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Revisiting the debate on the legal status of sustainable development in international law

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Revisiting the debate on the legal status of sustainable development in international law: ideas and proposals on how international law could aid sustainable development to promote its aims

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Abstract

This thesis is about the legal status of sustainable development in international law. In particular, the thesis revisits the debate of the legal status of sustainable development seeking to identify solutions in international law that would help to promote sustainable development's case. The thesis accepts that sustainable development performs a useful function seeking to improve the quality of life for current and future human generations and for the planet as a whole and that for this reason international law should offer sufficient support. At the moment there are various problems raising obstacles to the process. These problems in a great extent arise out of the considerable uncertainty currently existing about the exact meaning and scope of sustainable development which has resulted in the failure of the concept so far to achieve a customary law status. The thesis revisits the issue and approaches it from both sustainable development and international law perspectives. In particular, it looks into the definitional problem and the principles underpinning sustainable development seeking answers on whether the definitional problems is so serious that excludes any possibility that sustainable development will acquire the status of an obligatory norm in the future. Then the focus shifts on the current structure and operation of international law which has so far refused to grant the concept a binding status. The aim of this analysis is to explain the reasons behind the current treatment of sustainable development by international law as well as to identify potential opportunities for overcoming the current difficulties. The conclusion reached is that despite the problems sustainable development has great potential and that there are other tools, in addition to custom, that could be used to enhance the concept's status in international law and help promote its case.

Acknowledgments

To my family

I would like to thank my family for their patience, encouragement and support. Special thanks should go to my supervisor Professor Rachel Murray for her valuable advice and support and to the Law School of the University of Bristol which provided me an excellent working environment and research facilities.

Author's declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: ..... DATE:.....

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Chapter 1

Sustainable development and international law

1. Introduction

a. The concept of sustainable development

Sustainable development is a very popular theme in the daily lives of people around the globe. Issues such as recycling, waste management, the protection of wild animals and endangered species and the pollution of the environment all fall within the scope of the concept. Though sustainable development is closely related to environmental issues, the scope of its application is not limited to these issues. Poverty eradication, the protection of human rights and sustainable economic development are also between the themes falling within its ambit. Sustainable development is not always the motivating factor because many of the above-described areas of policy have their own independent background, identity and goals, but it helps to integrate these policies into a single framework and thus to achieve better results.

The need for an integrated approach to environmental protection and socioeconomic development arose out of the recognition that these policy objectives are greatly interdependent and that without an integrated approach to these issues the overriding objective of the improvement of the living standards and the harmonious development of the world would hardly succeed.

By way of example, development policies depend on the use of natural resources often scarce ones thus impacting negatively on the physical environmental. On the other hand, many environmental initiatives, such as the efforts to address the problem of global warming by controlling greenhouse emissions, have impact on industrial and human activities and thus also on economic and development activities. Lastly, societies plagued by poverty, abuses of

human rights and corruption pose increased risks to the environment, as a result of the non-existence of effective control mechanisms on the part of the state, the lack of sufficient technologies and financial means to prevent or reduce environmental harm, and the lack, often, of sufficient public support to the proposed policies. In such societies policies aimed at improving the environment would succeed only through efforts to tackle poverty and corruption and improve human rights, which are the actual causes of environmental destruction.

For the above reasons sustainable development, by raising the issue of an integrated approach to socioeconomic and environmental problems seeks to propose a single package of political initiatives that will be able to unify all the previously fragmented policies under a single umbrella and thus achieve better results[1]. Moreover, as continuous scientific and technological developments along with the advances of globalisation in all areas in recent years open up new opportunities, sustainable development seeks to establish long-term policy goals whose impact extends well beyond the current generation or the foreseeable future[2]. Lastly, and as the complexity and intensity of the problems have impact on areas beyond the local or regional level to the global one, sustainable development seeks mobilisation and coordinated action at all levels and across the world[3].

Obviously, the goals are very ambitious and require action of unprecedented scale which raises concerns about the viability of the proposed policies. There are also concerns whether the policies of environmental protection and economic development can work side-by-side

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[1] The nature of sustainable development as an umbrella term incorporating a number of principles aiming at addressing specific fundamental problems contributing to the current unsatisfactory situation on the planet is widely accepted in theory and in law.

[2] The connection that sustainable development seeks to make between current and future generations can be seen in the principle of intergenerational equity which is one of the principles incorporated into the concept. Intergenerational equity provides that the past, present and future generations are linked to each other through the use of the common patrimony of the earth and that the current generation is under an obligation to take into account the long-term impact of its activities and to sustain the resources base and the global environment for the benefit of future generations of humankind. Intergenerational equity is one of the distinctive themes of sustainable development and is explained in more details in chapter 3 of this thesis.

[3] Broad participation is a key factor for the success of the proposed policies and various principles related to sustainable development such as the principle of participation and good governance and the principle of common but differentiated responsibilities seek to establish a framework that would enhance participation at both domestic and international levels in the agreed policies. The principles are discussed in detail in chapter 3.

since they were traditionally considered as being in conflict with each other as incompatible[4]. Regarding issues of practical implementation there is uncertainty surrounding the effectiveness of the proposed methods for addressing the problems since many of these methods are innovative and not fully tested in real conditions. The reasons for this can be found in the great complexity of the problems and the inability of science and technology, despite their continuous advances and their unprecedented achievements, to offer fully effective solutions[5]. Science and technology have some answers to the problems but not all the answers and therefore their proposed solutions are not always effective. As a result, the proposed policies promoting sustainable development often suffer from a credibility deficit which undermines their potential of acceptance and success[6].

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[4] The conflict is related to the opposing approaches to economic development and environment that environmentalists and developmentalists have traditionally developed. In particular, environmentalists accept that economic development by requiring increasing exploitation of natural resources harms the environment whereas developmentalists call for continual economic development and do not give serious attention to environmental problems (see Fernanda De Piva Durante "Environment and Development Debate: Paradoxes, Polemics and Panaceas" 8 *Griffith L.Rev*. 1999, 258-260; Judith Koons "Earth Jurisprudence: The Moral Nature of Nature" 25 *Pace Envtl. L. Rev*. 2008, 263, 284 arguing that "by referring to economic processes that consume nature and push natural systems closer to collapse, the notion of development 'pulls against the idea of sustainability, leaving the sum of the words in doubt";David VanderZwaag "The Concept and Principles of Sustainable Development: 'Rio Formulating' Common Law Doctrines and Environmental Law" 13*Windsor Y.B. Access Just.* 1993,39).
The environment/development dichotomy is also present in the negotiations in international forums for the adoption of rules and policies relating to sustainable development where it is one of the main obstacles to the efforts to reach consensus. Developing nations whose main concern is economic development focus more on this pillar of sustainable development and appear cautious to calls for more strict rules and policies regarding environmental matters fearing that they will harm their development prospects. On the other hand, the developed states which due to the size of their economies contribute to environmental degradation more than the developing ones, are more keen to promote environmental norms as a means of satisfying their public opinion which actively pushes for measures protecting the environment. Developed countries also possess advanced technologies, which are not available to developed countries, that allow them to offer more effective environmental protection without having to harm their economies. However, overall, the environmental problems remain acute in both developed and developing countries and the situation does not improve whereas development seems to be the priority in almost all states. These issues will be considered in more details in chapters 2 and 3 of the thesis.

[5] Science and technology never before had dealt with problems such as global warming whose causes and mechanisms of creation are due to their complexity and size largely unknown and therefore hard to address. Every day science and technology comes up with new discoveries and ideas which keep raising the level of human knowledge and experience regarding global warming but it will take possibly a long time until the day where the natural mechanism causing the problem will be fully understood and methods fully addressing it will be established.

[6] Sustainable development uses the principle of precaution which requires that states should take measures to protect the environment from uncertain, potential or hypothetical threats. In this way precautionary principle operates as a mechanism of risk reduction against threats that could cause irreversible damage to the environment. However, as will be explained in chapter 3 of the thesis where the principle is analysed, there is often strong resistance by states to proposed measures which are costly and they do not guarantee success. Though the cost-effectiveness of these measures and the capabilities of states are taken into account when considering precaution, the application of the principle is still often problematic.

Further, sustainable development by seeking an alteration of existing well-established policies and attitudes at all levels is associated with significant implementation costs, economic, social and political ones, which some states find hard to accept[7]. In a straight connection to the costs, the exposure of states across the globe to the problems is uneven and therefore it is also uneven the distribution of the burden between these states in respect of addressing these problems, which often creates strong opposition by those states finding themselves in a disadvantageous position especially taking into account that many of these states are poor and lack sufficient resources to implement the policies[8].

Lastly, the international community, despite the advances of globalisation, which brought increased international cooperation between states, institutions and individuals and the rise of international forums aimed at facilitating this cooperation, remains generally still fragmented and dominated by states' unilateral action and great disagreements on issues which states think they have adverse impact on their national interests[9]. As a result, the international community lacks institutions and mechanisms with powers to ensure rigorous and widespread

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[7] By way of example it is well known the strong resistance expressed by the United States to the implementation of the Kyoto Protocol, which is attached to the framework Convention on Climate Change (9 May 1992, in force 24 March 1994, 31 ILM 849 (1992)) and seeks to address the problem of global warming by reducing emissions of six greenhouse gases. The proposed reductions create significant economic policy implications and the United States has so far failed for this reason to ratify the Protocol. The issue is discussed in more detail in chapter 3 of the thesis.

[8] As Hari M. Osofsky correctly notes, "...developed countries have already had the opportunity to grow by using practices that cause major environmental degradation. If developed countries cannot go through that same process, their growth would be unfairly impaired" (see Hari M Osofsky "Defining Sustainable Development after Earth Summit 2002", 26 *Loy. L.A. Int'l & Comp. L. Rev.* 2003, 111, 115).
Sustainable development uses the principle of common but differentiated responsibilities to address the problem. The principle promotes the idea that all states have a common responsibility to protect the global environment but this responsibility should not be shared equally between these states. The rationale for such an unequal or "differentiated" allocation of the common responsibility is that certain states have contributed more to the appearance and development of environmental problems than others whereas they also possess greater technical and financial capacity to respond to these problems than others. As a result, these states should assume greater responsibility. The principle, which is examined in detail in chapter 3, has helped to solve some problems in the relationship between developed and developing countries but its application remains difficult.

[9] The war that the United States and some of its allies declared and fought against Iraq in 2003 without support by the United Nations demonstrated in the best possible way that unilateral action still prevails in certain areas when states feel that such action serves their national interests more than collective initiatives, which often require painful compromises and self-restraint.

implementation of the proposed policies and to force the opponents to follow the leading majority[10]. This means more obstacles to sustainable development.

However, and despite all these setbacks, the extent of the ongoing destruction of the environment[11] which is fuelled by inappropriate development and social policies as well as the expansion of poverty across the world have reached such levels that it is imperative for the international community to set aside the disagreements and work together with all the means available to provide solutions[12]. Even if the proposed solutions will not be fully effective for a while, due to the scientific and technological constraints and the political

[10] As will be demonstrated later in the thesis, the international law edifice has been built mainly by a few powerful states in a way that best serves their interests. Usually the decisions adopted with the participation of these powerful states have better prospects of being implemented than decisions adopted without the participation or with the opposition of these states. However, overall, the international community lacks effective enforcement mechanisms and bodies that would ensure implementation of the agreements, which has the effect that the implementation of these agreements depends largely on the voluntary participation of states.

[11] By way of example the World Wildlife Fund (WWF) has created a Living Planet Index based on time-series population data collected from a number of sources over the past 30 years. The LPI calculation is based on three ecosystem-based population indices, comprising 555 terrestrial species, 323 freshwater species, and 267 marine species. Between 1970 and 2000, the LPI dropped by approximately 40%. During this time there were declines of approximately 30% in the terrestrial species population index, 30% in the marine species population index, and 50% in the freshwater species population index (Information taken from a Report, "Ecosystems and Human Well-Being: Current State and Trends" Island Press, 2005, p.100 published by the Millennium Ecosystem Assessment (MA) a body created by the then United Nations Secretary-General Kofi Annan in 2000 to "assess the consequences of ecosystem change for human well-being and the scientific basis for action needed to enhance the conservation and sustainable use of those systems and their contribution to human well-being").

[12] This was well summarised by Roseann Eshbach "It is now time for the world community to join forces to create a balance between individual state rights and duties, and the overriding right of the world community to a safe environment. It is only through a global approach, responsive to the differing needs and objectives of the international participants, that critical resources of the global community will be saved from inevitable destruction. Maybe then, the environment will be the common bond that unites autonomous nation-states into an indivisible world community" (see Roseann Eshbach "A Global Approach to the Protection of the Environment: Balancing State Sovereignty and Global Interests" 4 *Temp. Int'l & Comp. L.J.,* 1990, 271, 305).

disagreements, they will still produce some benefits which cannot be ignored[13]. As a result, it seems that the adoption of a framework of action similar to that proposed by sustainable development, even with its existing problems and deficiencies, is dictated by necessity rather than by certain overambitious scientists, philosophers or policymakers.

b. Sustainable development and international law

The various controversies surrounding sustainable development and the international community are fully reflected in the treatment of the concept by international law. International law is absolutely necessary for promoting the goals of sustainable development, since it provides the regulatory framework that would enable the adoption and implementation of the proposed policies. Law also by threatening sanctions to violators can be a powerful weapon for ensuring compliance of states with the agreed policies. Thus, support by international law is absolutely vital for translating the theories and ideas of sustainable development into concrete actions.

Law requires from sustainable development at least one thing: a precise and workable definition of the concept, which will enable the law to create in turn precise and coherent rules that will be clear and comprehensible to all those affected and will enable the courts to use them to identify and impose sanctions on possible violators.

A basic problem with sustainable development is that while it is a term widely used, there is no widely acceptable definition of it. The most popular definition is that given by the Brundtland Report, which was prepared by a UN World Commission on Environment and

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[13] By way of example Environmental Impact Assessment procedures aimed at preventing environmental harm from proposed development projects has gained worldwide acceptance and use.
Also 2008 UN Report, which records current progress regarding the achievement of Millennium Development Goals, reported significant progress regarding poverty eradication. By way of example between 1990 and 2005 the proportion of people living below the poverty line fell from 41.7 per cent to 25.7 per cent (see "Millennium Development Goals Report, Addendum", available at http://unstats.un.org/unsd/mdg/Resources/Static/Products/Progress2008/MDG_Report_2008_Addendum_En.pdf
Another report found that the use of ozone-depleting substances has been almost eliminated thus contributing to the effort to reduce global warming. The share of developing countries' export earnings devoted to servicing external debt fell from 12.5 per cent in 2000 to 6.6 per cent in 2006, allowing them to allocate more resources to reducing poverty (see "Millennium Development Goals Report" 2008, available at http://unstats.un.org/unsd/mdg/Resources/Static/Products/Progress2008/MDG_Report_2008_En.pdf
These statistics indicate some positive effects of collective action. However, the progress made so far is still fragile due to the appearance of new threats such as the big rise of food prices around the world noted during the last couple of years which threatens to push large proportions of the population in developing countries back into poverty and hunger. Nevertheless problems such as poverty eradication or food prices cannot be controlled without resort to coordinated international action.

Development in 1987: sustainable development is development that "meets the needs of the present without compromising the ability of future generations to meet their own needs"[14]. This definition given in the Brundtland Report has been viewed by some scholars a making "an important statement"[15], and having "a rhetoric quality…which gives it a powerful emotive appeal"[16]. Other views pointed to the vagueness of the definition which is "lacking substantive meaning[17]" and "offering no hint of what sustainable development involves in practice, what commitments it requires and what the costs will be"[18]. Lastly, it has been argued that "[d]espite its acclaimed vagueness and ambiguity, the WCED definition of sustainable development has been highly instrumental in developing a "global view" with respect to our planet's future"[19]. Similar problems seem to exist with other proposed definitions whose number according to a view exceeds eighty[20]. There are also disagreements about how many dimensions sustainable development has and about what sustainable development is: is it a principle? An ideal? A concept?

In recent years some consensus seems to have been developed that sustainable development rests on economic development, social development and environmental protection as interdependent and mutually reinforcing pillars[21]. Also there have been efforts to identify the principles that serve sustainable development's objectives, which would help to offer more concrete evidence of what sustainable is. In the latter context various principles have been proposed and identified such as intergenerational and intra-generational equity, common but

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[14] World Commission on Environment and Development *Our Common Future* Oxford University Press, 1987, 42.

[15] David Reid *Sustainable Development, An Introductory Right,* London, Earthscan 1995, xv.

[16] *Ibid.*

[17] See Duncan French *International Law and Policy of Sustainable Development*, Juris Publishing 2005, 16.

[18] Reid, *op.cit*.3, xv.

