SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS: AN INTEGRATED CONCEPTION

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I. INTRODUCTION

THIS article seeks to present an integrated conception of sustainable development, with particular emphasis on the contribution of international human rights law and theory. Part II considers a structural conception of sustainable development. Part III considers parallels between sustainable development and self-determination. Part IV provides some general reflections on international environmental law and international human rights law in terms of analogous concepts, principles and systems. What similarities are there and what differences? Part V considers the progress made towards recognition of a "human right to the environment". Part VI considers how international environmental claims could be brought within the existing international human rights complaint systems. Part VII analyses the judgment of the European Court of Human Rights in the *Lopez Ostra* case (1994), the leading case on environmental claims to have reached that Court.

II. A STRUCTURAL CONCEPTION OF SUSTAINABLE DEVELOPMENT

WIDESPREAD use of the expression "sustainable development" generally dates from the Report of the World Commission on Environment and Development (WCED), *Our Common Future* (the Brundtland Report) of 1987. Its understanding of it was as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[1] Since 1987 sustainable development has rapidly become part of popular language and a range of intellectual disciplines.[2]

It is suggested that sustainable development can be structurally conceived as having a pillared, temple-like structure (see opposite).[3] The three pillars are composed of international environmental law,

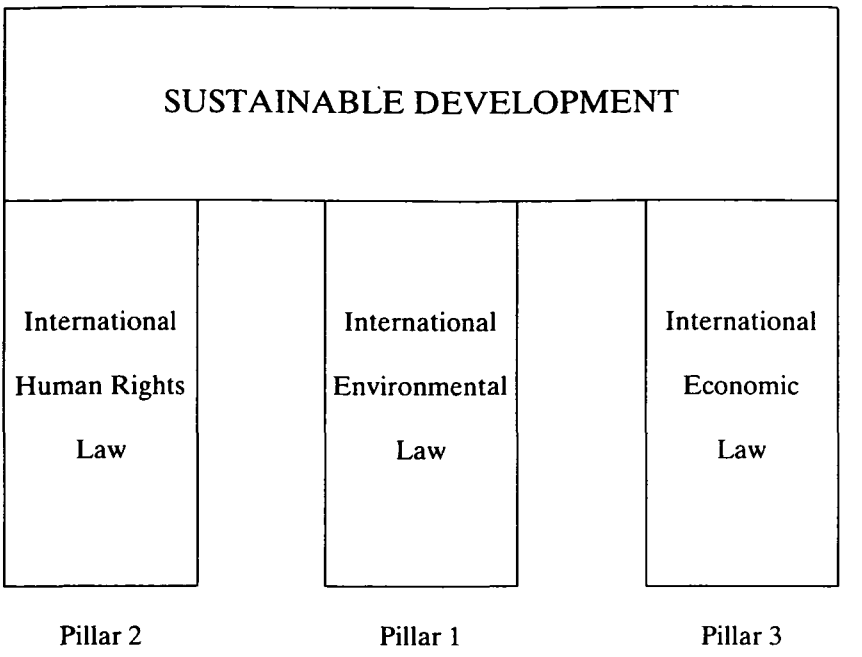
* Director, International and European Law Unit, University of Liverpool. Based on a seminar on "Sustainable Development and Human Rights" given for SOAS at the IALS on 13 Feb. 1996. I am grateful to Peter Davies for his comments on the first draft of this article, to Amazu Asouzu for comments on the final version and to Colin Warbrick for discussions on the *Lopez Ostra* case. Responsibility for the views expressed is mine alone.

1. WCED, *Our Common Future* (1987), p.43. See P. W. Birnie and A. E. Boyle, *International Law and the Environment* (1992), pp.433–435.

2. See D. Reid, *Sustainable Development: An Introductory Guide* (1996); J. Holmberg, S. Bass and L. Timberlake, *Defending the Future* (1991).

3. This may partly account for any mystical qualities it may appear to have.

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international human rights law and international economic law. The attractiveness of such a simple structure is that it presents sustainable development as integrating and interactive. It has elements of an objective,[4] a process and a principle.[5] It overarches a broad range of disciplines yet it is separate. The integrated structure of sustainable development is such that it requires support from each of the pillars. Its central pillar is international environmental law, a discipline of international law that has seen enormous growth in recent decades.[6] It is sometimes argued that some international environmental instruments deal with matters of common concern to mankind and are thus a reflection of sustainable

4. E.g. the Preamble to the Agreement Establishing the World Trade Organization refers to "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development", *GATT: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1994).

5. P. Sands, "International Law in the Field of Sustainable Development" (1994) 65 B.Y.I.L. 303, 305, asks which of these sustainable development is.

6. See P. Sands, *Principles of International Environmental Law*, Vol.I, (1995); Birnie and Boyle, *op. cit. supra* n.1. The Ksentini Report, *infra* n.36, at para.24, notes: "International environmental law has developed to such an extent that there are some 350 multilateral treaties, 1,000 bilateral treaties and a multitude of instruments of intergovernmental organizations that have been adopted in the form of declarations, programmes of action and resolutions."

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development, e.g. those on climate change[7] and biodiversity,[8] while others predominantly reflect environmental protection, e.g. forests.[9] However, even development of the latter has to be consistent with sustainable development.[10] The second pillar is international human rights law. Principle 1 of the UN Conference on Environment and Development's Rio Declaration stated that "human beings are at the centre of concern for sustainable development" and that they "are entitled to a healthy and productive life in harmony with nature".[11] Being at the "centre of concern" is not the same as being at the centre of the concept. Fortunately, the emergence of sustainable development has coincided with a broadly increasing consensus in international human rights, substantially assisted by the end of the Cold War.[12] The third pillar is international economic law, which has similarly seen substantial progress, consensus and rule generation,[13] most notably with the World Trade Organization and its 30 related agreements.[14]

Sustainable development appears to be "a seductively simple concept".[15] However, there are substantial controversies as to how to translate it into practice and develop standards and indicators to assess whether it is being achieved.[16] Sustainable development may differ depending on which of the pillars it is being considered from, which half of the world it is being considered from[17] or which gender it is impacting

7. UN Framework Convention on Climate Change (1992) 31 I.L.M. 849; reprinted in P. Sands, R. G. Tarasofsky and M. Weiss, *Documents in International Environmental Law*, Vol.IIA (1995), p.248.

8. Convention on Biological Diversity (1992) 31 I.L.M. 822; reprinted in *idem*, p.845. See C. Redgwell and M. Bowman (Eds), *International Law and the Conservation of Biological Diversity* (1996).

9. See the "Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests" (1992), UN Doc.A/CONF.151/6/Rev.1; reprinted in Sands *et al.*, *idem*, p.874.

10. Statement, *idem*, Principle 2(a).

11. See also the Stockholm Declaration (1972), Principle 1.

12. See D. McGoldrick, "A New International Economic Order for Europe?" (1992) 12 Y.E.L. 433. This is not to underestimate the difficulties of implementation that remain.

13. See R. Higgins, *Problems and Process—International Law and How We Use It* (1995), chap.8: "Natural Resources and International Norms".

14. See A. Qureshi, *The World Trade Organisation* (1996).

15. Birnie and Boyle, *op. cit. supra* n.1 at p.5; S. M. Lele, "Sustainable Development: A Critical Review" (1991) 19(6) World Development 607.

