their right to life, personal integrity, health and/or health environment violated must have access to justice (Article 25 of

24 IACHR, La Situación de los Derecho Humanos en Cuba Séptimo Informe, OEA/Ser.L/V/II.61, Doc.29 rev. 1 (1983).
25 Ibid; Ibid (n 10) 116.
26 Ibid (n 23).
27 Ibid.
28 Ibid (n 19), Article 4–5.
29 Ibid (n 23),
30 Ibid (n19), Article 2.
31 Ibid (n 23).
32 Ibid (n 10) 123.
33 Ibid 114.
34 Ibid 123.

American Convention). It is a State obligation to create effective measures to ensure this right.[35]

Beyond access to justice, another procedural right in close link with a health environment is the right to information. This is a basic pre-requisite to allow people to take part in decision making processes and effectively use judicial resources.[36] In the Inter-American system, the right to information is reflected in Article 13 which includes the right to seek, receive and impart knowledge.[37] Moreover, Article 23 affirms the right to participate in government, including to take part in conduct of public affairs.

In the case *Claude Reyes et al. Vs. Chile*, the IACtHR dealt with violations of procedural rights in relation to proper access to information regarding environmental matters.[38] It concerned a project that would potentially harm the right to a health environment to which the Chilean government denied full disclosure of information. The victims alleged violations of freedom of expression (access to information), right to participate in the government, fair trial and access to justice. In its reasoning, with relevance for the protection of the environment, the Court recalled Principle 10 of the Rio Declaration which affirms:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[39]

Hence, through its judgement the Court gave force to the above principle, ruling that the State has the positive duty to provide information and that individuals do not need to prove a direct

35 Ibid (n 23).
36 Ibid.
37 Ibid (n 19), Article 13.
38 IACtHR, *Claude Reyes et al. Vs. Chile, Merits, Reparations and Costs*, Series C Nº. 151 (2006).
39 Ibid (n 9) The Rio Declaration, Principle 10.

interest to obtain it.[40] Considering that environmental harm is of public interest and that the situation did not present any legitimate reason to permit restriction of information, Chile violated the rights of the claimants of access to information and participation in government.[41]

Thus, violations of the right to a health environment that are connected to foreclosing pertinent information and excluding individuals and peoples from decision making process give rise to direct violations of the American Convention and serve as means to address environmental concerns in traditional human rights sphere.

Another area in which the right to a health environment is reflected is indigenous peoples' rights. The fact that these peoples have an especial relationship with their land, as recognized in the IACtHR jurisprudence, entails that damage to the environment substantially affects their way of life, including cultural expression.[42] Furthermore, other rights violations that affect the population in general also features among the violations upon indigenous peoples' rights, for example, right to life and health.

Regarding, for instance, the right to health, in a report on indigenous peoples' rights in Paraguay, the Commission took note of the environmental destruction and its consequential harm to economic production and acquisition of food by the indigenous communities.[43] In its recommendations the Commission stressed the need for environmental protection in order to safeguard basic resources needed for those communities' health and survival.[44]

One of the most important developments of the Inter-American system regarding the protection of environment for safeguarding indigenous peoples' rights is the recognition of their collective right to their ancestral lands: the Commission and the Court have interpreted the right to property (Article 21) encompassing collective property.[45]

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40 Ibid (n 38) para 77.

41 Ibid, para 73; 89-91.

42 IACtHR, *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs,* Series C Nº. 172 (2007), para 82.

43 IACHR, Tercer Informe Sobre la Situación de los Derechos Humanos en Paraguay, OEA/Ser./L/VII.110, doc. 52 (2001), Ch IX.

44 Ibid.

45 See Ibid (n 7) *Mayagna (Sumo) Awas Tingni Community v. Nicaragua.*

In this sense, in the case of Yanomami people in Brazil, the Commission has acknowledged:

> Their integrity as a people and as individuals is under constant attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures and invasions is irregular and feeble, so that they are constantly in danger and their environment is suffering constant deterioration.[46]

Therefore, it is logical that protection of indigenous land, including from environmental harm, is key to defend the human rights of indigenous people. The State is under obligation to protect the Yanomami right to property of their land from invaders and consequential environmental degradations.[47]

In the case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* the Court developed its rational for recognizing indigenous peoples collective right to property of their lands.[48] Using progressive interpretation and considering current living conditions, the Court relied on Article 29, which forbids strict interpretation of provisions of the Convention, to recognize indigenous people property rights, regardless of the non-centrality of ownership with one or few individuals.[49] In consequence, by grating concessions for third parties to explore resources at Awas Tingni Community land, the State has violated Article 21 of the Convention.[50] Hence, through this analyses, environmental degradation on indigenous peoples' lands may be prosecuted.[51]

A similar rational has been used in other cases involving indigenous peoples and degradation of their lands.[52] It is important to notice, though, that there are legitimate restrictions that can be imposed on property rights. In the case *Saramaka People v.*

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46 IACHR, Report in the Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97, Doc. 29 rev.1 (1997), Ch. VI.