[19] Desta Mebratu "Sustainability and Sustainable Development: Historical and Conceptual Review" 18 Environ. Impact Assess. Rev. 1998, 493, 494.

[20] Collin Williams and Andrew Millington "The Diverse and Contested Meaning of Sustainable Development" 170 *The Geographicla Journal, 2004, 99, 99.*

[21] See e.g. the UN General Assembly Resolution of 15 September 2005 which followed the 2005 World Summit, in para.48 where the member states of the Organisation reaffirmed their commitment to sustainable development.

differentiated responsibilities, sustainable use of natural resources, precaution, integration and integration and interrelationship in particular in relation to human rights and social economic and environmental objectives. These principles cover both substantive and procedural aspects of sustainable development and stress its temporal dimension, which extends well into the future. However, the list of the principles is not exhausted and their status and relationship with each other remain largely unsettled.

There are various reasons behind the inability to reach consensus on an acceptable and workable definition of sustainable development. Strong political disagreements between developed and developing countries, scientific uncertainties, the need for flexibility in the concept to help accommodate quickly new opportunities and address new challenges, the high costs of the proposed measures and the great complexity and unprecedented nature of the issues are between the contributing factors. In the light of these factors and taking into account the multifaceted nature of sustainable development it has been argued that there may be no need to define sustainable development[22]. The concept could play its useful role without having a precise meaning because in this way reaching consensus between states gets easier whereas the concept can adapt quickly to ever changing economic, political, scientific and environmental conditions.

The current nebulous situation regarding sustainable development is reflected in the treatment of the concept by international law where its legal status is still debated and as in the case of its definition various proposals have been put forward. There are views arguing that sustainable development is not capable of creating legal obligations in international law and as a rationale cite the definitional problems of the concept and the lack of recognition of the concept's customary status by the International Court of Justice due to the absence of sufficient state practice supporting the concept[23]. They also cite the lack of recognition of the principle's normative status by treaty law. Treaties and custom are traditional considered as the main sources of international law responsible for creating rules and principles binding on states.

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22 P.Birnie and A.Boyle *International Law and the Environment,* (2nd Ed.) Oxford 2002, 47.

23 See Vaughan Lowe "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone (Eds), *International Law and Sustainable Development*, Oxford University Press, 1999, 19-37.

On the other hand, there are views arguing that sustainable development has already acquired a normative status in international law as a customary norm[24]. There are also views pointing to flaws existing in the current international law edifice for treaties and custom, which renders unnecessary the usage of these tools for achieving a normative status[25]. They point to other ways for solving the problem of sustainable development's status by using other available tools such as soft law documents.

In the meantime, the International Court of Justice has recognised that sustainable development is associated with legal effects but has stopped short of recognising its status as a customary law[26]. Sustainable development does not meet the relevant criteria.

However, and whatever view one takes on the issue, reality clearly demonstrates that sustainable development appears in a variety of legal instruments, including treaties, soft law documents and court decisions. Also, the drafting of many of these instruments often involves actors beyond states, the traditional and prevalent lawmaking actors, such as international organisations and non-governmental organisations (NGOs). The measures adopted have impact not only on state acts but also on acts of institutions and even individuals whereas they cover a great diversity of human activities demonstrating the great influence that sustainable development exercises globally.

Even if the large majority of the produced legislation, which is massive, contains mostly non-binding documents, which according to the prevalent view, in effect, exclude the obligatory status of sustainable development, it is more than certain that such an exclusion cannot be granted lightly especially taking into account the influence that sustainable development exercises in international and domestic affairs.

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[24] See Judge Weeramantry's dissenting Opinion in the *Gabcikovo-Nagymaros* case 1997 ICJ 7.

[25] See e.g. Jutta Brunnee "International Environmental Law: Rising to the Challenge of Common Concern?" in *International Environmental Law in the Beginning of the 21st Century,*100 *Am.Soc'y Int'l L. Proc.,* 2006, 307, 308 criticising the current international law established rules about custom which is founded on interstate relations and state consent which does not fully correspond to modern needs especially in the area of environmental law.

[26] See the ICJ decision in *Gabcikovo-Nagymaros* case 1997 ICJ 7. This case is discussed in detail in chapter 4 of the thesis.

At this point it should be mentioned that international law is not a well-structured legal order. There is no established authority with lawmaking power or standard lawmaking and enforcement procedures whereas compliance with the agreements even those considered as legally binding ones (mainly treaty and custom) is voluntary for states which are the main internationally recognised actors. Also as the globalisation advances and the numbers of states forming the international community increases, the corpus of international law expands rapidly but in a manner which due to the flourishing numbers of states and issues is rather anarchic and fragmented making the situation even worse.

In such a context, the treatment of sustainable development by international law does not depend only on factors relating to the concept but also on the situation in international law, which in recent years is under consistent pressure to reform. The current international law edifice was created in the 20th century mainly by contributions by a few powerful states and without the majority of states currently forming international community. Some scholars consider this process outdated and failing to meet modern realities because it fails to accommodate all states in the process and to recognise the role of new lawmaking actors such as international organisations and NGOs[27]. There are also arguments that international law fails to demonstrate sufficient flexibility to respond to new challenges.

Environmental issues and sustainable development provoke such challenges by creating innovative ideas and proposals that call for radical change of thinking and action. Ideas such as common but differentiated responsibilities of states and precaution proposed by sustainable development challenge traditional ideas such as the equality of states and the need for certainty in the proposed rules and policies, which are supported by the established international law rules. As a result, the failure of sustainable development to acquire a clear status in international law is not only the result of its own flaws but potentially also of the developments in the current international law edifice.

[27] The issue is discussed in detail in chapter 4 and 5 of the thesis.

2. Scope of the thesis

This thesis focuses on the legal status of sustainable development in international law. The thesis accepts that the achievement of sustainable development's goals serves the interests of humanity and therefore there is need for worldwide support of the proposed policies. The thesis also accepts that international law is a necessary means which sustainable development must use to achieve worldwide recognition and acceptance of its proposed policies. It is also a necessary means for ensuring compliance of states with the proposed policies. Lastly, the thesis accepts that there are currently problems raising obstacles to the efforts to promote and implement sustainable development's proposals at the international level. These problems concern both the concept itself and the current state of affairs in international law.

The thesis will research the current treatment of sustainable development by international law focusing on factors relating both to the concept and international law. It will seek to identify in the current situation the factors that facilitate or hinder sustainable development's course. The ultimate aim is to make proposals on how international law could be used to help sustainable development's case.

The legal status of sustainable development in international law is the critical parameter in the discussion. Is sustainable development in position to create rules binding on member states? The current answer to the issue appears to be negative because sustainable development does not meet the requirements set by customary law or treaty law, which are traditionally considered as the main sources of legal obligations in international law. The next questions then are: why sustainable development, which enjoys such worldwide recognition and acceptance, does not meet the criteria? Is the problem created by the concept itself or by the current inflexible structure of the rules relating to treaties and custom?

Providing answers to these questions will help to identify the causes of the problem and explore possible solutions: how can the problems be solved? Is it necessary for sustainable development to seek recognition by treaties and custom in order to promote its aims or are there alternative solutions available?

The thesis will seek answers to all these questions and many more that will arise in the course of the analysis. The conclusion that will be reached is that while the adoption of a normative status under traditional international law instruments such as treaties and custom should always be pursued, this is not necessarily a solution that will solve all the problems associated with sustainable development. Treaties and custom face themselves a number of challenges including compliance issues which indicate that the recognition of sustainable development as a binding norm by these instruments does not guarantee acceptance and implementation of the proposed policies[28]. Therefore, sustainable development should use also other tools to promote its policies such as soft law documents and international forums.

Also the thesis will argue that the definitional problem is not a factor which necessarily excludes the normative status of the principle. Sustainable development is a multifaceted concept seeking action at different levels and coordination both nationally and internationally. It also seeks to demonstrate flexibility in terms of scope and content in order to be able to achieve international consensus and accommodate new developments. Providing a precise definition of the term, could offer some legal certainty helping the courts to use it in their decisions but on the other hand the concept's ability to address the challenges could be crippled. Thus, the courts may end up using a definition which limits the scope of sustainable development thus hindering its beneficial potential.

Overall, the thesis argues that sustainable development's chances of success depend largely on its ability to convince states to comply with its proposed policies and in this direction the use of binding norms that threaten sanctions to violators is not the only option especially when international law lacks effective enforcement mechanisms and relies on the voluntary participation of states.

3. Methodology of the thesis

The thesis seeks to prove its arguments using the following methods:

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[28] According to Brunnee, *op.cit.* 21 "states rarely take formal steps of enforcement of international environmental law by invoking the responsibility of another for breaches of international law".

a. First, it will provide a historical account of the developments in international law and policy relating to sustainable development. The concept emerged in international law relatively recently whereas its evolution given the contradictions existing in the term and the political disagreements was not easy. The thesis will refer to the main processes and documents which identified and developed sustainable development in international law. Such a step is necessary in order to help explain how the situation developed and reached the current level and to set up the general context for the discussion of the legal status of sustainable development in international law.

b. Then, the focus will shift to the problems relating to sustainable development. The thesis will focus on issues relating to both the concept itself and international law. Regarding the concept, the thesis will focus on its definitional problem by looking into both the currently available definitions and to the principles which are considered as supporting this umbrella term. The main aim of this analysis is to assess how serious the definitional problem is and if it is really fatal to the efforts to grant sustainable development the status of a binding norm in international law. Regarding international law the focus will be on current theories of international law, its sources and current structure.

   Criticism of international law in its current form will also be discussed along with proposals for reform. The aim of this analysis is to explain the current position of international law toward sustainable development as well as the latter's opportunities and prospects.

c. Further, various proposals regarding sustainable development's status in international law will be presented as a means of clarifying the current situation. As will become clear from the presentation there is currently a great variety of views which cover almost all the spectrum of possible solutions.

d. Lastly, the views of the thesis will be presented. The thesis will assess the current situation and opportunities in international law, will look into the means that international environmental law which faces similar challenges to sustainable development, uses to promote its own policies and will discuss the definitional

problem facing sustainable development. Then it will present its final proposals on how international law could help promote sustainable development's aims.

e. The thesis will use primary and secondary sources in the analysis. Will also look into available empirical studies relating to the implementation of sustainable development in international law and the effectiveness of the latter. The aim is to use sources helping to clarify the existing debate and to explore future directions.

4. Structure of the thesis

The thesis has the following structure: chapter 2 will present a historical account of sustainable development in international law and policy by focusing on certain key processes and documents. Chapter 3 will look into the definitional issue by looking into view about the meaning of sustainable development. Te second part of the chapter will use the New Delhi Declaration on the Principles of International Law Related to Sustainable Development, adopted by the International Law Association Committee on the Legal Aspect of Sustainable Development in 2002, to explain and discuss the meaning and role of certain basic principles relating to sustainable development. Chapter 4 will shift the focus to international law by presenting theories of international law and its current structure. In the second part, chapter 4 will present various theories and ideas seeking to explain the current status of sustainable development in international law. Finally chapter 5 will explain the thesis's views.

Chapter 2

The evolution of the concept of "sustainable development" in international law and policy

1. Introduction

This chapter discusses the evolution of the concept of sustainable development in international law by referring to the main events and legal instruments. Such a reference is necessary in order to set up the context in which the debate of the meaning and status of sustainable development in international law will take place.

The concept of sustainable development emerged in the context of global efforts to coordinate environmental, social and economic policies and laws. It gained popularity in 1987 due to the Brundtland Report of the World Commission on Environment and Development (WCED). The Report defined sustainable development as "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs".

The underlying idea is that, given the limited nature of natural resources of the earth, humankind should manage these resources to meet the needs of the current generation in a way that does not deprive future generations from the ability to meet their own needs. This idea is not new.

According to Judge Weeramanty, in *Gabcikovo-Nagymaros* case, the idea that acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment can be traced back to ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia[1].

James May refers to Leonardo Da Vinci's *Codex Leicester*, a book written more than 500 hundred yeas ago, as being potentially "…the first book evincing a sustainable development ethic"[2]. According to May, the *Codex Leicester* sought to accommodate environmental preservation and economic development with an eye keenly fixed on the needs of future generations.

In international legal relations the idea of "sustainability" can be traced back at least to 1893 when the United States presented a right to safeguard for the benefit of mankind the protection and proper use of seals in the Bering Sea[3].

In the context of the United Nations (UN), the Charter of the Organisation did not contain provisions on environmental protection of the natural resources. However, between the UN objectives is the achievement of international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and

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[1] *Gabcikovo-Nagymaros* 1997 ICJ 1997, 97-110 (separate opinion of Judge Weeramanty).

[2] James R. May "Of Development Da Vinci and Domestic Legislation: The Prospects for Sustainable Development in Asia and its Untapped Potential in the United States" 3 *Widener L. Symp. J.,*1998, 197,198.

[3] The United States presented the relevant argument in the arbitral tribunal in the *Pacific fur Seal Arbitration,* which concerned the right of states to adopt regulations to conserve fur seals in areas beyond national jurisdiction. The arbitrators rejected the United States' argument that the US could apply conservation measures in areas beyond national jurisdiction but they, nevertheless, went on to the adoption of Regulations for the protection and the preservation of fur seals outside jurisdictional limits (for more details on this case see Phillippe Sands *Principles of International Law* (2nd Ed.) Cambridge University Press, 2003, 561-567).

this has been used as the basis for the development of the environmental activities of the Organisation[4].

The progress on issues of environmental protection had a slow start, since the scope of the early action was limited. For instance, in 1949 the UN Scientific Conference on the Conservation and Utilisation of Resources (UNCCUR) took the form of an exchange of experiences in resource use and conservation techniques[5].

Earlier in 1947, an Economic and Social Council (ECOSOC) resolution stressed the importance of the world's natural resources and their importance for the reconstruction of devastated areas. The resolution also recognised the need for the "continuous development and widespread application of the techniques of resource conservation and utilisation". The resolution also determined the competence of the UN over environmental matters and paved the way for the 1972 Stockholm Conference, the 1992 UN Conference on Environment and Development (UNCED) at Rio and the 2002 World Summit on Sustainable Development at Johannesburg.

The 1972, 1992 and 2002 events constitute the three milestones in the evolution of the concept of sustainable development at the international level and therefore they should be examined in more details.

2. The 1972 Stockholm Conference

The preparations for the UN Stockholm Conference on Human Environment (UNCHE) started in 1968 when the General Assembly of the Organisation adopted a

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[4] See Art 1(3) of the UN Charter, San Fransisco, 26 June 1945, in force 24 October 1945, 1 UNTS xvi.

[5] Patricia Birnie and Alan Boyle *International Law and the Environment,* (2nd Ed.) Oxford 2002, 37.

resolution, first proposed by Sweden, which called for the convocation of a world conference on the environment. The resolution recognised the existence of "an urgent need for intensified action, at national and international level to limit and where possible to eliminate the impairment of the global environment"[6]. The Conference was held in Stockholm on 5-16 June 1972 with the participation of 114 states and a large number of international institutions and non-governmental observers.

A particularly important document in the Conference was the so-called "Founex Report" which was drafted by a group of experts as part of the preparation of the Conference. The Report focused particularly on the complex interrelationship between the environment and economic development. It stressed that in developing countries the environmental problems could not be solved without addressing the underlying problems such as poverty and underdevelopment. The Founex Report encouraged the participation in the conference of the developing countries, which until then had been concerned about the environmental movement fearing that by seeking to impose rules for the protection of the environment, it would inhibit their economic development[7]. Some developing countries had also seen the environmental

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[6] UNGA Res.2398 (XXIII)(1968)

[7] An illustration of the developing countries' concerns could be seen in the Ugandan Delegation leader's statement at Stockholm: "Developing countries face environmental problems different in degree from those encountered in developed countries of the world. Our fundamental problem is how to raise the material standard of life of our people to levels that are humanly decent. In other words, we are not confronted with an environment that has degenerated into pollution as a result of development. On the contrary, we are faced with an environment many of whose inherent aspects are prohibitive to development and injurious to human comfort" (see Statement by Head of Ugandan Delegation, in *Evolving Environmental Perceptions: From Stockholm to Nairobi*, (M. Tolba ed.), 1988, 342). See also John Ntambirweki "The Developing Countries in the Evolution of an International Environmental Law" 14 *Hastings Int'l & Comp. L. Rev.* 1991, 905.

movement as another neo-imperialist policy of the developed countries[8]. The Founex Report sought to address these concerns by stressing that any environmentally protective measures resulting from the Conference would not be used to inhibit the development of the developing countries by imposing extra costs on them. The UN General Assembly's Resolution 2849(XXVI) confirmed the conclusions of Founex Report and suggested that developing countries should be provided with technical assistance and financial resources to promote environmental measures and policies.