16. See M. Redclift, *Sustainable Development: Exploring the Contradictions* (1989), esp. chap.2; O. Kuik and H. Verbruggen, *In Search of Indicators of Sustainable Development* (1991); Y. J. Ahmad, S. El Sarafy and E. Lutz (Eds), *Environmental Accounting for Sustainable Development* (1989).

17. See M. Redclift, "Reflections on the 'Sustainable Development' Debate" (1989) 1 Int.J. Sustainable Development and World Ecology 3; M. Redclift and C. Sage, *Strategies for Sustainable Development: Local Agendas for the Southern Hemisphere* (1994); J. A. Elliot, *An Introduction to Sustainable Development: the Developing World* (1994); R. Jayakumar Nayar and D. M. Ong, "Developing Countries, 'Development' and the Conservation of Biological Diversity", in Redgwell and Bowman, *op. cit. supra* n.8, at pp.235–253; *Global Conference on the Sustainable Development of Small Island Developing States* (1994), UN

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upon.[18] Considerable care has to be taken to distinguish whether claimants are asserting different criteria for assessment or simply differing in their assessment of sustainable development. In legal terms sustainable development is reflected in international law,[19] EC law and EU law,[20] and in national law and practice.[21]

There are various developments in international law which reflect an integrated approach to sustainable development.[22] A World Charter for Nature was adopted in 1982.[23] Principle 4 of the Rio Declaration states that "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". This is a key principle. Environmental matters are not on the outside of economic and development law but at its core. Sustainable development has become a central part of economic and environmental thinking at all levels. Environmental economics have become a central part of economic studies.[24] Agreed rules are being sought for when trade rules and environmental standards, and perhaps also human rights rules,[25] come into con-

Doc.A/CONF.167/4; S. J. M. Bass, "Ecology and Economics in Small Islands: Constituting a Framework for Sustainable Development", in Barbier, *op. cit. infra* n.24, at pp.156–176.

18. See W. Harcourt (Ed.), *Feminist Perspectives on Sustainable Development* (1994); S. Joekes *et al.*, "Gender, Environment and Population", in D. Ghai (Ed.), *Development and Economics: Sustaining People and Nature* (1994).

19. See Sands, *op. cit. supra* n.5; Birnie and Boyle, *op. cit. supra* n.1, at pp.3–6, 122–124; W. Lang (Ed.), *Sustainable Development and International Law* (1995).

20. See Art.B of the Treaty on European Union; Declaration No.20 to the TEU; Art.130u EC. The EC's Fifth Action Programme on the Environment for the period 1992–2000 is entitled *Towards Sustainability*: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, [1993] OJ C138/1. For a Progress Report on the Programme by the European Commission see COM(95)624, 10 Jan. 1996. The Commission has also proposed a European Parliament and Council Decision on review of the Programme, COM(95)647, 24 Jan. 1996.

21. Birnie and Boyle, *op. cit. supra* n.1, at p.122, n.211; see *Sustainable Development: The UK Strategy* (Cm.2426, 1994); *UK Strategy for Sustainable Development: A Consultation Paper* (1993); British Government Panel on Sustainable Development, 1st Report (Dept of Environment 1995); HL Select Committee on Sustainable Development, HL Paper 72, Session 1994–95, Vol.I.

22. See D. McGoldrick, "From the New International Economic Order to the Agenda for Development", in BIICL, *Essays on Privatisation* (1996).

23. GA Res.37/7.

24. See C. Tisdell, *Environmental Economics: Policies for Environmental Management and Sustainable Development* (1993), chap.1; F. Cairncross, *Costing the Earth* (1991); E. B. Barbier (Ed.), *Economics and Ecology: New Frontiers of Sustainable Development* (1993); D. W. Pearce and J. J. Warford, *World Without End: Economics, Environment and Sustainable Development* (1993).

25. See C. Barnard, "The External Dimension of Community Social Policy: The Ugly Duckling of External Relations", in D. O'Keeffe and N. Emiliou (Eds), *The European Union and World Trade Law* (1996), pp.149–164; S. Charnovitz, "The World Trade Organization and Social Issues" (1994) 28(5) J.W.T. 17. *The Times*, 20 May 1996, p.37, reports that the OECD was to adopt a report on trade and social issues. In July 1996 the European Commission adopted a Communication which suggested that the WTO should establish a working party on labour standards.

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flict.[26] The World Trade Organization is likely to have an important role in focusing on the trade-related aspects of the environment.[27] The UN Secretary-General's *Agenda for Development*,[28] with its "new vision" of development, follows the integrated approach through its "five dimensions of development": peace as the foundation, the economy as the engine of growth, the environment as the basis for sustainability, justice as a pillar of society, and democracy as good governance.[29] Developments within the Organisation for Security and Cooperation in Europe, integrating human rights and market economics, have been important because it is a forum for essentially the northern half of the world.[30] The establishment and operation of the European Bank for Reconstruction and Development (1990) was significant because it integrated the objectives of multiparty democracy, the rule of law, market economics and promoting environmentally sound and sustainable development as part of its "sound banking principles".[31] The European Community has wrestled with making an original economic and trade system incorporate environmental standards[32] and human rights standards within the EC Treaty and through the jurisprudence of the European Court of Justice.[33] Similarly, the Community's policy on "Development Cooperation" "shall contribute to the general objective of developing and consolidating democracy and the rule of law, and that of respecting human rights and fundamental freedoms".[34] In the 1990s human rights and democracy clauses have increasingly been included in the Community's expanding array of international agreements.[35] Finally, the most recent reflections of the integrated approach are the Final Report, *Human Rights and the Environment*, by Mrs Ksentini, the Special Rapporteur of the UN Sub-Commission on Prevention of Dis-

26. See E. Brown Weiss, "Environment and Free Trade as Partners in Sustainable Development" (1992) 86 A.J.I.L. 728; T. J. Schoenbaum, "Free International Trade and Protection of the Environment: Irreconcilable Conflict" (1992) 86 A.J.I.L. 700; P. Umoner, "Trade Rules and Environmental Controversies During the Uruguay Round and Beyond" (1995) 18(1) World Economy 71; Sands, *op. cit. supra* n.6, at chap.18.

27. See Qureshi, *op. cit. supra* n.14, at pp.4 and 12; B. Kingsbury, "The Tuna–Dolphin Controversy, the WTO and the Liberal Project to Reconceptualize International Law" (1994) 5 Y.I.E.L. 1.

28. UN, New York (1995).

29. See K. Ginther, E. Denters and P. J. I. M. De Waart (Eds), *Sustainable Developments and Good Governance* (1995).

30. See McGoldrick, *op. cit. supra* n.12.

31. *Ibid.*

32. See the excellent essay by M. Hession and R. Macrory, "Balancing Trade Freedom with the Requirements of Sustainable Development", in O'Keeffe and Emiliou, *op. cit. supra* n.25, at pp.181–217.

33. See S. Weatherill, *Law and Integration in the European Union* (1995).

34. Art.130u(2). See I. Macleod, I. D. Hendry and S. Hyett, *The External Relations of the European Communities* (1996), chap.18.

35. See M. Cremona, "Human Rights and Democracy Clauses in the EC's Trade Agreements", in O'Keeffe and Emiliou, *op. cit. supra* n.25, at pp.62–77.