47 Ibid.

48 Ibid (n 7) *Mayagna (Sumo) Awas Tingni Community v. Nicaragua.*

49 Ibid, para 146-149.

50 Ibid, para 153.

51 Ibid (n 10) 119.

52 Other similar cases: IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, *Merits, Reparations and Costs*, Series C Nº. 146 (2006); *Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*, Series C Nº. 125 (2005).

Suriname the Court explains that the scope of protection granted by property rights for indigenous and tribal peoples is limited to "those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life."[53] In this manner, the State can limit, pursuant defined criteria, the rights of peoples to the enjoyment of their resources provided that such restriction does not deny their survival as people.[54] Even so, considering the special connection these peoples have with their lands and their dependency on availability of natural resource with quality to maintain their lifestyle, the protection of indigenous and tribal peoples lands has potential to safeguard the environment through human rights mechanisms.

Nevertheless, there are limits to the effective protection of the environment through the Inter-American system of Human Rights. For instance, a petition regarding the Metropolitan Nature Reserve in Panama was declared inadmissible by the Commission.[55] The claimant alleged a violation to the all Panamanian people right to property since the government allowed the construction of a road through the Reserve.[56] For the Commission, he failed to identify a specific victim or group of victims, thus, not meeting *ratione personae* criteria of admissibility.[57] Considering this example, it is possible to understand that damages to the environment that do not affect particular victims, going beyond human well-being, falls outside the realm of the Commission and Court.

4. INTER-AMERICAN HUMAN RIGHTS SYSTEM: APPROACHES TO DEVELOPMENT

The issue of development in the Inter-American system is less frequent than environment. Generally, cases and reports refer to the right to economic, social and cultural rights, as specified in Article 26 of the American Convention, which entails progressive development.[58] This does not mean, however, that the right to

53 Ibid (n 42) para 122.
54 Ibid, para 128.
55 IACHR, *Metropolitan Nature Reserve v. Panama*, Report Petition 11.533, Nº. 88/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 (2003).
56 Ibid,
57 Ibid.
58 Ibid (n 19), Article 26.

development has not been referred to. The Commission explained: "the right to development implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment."[59]

Both Court and Commission, have established standards regarding development. For instance, respect for the human rights of people affected and benefit-sharing. The first one includes, with pertinence to this article, the right to a health environment. As the Commission has recalled, the norms of the Inter-American system do not preclude development, but establish that, as affirmed in the First Summit of the Americas: "Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly."[60] So, States are not exempted of their obligations towards the environment and human rights in their development plans.[61] In fact, States have the obligation to put in place adequate and effective measures to guarantee that development activities do not negatively affect people and the environment; they have the duty to regulate and supervise these activities.[62]

Regarding benefit-sharing, the Court states that it is inherent from the right to compensation (Article 21.2).[63] In this sense, the benefits of development must be reasonably shared with people of a territory, especially regarding exploitation of indigenous peoples' lands.[64] The Commission has also made this point clear in relation to the development of economic, social and cultural rights.[65] In many reports, it has stressed the consequences of unfair income

59 Ibid (n 23).
60 Ibid; OAS, First Summit of the Americas, Declaration of Principles (1994).
61 Ibid (n 10) 118.
62 IACHR, *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, Report Nº. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004); Ibid (n 23).
63 Ibid (n 42), para 138.
64 Ibid; Ibid (n 43).
65 IACHR, Informe sobre la Situacion de Derechos Humanos en Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1 (1998), Ch. VIII; IACHR, Informe sobre la Situacion de Derechos Humanos en Brasil, OEA/Ser.L/V/II.97, Doc. 29 rev.1 (1997), Ch. II; IACHR, Fith Inform on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111, Doc. 21 rev. (2001), Ch.III.

distribution and extreme poverty to enjoyment of the development of these rights.[66]

Additionally, the Commission has affirmed that, the progressive character of the development of social, economic and cultural rights, does not mean that the State can take long to put all possible measures in place in order to realize these rights.[67] On the contrary, States have an obligation to start immediately the necessary processes towards their realization.[68] This is a key rationale that influences broadly the right to development, since it also requires progressive realization.

Another important jurisprudential remark for this study regards the case of the *"Five Pensioners" v. Peru*.[69] In it, the Court rejected the request to evaluate the progressive development of economic, social and cultural rights in Peru because the case was not representative of the broader situation in the State.[70] For the Court:

> (…) progressive development (…) should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity (…).

Therefore, the Court highlights a condition for bringing the issue of progressive development to judgements: the case must be an adequate sample of domestic conditions.