The Stockholm Conference resulted in the adoption of the Stockholm Declaration on the Human Environment. The Declaration, which was not legally binding, contained 26 Principles intended 'to inspire and guide the peoples of the world in the preservation and enhancement of the human environment'[9]. The Declaration did not use the term 'sustainable development'. However, by establishing the need for integrated consideration of environment and development and by giving a global dimension to the planning and implementation of measures and policies relating to these issues, the Declaration paved the way for the formulation of the concept of 'sustainable development' as it is understood today.

In more detail the existence of a close interrelationship between the environment and social development was confirmed already in the Preamble of the Declaration where in paragraph 6 it was stated: 'To defend and improve the human environment for present and future generations has become an imperative goal for mankind-a goal to

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[8] The speech of Indira Gandhi, Prime Minister of India, is illustrative: "Many of the Advanced Countries of today have reached their present affluence by their domination over other races and countries, the exploitation of their own masses and natural resources. They got a head start through sheer ruthlessness, undisturbed by feelings of compassion or by abstract theories of freedom, equality or justice" (see "What Happened in Stockholm-A Special Report" 28 *Science and Public Affairs: Bulletin of the Atomic Scientists,* 1972, 44) .

[9] For a detailed analysis and assessment of the Conference and the Declaration see Louis B. Sohn "The Stockholm Declaration on the Human Environment" 14 *Harvard International Law Journal* 1973, 423.

be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development'. Further, Paragraph 4 of the Preamble sought to address the concerns of the developing countries by stressing that in these countries most of the environmental problems were caused by under-development and that therefore 'the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment'. Paragraph 4 also required the developed countries 'to make efforts to reduce the gap themselves and the developing countries'.

As regards the need for international cooperation for the planning and implementation of environmental policies, paragraph 7 of the Preamble stated three reasons which made such cooperation necessary. First, international cooperation was needed in order to raise the resources required to support the developing countries' efforts to carry out meaningful environmental policies. Second, the nature of a growing class of environmental problems was regional or global in extent, which made necessary the resort to regional or global cooperation. Lastly, regional or global environmental problems had impact on the 'common international realm'[10], which pointed to the need for action at the international level.

The 26 Principles included in the main text of the Declaration sought to provide measures to achieve the goals set in the Preamble. A significant number of these Principles concerned the harmonization of environment and development and suggested means and ways to achieve such harmonisation.

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[10] The term resembles to the idea of 'common heritage of mankind' adopted by the UNGA resolution 2749 (XXV) in 1970. The resolution contained Declaration of Principles governing the sea-bed and the ocean floor.

For instance, Principle 8 stated that economic and social development was essential for ensuring a favourable living and working environment, while Principle 9 suggested that the problem of under-development, which causes environmental problems in the developing countries could be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance to these countries. Further, Principle 11, taking into account the conclusions of Founex Report, sought to address the concerns of developing countries that the adoption of vigorous environmental policies would inhibit their economic development by stating that the environmental policies should not adversely affect the present or future development potential of developing countries. Principle 12 sought to address another developing countries' concern that funds previously used to support the further development of these countries might be used to support the new environmental policies thus harming the development prospects. Principle 12 provided that for the preservation and improvement of the environment additional funds to those used for development should be provided. In order to achieve more rational management of resources and thus to improve the environment Principles 13-15 called for the adoption of an integrated and coordinated approach to rational development planning which would help to protect and improve environment.

In general, the Declaration by focusing on the difficult relationship between development and environment and by seeking ways to harmonize these two conflicting concepts set the basis for future progress in the area of sustainable

development[11]. Further, the political consensus between developing and developed countries as recorded in the Principles of the Declaration was another significant achievement of the Stockholm Conference because it laid the foundations on which the concept of sustainable development was later built. However, in terms of action for the implementation of the Principles contained in the Declaration, the results were poor. It seems that whilst the Stockholm Conference was successful in generating global concern about environmental problems and in focusing the world on the need to merge the environment and development policies in order to achieve better results, it nevertheless failed to produce action sufficient to achieve the Declaration's goals and objectives. As a result, many of its principles were never implemented[12]. This, though, could not be deemed a surprise taking into account that deeply diverging economic and political interests existed between the developed and the developing countries and the inherent complexity of environmental problems, which require adoption of coordinated policies at both the national and international level. However, even without resulting in significant practical breakthroughs the Stockholm Declaration constituted a step in the right direction in respect to the environment.

Another significant legal document adopted by the Conference was the Action Plan for the Human Environment, which contained 109 Recommendations for action at the international level. The final section of the Action Plan (Recommendations 102-109) contained recommendations related to 'development and environment'. Particular

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[11] According to Maurice F. Strong, Secretary-General of the Conference, the Declaration 'provides an indispensable basis for the establishment and elaboration of new codes of international law and conduct which will be required to give effect to the Principles set out in the Declaration' (Statement by Maurice Strong….before the Second Committee of the General Assembly….19 Oct 1972, at 2-3 (mimeo) (1972) .

[12]Ranee Khooshie Lal Panjami "From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law" 21 *Denv.J. Int'l L.&Pol'y* 1992-1993, 215, 217.

reference should be made to Recommendation 102(b), which provided that regional organisations should give consideration to the evaluation of 'the administrative, technical and legal solutions to various environmental problems in terms of both preventive and remedial measures, taking into account possible alternative and/or multidisciplinary approaches to development'. Recommendation 102 demonstrates an integrated approach to environment and development. Further, a number of recommendations provided for the adoption of measures aimed at protecting the trade interests of the developing countries against negative effects from the environmental policies. In recommendations 103 and 107-109 there are visible traces of emerging legal principles of sustainable development, such as the transfer of technologies friendly for the environment to the developing countries and the need to increase financing for international environmental action[13].

At the institutional level, the Stockholm Conference issued a Resolution on Institutional and Financial arrangements where, after recognising 'the urgent need for a permanent institutional arrangement within the United Nations for the protection and improvement of the human environment' it proposed that action be taken by the General Assembly of the UN to establish four institutional arrangements: a Governing Council for Environmental Programmes to promote international cooperation in the environment field by providing general policy guidance for environment issues; an Environment Secretariat, headed by an Executive Director, to manage environmental action and coordination within the UN; a voluntary environment fund to provide

[13] Alexandre S. Timoshenko "From Stockholm to Rio: The Institutionalisation of Sustainable Development" in W.Lang ed. *Sustainable Development and International law,* Graham and Trotman/ Martinus Nijhoff, 1995, 144.

additional financing for environmental programmes; and an Environment Co-ordination Board to provide efficient coordination of UN environmental programmes.

3. From Stockholm to Rio

The political consensus reached in the Stockholm Conference and the decisions and proposals adopted there soon translated into the adoption of certain concrete measures about the environment. These measures did not produce solutions to all environmental problems raised in Stockholm but nevertheless constitute steps aimed at improving the environment or at least preventing its deterioration. The most important of these measures, which is directly related to the evolution of sustainable development, was the establishment by the UNGA Resolution 2997 (XXVI) of a new institution within the UN, the United Nations Environment Programme (UNEP), which began operations in 1973. The Resolution recognised the need to 'assist developing countries to implement environmental policies and programmes that are compatible with their development plans'. Within the duties of the Governing Council[14] of the new institution was to promote international cooperation in the field of environmental policies and to ensure that the environmental programmes and projects to be adopted 'shall be compatible with the development plans and priorities' of the developing countries. Also, the Economic and Social Council, which would receive the annual reports of the Governing Council would submit to the General Assembly its comments on these Reports particularly with regard to the 'relationship of environmental policies and programmes within the United Nations system to overall

[14] The Governing Council consists of fifty-eight members elected by the General Assembly.

economic and social policies and priorities'. Further, the Resolution 2997, in its part dealing with the Environment Fund, stated that between the programmes to be financed by the Fund were those promoting 'environmental research and studies for the development of industrial and other technologies best suited to a policy of economic growth compatible with adequate environmental safeguards'. The Executive Director of the Fund would keep under continuing review the problem of ensuring that 'the development priorities of developing countries shall not be adversely affected' by environmental programmes.

The UNEP, which has played a significant role in the development of treaties and soft law rules[15], began operations in 1973 and from very early it became clear that the integration of environment and development were in the core of the institution's main duties. At its first, 1973, session the Governing Council included the task of ensuring 'a more efficient integration of developmental and environmental concerns' in the list of major issues to be dealt with by the UNEP[16]. In 1975 the Governing Council recognised the 'great importance' of environment-development relationships 'for the further evolution of national economies and of international economic relations' and also the need 'for a complex and integrated analysis of the over-all concept of development which would include the environmental dimension'[17]. In 1976 the Governing Council stressed, amongst others, the intergenerational aspect of the issue:

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[15] For further information on the UNEP see the institution's website www.unep.org; also C.A.Petsonk "The Role of the United Nations Environment Programme in the Development of International Environmental Law", 5 *Am. Un. J. Int'l L. & Pol'y,*1990, 351; Philippe Sands *op.cit.*3, 83-85; Timoshenko *op.cit.*13*,* 145-146.

[16] UNEP Governing Council Decision 1(I), para.4(d).

[17] UNEP Governing Council Decision 21(III).

'the present and future generations of environmentally sound development'[18], while in 1977 it was recognised that industrial activities were raising concerns about their impact on the environment and that therefore there was need for the industrialisation to take place within an environmentally sound framework[19].

In respect of significant legal developments that followed the Stockholm Conference, particular reference should be made to the Montevideo Programme for the Development and Periodic Review of Environmental Law, which was adopted by the UNEP Governing Council in 1982[20]. The programme was prepared by an *ad hoc* meeting of senior government officials, expert in environmental law, held in Montevideo in 1981. In accordance with the Programme's mandate, UNEP would undertake programme activities in regard of the conclusion of international agreements and the development of international principles, guidelines and standards. The initial Montevideo programme proposed three subject areas where principles, guidelines and standards should be developed to address: marine pollution from land-based resources; protection of the stratospheric ozone layer; and the transport, handling and disposal of toxic and dangerous wastes. The existence of a direct link between the programme and the environment and development issues can be seen in the conclusions and recommendations of the experts' report where it was stated that the programme would be 'directed to harmonising developmental and environment concerns by the adoption of an integrated and coordinated approach in all aspects of

[18] UNEP Governing Council Decision 79(IV).

[19] UNEP Governing Council Decision 87(V).

[20] More information about the programme, which was revised in 1993 and 2001 can be found on the UNEP's website at http://www.unep.org/dpdl/law/About_prog/montevideo_prog.asp

environmental legislation and its application'[21]. The Montevideo programme, which was revised in 1993 and in 2001 and will be further revised in 2009, provided the basis for UNEP's action aiming at progressive development of international law.

In another significant legal development, the UN General Assembly adopted in 1982 the World Charter for Nature in the context of global efforts to achieve "international cooperation in solving the international problems of economic, social, cultural, technical, intellectual or humanitarian character"[22]. This Charter, which "illustrates the widespread verbal acceptance of the principles enunciated at Stockholm"[23], constituted a step taken at the initiative of developing countries[24] to implement the Stockholm principles. The Charter is not legally binding. Although it does not expressly refer to sustainable development, the Charter contains certain provisions, which demonstrate elements of the concept or which are related to it. In particular, the Charter provides that the conservation of nature is an integral part of social and economic development activities and has, therefore, to be taken into account in the planning and implementation of those activities. Policy-makers when formulating plans for 'long-term economic development, population growth and the improvement of standard of living' should take account of 'the long-term capacity of natural

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[21] See also Timoshenko *op.cit.*13, at 148.

[22] UNGA Res.37/7 1982.

[23] Lynton Keith Caldwell *International Environmental Policy* (3rd Ed.) Duke University Press, 1996, 98.

[24] The idea for the charter belonged to the President Mobutu of Zaire, who in a speech given to the Twelfth General Assembly of the IUCN held in Zaire in 1975, proposed that "all human conduct affecting nature must be guided and judged" (UN General Assembly "Draft World Charter for Nature. Report of the Secretary General", Thirty-sixth Session, Agenda Item 23, A/36/539, 13 October 1981, Annex I, Appendix II, pp.14-15). The text of the Charter was elaborated by IUCN and an international Group of experts and undertook several revisions. The final text was presented to the UN by Zaire and was supported by the Organisation of African Unity. The Charter was finally approved by the General Assembly by a majority of 111 with 18 abstentions and 1 negative vote by the United States (for a commentary on the Charter by the European Council for Environmental Law see *The World Charter for Nature,* Erich Schmitt Verlag, Berlin, 1986)

systems to ensure the subsistence and settlement of the populations concerned recognising that this capacity may be enhanced through science and technology'. The Charter provides that development activities should be preceded by assessment of their impact on the environment and, if finally undertaken, such activities should be carried out so as to minimise potential adverse effects. Lastly, the Charter calls for implementation of its principles in the national law and practice of the States, which, amongst others, when planning policies and activities should formulate strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature.

Earlier, in 1980 the International Union for the Conservation of Nature (IUCN), the UNEP, the World Wildlife Fund (WWF), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), and the Food and Agricultural Organisation (FAO) prepared the World Conservation Strategy[25]. The Strategy emphasised that humanity, which exists as part of nature, has no future without the conservation of nature and natural resources. It asserted that conservation can not be achieved without development to alleviate the poverty and misery and proposed ways of improving the prospects of "sustainable development", that is development "likely to achieve lasting satisfaction of human needs and improvement of the quality of human life by integrating conservation into the development process"[26]. Thus, by stressing the interdependence of conservation and development, the World Conservation Strategy first gave currency to the term "sustainable development". Further, the Strategy

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[25] IUCN, UNEP and WWF, *World Conservation Strategy: Living Resource Conservation for Sustainable Development*, Glad, Switzerland, 1980. The Strategy initially was published in a pack format for decision makers and later on appeared in a book form (see Robert Allen, *How to Save the World: Strategy for World Conservation*, Kogan Page Ltd, 1980).

[26] Allen *ibid.* at p.23.

emphasised three objectives: a) the maintenance of essential ecological processes and life support systems; b) the preservation of genetic diversity; c) the sustainable utilisation of species and ecosystems[27]. The Strategy also recognised six main obstacles to conservation. Between them there were the failure to integrate conservation with development; the "generally inflexible and needlessly destructive" development process caused by inadequate environmental planning and a lack of rational allocation of land and water uses; and the failure to deliver conservation-based development where it is most needed, notably the rural areas of developing countries[28].

The issue of the World Conservation Strategy led to the preparation of national and subnational conservation strategies by more than 50 countries and had an impact on the international legal developments[29]. In 1991, the "Caring for the Earth" Strategy[30] extended the message of the 1980 Strategy taking into account the new thinking about conservation and development. The 1991 Strategy defines "sustainable development" as "improving the quality of human life while living within the carrying capacity of supporting ecosystems". The "Caring for the Earth" Strategy had two main objectives: the first was to secure global commitment to the ethic of sustainable living and to translate its principles into practice; the other was to integrate conservation and development policies[31]. To achieve these objectives the Strategy presented Principles

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[27] *Ibid.*

[28] *Ibid.* at p.27.

[29] Sands, *op.cit.*3, at p.47.

[30] IUCN, UNEP and WWF, *Caring for the Earth: A Strategy for Sustainable living,* Glad, Switzerland, 1991.

[31] *Ibid.* at p.3.

and Additional Actions for Sustainable Living and proposed guidelines seeking to help adapting the Strategy to needs and capabilities and to implement it. The Strategy stressed the significance of environmental laws at the national and international level as essential tools for achieving sustainability. Environmental laws by setting standards of social behaviour and giving a measure of permanency to policies could lead communities to sustainable living[32]. The 1991 Strategy called governments to establish a constitutional commitment to the principles of sustainable society and to establish a comprehensive system of environmental law providing for its implementation and enforcement. Further, governments should review the adequacy of legal and administrative controls and of implementation and enforcement mechanisms and ensure that national policies, development plans, budgets and decisions on investments take full account of their effects on the environment. Lastly, governments should use economic policies to achieve sustainability, provide economic incentives for conservation and sustainable use and strengthen the knowledge base and make information on the environment more accessible[33].

The Strategy advocated the strengthening of international environmental law by strengthening existing international agreements, concluding new international agreements to help achieve global sustainability, and preparing and adopting a Universal Declaration and Covenant on Sustainability[34].

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[32] *Ibid.* at 68.

[33] *Ibid.* at 67-73.

[34] *Ibid.* at 79-81.

4. The Brundtland Report

The decisive step towards the worldwide recognition of "sustainable development" was taken by the World Commission on the Environment and Development (WCED), which in 1987 published its Report *Our Common Future*[35] containing a definition of the concept, which made it popular. The Report (also known as "Brundtland Report" taking its name from the Norwegian Prime Minister Gro Harlem Brundtland who chaired the Commission) defined "sustainable development" as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs"[36].