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crimination and Protection of Minorities (the Ksentini Report),[36] the Report of the Commission on Global Governance, *Our Global Neighbourhood*,[37] and the Draft International Covenant on Environment and Development (hereafter "the Draft Covenant").[38]

Economic growth based on sustainable development is thus close to universal acceptance. However, some limitations and concerns must be noted. There seems to be no ideological or practical retreat from the prerequisite of "economic growth".[39] A rate of population growth of 100 million per year generates additional environmental damage and consumption and thus may largely eradicate any environmental achievements made.[40]

If this structural analysis is broadly helpful to understanding sustainable development, there is a sense in which anything which improves implementation and effectiveness within any of the pillars is a contribution towards sustainable development. It is likely to be more within the pillars that sustainable development is turned into an operable concept rather than being applied as a separable concept.

III. PARALLELS BETWEEN SUSTAINABLE DEVELOPMENT AND SELF-DETERMINATION

SELF-DETERMINATION is perhaps the closest analogous concept in international human rights law to sustainable development. Both are continuing rights. Sustainable development may well follow the jurisprudential struggle of self-determination.[41] The latter began as a political principle which was translated into a legal principle, then on into a legal right and then, arguably, into the status of *jus cogens*.[42] The last proposition is more doubtful. It is more likely that certain elements of self-determination have reached the stage of *jus cogens*. Moreover, the practical application of self-determination in international law has been much more conservative than the potency of its political force would suggest. The same may prove

36. Mrs F. M. Ksentini, *Human Rights and the Environment*, Final Report, UN Doc.E.CN.4/Sub.2/1994/9 (6 July 1994). See A. F. Aguilar and N. A. F. Popovis, "Lawmaking in the United Nations: The UN Study on Human Rights and the Environment" (1994) 3(4) R.E.C.I.E.L. 197.

37. (OUP, 1995.)

38. IUCN's Commission for Environment Law, International Council for the Environment (1995); see also "Report of a Consultation on Sustainable Development: The Challenge to International Law" (1993) 2(4) R.E.C.I.E.L.

39. See A. E. Boyle (Ed), *Environmental Regulation and Economic Growth* (1994).

40. See P. Harrison, *The Third Revolution: Population, Environment and a Sustainable World* (1993); P. Sarre and J. Blunden (Eds), *An Overcrowded World?—Population, Resources and the Environment* (1995).

41. See G. Handl, "Environmental Security and Global Change: the Challenge to International Law" (1991) 1 Y.I.E.L. 3, 22.

42. See A. Cassese, *Self-Determination of Peoples—A Legal Reappraisal* (1995); M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 I.C.L.Q. 241.

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true for sustainable development. Sustainable development has made some normative progress, most probably to that of a legal principle. However, contemporary assessments of the normative status of sustainable development are generally cautious. Birnie and Boyle take the view that "it cannot yet be said to be a norm of international law".[43] However, they also recognise "the widespread international endorsement of sustainable development as the central concept of international environmental law", and that:[44]

> it is clear that few states would quarrel with the proposition that development should be sustainable and that all natural resources should in principle be managed in this way. This evidence, coupled with indications of supporting State practice, might be sufficient to crystallise the *opinio juris* into a normative standard of international law, or even into a peremptory norm of international law.

Sands takes the view that:[45]

> the concept of "sustainable development" is now established in international law, even if its meaning and effect are uncertain. It is a legal term which refers to processes, principles and objectives, as well as to a large body of international agreements on environment, economics and civil and political rights.

Within the specific context of EC law, and taking account of future generations, Kramer comments: "Whether any legal consequence can be drawn from the notion of sustainable development, is more doubtful."[46] The WCED set out sustainable development as a policy/concept.[47] To some extent these differences are simply ones of jurisprudential appreciation. Divergent views were also taken on the normativity of self-determination as it developed.[48] If the normative process for sustainable development continues in the same way as self-determination then various aspects of it will develop, and may well already have developed, into more specific legal rules.[49] So, for example, in the structure above there are aspects of environmental law, human rights law and international economic law that are legal principles or rules and some of which may have the status of *jus cogens*. In the same way that self-determination is essentially a territorial

43. Birnie and Boyle, *op. cit. supra* n.1, at p.5.
44. *Idem*, p.123. See also Handl, *op. cit. supra* n.41.
45. Sands, *op. cit. supra* n.5, at p.379.
46. L. Kramer, *EC Treaty and Environmental Law* (2nd edn, 1995), para.2.34.
47. See *op. cit. supra* n.1.
48. See D. McGoldrick, *The Human Rights Committee* (1991), pp.14–16.
49. Important milestones in the normative development of self-determination were its inclusion as Art.1 of both the International Covenants on Human Rights (1966), a series of important GA resolutions, in particular Res.1514(1960) and 2625(1970), and in the Helsinki Final Act (1975).

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principle to which a human rights mantle has been added,[50] so sustainable development may evolve as essentially an environmental principle supported by aspects of international human rights law and international economic law.

The danger which sustainable development faces is that which self-determination is currently facing. Self-determination has become so controversial, so value-laden and so open to abuse by political forces and claimant groups that it is struggling to cope with the demands placed upon it.[51] If that were not enough, it is pressed into use as the way to resolve the increasing number of ethnic group and minority problems the world faces.[52] If sustainable development is to avoid the same fate, it is the more specific international law principles and rules that lie within the three pillars that must develop and evolve to meet new challenges and situations.

IV. PARALLELS BETWEEN INTERNATIONAL ENVIRONMENTAL LAW/ SUSTAINABLE DEVELOPMENT AND INTERNATIONAL HUMAN RIGHTS LAW

A. Some General Parallels

The parallels are striking in many ways. Sustainable development has been described as a "concept whose time had come".[53] The same expression was used by Louis Henkin in relation to human rights.[54] Developments in international environmental law appear "revolutionary" until, on reflection, it is explained that they are evolutionary.[55] The same path has been followed by international human rights law. Gross violations of human rights and humanitarian law have been characterised by Security Council resolutions as threats to international peace and security for the purposes of Chapter VII of the UN Charter. In a statement by the President of the Security Council adopted after a meeting at the Head of State level, the Security Council asserted that "The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace."[56] One area where international human rights law and environmental law may differ is in the application of the rules of State responsibility.[57] The former appears to sit fairly within the general

50. See Higgins, *op. cit. supra* n.13, at chap.7. Cf. R. McCorquodale, "Self-Determination: A Human Rights Approach" (1994) 43 I.C.L.Q. 857.

51. For claims and claimants to sustainable development see *supra* nn.17–21.

52. See Cassese, *op. cit. supra* n.42, esp. at chap.12.

53. Redclift, *loc. cit. supra* n.17.

54. The literary reference is Victor Hugo's: "nothing is more powerful than an idea whose time has come".

55. See Sands, *op. cit. supra* n.5, at pp.378–379.

56. See UN Doc.S/23500, 31 Jan. 1992, repr. in the UN Secretary-General's *Agenda for Peace* (2nd edn, 1995), p.115; Ksentini Report, *supra* n.36, at paras.111–116.