In this context, one can notice that the right to development is not a self-standing right in the approach of the Inter-American system. The Commission's recognition of it is closer to a right of States than individuals. Nonetheless, other approaches from the Court entail positive outcomes for development, as it will be analysed in the following sub-section.

66 Salvioli, Fabian. La protección de los derechos económicos, sociales y culturales en el sistema interamericano de Derechos Humanos, Instituto Interamericano de Derechos Humanos, Nº 40 (2004).
67 Ibid; IACHR, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (1999), Ch. III.
68 Ibid (n 66).
69 IACHR, *"Five Pensioners" v. Peru. Reparations and Costs*, Series C Nº. 98 (2003).
70 Ibid, para 148.

5. DEVELOPMENT AS OUTCOME: REPARATIONS MEASURES IN THE IACTHR

Despite the less prominent space of the right to development in the Inter-American Commission and Court, the question of development figures in a very interesting space within the system: measures of reparation. Indeed, the IACtHR is bold in its awards of reparation and, as it will be demonstrated, many of them aim to contribute to the development of the benefited community, including aiding to safeguard the right to a health environment.

Starting with the Commission, in one report on Paraguay, it recommended the State to protect environmental and social resources of poor communities with a view to allow people to use them to overcome poverty.[71] This is relevant as the right to development is closely connected to achieving a minimum standard of life.

Other reparation orders aiming to development are frequent in cases involving indigenous peoples. In the *Awas Tingni Community* case the Court instructed the State to invest US$ 50.000 in public constructions and services for the collective benefit of the community.[72] Additionally, the Court has in a few cases ordered the creation of development funds in favour of people affected. This took place, for example, in the *Saramaka People,* to compensate environmental damage and resources destruction, and in the *Sawhoyamaxa Indigenous Community v. Paraguay*.[73]

Moreover, in the case of *Aloeboetoe et al. v. Suriname* the Court ordered the reopening of a school and health clinic in the area where the descendants of the victims lived.[74] Opening schools was also a reparation found in *"Street Children" v. Guatemala* and *Trujillo Oroza v. Bolivia.*[75] The realization of the right to health and education are paramount for achieving development, realizing "all human rights and fundamental freedoms".[76]

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71 Ibid (n 43).

72 Ibid (n 7) *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* para 173.

73 Ibid (n 42), para 199, 201, 202, 208, 210-212, 214; Ibid (n 52) Sawhoyamaxa Indigenous Community v. Paraguay, para 224-225, 248.

74 IACtHR, *Aloeboetoe et al. v. Suriname*. *Reparations and Costs,* Series C Nº. 15 (1993), para 116.

75 IACtHR, *"Street Children" (Villagrán-Morales et al.) v. Guatemala*. *Reparations and Costs,* Series C Nº. 77 (2001); IACtHR, *Trujillo Oroza v. Bolivia*. *Reparations and Costs*, Series C Nº. 92 (2002).

76 Ibid (n 14).

6. CONCLUSION

Development and a health environment are important goals of the international community, as reflected through sustainable development. More than that, these concepts reflect rights which are inalienable. Therefore, it is paramount to remediate their absence from many human rights instruments and embrace their connection with other rights.

In the Inter-American system, a health environment figures as necessary in order to safeguard many rights. Since States have a positive obligation to ensure all rights under the Convention, protecting the environment becomes a consequential duty. However, environmental damage is not a self-standing claim in this system. Additionally, even in light of a general loss derived from harm to environment, without an identifiable victim, petitions are not admissible. In this context, the emphasis on procedural rights can secure the existence, in domestic systems, of means to directly challenge environmental degradation.

Development by its turn, despite being recognized in the Inter-American system, features more often as an element of economic, social and cultural rights. Moreover, as the Commission and Court have stated, it must be implemented with respect for human rights, including a health environment, and enable all to enjoy from its benefits. Also, States are not exempt to continually delay its realization: they must immediately start implementing it as much as possible. Nevertheless, it is difficult to bring claims regarding the evaluation of progressive realization, as seen in the *Five Pensioners* case.

The Inter-American system has an interesting role regarding development: through its reparations measures it has paid attention to developmental needs of victims and their communities. This approach recognizes the interdependency of rights and that low levels of development frequent lead to more rights violations.

Finally, regardless of legal limitations derived from the absence of environment and development in most binding instruments of the Inter-American system, the Commission has a broad mandate for evaluation of human rights situations and could play a more prominent role in strengthening the right to development and health environment as self-standing rights. Additionally, considering the clear importance of environmental protection for human beings' life and continuity of life for future generations, and that environmental

degradation can affect, in different degrees all people, the matter of who can claim to be a victim of environmental degradation must be adapted to this reality.