The WCED had been established as a special, independent body in 1983 by the General Assembly of the UN[37]. It had three objectives: a) to re-examine the critical issues of environment and development and to formulate innovative, concrete and realistic action proposals to deal with them; b) to strengthen international cooperation on these issues and to make assessments and proposals for new forms of cooperation that could influence policies and events in the direction of needed change; and c) to raise the level of understanding and commitment on the part of individuals, voluntary organisations, businesses, institutes and governments[38].

The Commission's Report based its analysis "on the best available scientific knowledge about the state of our global environment and the direct link between

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[35] World Commission on Environment and Development *Our Common Future* Oxford University Press, 1987.

[36] *Ibid.* at 42.

[37] UNGA Res. 38/161 (XXXVIII) (1983)

[38] *Op.cit.*35, at 356-357.

environment and development"[39]. It proposed changes in the way we see the future of the world. The Report saw "a new era of economic growth", based on "policies that sustain and expand the environmental resource base" and which will relieve the great poverty "that is deepening in much of the developing world"[40].

The Report considered that compared to the past where the planet "was a large world in which human activities and their effects were neatly compartmentalised within nations, within sectors (energy agriculture, trade), and within broad areas of concern (environmental, economic, social)"[41], the situation has now changed. Now "[t]here are not separate crises: an environmental crisis, a development crisis, an energy crisis. They are all one"[42]. Also in the past, there used to be concerns about the impact of economic growth upon the environment. Now, it is environmental degradation, which has impact upon the economic prospects. This situation combined with a sharp increase in the economic and ecological interdependence between nations leads to a new reality where economy and ecology at the local, regional, national and global level become "even more interwoven into a seamless net of causes and effects"[43].

The Report noted the existence of negative trends in the planet caused by "failures of development" and "failures in the management of our human environment". The development failures result in the existence of more hungry people in the world "than ever before" with the relevant numbers further increasing and in the widening of the

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[39] See Gro Harlem Brundtland "Sustainable Development: The Challenges Ahead" in Olav Strokke (Ed.) *Sustainable Development,* Frank Cass: London, 1991, at 32.

[40] *Op.cit.*35, at 1.

[41] *Ibid.* at 4.

[42] *Ibid.* at 5.

[43] *Ibid.*

gap between developed and developing countries. The environment failures result in direct threats to the lives of many species upon the planet including the human species[44].

The Commission was particularly concerned about the relationship between poverty, population growth and environmental degradation. The conclusion reached was that poverty "pollutes" the environment because those who are poor and hungry resort to overexploitation of natural resources in their areas in order to survive. The situation in poor countries became even worse from the high rates of population growth there, which was creating more poor and hungry people. The Commission also noted the uneven development rates between developed and developing countries, which was widening the economic gap between these countries thus producing further negative effects on the environment.

The concept of "sustainable development" proposed by the Commission has as a necessary condition the adoption of effective policies to address the problems of world property, uneven development and population growth. In particular, the concept of "needs" mentioned in the definition of the term concerns mostly the world's poor to which overriding priority should be given. Also, the reference to the "ability of future generations to meet their own means" is related to the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs[45]. Further, the Report proposes that the costs and benefits of environmental protection should be shared equally within and between developed and developing countries. Generally speaking, the Report proposes that the

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[44] *Ibid* at 2.

[45] *Ibid.* at 42.

parallel problems of environmental degradation and lack of social and economic development should be addressed together.

On policy issues the Commission focused its attention on the areas of population, food security, the loss of species and genetic resources, energy, industry and human settlements. The Commission stressed that all these areas were connected and could not be treated in isolation one from another[46].

The Commission also dealt with issues of international cooperation as well as legal and institutional issues. Regarding international cooperation the Commission focused on international economy; the management of the "commons"; the relationship between peace, security, development and environment; and institutional and legal change. The Commission made specific recommendations in respect of all these issues but specific reference should be made to the recommendations for institutional and legal change, which covered six priority areas[47]. First, the Commission called on governments, international organisations and international bodies and agencies to support policies and programmes promoting ecologically sustainable development, to integrate environment fully in their goals and activities and to improve international cooperation and coordination. Secondly, governments should reinforce the roles and capacities of environmental protection and resource management agencies and strengthen the role of UNEP as the principal source of environmental data, assessment, and reporting and as the principal advocate and agent for change and international cooperation on critical environment and natural resource protection issues. Thirdly, the capacity of the international community to identify, assess and

[46] *Ibid.* at 11.

[47] *Ibid.* at 308-346.

report on risks of irreversible damage to natural systems and threats to the survival, security, and well being of the world community should be reinforced and increased. The Commission proposed the establishment of a new international programme for cooperation between largely non-governmental organisations, scientific bodies and industry groups, which would serve the above purposes. Fourthly, the Commission called for widespread support and involvement in achieving sustainable development through the participation in development planning, decision-making and project implementation of an informed body and of non-governmental organisations, the scientific community and industry. Fifthly, the Commission noted that national and international law "is rapidly outdistanced" by the accelerated pace and expanding scale of impact on the ecological basis of development and called on governments "to fill major gaps in existing national and international law related to the environment, to find ways to recognise and protect the rights of present and future generations to an environment adequate for their health and well-being, to prepare under UN auspices a universal Declaration on environmental protection and sustainable development and a subsequent convention, and to strengthen procedures for avoiding or resolving disputes on environment and resource management issues. Sixthly, the Commission called for investments in renewable energy development, pollution control, and achieving less resource-intensive forms of agriculture. The World Bank, regional Development Banks and the International Monetary Fund should provide financial assistance in this respect.

The Commission called for the UN General Assembly to transform its report into a UN Programme of Action on Sustainable Development and proposed that special follow-up conferences could be initiated at the regional level. Also, the Commission

proposed the convention of an international conference to review progress made and promote follow-up arrangements.

Lastly, the Commission commissioned a group of legal experts which drafted legal principles "for environmental protection and Sustainable development"[48]. The drafting of the principles was aimed to facilitate the process of preparing the Universal Declaration and the Convention on environmental protection and sustainable development proposed by the Commission[49].

The definition of sustainable development by the Brundtland Commission has been criticised as vague and "lacking substantive meaning[50]" and "offering no hint of what sustainable development involves in practice, what commitments it requires and what the costs will be"[51]. Other views argued that despite its vagueness the Brundtland definition "makes an important statement"[52], "has a rhetoric quality…which gives it a powerful emotive appeal"[53]. Further, other commentators have pointed to the contradictions of bringing together environmental protection and economic growth, two concepts diametrically opposite to each other, while others views have argued

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[48] A summary of the proposed principles was annexed to the Commission's Report *op.cit.*33 at 348, while the full text was published in *Legal Principles for Environmental Law and Sustainable Development,* Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1987

[49] Op.cit.35, at 332. According to Professor Alexandre Kiss, a member of the group of legal experts, the idea was to develop the principles of the Stockholm Declaration and the World Charter for Nature to specify their legal content and to "inscribe them in a universal convention for the protection of the biosphere, along the lines of the United Nations Covenants striving to guarantee the protection of human rights throughout the world" (see Alexandre Kiss "Le droit international de l' environment: formulation et mise en ceuvre universelle" in *Per Un Tribunale Internazionale dell Ambiente* Amedeo Postiglione ed., 1989, 211, 215 cited in Marc Pallemaerts "International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process" 15 *J.L.& Comp* 1996, 623,627).

[50] See Duncan French *International Law and Policy of Sustainable Development*, Juris Publishing 2005, 16.

[51] David Reid *Sustainable Development, An Introductory Right,* London, Earthscan 1995, xv.

[52] *Ibid.* at xvi.

[53] *Ibid.*

that many of the objectives set by the Report of the Commission, such as the satisfaction of basic human needs, are difficult to materialise[54].

However, despite these criticisms all agree that the Brundtland definition popularised the term "sustainable development" while the Brundtland Report "catapulted the principle of sustainable development to paramount international significance"[55].

The UN General Assembly[56] welcomed the WCED's Report and noted "the important contribution made by the Commission to raising the consciousness of decision-makers in Governments, intergovernmental and non-governmental international organizations, industry and other fields of economic activity, as well as of the general public, in regard to the imperative need for making the transition towards sustainable development, and calls upon all concerned to make full use in this regard of the report of the Commission". The General Assembly, also called on all national governments and international organisations as well as the organs and organisations of the UN to adapt their policies in the direction of sustainable development.

Moreover, at the end of 1987, the General Assembly of the UN adopted the "Environmental Perspective to the Year 2000 and Beyond"[57]. The adoption of the document by the General Assembly was the culmination of a process which had been initiated in 1983 when the General Assembly had requested from the UNEP to

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[54] For more details about the criticism of the Report see French *op.cit*.50, 16-17. Also Reid *op.cit.*51. About the contradictions existing in the term sustainable development see Michael Redclift *Sustainable Development: Exploring the Contradictions,* London: Routledge, 1987. These issues are examined in detail in other chapters of this thesis.

[55] See Suzan L. Smith "Ecologically Sustainable Development: Integrating Economics Ecology and Law" 31 *Willamette L.Rev.* 1995, 261, 273.

[56] UNGA Res.42/187, 11 Dec 1987.

[57] UNGA Res.42/186, 11 December 1987.

prepare the Perspective[58]. The UNEP set up an intergovernmental preparatory committee, which 4 years later presented the document to be used as "a broad framework to guide national action and international co-operation on policies and programmes aimed at achieving environmentally sound development"[59]. The Perspective incorporated concepts, ideas and recommendations contained in the Report of the WCED.

In 1988, the General Assembly, following amongst others a WCED's recommendation, called for a conference on environment and development by no later than 1992[60]. One year later General Assembly Resolution 44/228[61] convened the United Nations Conference on Environment and Development for June 1992 in Brazil. The main aims of the conference, whose duration was two weeks, were to "elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of increased national and international efforts to promote sustainable and environmentally sound development in all countries"[62].

5. The UNCED

The United Nations Conference on Environment and Development (UNCED), which soon became known as "Earth Summit", took place twenty years after the Conference

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[58] UNGA Res.38/161, 19 December 1983.

[59] *Op.cit.*57.

[60] UNGA Res.43/196, 20 December 1988. See also UNEP Governing Council Decision 15/3 (1989); ECOSOC Res. 1989/87 (1989); Report of the Secretary General, UN Doc. A/44/256-E/1989/66 and Corr.1 and Add.1 and 2 (1989).

[61] UNGA Res.44/228, 22 December 1989.

[62] *Ibid.* para.3.

on the Human Environment in Stockholm. Representatives from 179 governments, hundreds of officials from UN Organisations, municipal governments, businesses, NGOs, and scientific and other groups all gathered in Rio de Janeiro, Brazil, on 3-14 June 1992. In a parallel meeting with the official conference, the unofficial Global Forum took place. The forum was attended by 18,000 grassroots environmentalists from 166 countries[63] which produced thirty-three "alternative treaties".

The UNCED adopted three non-binding documents, which were prepared by the Preparatory Committee[64]: the Rio Declaration on Environment and Development; A "Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forest (The Forest Principles); and a plan of action titled "Agenda 21". Two Treaties were also signed in the Conference: The Convention on Biological Diversity[65], which "established objectives for the comprehensive preservation of biological diversity reflecting objectives of the 1980 World Conservation Strategy"[66]; and the UN Framework Convention on Climate Change[67], which established principles, commitments and mechanisms to address climate change and its effects[68].

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[63] M Keating *Agenda for Change,* Centre for Our Common Future, Geneva 1993, p vii.

[64] About the structure, the negotiating process and the functions of the Preparatory Committee which was enormous in size since it consisted of all UN Member States as well as non-Member States, such as Switzerland, see Ambassador Tommy Koh "The Earth Summit's Negotiating Process: Some Reflections on the Art and Science of Negotiating" in N. Robinson (Ed.) *Agenda 21: Earth Action Plan,* Oceana Publications Inc. 1993, v.

[65] www.biodiv.org The Convention was signed by 153 States and the European Community and as at 1 January 2006 had 188 parties.

[66] See Sands *op.cit.*3 at 515-516.

[67] The Convention was signed by 155 states and the European Community.

[68] See Sands *op.cit.*3 at 359-368.

In respect of the relationship between developed (the "North") and developing (the "South") countries, problems similar to those in Stockholm appeared also in Rio, since the two sides demonstrated the same diverging interests: developed countries continued to insist on the priority of environmental protection while the developing countries focused again on development issues[69]. This gave rise to bitter debates[70], which had impact on the formulation of the texts of the Rio Declaration and Agenda 21[71]. The developing countries' argument was that their development needs would inevitably result in the greater exploitation of natural resources and the environment. Developed countries could prevent further environmental degradation only if they provided more financial and technical assistance to the developing world in a way that would help the latter to minimise environmental harm[72]. However, and despite these problems, political realities led to a compromise between the two sides. Many Rio texts contained references to the "developmental" perspective thus reflecting the developing countries' position[73], while certain issues, which had raised concerns in these countries were not included in the final texts[74]. However, and despite these

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[69] See M. Kindall "Talking Past Each Other at the Summit" 4 *Colorado Journal of International Environmental Law and Policy,* 1993, 72 cited in French *op.cit.*50, 18. See also Schabecoff Philip *A new Name for Peace: International Environmental Law, Sustainable Development and Democracy*, University Press of New England, 1996, 160 cited in David Hunter, James Salzman and Durwood Zaelke *International Environmental Law and Policy,* (2nd Ed.), Foundation Press 2002, 189.

[70] The situation is best described in the following text: "The original idea among the developed countries was to produce a ringing declaration in Rio, which 'kids all over the world could hang on their bedroom walls. But then the developing countries rather unhelpfully pointed out that many of the children in their part of the world don't have bedrooms (see Frank McDonald, "If this is Progress we are in big Trouble", *Irish Times,* June 11, 1992, at 7 cited in Ranee Khooshie Lal Panjabi "From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law" 21 Denv.J. Int'l L.&Pol'y 1993, 215, 221)

[71] According to Hunter *et al. op.cit.*69, 196 elements of compromise between the developed and the developing countries are visible in virtually every principle.

[72] For the South's position at the UNCED see South Centre, *Environment and Development: Towards a Common Strategy of the South in the UNCED Negotiations and Beyond* (Geneva 1992).

[73] See French *op.cit.*50 at 18; also below.

[74] See below.

concessions by the developed countries, in the final Rio texts the environmental provisions were still strong indicating that the North-South divide was still there and would continue to influence future developments[75].

From the documents adopted in Rio, the Rio Declaration and Agenda 21 are particularly important for the case of sustainable development. Also, the Framework Convention on Climate Change and the Convention on Biological Diversity incorporated elements of sustainable development.

a. The Rio Declaration

The initial idea had been that the UNCED would result in an agreement on a binding "Earth Charter"[76] based on a recommendation made by the Brundtland Convention. Such an Earth Charter would articulate the general principles, rights and obligations of States with respect to the environment and would constitute the "keystone to the edifice of international environmental law"[77]. However, during the negotiations in the Preparatory Committee it became clear that the Earth Charter was not a realistic goal.

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[75] See also below.

[76] Maurice Strong, the Secretary General of the Conference, in his introductory statement made at the first Session of the Preparatory Committee proposed the drafting of a document containing "general rights and obligations of States" in accordance with the Conference's mandate (Res. 44/228). The document would set out "the basic principles for the conduct of the people and nations towards each other and the Earth to ensure our common future" (see *Introductory Statement Made by the Secretary-General of the Conference at the First Session of the Preparatory Committee,* UN Doc. A/CONF. 151/ PC/5 Add.1 (1990) cited in Stanley Thomson *The Earth Summit,* London: Graham & Trotman/Nijhoff, 1993, 25). The relevant proposal was submitted to the Preparatory Committee by the Canadian Delegation (see *Preparatory Committee for the United Nations Conference on Environment and Development* UN Doc A/CONF. 151/PC/WG.III/L.5 1991) but was met with resistance by the majority of the participating countries. The G-77 and China rejected the document as being unbalanced because it suggested an undue emphasis on the development at the expense of the environment.

[77] See Pallemaerts *op.cit.*49 at 629.

What was adopted instead was a non-binding instrument having the form of a political declaration titled "Rio Declaration on Environment and Development" [78].

The Rio Declaration is a short document of twenty-seven principles, which builds on the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment "with the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people" in order to work "towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system".