57. See e.g. T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).

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rules but, at least in the work of the International Law Commission, the approach has been different, if rather unconvincing.[58]

At the most general level of analysis, international environmental law shares with international human rights law the characteristic that it interpenetrates the whole of the international law discipline.[59] You need to be a good general international lawyer to be a good environmental or human rights lawyer. The two advisory opinions before the International Court of Justice on nuclear weapons may be centred on humanitarian law but they were also argued to raise issues of human rights law and environmental law.[60] Human rights law has become increasingly concerned with its impact on women[61] and on indigenous peoples.[62] The same is true for international environmental law.[63] Both human rights law and environmental law have penetrated into international humanitarian law.[64]

B. Implementing Sustainable Development at Local and National Levels

The practicalities of implementing environmental law are often much the same as for human rights, e.g. local and national regulatory frameworks, administrative machinery, protection agencies, training, education, remedies systems. In addition, what is considered as "environmental law" is not self-contained but covers an array of legal sources and branches of law. National constitutional rights can be widely interpreted to provide environmental protection.[65] One element of the modern understanding of

58. See A. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?" (1990) 39 I.C.L.Q. 1.

59. See O. Schachter, *International Law in Theory and Practice* (1991).

60. See text accompanying *infra* nn.92–99. The establishment by the ICJ of an environment chamber is unhelpful in the sense that it implies that environmental law remains marginalised from general international law.

61. See Ksentini Report, *supra* n.36, at paras.45, 138–143. Note also the concept of gender auditing of laws and policies: World Declaration on Human Rights (1993), pr.42. Cf. in the economic sphere, F. Beveridge and S. Nott, "Gender Auditing—Making the Community Work for Women", in T. Harvey and D. O'Keeffe (Eds), *Sex Equality in EC Law* (1996), pp.382–398; see also *supra* n.18.

62. See Ksentini Report, *idem*, paras.74–94; Draft UN Declaration on the Rights of Indigenous Peoples, UN Doc.E/CN.4/1995/2 and E/CN.4/1994/56.

63. See e.g. Art.8(j) of the Biodiversity Convention, *supra* n.8; J. Woodliffe, "Biodiversity and Indigenous Peoples", in Redgwell and Bowman, *op. cit. supra* n.8, at pp.255–269; A. Fabra, "Indigenous Peoples, Environmental Degradation and Human Rights: A Case Study", in M. Anderson and A. E. Boyle (Eds), *Human Rights Approaches to Environmental Protection* (1996), 245; Symposium, "Endangered Peoples: Indigenous Rights and the Environment", (1994) 5 Co.J.I.E.L.P. 23.

64. See Ksentini Report, *supra* n.36, at paras.95–110; A. P. V. Rogers, *Law of the Battlefield* (1996), chap.6.

65. See M. R. Anderson, "Individual Rights to Environmental Protection in India", in Anderson and Boyle, *op. cit. supra* n.63, at 199; T. Allen, "Commonwealth Constitutions and Implied Social and Economic Rights", (1994) 6 A.J.I.C.L. 555.

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sustainable development that is reflected in international environmental law is the right to participate in decision-making related to the environment. The UN Conference on Environment and Development was quite strong on this aspect. Agenda 21 stated that "one of the fundamental prerequisites for the achievement of Sustainable Development is broad public participation in decision-making".[66] A key part of effective participation is access to environmental information.[67] One can see the parallel here with the emergence of the arguments for participatory rights as part of internal self-determination.[68] These are participatory rights in general but they apply in particular to minorities and indigenous peoples.[69]

As for remedies, the increased public recognition of and concern with the environment have led to movement in national complaint systems. Principle 10 of the Rio Declaration and Agenda 21 give some support for individual enforcement of laws and obligations before courts and tribunals.[70] However, the wording is, perhaps necessarily, limited. Agenda 21 states that judicial and administrative procedures should be established "for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organisations with a recognised legal interest". However, if there are relatively strict rules on what constitutes a "recognised legal interest" for the purposes of judicial review at national, European and international levels, this does not necessarily amount to very much. The success of public interest litigation is enormously varied between States.[71] In the United Kingdom there has been some notable movement on the scope of legal interests. For example, there is a greater willingness to grant organisations and groups *locus standi* to bring environment-related claims.[72]

66. Agenda 21, para.23.2. See D. P. Ghai, and J. M. Vivian (Eds), *Grassroots Environmental Action: People's Participation in Sustainable Development* (1992); A. Tolentino, "Good Governance Through Popular Participation in Sustainable Development", chap.9 in Ginther *et al.*, *op. cit. supra* n.29.

67. See e.g. S. Ball and S. Bell, *Environmental Law* (3rd edn, 1995), chap.7. On access to information in the context of environmental accidents or emergencies see L. Schwarz, "International Legal Protection for Victims of Environmental Abuse" (1993) 18 Yale J.I.L. 373.

68. See e.g. P. Thornberry, "The Principle of Self-Determination", in V. Lowe and C. Warbrick (Eds), *The United Nations and the Principles of International Law* (1994), pp.175–203.

69. See the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992) esp. Arts.2 and 5; Draft Declaration on the Rights of Indigenous Peoples, *supra* n.62, Arts.4, 19–20.

70. Agenda 21, para.27.13. Various of the WTO agreements also establish obligations to provide for domestic court proceedings as a remedy.

71. See e.g. M. Lau, "Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan", in Anderson and Boyle, *op. cit. supra*, n.63, at 285.

72. See e.g. Ball and Bell, *op. cit. supra* n.67, at pp.32–34; C. Hilson and I. Cram, "Judicial

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Another progressive technique of environmental law that is now widespread is that of environmental impact assessments.[73] These are intended to provide a systematic environmental analysis, based on a wide range of information, which is then fed into the decision-making process. Environmental impact assessments have no formal equivalent in international human rights law. In practice there are often problems in terms of their quality, objectivity, methodology and consistency.[74] Human rights criteria may be expressly built into banking principles, as with the European Bank for Reconstruction and Development, or form part of the operational directives of international financial institutions, as with the World Bank. However, it remains a curious and significant omission that the European Bank and the international financial institutions do not have to undertake formal human rights impact assessments or publish annual reports on the human rights consequences of their lending policies.[75]

The role of national and international non-governmental organisations (NGOs) has been critically important for both international environmental law and international human rights law. Environmental political parties have been established at national and EC levels. NGOs use a wide variety of techniques, including protest, exposure, shaming, campaigning, monitoring, supervision, lobbying.[76] There are estimated to be around 25,000 NGOs on environmental issues.[77] Increasingly, both sets of NGO communities are co-ordinating their resources and their output. The involvement of NGOs is an aspect of the participatory rights and the issue of legal interest to bring environmental claims referred to above.

C. Implementing Sustainable Development at Regional and International Levels

Again a great range of techniques exist. These include inspection, independent monitoring, non-compliance mechanisms, the range of NGO activities, environmental impact assessments, institutional supervision and monitoring, and dispute settlement techniques.[78] A common element

Review and Environmental Law—Is There a Coherent View of Standing" (1996) 16 Legal Studies 1; *R.* v. *Poole BC, ex p. Beebee* [1991] J.P.L. 643; *R.* v. *Her Majesty's Inspectorate of Pollution, ex p. Greenpeace Ltd (No.2)* [1994] 4 All E.R. 329; *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement* [1995] 1 All E.R. 611.

73. See Sands, *op. cit. supra* n.6, at pp.579–594; A. Gilpin, *Environmental Impact Assessment* (1995).

74. See e.g. Ball and Bell, *op. cit. supra* n.67, at chap.10.

75. The structural adjustment programmes of the World Bank have attracted severe criticism for their effect on human rights.