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TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT AND INTERNATIONAL ENVIRONMENTAL: STILL MORE MYTH THAN REALITY?[1]

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1. CONTEXT: THE "MYTH" OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT?

In an intriguing and influential article entitled "The Myth and Reality of Transboundary Environmental Impact Assessment,"[2] John H. Knox argues that the predominant account of transboundary EIA has the following elements: (1) a customary international law prohibition of transboundary environmental harm; (2) Principle 21 of the 1972 Stockholm Declaration, which provides that states must ensure that activities within their territories or under their control do not harm the environment beyond their territory or control; and (3) the prevention of transboundary harm by, among

1 The authors wish to acknowledge that this chapter is a fully collaborative work, and the alphabetical order of authorship is not indicative of unequal input. Moreover, one of the authors, Miriam Cohen, further wishes to acknowledge that she was previously an Associate Legal Office at the International Court of Justice where she worked on the initial stages of the case discussed in this Chapter. The discussion and analysis contained in this Chapter are solely and exclusively based on publicly available information, and the views expressed herein are her own, and those of her co-author.

2 John H. Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96:2 *American Journal of International Law* 291.

other things, conducting EIAs before undertaking environmentally risky activities.[3] Knox further argued that this dominant narrative of transboundary EIA belongs to what Daniel Bodansky has described as the "myth system" of international environmental law: a collection of ideas often considered part of customary international law not supported by actual state practice. These ideas, rather, "represent the collective ideals of the international community, which at present have the quality of fictions or half-truths."[4] As Oscar Schachter puts it, "[t]o say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day."[5]

Because state practice prioritizing economic development over environmental protection so routinely fails to live up to the promise of Principle 21, its status, as well as that of its corollary procedural EIA obligation, remains unclear, calling into question the characterization of Principle 21 as customary international law[6] and the cornerstone of international environmental law.[7] More broadly still, the discrepancy between Principle 21 and actual state practice in an ever-more integrated, globalized world and planetary ecosystem raises the question of how the human right to a healthy environment – if such a right exists, or should come to exist – would be asserted and enforced.[8] This question is particularly urgent in light of the increasing importance and impacts of the contributions – both constructive and destructive – of non-state actors, especially civil society groups and transnational corporations, respectively.[9]

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3 *Ibid.*

4 Daniel Bodansky, "Customary (and Not So Customary) International Environmental Law" (1995) 3 *Indiana Journal of Global Legal Studies* 106 at 116.

5 Oscar Schachter, "The Emergence of International Environmental Law" (1991) 44 *Journal of International Affairs* 457 at 463.

6 See e.g. Philippe Sands, *Principles of International Environmental Law* (1995) at 190; David Wirth, "The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?" (1995) 29 *Georgia Law Review* 599 at 620.

7 Sands, *ibid*, at 186.

8 See e.g. Rebecca Bratspies, "Do We Need a Human Right to a Healthy Environment?" (2015) 13 *Santa Clara Journal of International Law* 31. More generally regarding the emergence of global administrative law, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law" (2005) 68 *Law and Contemporary Problems* 15.

9 See e.g. Jason MacLean, "*Chevron Corp. v. Yaiguaje:* Canadian Law and the New Global Economic and Environmental Realities" (2016) 57 *Canadian Business*

2. TRANSBOUNDARY EIA AND THE INTERNATIONAL COURT OF JUSTICE

Unsurprisingly, commentators and practitioners have looked to the ICJ for clarification. But thus far, the ICJ's pronouncements raise as many questions and they answer. For instance, in its 1996 advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ noted that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[10] As Knox rightly observes, however, the ICJ's use of the impossibly vague term "respect" does little to clarify the scope or substance of Principle 21 and its attendant procedural obligations, including the obligation to conduct transboundary EIAs.[11]

Thus, does the ICJ continually giveth and taketh away when it comes to transboundary EIA. In its decision in *Pulp Mills (Argentina v. Uruguay)*, for example, the ICJ reiterated the customary nature of transboundary harm prevention and the EIA obligation, observing that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse in a transboundary context".[12] The ICJ was not prepared in *Pulp Mills*, however, to identify the minimum core components of an adequate EIA, once again raising more questions than answers.[13]

Law Journal 367.

10 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, at 241-242, para. 29.

11 Knox, *supra* note 8 at 293.

12 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 ("*Pulp Mills* Judgment"), para. 204.

13 *Ibid*, para. 205, where the Court explained that the specific substance of an EIA "is for each State to determine in its domestic legislation or in the authorization process for the project." However, the Court was unequivocal in holding that "an environmental impact assessment must be conducted prior to the implementation of a project" (*ibid*). But see Carl Bruch *et al.*, "Assessing the assessments: improving methodologies for impact assessments in transboundary watercourses" (2008) 26:4 *Impact Assessment and Project Appraisal* 239 on the need for greater clarity of the regime governing EIA.