The Rio Declaration does not contain an explicit definition of the concept of "sustainable development" due to the "lack of any real consensus about such a definition within the international community". However, in the 27 principles of the Declaration there are in existence both substantive and procedural aspects of sustainable development. In particular, principles in the Declaration that are related to sustainable development are as follows:

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[78]31 ILM 874 (1992). The joint proposal by China, Pakistan and the Group of 77 developing countries played crucial role of the adoption of the declaration (see *Preparatory Committee for the United Nations Conference on Environment and Development: Proposals Submitted by China and By Pakistan on Behalf of the States Members of the United Nations that are Members of the Group of 77,* UN Doc. A/CONF. 151/PC/WG.III/L.20 (1992)). See also Jeffrey Kovar "A Short Guide to the Rio Declaration" 4 *Colo.J.Int'l.L &Pol'y* 1993, 119. However, according to a view the choice of the term "Charter" or "Declaration" did not affect the legal significance of the instrument, which was to be non-binding whatever its title (see David A. Wirth "The Rio Declaration on Environment and Development: Two Steps Forward and One Step Back, or Vice Versa?" 29 *Ga.L.Rev.* 1995, 599, 612-613)

a. Human beings are at the centre for sustainable development. They are entitled to a "healthy and productive life in harmony with nature" (Principle 1). This means that it is people needs that guide environmental policies and not vice versa[79].

b. the right to development must "equitably meet developmental needs of present and future generations" (Principle 3). This is the principle of intergenerational equity.

c. in order to achieve sustainable development, environmental protection must constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4). This principle integrates environmental and developmental policies thus seeking to balance these two potentially conflicting ideas by ensuring that the development decisions do not disregard environmental considerations[80]. Principle 4 is "the closest the Rio Declaration comes to a definition of sustainable development[81]".

d. Poverty eradication is an "indispensable requirement for sustainable development" (Principle 5). This is the principle of intra-generational equity, which seeks to address inequity within the existing economic system[82]. The Declaration requires special attention to be given to the needs of developing countries, particularly the least developed and those most environmentally vulnerable (Principle 6).

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[79] This human-centred approach was a victory for the developing countries against the developed ones which had argued for a radical change from the human-centred approach towards an approach where the workings of the Earth's ecosystem would be the new centre of thinking (see Kovar *ibid.* at 124). Also by putting human beings in the centre of all decisions about sustainable development the Rio Declaration is considerably more anthropocentric than the Stockholm Declaration (see Wirth *ibid.* at 615).

[80] Birnie & Boyle *op.cit.*5, at 86.

[81] Kovar, *op.cit.*78, at 127.

[82] Birnie & Boyle *op.cit.*5 at 91.

e. In a move that seeks to satisfy the developing countries the Declaration recognised that "in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities" (Principle 7)[83].

f. Principle 8 calls for states to "reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies". Principle 8 is the result of a compromise between developing and developed countries. Developing countries had demanded the condemnation the production and consumption patterns existing in developed countries while the latter countries had stressed the need for control of population growth in the developing countries as a means to address effectively environmental degradation and poverty[84].

g. Principle 9 calls for states to "…cooperate 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"

h. Principle 10 provides for individuals to be given at the national level access to information concerning the environment that is held by public authorities, the

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[83] Principle 7 reflects an idea introduced in earlier instruments such as in the Preamble of Resolution 44/228 of the UNGA which had affirmed that "the responsibility for containing, reducing and eliminating global environmental damage must be borne by the countries causing such damage, must be in relation to the damage caused and must be in accordance with their respective capabilities and responsibilities". The issue had been raised by the developing countries which favoured an equitable distribution of duties and responsibilities respecting the protection of the environment at a global level, by taking into account the greater historical contribution of the developed countries to the degradation of the environment (see also Pallemaerts *op.cit.*49, at 651-2; Kovar *op.cit.*78, at 128-9). Acceptance of the principle of common but differentiated responsibility was one of the conditions for ensuring the widest possible participation by developing countries in the Rio instruments (See Birnie and Boyle *op.cit.*5, at 103-4).
However, the United States included in Principle 7 an interpretative statement which rejects "…any interpretation of Principle 7 that would imply a recognition and acceptance by the United States of any obligations or liabilities, or any diminution in the responsibilities of developing countries" (A/ CONF.151/26/Rev.1 (vol. II), 18 (1993).

[84]See also Kovar *op.cit.*78, at 130.

opportunity to participate in the decision-making process and access to judicial and administrative proceedings including redress and remedy.

i. Principle 11 calls for states to enact "effective environmental legislation" whose standards, objectives and priorities should reflect the environmental and development context to which they apply. The principle also recognises that the standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

j. Principle 15 establishes the precautionary approach which should be widely applied by states according to their capabilities. States should act on "threats of serious or irreversible damage" even if there is a lack of full scientific certainty. The precautionary approach (or principle) became one of the general principles of the international law of sustainable development[85].

k. Principle 16 establishes the "polluter pays" principle, according to which national authorities should "promote the internalisation of environmental costs". It is based on the idea that private polluters should bear the costs of their pollution. The polluter-pays principle became one of the elements of the concept of sustainable development[86].

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[85] The precautionary principle, inspired by German and Swedish environmental laws, was first employed in international law in the North Sea Conference in 1984 and later affirmed by EC governments in the 1990 Bergen Ministerial Declaration on Sustainable Development. The European Union supported by the United States succeeded in incorporating the precautionary principle in the Rio Declaration thus securing its global endorsement (see Birnie & Boyle *op.cit.*5, 116). The principle is discussed in more detail in the next chapter.

[86] The "polluter pays" principle was first endorsed by the OECD in a series of recommendations starting in the 1970s. In Rio, the United States and other industrialised countries made clear that this issue was of great importance for the Declaration. On the other hand, a number of states, both developed and developing, sought to limit the scope of the principle only at the domestic level holding that the principle should not govern relations or responsibilities between states at the international level.
At those states insistence principle 16 contains a condition that in the application of the polluter pays principle public policy goals, such as the public interest and the necessity not to distort international trade and investment, will be taken into account (see also Sands *op.cit.*3, at 280-1; Kovar *op.cit.*78 at 134; Birnie & Boyle, *op.cit.*5 at 92-93).

l. Principles 17-22 include further procedural elements of sustainable development such as environmental impact assessment (principle 17), notification and consultation with affected States in situations involving natural disasters or activities harmful to the environment, (principles 18-19) and involvement of major groups (women, youth and local communities) in the promotion of sustainable development (principles 20-22).

m. Finally, Principle 27 calls for further development of international law "in the field of sustainable development".

b. Agenda 21

Agenda 21 contains an action plan seeking to address the pressing problems of today and to prepare the world for the challenges of the 21st century. An important feature of Agenda 21 is that it "reflects a global consensus and political commitment at the highest level on development and environment cooperation"[87].

It calls for a global partnership for sustainable development, which by integrating environmental and developmental concerns and paying greater attention to them, will fulfil the basic needs, improve the living standards for all and offer better protection and management of ecosystems and a safer and more prosperous future[88]. Compared with the Stockholm Action Plan, Agenda 21 demonstrates a more explicit interconnection between environment and development issues.

[87] Chapter 1, para.1.3

[88] Chapter 1, para.1.1.

Agenda 21 contains 40 chapters and hundreds of programmes setting out the "basis for action, objectives, activities and means of implementation" in virtually all areas of human activity. The implementation of agenda 21 is a responsibility of national governments, the UN system and other international, regional and sub-regional organisations. Broad public participation and active involvement of non-public organisations and other groups was also encouraged[89].

In terms of international law, Agenda 21 contains throughout its forty chapters many references to existing or proposed international legal instruments in the field of environment, such as the Framework Convention on Climate Change, the Convention on Biological Diversity and the Basel Convention[90]. Agenda 21 also contains references to international agreements addressing social and economic concerns, such as the Convention on the Elimination of All Forms of Discrimination against Women.

The implementation of Agenda 21 requires compliance with those agreements. Also, chapter 39 of Agenda 21 stresses the need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of developing countries[91]. Lastly, chapter 39 calls for the further development of international law of sustainable development with the participation in and the contribution of all countries, including the developing countries to treaty-making[92].

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[89] Chapter 1, para.1.3.

[90] The Convention on Climate Change and the Convention on Biological Diversity were adopted by the UNCED as means to address the consequences of energy use and the depletion of natural resources. The Basel Convention was adopted in 1989 to regulate transboundary shipment of hazardous waste.

[91] Chapter 39, para.1(b).

[92] Chapter 39, para.1(c).

At the institutional level, Agenda 21 proposes the establishment of a Commission on Sustainable Development in accordance with the UN Charter. The main duties and responsibilities of the Commission would be to enhance international cooperation and rationalize the intergovernmental decision-making capacity for the integration of environment and development issues and to examine the progress of the implementation of Agenda 21 at the national, regional and international levels[93].

c. The non-legally binding authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests

The forest principles contain several references to sustainable development. In the preamble of the Statement there an explicit recognition that "the subject of forests is related to the entire range of environmental and development issues and opportunities, including the right to socio-economic development on a sustainable basis". References to sustainable development can be found in several of the fifteen principles of the Statement[94], which though are difficult to classify and poorly drafted. The guiding objective of these principles is "to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses"[95]. Prior to the Rio Conference there was hope

[93] Chapter 38(11).

[94] For instance Principle 2(b) states that "Forest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations", while Principle 3(c) states that "all aspects of environmental protection and social and economic development as they relate to forests and forest lands should be integrated and comprehensive".

[95] See para.(b) of the preamble.

that a binding Treaty would be adopted but the developing countries steadfastly refused to conclude such a treaty because it would particularly affect tropical rainforests, which mostly exist in these countries, in a way that could harm the development and economic prospects of the developing countries[96]. In the face of such a strong opposition by developing countries, the proclaimed solution was the adoption of a non-legally binding statement of principles which would represent the most that could be agreed and not what would be desirable. However the adoption of the Statement, which applies to all types of forests, represents "a first global consensus on forests", which could serve as a basis for a future legal instrument[97].

d. The Framework Convention on Climate Change and the Convention on Biological Diversity

The Framework Convention on Climate Change was adopted in an attempt by the international community to tackle the problem of global warming and climate changes. In particular, the ultimate objective of the Convention is to achieve stabilization of greenhouse gas concentrations in the atmosphere "at a level that would prevent dangerous anthropogenic interference with the climate system"[98]. Such a level would…"allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a

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[96] See Philip Shapecoff, "Earth Summit: After the Carnival in Rio-What?" *Am.Pol.Network Greenwire,*June 18, 1992 cited in Sir Geoffrey Palmer "The Earth Summit: What Went Wrong at Rio?" 70 *Wash.U.L.Q.,*1992, 1005, 1020. The initial proposal was for a convention on tropical forests alone which met strong opposition by developing countries (see also Birnie & Boyle, *op.cit.*5 at 44).

[97] See Sands, *op.cit.*3, at 549. According to Birnie & Boyle, *op.cit.*5, at 44 the adoption of the Statement led to revision of the International Tropical Timber Agreement in 1994 and continuing negotiations within the UN thereafter.

[98] Art 2.

sustainable manner"[99]. Article 3 of the Convention which sets out general principles, contains amongst others several elements of sustainable development contained also in the Rio Declaration, such as the need to take into account the needs of future generations, the common but differentiated responsibilities and respective capabilities, the precautionary approach and the right to promote sustainable development. Other provisions of the Convention also seek to integrate environmental and developmental concerns[100].

The Convention on Biological Diversity has three main goals: the conservation of biological diversity[101], the sustainable use of its components and the fair and equitable sharing of the benefits from the use of genetic resources[102]. Although the text of the Convention contains only limited references to "sustainable development", it has been confirmed by later documents that "biodiversity….plays a critical role in overall sustainable development"[103].

e. An assessment of the UNCED

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[99] *Ibid.*

[100] See Timoshenko *op.cit.*13, 153-5.

[101] According to the Convention, "biological diversity" means "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and ecosystems".

[102] Article 1 of the Convention.

[103] See para.44 of the Implementation Plan of the 2002 Johannesburg World Summit on Sustainable Development; Timoshenko *op.cit.*13 at 153-5; C.Shine and P.T.B. Kohona "The Convention on Biological Diversity: Bridging the Gap Between Conservation and Development" 1 *RECIEL,* 1992, 278; P.Le Prestre "The CBD at Ten: The Long Road to Effectiveness" 5 *Journal of International Wildlife Law and Policy* 2002, at 270 cited in Duncan French *International Law and Policy of Sustainable Development,* Manchester University Press, 2005, at 133.

The UNCED main objectives were to "elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of increased national and international efforts to promote sustainable and environmentally sound development in all countries"[104]. The legal instruments adopted in the UNCED even if not widely accepted as fully satisfactory, constitute a big step forward for adopting at the global level economic policies that take into account environmental concerns.

The adoption by consensus of the Rio Declaration and Agenda 21 led to the political legitimization of the concept of sustainable development and to the adoption of long-term and wide-ranging programmes for implementing the concept at national, regional and global levels. Further, the Framework Conventions for Biological Diversity and Climate Change along with the forest principles constitute steps to address major environmental problems such as the protection of endangered species, the global warming and Climate change and the conservation of forests.

Of course one should not ignore that several of the pre-determined objectives of the UNCED were not fully achieved. For instance, the Rio Declaration is not legally binding and was adopted instead of a legally-binding Earth Charter initially proposed. In addition, the Declaration has been characterised as "a text of uneasy compromises, delicately balanced interests, and dimly discernible contradictions, held together by the interpretative vagueness of classic UN-ese"[105]. However, these criticisms cannot override the great significance of the Declaration, which is one of the most significant instruments endorsed at the global level and which contains general rights and

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[104] *Ibid.* para.3.

[105] Porras in Sands (Eds) *Greening International Law,* 20. According to Wirth, *op.cit.*78 at 650, the Rio Declaration "…should be interpreted more as a global compromise on environment and development issues than as a code of future conduct. Its emphases on equity, distributional justice, and resolution of competing policy concerns as a result of North-South tensions plausibly account for some textual formulations that reflect a loss of a sense of urgency about environmental considerations".

obligations of states affecting the environment. Also, the Declaration sets out the framework for the development of environmental law at the national and international level and several of its principles are now present in international treaties and domestic legal instruments. Lastly, compared with the Stockholm Declaration, the principles of Rio Declaration reflect a new thinking, which is based on the integration between environment and development with priority given to development which favours developing countries. This new thinking by taking into account the interests of the developing countries is reflective of a more balanced approach to current realities in the world[106].

Further, Agenda 21 had been considered too costly to implement, while its text in certain areas contains gaps and vague language thus requiring the adoption of further legal instruments for its proper implementation[107]. But even with those deficiencies Agenda 21 constitutes a very significant document which, adopted by consensus, provides "the only agreed global framework for the development and application of international legal instruments, including 'soft law' instruments and the activities of international organisations"[108].

Further, the USA initially refused to sign the Biodiversity Convention whereas developing countries prevented the adoption of a Treaty on tropical forests. Also, many governments and NGO's expressed regret that the climate Convention was weakened. But as with the Declaration and Agenda 21 these deficiencies cannot

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[106] See also Ved P. Nanda and George Pring, *International Environmental Law for the 21st Century,* Transnational Publishers, 2003, 101.

[107] The average annual cost of implementing Agenda 21 was estimated at $600 billion in the period 1993-2000 (see Sands *op.cit.*3 at 57)

[108] Sands *op.cit.*3 at 58.

nullify the utility of these documents, which laid down for the first time frameworks for further action by governments and international organisations in those areas.

In terms of international law, the legitimization of sustainable development that emerged from Rio, according to a view "accelerated the emergence of a discrete discipline of international environmental law with its own distinctive principles, its own mechanisms and instruments designed to address issues that are different in kind from other issues of international law"[109]. However, the fact that the concept of sustainable development incorporates both environmental and developmental issues, thus leading to arguments for the emergence of a new branch of international law[110]- the branch of international law of sustainable development- raised fears that in this way the autonomy of environmental law, whose rules are crucial for preventing the destruction of the environment, would be seriously undermined[111]. The relationship between sustainable development and environmental law is discussed in detail in other chapters of the thesis but as a preliminary comment it could be said that such fears do not appear to have been confirmed by the developments that followed Rio.

In terms of the relationship between the developed and the developing world, the UNCED resulted as shown in a number of uneasy compromises between the two sides not only with regard to the shape and context of the adopted legal instruments but also

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[109] David Freestone "The Road From Rio: International Environmental Law After the Earth Summit" 6 *J.Envtl.L.,* 1994, 193,218.

[110] Agenda 21 in chapter 39 calls for the further development of "international law on sustainable development". See also Mary Pat Williams Silveira "International Legal Instruments and Sustainable Development: Principles, Requirements and Restructuring" 31 *Willamette L.Rev.* 1995, 239 242 ("… there is a paradigmatic shift between 'environment' and 'sustainable development'").

[111] See Pallemaerts *op.cit.*49, at 673-6 ("This new concept of 'international law of sustainable development' seems to be called upon to displace the concept of international environmental law, as it has been understood thus far…International environmental law must be 'rebalanced' to better take into account the priority of economic development over protection of the environment"); also Wirth *op.cit.*78, at 648-652.

with regard to their implementation. These compromises did not fully satisfy the two sides, particularly the developing countries which were expecting more concessions from the developed countries in the area of financing of environment and development programmes envisaged in Agenda 21[112], but they nevertheless constitute realistic solutions given the very difficult nature of the existing problems and the diverging interests between the developed and the developing countries.