76. See H. J. Steiner and P. Alston, *International Human Rights in Context* (1996), pp.456–499.

77. E. Childers and B. Urquhart, "We, The Peoples", in *Renewing the UN System* (1994), p.172.

78. See Birnie and Boyle, *op. cit. supra* n.1, at chap.4; Sands, *op. cit. supra* n.6, at chaps.4–5,

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of regional and international environment implementation is some kind of reporting system.[79] This is borrowed directly from international human rights law.[80] What seems to have been largely overlooked at the international level is that the reporting system in international human rights law faces a substantial credibility crisis.[81] State reports are inadequate and hundreds of them are overdue, the monitoring bodies cannot cope, they are under-resourced and under-financed, secretariat assistance is inadequate.[82] Even developed States struggle to cope with the reporting demands on them. Developing countries are often overwhelmed.[83] The Climate Change Convention (1992) makes some attempt to recognise these difficulties, including providing developing countries with financial resources to meet the costs of complying with their reporting obligations.[84] The Draft Covenant provides for a reporting system under which parties "undertake to submit periodic reports on the measures they have adopted, progress made, and difficulties encountered in implementing their obligations under this Covenant".[85] The reports are to be submitted to the United Nations' ECOSOC, a body whose role in the international human rights reporting system has been described as merely being a post-box.[86] Significantly, the Draft Covenant does not propose any form of individual petition system.

EC law has become an important source of environmental rights and remedies.[87] Although no provision of EC environmental law has yet been held to be of direct effect, environmental claims are increasingly being argued before the EC courts. A major limitation is the restriction on *locus standi* in Article 173 of the EC Treaty, which is strictly interpreted by the European Court.[88] A substantial number of directives require member States to report on their implementation. Recognition of the inadequacy

15–19; J. Cameron, J. Werksman and P. Roderick, *Improving Compliance with International Environmental Law* (1996); Symposium, "Compliance with International Standards: Environmental Case Studies" (1995) 82 Proc.A.S.I.L. 206.

79. See Sands, *idem*, pp.600–605.

80. See P. Alston (Ed.), *The United Nations and Human Rights—A Critical Appraisal* (1992); McGoldrick, *op. cit. supra* n.48, at chap.3.

81. See A. F. Bayefsky, "Making Human Rights Treaties Work", in L. Henkin and J. L. Hargrove (Eds), *Human Rights: An Agenda for the Next Century* (1994), pp.229–295.

82. Interestingly, secretariats of international environmental institutions tend to be better financed than those in human rights institutions.

83. The UN has published manuals to assist States in compiling their national reports on human rights.

84. Climate Change Convention, Art.4(3). See also Biodiversity Convention, Art.20.

85. Art.60. See also Art.61 on "Compliance and Dispute Avoidance" and Art.62 on "Settlement of Disputes".

86. See also D. O'Donovan, "The ECOSOC", in Alston, *op. cit. supra* n.80, at pp.107–125.

87. See S. Douglas-Scott, "Environmental Rights in the European Union: Participatory Rights or Democratic Deficit", in Anderson and Boyle, *op. cit. supra* n.63, at 109.

88. See Case T-585/93, *Stichting Greenpeace and Others* v. *Commission* [1995] E.C.R. II-2205. See also the strict application of the rules for *locus standi* under the EAEC Treaty in the application for interim relief seeking the suspension of the operation of a Commission

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of the reports submitted led to the passing of EC Directive 91/692 on the standardisation and rationalisation of environmental reports.[89] It is also worth drawing attention to the establishment of the European Environment Agency.[90]

A substantial number of environment-related claims has also been brought under the European Convention on Human Rights system.[91]

At the international level, in September 1995 the International Court of Justice dismissed a request by New Zealand for an "examination of the situation" in accordance with paragraph 63 of the Court's 1974 judgment in the *Nuclear Tests Case (New Zealand* v. *France)* on the basis that it did not fall within that paragraph.[92] The Court's opinion makes no reference to any factors that would affect *locus standi* in the particular circumstances of that request or more generally in environmental cases. A number of the judges argued for a wider approach or commented on the devastating effect of nuclear weapons.[93] In July 1996 the Court dealt with two requests for advisory opinions, which were heard together. The first was a request from the World Health Organisation (WHO) concerning the legality of the use by a State of nuclear weapons in armed conflict. The second was from the General Assembly concerning the legality of the threat or use of nuclear weapons. Written statements were filed by the WHO and by 28 States. Oral submissions were made by the WHO and 22 States.

In the first Opinion, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*,[94] the ICJ, by eleven votes to three, took the view that: [95]

> the request submitted by the WHO does not relate to a question which arises "within the scope of [the] activities" of the Organization in accordance with Article 96, paragraph 2, of the Charter.

Accordingly, the ICJ found that an essential condition of founding its jurisdiction was absent and so it could not give the Opinion requested. However, the ICJ did give an Opinion, *Legality of the Threat or Use of Nuclear*

decision regarding nuclear tests by France in the South Pacific: Case T-219/95R, *M.-T. Danielsson and Others* v. *Commission* (22 Dec. 1995, not yet rep.).

89. (1991) O.J. L377/48; see Kramer, *op. cit. supra* n.46, at p.25.

90. See P. G. G. Davies, "The European Environment Agency" (1994) 14 E.L.Rev. 313.

91. See *infra* Part VI.

92. New Zealand's request for an examination of the situation in accordance with para.63 of the Court's 1974 judgment in the *Nuclear Tests Case (New Zealand* v. *France)*, Order of the Court, I.C.J. Rep. 1995, 288. See also M. Craven (1996) 45 I.C.L.Q. 725.

93. See the declaration of Judge Oda, the separate opinion of Judge Shahabuddeen and the dissenting opinions of Judges Weeramantry and Koroma and *ad hoc* Judge Palmer.

94. I.C.J. Rep. (1996), 8 July 1996, General List No.93.

95. *Ibid*, pr.31.

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Weapons,[96] if rather a mixed and confusing one, in response to the request from the General Assembly. In the context of this article it is interesting to note that the ICJ devoted considerably more attention, and gave greater weight to, applicable environmental law rather than applicable human rights law.[97] Thus: [98]

> while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

In contrast: [99]

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

The experience of international human rights implementation has clearly shown that establishing committees of independent experts is the way to create credible monitoring systems.[100] By contrast, international environmental systems have increasingly created inter-governmental "conferences of the parties" or "commissions" with implementation and monitoring functions.[101] The usual explanation for this lack of independence is that "most environmental commissions have a responsibility for the development of regulatory standards and the adoption of further measures".[102] They thus require appropriate negotiating authority. This does not seem overly convincing. The necessity for monitoring and supervision by bodies of independent experts in the field of international human rights law was evidenced by the weak record of bodies like the UN Human Rights Commission which mixed the monitoring and negotiation functions.[103] Within the Council of Europe system the tasks of supervision have largely been kept separate. The original role of the Committee of Ministers of the Council of Europe in assessing breaches of the European Convention on Human Rights will be reduced by Protocol 11.[104]

96. I.C.J. Rep. (1996), 8 July 1996, General List No.95.
97. *Ibid*, prs.24–6 on human rights and prs.27–33 on the environment.
98. *Ibid*, pr.33.
99. *Ibid*, pr.25.
100. See Alston, *op. cit. supra* n.80.
101. See e.g. Art.23 of the Biodiversity Convention; A. Boyle, "The Rio Convention on Biological Diversity", in Redgwell and Bowman, *op. cit. supra* n.8, pp.33–49, at pp.47–48.
102. Birnie and Boyle, *op. cit. supra* n.1, at pp.165–166.
103. See P. Alston, "The UN Commission on Human Rights", in Alston, *op. cit. supra* n.80, at pp.126–210.
104. See D. J. Harris, M. O'Boyle and C. Warbrick, *The Law of the European Convention on Human Rights* (1995), pp.706–14. See also Protocol 10.