3. MUDDYING THE WATERS? THE *COSTA RICA V. NICARAGUA AND NICARAGUA V. COSTA RICA CASES*

A pair of related cases – *Costa Rica v. Nicaragua*, and *Nicaragua v. Costa Rica* – recently presented the ICJ with a fresh opportunity to clarify the nature of Principle 21 and the scope and substance of the international law obligation to undertake EIAs.

Costa Rica and Nicaragua have been entangled for a number of years in intertwined disputes relating to sovereignty over territory and activities carried out in close proximity to a boundary river between Costa Rica and Nicaragua. The dispute first reached the ICJ in 2010 when Costa Rica alleged that Nicaragua had occupied the three-square-kilometer block. Nicaragua maintained that the territory historically belonged to it, and in 2011 Nicaragua instituted proceedings against Cost Rica arguing that Costa Rica was causing transboundary environmental damage by constructing a road running along the San Juan River ("river"). [14]

The ICJ ruled in favour of Nicaragua on the transboundary harm issue, finding that Costa Rica had failed to conduct an EIA prior to undertaking construction on the road, which veers dangerously close to the river. But the Court (forgive us) muddied the waters by refusing to award damages to Nicaragua, stating that the declaratory judgment in its favour was "satisfaction" enough.[15] Below we assess the implications of the Court's reasoning for the nature, substance, and scope of the transboundary EIA obligation in international law, as well as the nature and promise of international environmental law more generally.

As noted above, the Court's judgment examined, in addition to a claim of breach of territorial sovereignty, mutual allegations of breaches of international environmental law obligations. While there are many interesting questions addressed in the Judgment,[16],

14 *Certain activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015 ("*Costa Rica and Nicaragua Judgment*"), paras. 92, 99.

15 *Ibid*, para. 139.

16 See e.g. Diane Desierto, "Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice in Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)", *EJIL: Talk!,* 26 February 2016; Jutta Brunnée, "International Environmental Law and

our contribution focuses on the Court's analysis of the substance and scope of the international obligation to conduct an EIA for activities that pose a risk of significant transboundary environmental harm. This chapter also comments on the Court's analysis of the appropriate remedy in cases of a breach of the procedural obligation to conduct an EIA.

By way of additional background, the Judgment on the merits of the joined cases of Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) dealt with two distinct but connected international environmental law questions, both related with the EIA obligation.[17] In the Costa Rica v. Nicaragua case, Costa Rica alleged that Nicaragua violated international environmental law obligations in the course of conducting activities in the San Juan River. Costa Rica claimed that Nicaragua's activities posed a potential risk to the flow of the Colorado River and adversely affected Costa Rica's wetlands. In the Nicaragua v. Costa Rica case, Nicaragua alleged that Costa Rica breached its international law obligation to conduct an EIA prior to commencing construction of Route 1856, Juan Rafael Mora Porras (the "road"), which is situated in Costa Rican territory running alongside part of its border with Nicaragua.

In relation to the scope and substance of the EIA obligation, the parties in *Costa Rica v. Nicaragua* agreed that there exists an obligation under international environmental law to conduct an EIA whenever an activity carried out in one state's territory poses a risk of causing transboundary environmental harm in another.[18] In reaching its Judgment, the Court was presented with an opportunity to confirm and clarify its 2010 ruling in *Pulp Mills,* particularly with respect to the core elements of the EIA obligation.

The ICJ made an important initial finding: while the *Pulp Mills* case referred to "industrial" activities, the Court affirmed in *Costa Rica v. Nicaragua* that the EIA obligation applies even more generally to "proposed activities which may have a significant adverse

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Community Interests: Procedural Aspects", *in* Eyal Benvenisti and Georg Nolte (eds), *Community Interests in International Law* (2017).

17 For a background of the two cases, see *Costa Rica and Nicaragua Judgment*, paras. 1-52.

18 *Ibid*, para. 101.

impact in a transboundary context."[19] Useful as this incremental clarification is, however, the Court neglected to further clarify the scope or substance of the EIA obligation. Instead, the Court simply stated that "to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment".[20] Importantly, however, the Court failed to elaborate on what amounts to "significant" transboundary harm. Nor did the Court explain how a state is "to ascertain" whether a proposed activity poses such a risk. Rather abruptly, and with little discussion of the supporting evidence, the ICJ dismissed Costa Rica's claim that there was a risk of significant transboundary harm obligating Nicaragua to conduct an EIA prior to commencing dredging the San Juan River.