As a whole, the UNCED, even if it did not meet all expectations[113], was a successful summit. Its major achievement was the establishment of an integrated framework for the adoption and implementation of sustainable development and the introduction of a number of legal and normative concepts in the field of international law. The UNCED also raised public awareness of the global environment and development issues.

6. **The 2002 World Summit for Sustainable Development in Johannesburg**

Significant developments followed the conclusion of the UNCED in Rio. New environmental Treaties such as the 1994 Convention to Combat Diversification or

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[112]Developed countries had agreed to provide 0.7 of their gross domestic product as aid to developing countries. However, the official documents while calling for this target to be met "as soon as possible" also left room for manoeuvres since some countries "agree or have agreed to reach the target by the year 2000" ("Earth Summit: Compromise Reached in Financing; Developing Nations Dismayed with Accord", 15 *Int'l Env't Report.* (BNA), Curr.Rep.395 (June 17, 1991)). However, as feared, the target was not reached by the time of the Johannesbutg Summit on Sustainable Development in 2002.

[113] The view of Sir Jeoffrey Palmer *op.cit.*96, 1028, best summarises the views of those who saw with a great deal of scepticism the results of UNCED "Rio produced too little, too late. Certainly Rio had the effect of raising people's awareness of the global environmental issues…In the end, however, action is required to address the problems. We have had plenty of rhetoric-the time for rhetoric is past. The time for binding international instruments that actually produce change has arrived.
Rio conjures up warm visions of exotic romance at Copacabana and Ipanema. The occasion was rich in symbolism; everyone wanted something to happen. Perhaps it was a start. But how many new dawns must we endure before real, substantive progress is achieved? There were insufficient accomplishments at Rio to make as confident about the future of the global environment".

additional agreements to existing UN Conventions such as the 1997 Kyoto Protocol on Climate change and the 2000 Cartagena on biodiversity were created in direct relationship with the Rio principles. Moreover, virtually all main legal instruments of international law which involved multilateral cooperation and which were created in the aftermath of Rio, included environmental protection between their stated objectives. By way of example, the 1994 Charter Establishing the World Trade Organisation mentions between its aims the environmental cooperation.

At the institutional level the establishment of the Commission on Sustainable Development (CSD) was the most significant new development. The CSD was created by the UN as a functional commission of the Economic and Social Council (ECOSOC)[114] and its main responsibilities include the review of implementation of agenda 21 and making recommendations to the ECOSOC for new cooperative arrangements related to sustainable development[115].

The CSD's review of the implementation of Agenda 21 raised the status and significance of this soft law instrument since the involvement of the CSD would exert additional pressure on national governments to implement Agenda 21. It also left the impression that that the CSD would have a prominent role in respect of sustainable development issues. In practice, though, this does not appear to have been the case. Even if the CSD took certain steps to establish a credible system for monitoring the implementation of Agenda 21[116], this did not seem to have significantly changed the

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[114]UNGA Res.47/191, 22 December 1992.

[115] Ibid. at para.4(c).

[116] For instance, in order to consolidate its monitoring system, the Commission adopted a multi-year Programme of Work. Also in its first substantive session in June 1993 the Commission established two inter-sessional *adhoc* open-ended working on technology transfer and cooperation and on financial flows and funding mechanisms in order to improve regional cooperation and coordination in sustainable development (see Timoshenko *op.cit.*13, 158).

attitudes of national governments, which remained cautious and slow in respect of its implementation. Also the CSD seems to be lacking sufficient resources and powers which has limited its role to issuing policy recommendations rather than reviewing the performance of the states or the effectiveness of environmental treaties[117].

In 1997, a special session of the UN General Assembly was held in New York with the participation of State governments from across the world. The aim of this "Rio+5" Conference was the review and assessment of the implementation of Agenda 21 and other commitments adopted in the UNCED. The Conference noted[118] that despite global efforts the main worrying trends identified in the UNCED (continuous environmental degradation, widening of the gap between poor and rich, continuous population explosion, continuous decline of the living standards) had remained unscathed of even strengthened after Rio. It reaffirmed the international support for the Rio Declaration and Agenda 21, which "remains the fundamental programme of action for achieving sustainable development" and adopted a Programme of Further Action to Implement Agenda 21[119]. The Programme fixed priorities for action to promote sustainable development worldwide for a five-year period running up to the first major review of Agenda 21 implementation scheduled for 2002.

Issues related to sustainable development arose also in the 2000 UN Millennium Summit[120]. The aim of this summit, in which more than 150 world leaders participated, was to assess the UN role in the on the eve of the 21st century. The Summit adopted a declaration which identified development and poverty eradication

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[117] See also Birnie and Boyle *op.cit.*5, at 52.

[118] A/RES/S-19/2, para.4.

[119] *Ibid.* at para.6.

[120] Fr more information for the 2000 Summit, see http://www.un.org/millennium/summit.htm

between the key objectives for the 21st century action[121]. The Secretary General of the Organisation was asked to prepare a "road map" containing the details explaining how the specific would be fulfilled. The Secretary General produced the Millenium Development Goals in 2001[122]. They included between others the need to halve by 2015 the proportion of people whose income is less than a dollar per day and the proportion of people who suffer from hunger[123]. Also the document provides for the goal of integrating the principles of sustainable development into country policies and programmes and reversing the loss of environmental resources[124].

A follow-up summit took place in 2005 with the aim of endorsing the Millennium Development Goals and other major international agreements[125]. The 2005 summit was characterised as "a once-in-a-generation opportunity to take bold decisions in the areas of development, security, human rights and reform of the United Nations"[126].

Also in 2000 the UN General Assembly convened the World Summit on Sustainable Development (WSSD)[127] which took place in 2002 in Johannesburg, South Africa 10 years after the UNCED. Unlike the latter, which dealt with both policy creation and policy implementation issues, the WSSD dealt mostly with policy implementation. In particular the WSSD was charged with reviewing the progress made since Rio,

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[121] United Nations Millennium Declaration (UN General Assembly Resolution 55/2, 8 September 2000),

[122] See "Road Map towards the Implementation of the United Nations Millennium Declaration", Report of the Secretary-General, U.N. Doc. A/56/326, 6 September 2001.

[123] *Ibid.*

[124] *Ibid.*

[125] Information about the 2005 Summit can be found in http://www.un.org/summit2005

[126] See "The 2005 World Summit: an Overview" available at http://www.un.org/ga/documents/overview2005summit.pdf

[127] UNGA Res.55/199 (20 December 2000).

identifying the areas where further action was required in order to implement Agenda 21 and addressing new challenges and opportunities within the framework of Agenda 21. The progress made regarding the implementation of Agenda 21 since Rio, as also acknowledged in the "Rio+5" Conference, was not satisfactory and in the UN there was hope that the 2002 summit would "reinvigorate the global commitment to sustainable development". Also, the resolution required that the Summit "should ensure a balance between economic development, social development and environmental protection, as these are interdependent and mutually reinforcing components of sustainable development".

The agenda of the summit was not specified in the resolution but was expected to emerge from the preparatory process. The CSD would be in charged of this process as the official preparatory committee.

At the political level the divide between developed and development countries which had influenced the developments in all previous grand summits reappeared also in the preparatory process for the WSSD. This time there was a new element in the dispute: the rising tide of the USA unilateralism. Following the rise in power of George W. Bush who had won the 2000 elections, and the September 11, 2001, terrorist attacks in New York the USA position became negative and reactionary on almost every issue and this further complicated the situation[128].

In more detail, during the Prep-Com negotiations the developing countries led by South Africa sought to shift the focus of the summit away from environmental issues

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[128] See also George (Rock) Pring "The 2002 Johannesburg Summit on Sustainable Development: International Environmental Law Collides with Reality, Turning Jo'Burg into 'Joke'Burg'" 30 *DEnv.J..Int'l L.&Pol'y* 2002, 410.

and towards economic and social development[129]. Poverty eradication and wealth redistribution were the main issues for these countries which backed up their intentions with the introduction of a draft Plan of Implementation for the WSSD[130]. The draft Plan was calling, between others, for ensuring the availability of funds for development activities, developing ways of generating new public and private sources of finance and reducing the unsustainable debt burden of poor countries[131]. On the other hand, developed countries led by the USA resisted this shift to developmental issues as well as the adoption of fixed targets, percentages or timetables for accomplishing the Agenda 21's aims. In other words the developed countries were not willing to pay what was necessary for the full implementation of the Rio agreements[132]. As a result, no breakthroughs in respect of these issues were to be expected from the Summit. In addition, the USA was against any new legal treaties, mandatory agreements of even legal principles of substance[133]. In general the USA stance did not favour the further enhancement of multilateral action in respect of important issues.

The Summit took place from August 26 through September 4, 2002 with the participation of more than 9,000 delegates from 192 countries. The Summit

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[129] See also, Lavanya Rajamani "From Stockholm to Johannesburg: the Anatomy of Dissonance in the International Environmental Dialogue" 12(1) *RECIEL* , 2003, 23. Also, Heinrich Boll Foundation, *The Jo'burg Memo-Fiarness in a Fragile World- Memorandum for the World Summit on Sustainable Development 6,* available at http://www.worldsummit2002.org/publications/memo_en_without.pdf

[130] *Draft Plan of Implementation for the World Summit on Sustainable Development,* available at http://www.johannesburgsummit.org/html/documents/prepcom4docs/bali_documents/draft_plan_1206.pdf

[131] *Ibid.*

[132] Greenpeace, *Rich Countries Refuse to Pay their Environmental and Social Debt,* available at http://archive.greenpeace.org/earthsummit/news_june7b.html.

[133] See also Pring *op.cit.*131; K.Gray, 'World Summit on Sustainable Development: Accomplishments and New Directions?" 52 *International and Comparative Law Quarterly,*2003, 267.

culminated with the adoption of two documents: The Johannesburg Declaration (JD)[134] and the Johannesburg Plan of Implementation (JPoI)[135].

The JD contains a commitment of world leaders to sustainable development and to building a humane, equitable and caring global society, cognizant of the need for human dignity for all[136]. The JD recognises that economic development, social development and environmental protection are the "interdependent and mutually reinforcing pillars of sustainable development" and the collective responsibility to advance and strengthen these pillars at the local, national, regional and global levels[137].

The JD provides a brief historical account of the developments from Stockholm to Rio to Johannesburg and concludes that the deep fault line that divides human society between the rich and the poor and the ever-increasing gap between the developed and developing worlds pose a major threat to global prosperity, security and stability. Poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are overarching objectives of and essential requirements for sustainable development[138].

The JPoI contains an action-plan on the way forward to sustainable development. However, whereas the JPoI contains several commitments it lacks precision in respect of the actions that will be taken to fulfil these commitments. From the relatively more specific commitments included in the JPoI we could refer to the establishment of a

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[134] http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.org

[135] http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.pdf

[136] Para.2

[137] Para.5.

[138] Para.11.

world solidarity fund to eradicate poverty; the promise to halve by 2015 the proportion of the world's population whose income is less than a US dollar per day and the proportion of people that suffer from Hunger; development of integrated water resources management and water efficiency plan by 2005; enhancing the role of the CSD. Mindful of the need to demonstrate a clear connection between the WSSD and the UNCED, the JPoI reaffirms in its introduction the strong commitment of the participants to the Rio principles, the full implementation of Agenda 21 and the Programme for the Further Implementation of Agenda 21.

In general, the general impression coming from the JD and the JPoI is that the role of the developmental and societal pillars of sustainable development were strengthened in Johannesburg but the lack of concrete implementation plans and deadlines and specific targets do not give rise to much of optimism.

In the legal field, which is the main focus of this thesis significant new developments at Johannesburg include the strengthening of the role of two particular principles of international environmental law which are closely related to sustainable development: the principle of common but differentiated responsibilities and the principle of precaution.

In respect of the first principle, which as shown earlier in this chapter was included in principle 7 of the Rio Declaration, the WSSD expanded its scope in order to cover not only environmental issues as had been previously thought, but also developmental and social issues, such as poverty eradication. The JPoI indicates that the principle of common but differentiated responsibilities should be taken into account in implementing Agenda 21 and the internationally agreed development goals[139]. The

[139] Para.81

broadening of the scope of this principle expanded the responsibility for sustainable development to all sustainable development issues and is a major victory for developing countries[140].

The precautionary principle had been included also in the Rio Declaration. The essence of this principle is that if a risk is not certain, this will not be used as an excuse to prevent measures that could mitigate the harm[141]. The burden of proof in such cases is reversed and the proportionality principle is usually taken into account in respect of 'triggers' of the principle[142]. The application, though, of this principle has produced a number of problems related to disagreements between countries about its precise meaning and scope[143]. Also certain countries were concerned that this principle could be used for imposing trade protectionism particularly where the precautionary measures are taken in the absence of scientific evidence. The contribution of the WSSD, through the various references made in the JPoI to the principle, was that it helped to clarify the debate, to take the developing countries' perspectives further into account and in strengthening the recognition and role of precaution in international law[144].

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[140] The developed countries had been reluctant to accept the expansion of the scope of the principle to social and developmental issues, which by that time was considered to be a responsibility of the developing countries. They agreed to the expansion on the condition that the scope of the other Rio principles would also be expanded. However, the expansion of the scope of the principle of common but differentiated responsibility was a major issue for the developing countries and therefore their success in Johannesburg could be deemed significant. In respect of this issue see also Gray, *op.cit.*126, at 265-6; Rajamani, *op.cit.*129, at 31-32; Marie-Clair Cordonier Segger and Ashfaq Khalfan, *Sustainable development law : principles, practices, and prospects,* Oxford University Press, 2004, 137-139.

[141] Marie-Clair Cordonier Segger and Ashfaq Khalfan "Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation" 12(1) *RECIEL,* 2003, 54, at 61. See also in the next chapter of the thesis.

[142] *Ibid.*

[143] *Ibid.* Also, Gray *op.cit.*133, at 266.

[144] *Ibid.* at 62-64. The principle is discussed in more details in other parts of this thesis.

Lastly, and in addition to the inter-governmentally negotiated agreements the WSSD included a number of "Type-II Partnerships", which concerned partnerships between government, civil society and the private sector aimed at acting as a complement to the JPoI[145].

7. Other significant developments

Whereas the WSSD produced relatively little outcome in the legal field of sustainable development the International Law Association (ILA) in the 2002 *New Delhi Declaration of Principles of International Law Related to Sustainable Development* sought to identify the general substantive and procedural principles of international law for sustainable development. The Declaration referred to 7 such principles:

a. The duty of States to ensure sustainable use of natural resources.

b. The principle of equity and the eradication of poverty.

c. The principle of common but differentiated responsibilities

d. The principle of the precautionary approach to human health, natural resources and ecosystems

e. The principle of public participation and access to information and justice

f. The principle of good governance

g. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

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[145] For more details about these partnerships see Marie-Clair Cordonier Segger "Sustainability & Corporate Accountability Regimes: Implementing the Johannesburg Summit Agenda"12(3) *RECIEL,* 2003.

These principles along with other legal principles related to sustainable development will be discussed in more detail in the next chapter of the thesis.

Along with these developments special reference should be made also to the involvement of the International Court of Justice (ICJ), which in the dispute between Hungary and Slovakia about the Gabcikovo-Nagymaros project on the Danube River referred for the first time to "this need to reconcile economic development with protection of the environment [which] in aptly expressed in the concept of sustainable development"[146].

8. Summary-Conclusions

As stated in its introduction, the scope of this chapter was to record the historical evolution of the concept of "sustainable development" in international law and policy as a means of setting up the context for the discussion of the legal underpinnings and status of the term in international law, which will take place in subsequent chapters of this thesis.