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Another striking feature of recent developments in international environmental law has been the express linkage between the effective implementation of environmental commitments by developing countries and of commitments to financial resources and technology transfer by developed States. The Biodiversity Convention is a good example of this, although there are already problems concerning the meaning of the important concept of "incremental costs".[105] Although international human rights law acknowledges some of the difficulties faced by developing countries and the role of international assistance, it does not provide for this explicit conditionality.[106]

It was hoped by some that the World Conference on Human Rights in 1993 would make some move toward the establishment of some kind of super-committee for human rights. The best practices could be followed and the system could be properly financed and supported. However, no move in this direction was made.[107] It is symptomatic of its high political credibility that inter-governmental environmental bodies are generally better staffed. However, as new environmental instruments are agreed some kind of rationalisation of international implementation bodies should be considered. An environmental super-committee of some kind could be established. The UN Commission on Sustainable Development, with an enhanced role for the High-Level Advisory Board established in accordance with General Assembly Resolution 47/191, might be an initial model.[108] Such a body could provide the kind of integrated analysis that, as was suggested in Part II, has developed in international law doctrine.

V. INTEGRATING INTERNATIONAL ENVIRONMENTAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: A HUMAN RIGHT TO THE ENVIRONMENT?

THE most advanced form of integration can be found in the assertion of a right or a human right to environment.[109] The matter was considered in some detail in the Ksentini Report.[110] The right can be found in more than 50 national constitutions, the most recent example being that of South Africa.[111] In international human rights instruments, however, it has made

105. See Art.20(4) of the Biodiversity Convention; S. Johnston, "Financial Aid, Biodiversity and International Law", in Redgwell and Bowman, *op. cit. supra* n.8, at pp.271–288; Sands, *op. cit. supra* n.6, at pp.374–377.

106. See e.g. Art.2 of the International Covenant on Economic Social and Cultural Rights, on which see M. Craven, *The International Covenant on Economic Social and Cultural Rights* (1995), pp.106–152, esp. 144–150.

107. See the World Declaration on Human Rights (Vienna) 1993, esp. paras.87–89.

108. See Sands, *op. cit. supra* n.6, at pp.74–76; F. Dodd and T. Bigg, *The UN Commission on Sustainable Development: Three Years Since the Rio Summit* (1995).

109. Ksentini Report, *supra* n.36.

110. *Ibid*; Boyle, *op. cit. infra* n.114.

111. See Ksentini Report, *idem*, Annex III; J. Glazewski, "Environmental Rights and the New South African Constitution", in Anderson and Boyle, *op. cit. supra* n.63, at 177.

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only a limited appearance.[112] It is clearly stated in Article 24 of the African Charter on Human and Peoples' Rights (1981) and in Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988). It appears in a more limited form in Article 24 of the Convention on the Rights of the Child (1989) and in an even more indirect form in various articles of the ILO Convention Concerning Indigenous Peoples in Independent Countries (1989).[113]

The asserted right has been controversial for a number of reasons.[114] First, a "rights-based" approach, with all its intellectual and philosophical baggage, is neither appropriate nor helpful.[115] Environmental law pursues objectives similar to but different from human rights law.[116] Second, a "human rights-based" approach is excessively individualistic and anthropocentric and does not properly reflect the intrinsic value of the environment.[117] It is better to concentrate on duties, standards and enforcement. Third, in various respects it is indeterminable. What qualitative level of environment is guaranteed—safe, healthy, decent, satisfactory?[118] Upon whom, if anyone, does the right place corollary obligations?[119] Could it impose obligations on individuals or other private actors?[120] Within which "generation" of human rights does it fall? Is it within "civil and political" rights, "economic, social and cultural" rights or is it a "solidarity right"? The answer may partly resolve issues of the immediacy or otherwise of the

112. See R. Churchill, "Environmental Rights in Existing Human Rights Treaties", in Anderson and Boyle, *idem*, 89.

113. See Arts.4(1), 7(3), (4) and 23.

114. See essays by M. R. Anderson, "Human Rights Approaches to Environmental Protection: An Overview"; J. Merrills, "Environmental Protection and Human Rights: Conceptual Aspects"; and A. Boyle, "The Role of International Human Rights Law in the Protection of the Human Environment", all in Anderson and Boyle, *op. cit. supra* n.63, at pp.1, 25, and 43 respectively; D. Shelton, "Human Rights, Environmental Rights and the Right to the Environment" (1991) 28 Stanford J.I.L. 103; Symposium, "Environment, Economic Development and Human Rights: A Triangular Relationship?" (1988) Proc.A.S.I.L. 40. Similar comments could be made about the asserted human right to development.

115. See S. Douglas-Scott, "Environmental Rights: Taking the Environment Seriously", in C. Gearty and A. Tomkins, *Understanding Human Rights* (1996), pp.423–451, who concludes, at p.448: "The best way to take the environment seriously is not to accord it rights."

116. See Shelton, *op. cit. supra* n.114; A. C. Kiss and D. Shelton, *International Environmental Law* (1991); T. Allen, "National Perspectives on the Environment and Fundamental Rights", (1994) 6 A.S.I.C.L. Proc. 151.

117. See C. Redgwell, "Life, the Universe and Everything: A Critique of Anthropocentric Rights", in Anderson and Boyle, *op. cit. supra* n.63, at 71.

118. See I. Hodkova, "Is There a Right to a Healthy Environment in the International Legal Order?" (1991) 7 Conn. J.I.L. 65; J. Nickel, "The Human Right to a Safe Environment" (1993) 18 Yale J.I.L. 281.

119. See P. W. Gormley, "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms" (1990) 3 Geo.Int.Envt.L.R. 85.

120. On the possible danger of too extended a conception of the importance of the environment see M. Kloepfer, "An Authoritarian Ecological State" (1994) E.E.L.R. 122.

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obligation to implement, of justiciability and of derogability. Fourth, even if there is some kind of "human right to environment", is it of a procedural or a substantive nature, or both?[121]

Given these complexities an alternative integration strategy is to examine the possibilities of advancing environmental claims through the existing international human rights system.

VI. INTEGRATING INTERNATIONAL ENVIRONMENTAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: BRINGING INTERNATIONAL ENVIRONMENTAL CLAIMS WITHIN THE EXISTING INTERNATIONAL HUMAN RIGHTS COMPLAINT SYSTEMS

CLEARLY, environmental damage can impair or negate the enjoyment of a range of human rights, and certain human rights violations can equally result in damage to the environment.[122] At a general level, the wide range of bodies and organs which implement national and international human rights law is increasingly aware of environmental dimensions in the issues before them through the variety of implementation techniques. Environmental claims are also appearing more frequently in international petition systems. For convenience, the systems considered here are essentially those of the European Convention on Human Rights (the "European Convention"),[123] the International Covenant on Civil and Political Rights ("ICCPR") and its First Optional Protocol,[124] and the American Convention on Human Rights (the "American Convention").