Instead, the Court relied on, but did not discuss in any detail, a study conducted by Nicaragua in 2006 concluding that the dredging program planned in 2006 did not pose "a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland."[21] Costa Rica countered that the 2006 study did not specifically assess the potential harm to its wetlands. The Court, however, did not address this argument head on, choosing instead to advert to reports and expert evidence submitted by both parties without meaningfully discussing any particular piece of evidence. The Court concluded that there was no risk of transboundary environmental harm triggering an obligation on the part of Nicaragua to conduct an EIA. Such was the extent of the ICJ's discussion of the international environmental law EIA obligation in *Costa Rica v. Nicaragua*: an inconsequential affirmation of its previous jurisprudence, the failure to carefully scrutinize the parties' technical evidence, and most importantly, a missed opportunity to usefully clarify the scope and substance of the international environmental law obligation to conduct an EIA in a potential transboundary harm context.

19 *Costa Rica and Nicaragua Judgment,* para. 104.
20 *Ibid*, para. 104.
21 *Ibid*, para. 105.

Nicaragua v. Costa Rica likewise presented the ICJ with an opportunity to clarify the scope and substance of the EIA obligation of international environmental law. Nicaragua alleged that Costa Rica breached its obligation to conduct an EIA prior to commencing road construction. Costa Rica denied that there was any risk of significant transboundary harm and claimed that, in any event, it was exempted from the obligation to conduct an EIA in light of the state of emergency precipitated by Nicaragua's occupation of Isla Portillos. The Court began by addressing what it means to "ascertain" whether a given activity poses a risk of transboundary harm, a question it left unanswered in the companion case of *Costa Rica v. Nicaragua*. The Court stated that "to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm" triggering the obligation to conduct an EIA.[22] Upon evaluation of the circumstances surrounding the construction of the road, including the substantial scale of the road project, the location of the road along the river, and the geographic conditions of the river basin where the road was to be situated, the Court found that the construction of the road posed a risk of significant transboundary harm.[23]

Having found that the obligation to conduct an EIA was triggered, the Court dealt next with Costa Rica's claim that it was exempt from conducting an EIA because of the state of emergency precipitated by Nicaragua's territorial incursion. Curiously, the Court decided this question by looking solely to the facts of the case, without clarifying whether, as a matter of international law, a state of emergency is capable of exempting a state from its obligation to conduct an EIA where there is a risk of significant transboundary harm.[24] The Court's strange choice marks yet another missed opportunity to clarify the relationship between a declared state of emergency under domestic law and the obligation to conduct an EIA under international environmental law. Instead, the ICJ left the door open to further EIA exemption claims, which, in addition to making the law more uncertain, further calls into question the customary nature of transboundary EIA.

22 *Ibid*, para. 154.
23 *Ibid*, para. 156.
24 *Ibid*, paras. 157-159.

Referring to its previous jurisprudence, the Court confirmed that the obligation to conduct an EIA is one of a continuous nature, lasting for the life of a project, and that an EIA must be undertaken before a project commences. Because Costa Rica conducted studies only after its road construction had begun – they were in fact *post hoc* assessments of the stretches of the road that had already been built – the Court found that Costa Rica had breached its obligation under "general international law" to conduct an EIA. As Judge *ad hoc* Dugard discussed in his Separate Opinion, a review of international law demonstrates that the EIA obligation is one of *customary international law*.[25] This, however, is somewhat old news. More importantly, given state practice to the contrary, it is also highly dubious news.

By failing to conduct an EIA prior to commencing construction of the road, Costa Rica was unable to properly assess the risk of transboundary harm. Although the Court found this to be a breach of procedural international environmental law, not substantive international environmental law, the EIA obligation is nonetheless closely linked with the obligation of due diligence and the core *substantive* principle of prevention. In this regard, the Court's Judgment failed to clarify whether the duty to conduct an EIA is an independent obligation under international environmental law or whether it is a constituent element of the obligation of due diligence; Judges of the Court also diverged on this point,[26] thereby raising (once again) more questions than answers for international environmental law.

Against this background, it is at once surprising and perhaps not surprising at all that the Court found that a declaration that Costa Rica had breached its obligation to conduct an EIA constituted "satisfaction" enough of Nicaragua's claim.[27] This reasoning is classic bootstrapping: because there was no evidence of significant transboundary harm, a mere declaration was in order. But the precise point of conducting an EIA is to assess the risk of significant transboundary harm *prior* to the harm occurring. If a state can plead the absence of transboundary harm *after* a project has started without having conducted an *ex ante* EIA, the transboundary EIA

25 *Ibid,* Separate Opinion of Judge *ad hoc* Dugard.
26 *Ibid.*
27 *Ibid*, para. 224.

obligation begins to look much more like a myth than a robust, important obligation of international environmental law. By dismissing Nicaragua's claim for reparation, the Court minimized the significance of the severity of Costa Rica's breach in the case at bar and, more broadly, the EIA obligation of international environmental law. The Court's mere declaration is surprising in light of its jurisprudence on the customary nature of the EIA obligation, but it is not surprising at all in light of states' practiced disregard of this obligation along with the principle of transboundary harm prevention. Regrettably, the ICJ decided to follow present state practice rather than guide it.