The conclusions that could be reached from the above analysis are the following:

a. Sustainable development has been created as a result of the recognition of the need to take action to tackle environmental degradation and economic development within a single, integrated framework. Such integration was necessary because of the great impact that environment and development have on each other: development requires the use of natural resources which often

[146] *Gabcikovo-Nagymaros,* ICJ Rep. (1997), 7, at 140. See also *US-Import Prohibition of Certain Shrimp and Shrimp Products ('Shrimp-Turtle case'),* WTO Apellate Body (1998) WT/DS58/AB/R.

reaches extraordinary levels thus causing serious harm to the environment which in turn harms development process by depriving the latter of the critical resources lost due to the overexploitation.

b. The great extent of the problems of environmental degradation and underdevelopment, which exceed by far the national borders, as well as the high costs associated with the implementation of the principle of sustainable development, rendered necessary the adoption of action at the international level rather than at the national or regional one. For this purpose, a number of international law instruments and institutions were created to formulate and coordinate policies promoting sustainable development.

c. The formulation of the principle and of a workable strategy for putting it into practice proved to be a difficult task. The main reason is the divergence of interests and aims between the developing and the developed countries. The developing countries prioritise economic development as a necessary means for solving acute economic and social problems facing their societies. The developed countries prioritise environmental protection in order reduce and reverse environmental degradation and to preserve the development potential of their economies.

d. Virtually all documents adopted at the international level about sustainable development have been the result of intense negotiations and difficult compromises between developed and developing countries. The existence of diverging interests has slowed the pace of recognition and implementation of

sustainable development at the international level but nevertheless some serious progress has been made.

e. Even if the normative status of sustainable development is still debatable and there are disagreements about the legal significance of the relevant principles and agreements, it is beyond any doubt that the concept has acquired worldwide recognition and has been incorporated in the daily practice of all the states around the globe. Also some principles closely related to sustainable development, such as precaution and common but differentiated responsibility have made steady advances at the international level thus reinforcing the position of sustainable development as well.

Chapter 3

Sustainable development: definition and main components

A. Introduction

The previous chapter dealt with the evolution of the concept of sustainable development in international law and policy. It referred to the main stages in the process of the creation and recognition of sustainable development and the political, economic and other factors that have led to the current nebulous situation regarding the concept's status in international law. There were also extensive references to some of the principles which were found to be closely related to sustainable development and without which the latter would hardly achieve its goals. By relying on other principles, such as precaution and common but differentiated responsibilities, sustainable development becomes in effect an umbrella concept whose implementation goes side-by-side with the implementation of the principles covered by its umbrella. These principles also help to explain with some precision what sustainable development is, an issue still highly controversial, which according to certain views is the main obstacle to the recognition of its status as a binding norm in international law. The discussion of its legal status is therefore equally dependent upon the legal status of these principles.

This chapter will therefore look in more detail into the principles which are perceived to be forming the core of sustainable development. The focus will be on the role and legal significance that each of these principles has under sustainable development's umbrella. But before looking into these principles the chapter will provide a brief discussion of the definitional problem of sustainable development by discussing available definitions and existing disagreement on the issue. The discussion of the various definitions will help to identify the nature and extent of the umbrella term, whereas the discussion of the principles will help to identify the nature and extent of the principles covered by the umbrella. The result of the discussions of both these issues will be then used in the analysis of sustainable development's status in

international law and the presentation of the options available in order international law to help the latter to achieve its aims.

B. The definitional issue

The "Brundtland Report"[1] has provided the most popular definition of sustainable development according to which "sustainable development" is development that "… meets the needs of the present without compromising the ability of future generations to meet their own needs".

According to a view, the supporters of this definition "have…inferred a utilitarian prospective of the concept, stressed its anthropocentricity or emphasize a development oriented view of environmental resources"[2] Other views argued that the Brundtland definition "makes an important statement"[3], "has a rhetoric quality… which gives it a powerful emotive appeal"[4].

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[1]World Commission on Environment and Development *Our Common Future* Oxford University Press, 1987.

[2] See P.Schwarz "Sustainable Development in International Law" 5 *Non-State Actors and International law*, 2005, 127, 132, citing between others G.Handl "Sustainable Development: General Rules versus Specific Obligations" in W.Lang (Ed.), *Sustainable Development and International Law,* Boston, MA: Graham & Trotman/Martinus Nijhoff, 1995, 36 (arguing that sustainable development imposes restraints on developmental activities in so far as these would undermine the environmental basis for further development); B. Boer "Implementation of International Sustainability Imperatives at the national level" in Ginther, Denters and De Waart (Eds) *Sustainabloe Development and Good Governance,* Martinus Nijhoff Publishers Dordrecht/Boston/London, 1995, 104 (arguing that sustainable development will vary according to political, economic and social contexts including the particular economic activity to which it is applied); Pearce, Markandya and Barbier, *Blueprint for Green Economy,* Earthscan, London 2000, 33 (arguing that sustainable development implies and increase in 'development indicators'; 'capital accumulation' or 'welfare maximisation' for improving human condition'; McCloskey Michael "The Emperor Has no Clothes: The Conundrum of Sustainable Development" 9 *Duke Envtl. L. & Pol'y F.* 1999, 153,154 arguing that the Brundtland definition "seems to assume that the problem only involves meeting the needs of human beings".).

[3] David Reid *Sustainable Development, An Introductory Right,* London, Earthscan 1995, xv.

[4] *Ibid.*

In contrast, the critique argues that the Brundtland definition is vague, "lacking substantive meaning[5]" and "offering no hint of what sustainable development involves in practice, what commitments it requires and what the costs will be"[6].

Other scholars have pointed to the contradictions of bringing together environmental protection and economic growth, two concepts which are seen as incompatible seeking the achievement of fully diverging goals, while other views have argued that many of the objectives set out by the Report of the Commission, such as the satisfaction of basic human needs, are difficult to materialise[7]. A number of views have pointed to the environmental dimension of sustainable development by stressing the crucial role of the degradation of environmental wealth[8] and the need to sustain the natural resources[9].

Lastly, other views have pointed to an increasing connection between sustainable development and human rights and have talked about a three-pillared structure involving environment, development and human rights[10].

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[5] See Duncan French *International Law and Policy of Sustainable Development*, Juris Publishing 2005, 16.

[6] Reid, *op.cit*.3, xv.

[7] For more details about the criticism of the Report see French *op.cit*.5, 16-17. Also Reid *op.cit.*3. About the contradictions existing in the term sustainable development see Michael Redclift *Sustainable Development: Exploring the Contradictions,* London: Routledge, 1987.

[8] M. Jacobs, *The Green Economy: Environment, Sustainable Development and the Politics of the Future,* Pluto Press, 1991, 84, cited in Schwarz *op.cit.*2, 132.

[9] V. Shiva "Resources", in *The Development Dictionary,* Sachs W. (Ed.), Zed Books London, 1992, 217 cited in Schwarz *op.cit.*2, 132.

[10] See D. McGoldrick "Sustainable Development and Human Rights: an Integrated approach" 45 *International and Comparative Law Quarterly* 1996, 796, 797; UN Commission on Human Rights, Resolution 2003/71 on "Human rights and the environment as part of sustainable development" reaffirming that "...peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity are essential for achieving sustainable development and ensuring that sustainable development benefits all, as set forth in the Plan of Implementation of the World Summit on Sustainable Development"; the preamble of ILA New Delhi Declaration on the Principles of International Law Related to Sustainable Development, (London ILA 2002), "sustainable development...should be integrated into all fields of policy in order to realise the goals of environmental protection, development and respect for human rights..."; The Statement of the participants in the Global Judges Symposium on Sustainable development and the Role of Law, Johannesburg 18-20 August 2002, "We emphasise our commitment to the Universal Declaration of Human Rights and the UN Human Rights Conventions and recognise their close relationship with sustainable development".

Further, Schwarz[11] has identified three categories of definitions regarding sustainable development. The first of these categories bases its definition on elements and principles of sustainable development in the Rio Declaration or other international instruments. The ICJ's definition in *Gabcikovo Nagymaros* could be illustrative of this approach. According to the ICJ, sustainable developments is based on "new norms and standards…set forth in a great number of instruments" which seek to reconcile economic development with environmental protection[12].

Sands[13], applying the same method as Schwarz and focusing on the elements used in international agreements to define the concept, concluded that sustainable development could have four different meanings: a) it could mean a commitment to preserve natural resources for the benefit of present and future generations; b) it could refer to appropriate standards (e.g. "sustainable", "prudent" etc) for the exploitation of natural resources based upon harvest or use; c) it could require an equitable use of natural resources by taking into account not only national needs but also the needs of other states and people, and d) it could require that environmental factors be integrated into development and economic plans whereas development factors must be taken into account when environmental projects are executed.

The second of the definitional categories identified by Schwarz[14] focuses on the phrase "sustainable development" itself. As with the other categories different views have appeared. According to one of these views, the term is vague, theoretically obscure and lacking content[15]. Other views do not see any failure of language in the term but a positive function seeking "…to gloss over not only failed consensus, but a

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[11] Schwarz, *op.cit*.2, 133

[12] *Gabcikovo-Nagymaros, ICJ Reports* 1997, para.140.

[13] P.Sands "Environmental Protection in the Twenty-first Century: Sustainable Development and International Law" in R.S. Axelrod, D.L. Downie, and N.J. Vig (Eds.), *The Global Environment: Institutions, Law, and Policy* (2nd ed.), CQ Press, Washington, D.C., 2005, 116, 128-129.

[14] Schwarz, *op.cit*.2, 133.

[15] By way of example V.Lowe argues that the term "…is rooted in theoretical obscurity and confusion and…suffers from the same reluctance to test theoretical principles for their practical utility that impedes the development of many other areas of international law". According to Lowe, sustainable development is merely "…a convenient, if imprecise, label for a general policy goal, which maybe adopted by states, unilaterally, bilaterally or multilaterally" (V.Lowe, "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone (Eds), *International Law and Sustainable Development*, Oxford University Press, 1999, 30-31.

latent collision course" between rich and poor[16]. In similar terms it has also been argued that sustainable development has been deliberately construed in open-textured terms because it "…was not formulated as either a logical construct or an operational maxim- but rather as a unifying political meta-objective with a suggestive normative form"[17].

The third category, according to Schwarz, uses a "descriptive" definitional method that draws a meaning from a combination of the other three categories. This view identifies sustainable development "as a process or as a concept with an instrumental role of effecting change in development patterns"[18].

Lastly, there is another view, which argues that the complex nature of "sustainable development" is such that it cannot usefully be defined[19].

What one could infer as a common element in all the above definitions of sustainable development is that they stress the international nature of the term, which seeks to render the management of national natural resources an issue of international concern[20].

Another common issue is the existence in the concept of sustainable development of two main poles: socioeconomic development and environmental protection. Around these main poles many complex principles and ideas revolve whereas there does not seem to be a consensus on what the relationship between the main poles or between the poles and the revolving ideas and principles should be or even what precisely these revolving ideas would be.

One possible explanation about the lack of clarity and precision in the definition of sustainable development, which has already been stressed above, is the lack of consensus at the international level about what the term should mean and how it should be best used to serve the diverse and often conflicting interests of the various states and organisations. Although all states seem generally to accept the definition

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[16] Christopher D. Stone "Deciphering Sustainable Development" 69 *Chi-Kent L.Rev.*1994, 977, 978.

[17] J.Meadowcroft "Sustainable Development: a New(ish) Idea for a New Century"? 48 *Political Studies,* 2000, 370, 373.

[18] Schwarz, *op.cit*.2, 133.

[19] P.Birnie and A.Boyle *International Law and the Environment,* (2nd Ed.) Oxford 2002, 47.

[20] *Ibid.,* 85.

and interpretation of sustainable development given in the Brundtland Commission and the Rio Conference with its follow-ups[21], they fail to reach consensus, when they come to take concrete practical steps to implement the agreements. The Brundtland Report and the Rio documents, which are soft law documents, provide only general guidelines and leave great discretion to the states regarding the implementation of sustainable development. This fact along with the inherent and great complexity of sustainable development and the fact that it affects virtually all aspects of human activity and various established interests also explain the variety of definitions existing about the concept. States, organisations or interest groups have formulated definitions that best serve their own interests or help them achieve their own goals[22]. By way of example, environmentalists are highly critical of anthropocentric definitions which by placing human welfare in the centre, arguably place inadequate emphasis on the need to sustain the natural environment[23]. Conversely, proponents of the "developmental" aspect of sustainable development see in the views of environmentalists, who are particularly strong in developed countries, an attempt by these countries to control economic development of the developing world[24].

A more balanced approach which appears to consider the current contradiction regarding the definition and meaning of sustainable development as justified, argues that sustainable development and certain related principles are new formulations, which have emerged over a relatively short period of time[25], in an environment dominated by sharp differences of views between states about the meaning and

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[21] See Meadowcroft *op.cit.*17, 374.

[22] See also Birnie and Boyle *op.cit.*19, 47: D. McGoldrick *op.cit.*10, at 798-799 ("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 or which gender it is impacting upon"); D.Medratu "Sustainability and Sustainable Development: Historical and Conceptual Review" 18 *Env. Impact Assessment Review*, 1998, 493, 518.

[23] See C.Voigt, "From Climate Change to Sustainability: an Essay on Sustainable Development, Legal and Ethical Codes" 9 *Worldviews*, 2005, 112, 120; Meadowcroft *op.cit.*17, 372-373

[24] See also the discussion on the north/south dichotomy in the previous chapter.

[25] See for instance the *Gabcikovo-Nagymaros* decision *op.cit.*12; P.Sands *Principles of International Environmental law,* (2nd Ed.), Cambridge University Press, 2003, 289; M-C Codornier Segger "Significant Developments in Sustainable Development Law and Governance: A Proposal" 28 *Natural Resources Forum,* 2004, 61, 62.

application of these principles and for which the current state practice is still evolving[26].

Also, the existence of a variety of definitions and interpretations of sustainable development, in certain cases can be useful, by allowing flexibility which has helped to achieve consensus in specific areas which, in turn, has led to the adoption of several legally binding documents containing principles and norms relating to sustainable development[27]. This argument though is not acceptable by all. It has being argued that the large number of often contradictory and incompatible definitions of sustainable development make it increasingly difficult to adopt a more specific and therefore practicable definition of the term that would achieve harmonious and worldwide interpretation and application[28].

For the purposes of this thesis, the definitional problem has great practical significance since it directly affects the debate on the legal status of sustainable development. It has been argued, correctly, that the great uncertainty existing about the exact meaning of sustainable development constitutes "…one of the fundamental impediments to the concept's development as a binding legal obligation"[29]. However, and despite the existence of the definitional problem, the increasing recognition of the legal significance of sustainable development in legally binding documents in specific areas leaves space for some optimism that sustainable development is not legally meaningless.

C. The principles relating to sustainable development

Another way of approaching the legal status of sustainable development is by looking into the principles covered by the umbrella concept. Sustainable development is an umbrella concept comprising a number of principles supporting it. These principles,

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[26] Sands *ibid*.

[27] See in the previous Chapter where the evolution of the concept of sustainable development and certain key agreements were discussed.

[28] See also Voigt *op.cit.*23, 121.

[29] *Ibid.,* 15.

as will be explained, enjoy a free standing in international law and if it was possible to identify them and assess their legal status, then it would become easier to determine the precise meaning and scope of sustainable development as well.

Common element in all these principles is that they serve the goal of reconciling social, economic and environmental norms and regimes by establishing relevant procedural and substantive rules. Such rules can be found in a variety of legal instruments of international law, including treaty articles such as the 1992 Convention on Climate Change[30] and the Agreement establishing the World Trade Organisation[31], non-binding texts such as the Stockholm and Rio Declarations, and decisions of courts or tribunals such as the *Gabcikovo-Nagymaros* decision. In certain of these instruments express references to sustainable development itself are made but the utility of these references is constrained by the specific limited objectives of the instrument.

Some of the principles supporting sustainable development, like the latter, often face uncertainty regarding their precise meaning and scope. However, others have settled meaning and status thus offering legal certainty which adds legal certainty to sustainable development as well[32].

The number of the principles supporting sustainable development is not absolutely clear as well as the relationship between them. From the various lists of principles

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[30] Article 3(4) of the Convention states: "the Parties have a right to, and should, promote sustainable development".

[31] In the preamble of the Agreement it is stated that: "the *Parties* to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development"
Agreement Establishing the World Trade Organisation, Marrakesh, 15 April 1994, in force 1 January 1995, 33 ILM 1125 (1994).

[32] According to P.Sands some principles of international law are based upon or reflect customary law; others represent new or emerging international legal concepts; and clearly others are only intended to be inspirational in effect or to comprise statements reflecting future intent. See P.Sands "International Law in the Field of Sustainable Development: Emerging Legal principles" in W. Lang, (Ed.), *Sustainable Development and International Law*, Oxford: Oxford University Press, 1999, 53,57.
The issue is also discussed in more details in the next chapter.

available[33], this thesis will use the list included in the New Delhi Declaration (NDD) on the Principles of International Law Related to Sustainable Development, adopted by the International Law Association Committee on the Legal Aspect of Sustainable Development in 2002[34].

The New Delhi Declaration builds on previous works in the area, such as the World Commission Report on Environment and Development *Our Common future* (1987), the Rio Declaration on Environment and Development (1992), various world conferences and UN Declarations and its own previous 1986 Seoul Declaration, to identify the main principles of sustainable development.

According to the Declaration, sustainable development involves "...a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of environment on which nature and human life as well as social and economic development depend and which seeks to realise the right of all human rights to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations"

The Declaration proceeds to the identification of seven substantive and procedural principles related to sustainable development, which taken together "...may well be viewed as a framework of an international law in the field of sustainable development"[35].