A. Whose Rights?

This is an important jurisprudential and practical question. International environmental law has been heavily influenced by considerations relating to the protection of the rights of future generations. This is reflected in international instruments of a binding and non-binding character, General Assembly resolutions and academic literature.[125] To this extent such environmental claims do not come within the existing human rights petition systems, which require a present victim.[126] A communication from

121. See J. Cameron and R. Mackenzie, "Access to Environmental Justice and Procedural Rights in International Institutions", in Anderson and Boyle, *op. cit. supra* n.63, at 129; Douglas-Scott, *op. cit. supra* n.115, at p.436, comments: "A procedural approach provides environmental protection by way of democracy."

122. See Ksentini Report, *supra* n.36, at paras. 248–251.

123. See Harris *et al.*, *op. cit. supra* n.104.

124. See McGoldrick, *op. cit. supra* n.48; M. Nowak, *Commentary on the UN ICCPR* (1993).

125. The classic work remains that of E. Brown Weiss, *In Fairness To Future Generations* (1990). Art.5 of the Draft Covenant, *supra* n.38, provides: "The freedom of action of each generation in regard to the environment is qualified by the needs of future generations." See also ICJ Opinion, *op. cit. supra* n.96 at pr. 29.

126. See Harris *et al.*, *op. cit. supra* n.104, at pp.630–638; McGoldrick, *op. cit. supra* n.48, at pp.168–177. See the decision of the Supreme Court of the Philippines in *Minors Oposa* v.

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Canada on behalf of present and future generations was submitted to the Human Rights Committee under the First Optional Protocol. The Committee did not have to consider the admissibility of such an application *ratione personae* because some of the authors of the communication were living individuals. It did, however, describe the reference to future generations as "an expression of concern purporting to put into due perspective the importance of the matter raised in the communication". The communication was declared inadmissible for non-exhaustion of domestic remedies.[127]

Under the European Convention individuals, groups of individuals and NGOs can bring applications.[128] If an explicit environmental right of some kind were added to the Convention it would most probably be formulated as a right of an individual.[129] The Council of Europe has made no real progress on accepting any concept of group rights.[130] If the principal aim of environmental law is to prevent and limit environmental damage, human rights petition systems offer little help as they generally deal only with past rather than future violations. They may, of course, serve some future deterrent and remedial function. Under the American Convention individuals, groups of individuals and any non-governmental entity recognised in one of the member States of the Organisation of American States may lodge a petition.[131] This petition system does not extend to the right to environment in the Additional Protocol of 1989. There is no system of individual petition under the African Charter on Human and Peoples' Rights (1981).

If it were considered that an individual complaint system was not the appropriate implementation technique then another possibility would be to follow the analogy of the UN Economic and Social Council's Resolution 1503 (1970). The result would be that there would be a thorough study or complaints system, respectively, where there was a "consistent pattern of gross and reliably attested violations of" environmental rights. The excessive complexity and secrecy of Resolution 1503 should be avoided at all costs but otherwise this could be a useful model.[132] Com-

Secretary of the Department for Environment and Natural Resources (DENR) (1994) 33 I.L.M. 173.

127. *E.H.P.* v. *Canada*, *Selected Decisions of the HRC*, Vol.2, p.20.

128. Cf. Appn.9234/81, *X.* v. *Germany*, 26 D.R. 270.

129. See the Council of Europe's Draft Protocol on Environmental Rights, cited in Sands, *op. cit. supra* n.6, at p.225, n.290.

130. E.g. the work of the Council of Europe on a protocol on the cultural rights of minorities was suspended in Jan. 1996. It would in any event have granted individual rather than group rights. See Council of Europe, *Human Rights Information Sheet No.37*, July–Dec. 1995, p.106.

131. "... in cases with environmental concerns, the Inter-American Commission on Human Rights has allowed 'interest group' or 'interested citizen' actions": Ksentini Report, *supra* n.36, at para.222.

132. See Alston, *op. cit. supra* n.103.

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plaints could be considered by the environmental super-committee suggested above.[133] Similarly, ECOSOC Resolution 1235 (1967) could provide a system for undertaking a thorough study of such a pattern of violations.

Finally, an inter-State complaints system could be considered. However, the experience from the international human rights system is that such a system is at the mercy of the political relations of the States concerned and would be little used.

B. What Rights?

It is interesting to consider briefly what existing rights an environmental claim could be linked to. A claim based on self-determination (Article 1 of the ICCPR)[134] would fail on the basis of the jurisprudence of the Human Rights Committee that the First Optional Protocol provides a recourse procedure only for individuals claiming that their rights as individuals have been violated. As Article 1 is a right conferred upon peoples it cannot be the subject of a claim under the Protocol.[135] This is so even if an individual legitimately claims to be a representative of the people.

The right to life is a possible basis of claim (Article 2 of the European Convention; Article 6 of the ICCPR; Article 4 of the American Convention).[136] A claim was brought to the Committee alleging that the storage of radioactive waste near the residences of the applicants threatened the right to life of the present and future generations in the area.[137] The claim was declared inadmissible for failure to exhaust domestic remedies.

A claim alleging degrading treatment is another possibility (Article 3 of the European Convention; Article 7 of the ICCPR; Article 5 of the American Convention). However, such claims are rarely successful because the minimum, threshold level of humiliation or debasement that must be reached is quite high.[138] A claim of degrading treatment in *Lopez Ostra* v. *Spain*, considered below, based on severe environmental pollution failed, even though the European Court of Human Rights referred to the conditions as "very difficult".[139]

133. Cf. Sands, *op. cit. supra* n.5, at p.359, who notes a change by the World Bank that allows an affected party to complain that rights or interests have been affected by the Bank's omission to follow its procedures with respect to projects provided that the failure has or threatens to have a material adverse effect.

134. See Ksentini Report, *supra* n.36, at paras.163–171. There is no such right in the ECHR.

135. See McGoldrick, *op. cit. supra* n.48, at pp.255–256; Churchill, *op. cit. supra* n.112.

136. See Ksentini Report, *supra* n.36, at paras.172–175.

137. See *supra* n.127.

138. See Harris *et al.*, *op. cit. supra* n.104, at pp.80–84; McGoldrick, *op. cit. supra* n.48, at pp.370–371.

139. *Lopez Ostra*, *infra* n.149, at para.60.

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A claim for a fair trial in relation to environmental claims may be based on them falling within "civil rights and obligations" (Article 6 of the European Convention)[140] or "rights and obligations in a suit at law" (Article 14 of the ICCPR) or "rights and obligations of a civil ... or any other nature" (Article 8 of the American Convention).[141] The right to freedom of expression may carry with it elements of a right to know of information and to have access to it (Article 10 of the European Convention; Article 19 of the ICCPR; Article 13 of the American Convention).[142] A number of environment-related claims have been argued on the basis of respect for private and family life (Article 8 of the European Convention;[143] Article 17 of the ICCPR; Article 11 of the American Convention). Participatory rights in an environmental context may find a basis in rights to take part in public affairs and to participate (Article 25 of the ICCPR; Article 23 of the American Convention). Other environmental cases have been framed in terms of the right to peaceful enjoyment of one's possessions (Article 1 of Protocol 1 to the European Convention; Article 21 of the American Convention).[144] If any European Convention claim is arguable an individual may bring a claim for the right to an effective national remedy.[145]

The complexities of equality rights raise another possibility (Article 26 of the ICCPR; Article 24 of the American Convention). Where, as is often the case, environmental damage appears to be concentrated on certain groups or sections of society, claims of environmental discrimination could be constructed.[146]