4. CONCLUSION: WITHER CUSTOMARY INTERNATIONAL ENVIRONMENTAL LAW?

At bottom, or for that matter at its highest, is international environmental law just politics? Is the notion of customary international environmental law out of date? Has the time come, as Knox argues, to embrace regional transboundary EIA agreements that effectively embody the principle of non-discrimination, whereby states apply the same protections to potential transboundary harm as they would to potential domestic harm, even if those (political) agreements are as unlikely to actually prevent transboundary environmental harm as they are to prevent domestic environmental harm?[28] As Knox puts it, regional EIA agreements have an indisputable advantage over the "myth" of a customary norm of transboundary harm prevention: "they actually exist."[29] Consequently, Knox argues that treating Principle 21 and its procedural corollaries – including the obligation to conduct transboundary EIAs – as customary discredits international law generally.

We are not so sure. Aspirations matter. Discussing the nature of legal regulation generally, the Canadian legal theorist Rod Macdonald argued – convincingly, we think – that law is not merely a means to other ends; it is also an end in itself, a symbol and a collective achievement. As such, law can be "a surrogate for power, hate, prejudice, poverty or alienation".[30] Or, Macdonald argued, law can be

28 Knox, *supra* note 8 at 319.

29 *Ibid.*

30 Roderick A. Macdonald, "Understanding Regulation by Regulations" in I. Bernier & A. Lajoie, eds, *Regulations, Crown Corporations and Administrative*

"a surrogate for freedom, equality and justice."[31] Crucially, "[h]ow we deploy law to address these ideas betrays how we see ourselves. *How we discuss law does the same*."[32]

Law and politics, therefore, are intimately interconnected and fundamentally discursive. In the context of international human rights law, for example, Teitel argues that the expanded range of legal discursive practices represented by the ongoing expansion of legal machinery, institutions, and processes occurring in the international sphere contributes to a rhetoric that both enables and constrains politics.[33] Thus, even if "in the end it is all politics",[34] no one can predict what form(s) that particular politics is going to take. But as new proposals percolate, and as competing interests and institutions continue to interact, new forms of transnational democratic deliberation and decision-making may yet emerge which are "not above, or autonomous from, deliberation within domestic polities, but deeply intertwined with the domestic and the local."[35]

We conclude, then, that there is immeasurable value in the *aspiration* of a peremptory obligation of transboundary EIA. We urge practitioners to continue to advocate on its behalf, including before the ICJ, in order to help usher in a new discursive and institutional sphere for international environmental law capable of establishing and enforcing an international human right to a healthy environment and an institutional architecture capable of addressing climate change. Indeed, not only is this peremptory obligation critical to vindicating Principle 21 of the 1972 Stockholm Declaration as the cornerstone of international environmental law, but it may well also be pivotal to the ultimate success of the UN Paris Agreement. Given the gross inadequacy of the climate change mitigation strategies proposed thus far by ratifying states,[36] the ultimate success of the Agreement may well depend on the ability of subnational and

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Tribunals (Toronto: University of Toronto Press), 81-154 at 146 [emphasis added].

31 *Ibid.*

32 *Ibid.*

33 Ruti G. Teitel, "Humanity's Law: Rule of Law for the New Global Politics" (2002) 35:2 *Cornell International Law Journal* 355.

34 Robert Howse, "From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime" (2002) 96 *American Journal of International Law* 94 at 117.

35 *Ibid.*

36 Joeri Rogelj *et al.*, "Paris Agreement climate proposals need a boost to keep warming well below 2 °C" (2016) 534 *Nature* 631.

transnational civil society actors to leverage emergent international environmental norms and practices – including transboundary EIAs[37] – to compel states to implement more stringent mitigation policies in line with the urgent public policy warnings of climate scientists.[38] The ultimate fate of this international environmental law obligation – myth versus reality – may well determine the fate of the international environment itself.

37 See e.g. Jason MacLean & Chris Tollefson, "Climate-Proofing Judicial Review of Environmental Assessment" (2017) 31 *Journal of Environmental Law and Practice* (*forthcoming*).

38 See e.g. Johan Rockström *et al.,* "A roadmap for rapid decarbonization: Emissions inevitably approach zero with a 'carbon law'" (2017) 335:6331 *Science* 1269; Joeri Rogelj *et al.,* "Differences between carbon budget estimates unraveled" (2016) 6 *Nature Climate Change* 245; James Hansen *et al.,* "Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modeling, and modern observations that 2 °C global warming could be dangerous" (2016) 16 *Atmospheric Chemistry & Physics* 3761 at 3801 (arguing that even "2 °C global warming is dangerous" and concluding that "we have a global emergency. Fossil fuel $C0_2$ emissions should be reduced as rapidly as possible").

ATTACHMENTS

DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT

The United Nations Conference on the Human Environment, having met at Stockholm from 5 to 16 June 1972, having considered the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment,

PROCLAIMS THAT:

1. Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.

2. The protection and improvement of the human environment is a major issue, which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

3. Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time, man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.

4. In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized countries should make efforts to reduce the gap themselves and the developing countries. In the industrialized countries, environmental problems are generally related to industrialization and technological development.

5. The natural growth of population continuously presents problems for the preservation of the environment, and adequate policies and measures should be adopted, as appropriate, to face these problems. Of all things in the world, people are the most precious. It is the people that propel social progress, create social wealth, develop science and technology and, through their hard work, continuously transform the human environment. Along with social progress and the advance of production, science and technology, the capability of man to improve the environment increases with each passing day.

6. A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference, we can do massive and irreversible harm to the earthly environment on which our life and wellbeing depend. Conversely, through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes. There are broad vistas for the enhancement of environmental quality and the creation of a good life. What is needed is an enthusiastic but calm state of mind and intense but orderly work. For the purpose of attaining freedom in the world of nature, man must use knowledge to build, in collaboration with nature, a better environment. To defend and improve the human environment for present and future generations has become an imperative goal for mankind-a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.

7. To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and

institutions at every level, all-sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future.

Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International cooperation is also needed in order to raise resources to support the developing countries in carrying out their responsibilities in this field. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest.

The Conference calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.

PRINCIPLES

States the common conviction that:

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.

PRINCIPLE 2

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

PRINCIPLE 3

The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.

PRINCIPLE 4

Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development.

PRINCIPLE 5

The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

PRINCIPLE 6

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported.

PRINCIPLE 7

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

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.

PRINCIPLE 9

Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.

PRINCIPLE 10

For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management, since economic factors as well as ecological processes must be taken into account.

PRINCIPLE 11

The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

PRINCIPLE 12

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate- from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.

PRINCIPLE 13

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to

ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

PRINCIPLE 14

Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.

PRINCIPLE 15

Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect, projects which are designed for colonialist and racist domination must be abandoned.

PRINCIPLE 16

Demographic policies which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the environment of the human environment and impede development.

PRINCIPLE 17

Appropriate national institutions must be entrusted with the task of planning, managing or controlling the 9 environmental resources of States with a view to enhancing environmental quality.

PRINCIPLE 18

Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind.

PRINCIPLE 19

Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is

essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminates information of an educational nature on the need to project and improve the environment in order to enable mal to develop in every respect.

PRINCIPLE 20

Scientific research and development in the context of environmental problems, both national and multinational, must be promoted in all countries, especially the developing countries. In this connection, the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries.

PRINCIPLE 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

PRINCIPLE 22

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

PRINCIPLE 23

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider

the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

PRINCIPLE 24

International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing.

Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way, that due account is taken of the sovereignty and interests of all States.

PRINCIPLE 25

States shall ensure that international organizations play a coordinated, efficient and dynamic role for the protection and improvement of the environment.

PRINCIPLE 26

Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.

THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

PREAMBLE

The United Nations Conference on Environment and Development, having met at Rio de Janeiro from 3 to 14 June 1992, reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it, with the goal of establishing a new and equitable global partnership through the creation of new levels of co-operation among States, key sectors of societies and people, working towards international agreements that respect the interests of all and protect the integrity of the global environmental and developmental system, recognizing the integral and interdependent nature of the Earth, our home,

PROCLAIMS THAT:

PRINCIPLE 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

PRINCIPLE 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

PRINCIPLE 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

PRINCIPLE 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

PRINCIPLE 5

All States and all people shall co-operate 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.

PRINCIPLE 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

PRINCIPLE 7

States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

PRINCIPLE 8

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.

PRINCIPLE 9

States should co-operate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

PRINCIPLE 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

PRINCIPLE 11

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

PRINCIPLE 12

States should co-operate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on

international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

PRINCIPLE 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

PRINCIPLE 14

States should effectively co-operate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

PRINCIPLE 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

PRINCIPLE 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

PRINCIPLE 17

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

PRINCIPLE 18

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

PRINCIPLE 19

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

PRINCIPLE 20

Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.

PRINCIPLE 21

The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.

PRINCIPLE 22

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

PRINCIPLE 23

The environment and natural resources of people under oppression, domination and occupation shall be protected.

PRINCIPLE 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary.

PRINCIPLE 25

Peace, development and environmental protection are interdependent and indivisible.

PRINCIPLE 26

States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

PRINCIPLE 27

States and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.