A further possibility is to frame a claim as a violation of a minority right under Article 27 of the ICCPR.[147] The leading example of this is the case of *Lake Lubicon Band* v. *Canada*.[148] The Band was described by the Human Rights Committee as "a self-identified, relatively autonomous, socio-cultural and economic group", whose "members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in Northern Alberta since time immemorial". The Band alleged that the Canadian government had allowed the provincial government of Alberta to expropriate and destroy

140. Harris *et al.*, *op. cit. supra* n.104, at pp.174–195.
141. McGoldrick, *op. cit. supra* n.48, at pp.414–416.
142. See Ksentini Report, *supra* n.36, at paras.203–216.
143. See e.g. *Powell and Rayner* v. *UK*, Ser.A, Vol.172 (1990).
144. See Harris *et al.*, *op. cit. supra* n.104, at pp.516–539; *Pine Valley Development Ltd and Others* v. *Ireland*, Ser.A, Vol.222 (1991). There is no right to property in the ICCPR.
145. Art.13. Harris *et al.*, *idem*, pp.443–461; *Powell and Rayner*, *supra* n.143.
146. See Ksentini Report, *supra* n.36, at para.44.
147. There is no equivalent in the ECHR or in the AmCHR.
148. *Annual Report of the Human Rights Committee 1990*, UN Doc.A/45/40, Vol.II, App.A. See D. McGoldrick, "Canadian Indians, Cultural Rights and the Human Rights Committee" (1991) 40 I.C.L.Q. 658.

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the territory of the Band by granting leases for oil and gas exploration, and for timber development to supply a proposed pulp mill, to private corporate interests. The Band claimed that this deprived them of their subsistence, their enjoyment of their right of self-determination, had destroyed their economic base and made it impossible for them to survive. The Committee considered the case in terms of minority rights under Article 27 of the ICCPR and found a violation based on historical iniquities and certain more recent developments which threatened the way of life and the culture of the Band. Even though the Committee will not consider alleged violations of the right of self-determination (Article 1 of the ICCPR), in its decisions on Article 27 it will inevitably have to consider the economic and environment-related claims against the right of the whole people to economic self-determination. A cautious jurisprudence is therefore likely to develop.

VII. THE *LOPEZ OSTRA* v. *SPAIN* CASE (1994)[149]

THIS is the leading case on environmental claims to have reached the European Court of Human Rights. The case concerned a plant for the treatment of liquid and solid waste built 12 metres from Lopez Ostra's home. Ironically, the plant was built to solve a serious environmental problem. The plant released gas fumes, smells and contamination which caused health problems and nuisance to many people living in the area. Residents were evacuated and rehoused for a few months and then returned to their houses. There was a partial shutdown of the plant but certain nuisances continued. The health of Lopez Ostra's daughter was badly affected.

Lopez Ostra claimed that there was a violation of Articles 8 and 3 of the European Convention on Human Rights. Both the Commission and the Court unanimously agreed that there was a violation of Article 8 but not of Article 3. In its judgment the Court stated: "Naturally, severe environmental pollution may affect an individual's well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."[150] The use of the word "naturally" suggests that the Court had no great difficulty in reaching this conclusion. The Court considered that whether the question was analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1), or in terms of an interference by the public

149. Ser.A, Vol.303-C, 9 Dec. 1994. See A. Garcia Ureta, "Lopez Ostra v. Spain: Environmental Protection and the European Convention on Human Rights" [1995] Environmental Liability 81. In *Fredin* v. *Sweden*, Ser.A, Vol.192 (1991) the European Court of Human Rights had stated that protecting nature is "an increasingly important consideration in today's society".

150. *Lopez Ostra*, *idem*, para.51.

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authorities that had to be justified in terms of the limitations in Article 8(2) on the rights in Article 8(1), the applicable principles were broadly the same:[151]

> In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance.

On the facts of the case the Court considered that the State did not succeed in striking a fair balance between the interest of the town's economic well-being, that of having a waste treatment plant, and the applicant's effective enjoyment of her right to respect for her home and her private and family life.[152]

A. Comments on the Judgment

Having acknowledged that the applicable principles were broadly the same the Court took the Article 8(1) approach of looking at whether the national authorities took the measures necessary to protect Ostra's rights under Article 8. It did not go through its standard criteria for judging interferences with rights under Article 8(2). On the facts of the case there was State involvement in that the plant was built on municipal land and the State had subsidised its construction. There was also a State licensing system. Findings of violation will always be easier where there is some State involvement.[153] However, the positive obligations approach would also mean that there would be State responsibility even without this kind of State involvement, though the margin of appreciation could be wider still.[154] In line with its existing jurisprudence on striking a fair balance and the margin of appreciation, a wide range of factors is relevant, e.g. measures of mitigation, damages, offers to purchase the property, planning changes, environmental impact assessments, consultation, compensation. Possibly a claim based on Article 8 (right to private and family life) would demand more from the State than one under Article 1 of Protocol 1 (right to property).

As with all other claims under the international human rights systems, applicants will have to exhaust domestic remedies. If there are limitations on standing and legal interest in the national law system, there will not be

151. *Ibid.*
152. *Idem*, para.58.
153. Cf. Appn.No.7889/77, *Arrondelle* v. *UK* (1980) 26 Decisions and Reports of the European Commission on Human Rights 5: aviation authority, friendly settlement.
154. See A. Clapham, *Human Rights in the Private Sphere* (1993), pp.215–222.

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effective remedies that applicants will have to exhaust. The Court is also fairly robust when faced with State arguments that there were alternative remedies that applicants could have used. In *Lopez Ostra* the Court dismissed Spain's objection that the wrong national procedure was used. It looked at whether the remedy used by Lopez Ostra would have provided adequate protection, and decided that it would.

The Court's key finding was that "severe environmental pollution" could lead to a breach of Article 8 rights. It does not indicate the standards that would apply for determining when the pollution reaches a severe level. The expert reports cited before the Court were based on the application of Spanish environmental standards, some of which might stem from EC standards. What would be the situation if the national environmental standards were very low, e.g. in the non-EC members of the Council of Europe? The Court may have to search for common European environmental standards.[155] This will be no easy task.

Finally, a slightly curious factor that the Court appeared to give some weight to was that, by appealing, Spain had resisted judicial decisions that would have supported Lopez Ostra's rights under national law. Similarly, it had appealed against a judicial order to close the plant temporarily. It must be legitimate for States to exercise rights of appeal at the national level. However, the effect of this approach is that States run the risk that in prolonging proceedings they will be failing to take the measures necessary to protect individuals' rights.

VIII. CONCLUSION

THE critical importance of sustainable development is that it is an integrationist principle. It reflects the fact that the interpenetration of the concepts and principles in the three pillars of international environmental law, international human rights law and international economic law has made boundaries between them increasingly redundant. The relative weighting of economic, environmental and human rights norms has become increasingly complex. They range across the normative spectrum from *jus cogens* rules, through fundamental rights, non-derogable rules, duties to respect particular interests, general principles of law, respect for particular interests, to statements of interpretative value.[156] Conflicting norms exist within each pillar as well as between them. The challenge for sustainable development, both in theory and in practice, is to develop incrementally a credible and accepted normative hierarchy. That challenge to the discipline of international law grows ever more demanding and challenging for students, scholars, practitioners and judges alike.

155. On the importance of European national law standards in the ECHR see Harris *et al.*, *op. cit. supra* n.104, at pp.9–11.

156. See Hession and Macrory, *op. cit. supra* n.32, in the context of the EC.

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