The list is not exhaustive whereas each principle is divided into various sub-principles. The legal significance and status of each of these principles varies, as will be shown in the analysis.

The listed principles are the following:

1. The duty of states to ensure sustainable use of natural resources

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[33] See e.g. The Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva Sept, 1995. The Report was prepared by the Division for Sustainable Development for the Commission on Sustainable Development.

[34] ILA Resolution 3/2002: "New Delhi Declaration on the Principles of International Law Related to Sustainable Development" in ILA *Report of the Seventieth Conference, New Delhi,* London: ILA 2002.

[35] International Law Association, "Searching for the Contours of International Law in the Field of Sustainable Development", *5th and Final Report,* 2002, 6.

2. The principle of equity and the eradication of poverty
3. The principle of common but differentiated responsibilities
4. The precautionary approach to human health, natural resources and ecosystems
5. The principle of public participation and access to information an justice
6. The principle of integration and interrelationship in particular in relation to human rights and social economic and environmental objectives

1. The duty of states to ensure sustainable use of natural resources

The Declaration states that it is "...a well established principle of international law that all States have the sovereign right to manage their own natural resources pursuant to their own environmental and developmental policies and the responsibility to ensure that activities within their jurisdiction and control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction".

"The States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their own peoples....and to the conservation and sustainable use of natural resources and the protection of the environment including ecosystems".

The needs of future generations must be taken into account.

Lastly, the Declaration stresses that the protection, preservation and enhancement of the natural environment "...are the common concern of the mankind" and that "[t]he resources of outer space and celestial bodies and of the sea-bed, ocean floor and subsoil thereof beyond the limits of national jurisdiction are the common heritage of the mankind".

a. The meaning and aim of the principle

The first principle of NDD raises a number of issues because it actually incorporates a number of other principles well known to international law.

The first part of the principle builds on previous documents especially Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, which set out two further ideas that reflect customary international law: the sovereign right of states over their natural resources and their duty not to cause damage to other States. Principle 21 which is the main provision, has acquired status of customary law as confirmed by the ICJ[36].

The sovereign right of States over their natural resources is based on the sovereignty of States which is one of the basic and fundamental principles of international law[37]. The principle of sovereignty over natural resources arose out of the main sovereignty principle as a new principle of international economic law after the end of the second world war[38]. It was viewed as a response to a number of issues being of great concern for the international community and especially the developing countries and former colonies, such as the scarcity and optimum utilization of natural resources, the deteriorating terms of trade of developing countries, the promotion and protection of

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[36] See ICJ's 1996 Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons ICJ Report,* 1996, 226, 241-242.

[37] See Franz Xaver Perrez "The Relationship Between 'Permanent Sovereignty' and the Obligation not to Cause Transboundary Environmental Damage" 26 *Envtl.L.* 1996, 1187, 1188; Brownlie considers sovereignty and equality of the States as "...the basic constitutional doctrine of the law of nations", (Ian Brownlie, *Principles of Public International Law*, (6th Ed.), Oxford University Press, 2003, 287). The essence of state sovereignty is that states are allowed by international law a freedom to conduct and authorise within their territories such activities as they choose, even activities harmful to the environment. However, the exercise of sovereignty is not unrestricted. International law also imposes certain restrictions to the exercise of the sovereign right seeking to ensure that other states are not harmed by its exercise (see also Sands *op.cit.*25, 236). Growing international awareness of environmental degradation and increasing interdependence between states has shifted emphasis on the obligation of all states when managing their resources in the interest of the economic development of their peoples to take into account the impact of these policies on the environment and the interest of other States and humankind (see N. Schrijver, *Sovereignty Over Natural Resources*, Cambridge University Press, 1997, 25). See also below.

[38]The principle was formulated in a number of resolutions of the UN General Assembly adopted after 1952. By way of example, UNGA Res.523(VI) (1952) referred to the right of under-developed countries to determine freely the use of their natural resources; UNGA Res.626(VII) (1952) "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty".

foreign investment, state succession, nationalisation, cold war rivalry, economic independence and strengthening of sovereignty and the formulation of human rights[39]. The principle in various forms appears in various international law instruments including UN General Assembly Resolutions and international conventions or treaties[40].

The essence of the principle as described in UN General Assembly Resolutions is that all States have an inalienable right to freely explore, develop and dispose of natural resources in the interest of their national development and of the well-being of their people[41]. The right is exercised in conformity "...with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities"[42].

As a principle promoting economic development, permanent sovereignty over natural resources is regarded as a fundamental principle of contemporary international law[43].

The principle also incorporates freedom from interference. Further, the traditional interpretation of the principle prohibits extraterritorial application of national environmental laws[44]. Attempts for such application have occasionally been made, sometimes successfully, by states having strict environmental laws against neighbouring or other states whose laws offer lower level of environmental

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[39] See N. Schrijver, *op.cit.* 37*,* 4-7.

[40] E.g. see UNGA Resolution 1803 below. Treaties referring to the principles include the Climate Change and Biodiversity Conventions (1992) and the Energy Charter Treaty (1994)

[41] See UNGA Res.1803(XVII) 17 U.N. GAOR Supp. No 17 at 15, U.N. Doc. A/5217 (1962).

[42] *Ibid.*

[43] See Perrez, *op.cit.*37, 1192.

[44] See Sands, *op.cit.*25, 238.

protection[45]. This type of interference appears to be at odds with the prohibition mentioned above but nevertheless, as has been rightly argued, it is more consistent with a more modern approach to global realities which demonstrate increasing interdependence between States regarding environmental issues[46] and a continuous decline of the role of States at the international level[47].

This right of states over their natural resources is permanent[48] but also subject to certain restrictions, which have gradually increased as the advance of globalisation has increased interdependence between States. In particular, one of the restrictions imposed on the sovereign right of the States over their natural resources and which is mentioned in Principle 21 is the responsibility of these States not to cause damage to the territory, and then to the environment of other States. This in turn is translated into two main duties[49]: a) the duty to exercise permanent sovereignty so as to prevent significant harm to the environment of other States or of areas beyond the limits of national jurisdiction; b) the duty to manage the natural wealth and resources in such a

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[45] One such case was *Tuna/Dolphin I* (GATT Doc. DS21/R, 3 September 1991 (30 ILM 1594 (1991))) in the context of GATT where a GATT panel considered a US prohibition of imports of yellow-fin tuna caught within the Mexican exclusive economic zone by Mexican vessels using purse-seine nets, whose compliance with US environmental protection standards was disputed. The panel considered that the prohibition was contrary to the GATT. It held that "...a country can effectively control the production or consumption of an exhaustible natural resource only to the extent that the production of consumption is under its jurisdiction" (para.5.31). Accepting the extra-jurisdictional interpretation of the US would mean that "each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardising their rights under the General Agreement" (5.32).
However in *Shrimp/Turtle* case, in the context of WTO, which raised similar legal issues, a different approach was adopted. The case concerned a US import prohibition of certain shrimp and shrimp products from certain Asian countries. The prohibition was justified on grounds that the shrimps were harvested in a way adversely affecting endangered sea turtles. On the issue of the extraterritoriality the Appellate Body said that since sea turtles swim freely in the oceans and migrate there is "...a sufficient nexus between the migratory and endangered marine populations involved and the United States...", which allow the latter to have an interest in their conservation.

[46] As Gillespie realistically notes it is now widely accepted "...the futility of unilateral actions to protect the environment from international concerns". He also points out that unilateral action often creates domestic and international economic problems and actually worsening the environmental problems it is trying to solve (Alexander Gillespie, *The Illusion of Progress, Unsustainable Development in International Law and Policy*, Earthscan, 2001, 140). Similarly, Xue Hanqin states: "No State can single-handedly cope with such environmental crises as a shortage of fresh water, pollution and land degradation even if they fall entirely within national jurisdiction or control" (Xue Hanqin, *Transboundary Damage in International Law,* Cambridge University Press, 2003, 136).

[47] Gillespie *Ibid.* 140.

[48] The reference to permanent sovereignty was first introduced by Chile in 1952 in a debate in the UN Commission on Human Rights (see Schrijver *op.cit.*37, 369). UNGA Res.1720(XVI) (1961) "On Permanent Sovereignty over Natural Resources" formally introduced the term.

[49] Schrijver *op.cit.*37, at 392; Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law,* Oxford University Press, 2000, 65.

way as to ensure sustainable production and consumption for the interests not only of the State's own peoples but also of the peoples of other States and humankind in general including future generations.

The responsibility principle seems to be leading in a different direction than the sovereignty principle[50]. Principle 21 by including both in its content sought to achieve a reconciliation of the two principles[51] in the benefit of both the individual States and the international community, which as a concept gained increased popularity after the 1960s[52].

The responsibility principle, whose development and recognition in international law has not been unproblematic, pre-dates the Stockholm Declaration and is related to the obligation of all States to protect within their territory the rights of other states, in particular their right to integrity and inviolability in peace and war[53]. Early cases like

[50] Permanent sovereignty over natural resources recognises the right of a state to exploit its natural resources for its own benefit whereas responsibility seeks to impose limits on the exercise of this right by taking into account the interests of the other states.

[51] See also Duncan A. French "A Reappraisal of Sovereignty in the Light of Global Environmental Concerns" 21 *Legal Studies,* 2001, 376, 382.

[52] See below.

[53] PCA, *Palmas* Case, 2 HCR (1928) 84 at 93.

Trail Smelter[54], *Corfu Channel*[55] and *Lac Lanoux Arbitration*[56], though they dealt with specific issues and not with the responsibility principle directly, have been considered as contributors to the development of the principle since in their references they used general terms which facilitated the establishment of a basic framework on which the principle was later built[57]. Also certain UN resolutions[58] and environmental

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[54] United States v. Canada, 3 R. Int'l Arb. Awards 1911 (1938), reprinted in 33 *AJIL* 182 (1939), 3 R. Int'l Arb. Awards 1938 (1941), reprinted in 35 *AJIL* 684 (1941). The case concerned transboundary air pollution between the United States and Canada and the passage from the case which often mentioned is the following: "Under the principles of international law...no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".
This passage has been seen as containing a rule of customary international law even if the tribunal was not able to find directly relevant international precedents and relied on its decision mainly on decisions by US Courts on interstate litigation concerning transboundary harm (see the H.E. Justice Castro's statement in his dissent in the *Nuclear Tests* (New Zealand and Australia v. France (1974) *ICJ Reports* 457) case: "If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes, the consequences must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claims that France should put an end to the to the deposit of radio-active fall-out on territory"; Okowa, *op.cit.*49, 68; Sands *op.cit.*25, 242; Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable development law: principles, practices, and prospects*, Oxford University Press, 2004, 113). Moreover, this passage was obiter whereas many scholars have stressed the fact that the liability had not been an issue in this case since Canada had already acknowledged its liability. Also the tribunal made no reference to environmental protection *per se.* As a result, the tribunal decision does not contain a conclusive analysis regarding the exact nature of State responsibility and the required standard of care by States, which has led to criticism that the significance of the decision has been overestimated (see Duncan French *op.cit.*51, 382; Sumudu A. Atapattu, *Emerging Principles of International Environmental Law,* Transnational Publishers, 2006, 4; Karin Mickelson "Rereading *Trail Smelter*", 31 *Can. Y.B. Int'l L.,*1993, 219, 222-223; Okowa, *op.cit.*48, 68).

[55] UK v. Albania (*Corfu Channel*), (1949), ICJ Reports 4 at 22. The case does not concern environmental damage but a claim by UK against Albania for damage suffered by a British ship while in transit through the channel, an international straight falling within the Albanian territorial waters. The International Court of Justice relied on Art.74 of the UN Charter according to which the policy of UN members "...in their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters". The Court went on to make the significant statement that the principle of sovereignty contains "the obligation of every state not to allow knowingly its territory to be used for acts contrary to the rights of other states".

[56] Spain v. France (*Lac Lanoux*) (1957) 24 ILR 101. The case concerned a claim by Spain that a French proposal to divert the flow of a river originating in France and running through Spanish territory. The International Arbitral Tribunal that France was entitled to exercise its rights but it had to respect the rights of Spain and take into account the latter's interests.

[57] See also French *op.cit.*51, 383.

[58] E.g. in UNGA Res.1629 (XVI)(1961) on atomic radiation it is stated: "...the fundamental principles of international law impose a responsibility on all States concerning actions which might have harmful biological consequences for the existing and future generations of peoples of other states by increasing the levels of radio-active fallout". Also UNGA Res.2849(XXVI)(1972) on Environment and Development while reiterating the UN Members' respect for the permanent sovereignty over natural resources and the right of each State to exploit its own resources in accordance with its own priorities and needs, stresses the need such an exploitation to avoid producing harmful effects on other countries.

treaties[59] making reference to the responsibility of states appeared during that period. However, the breakthrough occurred in Stockholm in 1972. Principle 21 of the Stockholm Declaration formalised the responsibility principle, which since then appeared in a number of Treaties and non-binding instruments[60]. Court decisions also appeared during that period thus initiating along with the abovementioned treaties, the discussion of the normative status of Principle 21 and the responsibility principle. Particular reference in this respect should be made to the *Nuclear Tests* (1995) case[61] and the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* adopted a few months later[62], which led to the judicial recognition of the customary law status of the Principle 21 in international law[63]. It has been argued that these cases also reflect the autonomous status of the responsibility principle[64].

Beyond permanent sovereignty over natural resources and state responsibility principles, the New Delhi Declaration refers also to the sustainable use of national resources, which is another independent concept whose development could be attributed to the evolution of international law regarding the conservation of the

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[59]E.g. the 1963 Nuclear Test Ban Treaty provides that each party to the Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control "...in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted".

[60]E.g. the 1972 London Dumping Convention fully incorporates in its preamble Principle 21; Also Principle 2 of the Rio Declaration, a non-binding document endorsed, as shown, Principle 21.

[61] New Zealand v. France, *ICJ Report* (1995) 288. The Nuclear Tests case concerned a New Zealand's request for an order against the 1995 France's announcement that it would resume the underground nuclear tests. In the course of the case both New Zealand and France accepted that Principle 21/2 was a "well established proposition of customary international law". Judge Weeramantry in his dissenting opinion referred to a principle that damage "must not me caused to other nations" which according to him was "deeply entrenched principle grounded in common sense, case law, international conventions and customary international law" (at 347).

[62] *ICJ Report,* 1996, 226, 241-242. The passage in the text if the ICJ's Opinion which has particular importance is the following: "The existence of the general obligations 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".

[63] See also Sands *op.cit.*25, 241-242. However, many scholars point out the fact that the language used by the ICJ in its Advisory Opinion does not fully coincide with the language in Principle 21. In particular, the ICJ is talking about the obligation of States to *respect* the environment which is different from the formulation in Principle 21 which refers to the responsibility of States *not to cause damage* to the environment of other Sates. This apparent difference has led to comments that the ICJ's formulation is broader than Principle 21, though the language of the latter appearing stronger (see Sands *op.cit.*25, 245-246; Atapattu *op.cit.*54, 4).

[64] French *op.cit.*51, 385.

natural resources. The conservation of such resources has been employed by UN resolutions in order to address concerns that the economic development, especially in the developing countries, could jeopardise the natural resources in these countries[65]. The principle is aimed to benefit both present and future generations[66] even if it has been argued that the main focus is on the regulation, by the establishment of appropriate standards, of the rate of exploitation of specific natural resources rather than on their preservation for future generations[67].

According to the principle of sustainable use, the exploitation of natural resources must be conducted in a "sustainable" or "optimal" way[68]. Principle 1 of NDD refers also to the need to take into account the needs of future generations when determining the rate of use of natural resources. Other similar terms used in international instruments include between others "sustainable management"[69], "ecologically sound rational use" of natural resources[70]. The principle appears in numerous treaties and other international instruments.

Compared with Principle 21 and the permanent sovereignty of States, the principle of sustainable use recognises the sovereignty of States over their natural resources and only seeks to place certain limits on the rate and manner of its exercise. Certain UN resolutions have even pointed to possible threats to the exercise of sovereignty of

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65 See e.g. UNGA Res.1831 (XVII) (1962) on "Economic Development and the Conservation of Nature" which expressed concerns that the economic development in the developing countries "...may jeopardise their natural resources and their flora and fauna, which in some cases may be irreplaceable if such development takes place without due attention to their conservation and restoration".

66 See e.g. Principle 2 of the Stockholm Declaration: "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..."

67 See Sands, *op.cit.*25, 257.

68 E.g. The International Convention for the Regulation of Whaling (2 Dec 1946, 62 Stat.1716, 161 UNTS 72) states in the preamble that its objective is to achieve "optimum level of whale stocks". The Convention for the Conservation of Antarctic Seals (1 June 1972, 29 UST 441, TIAS No.8826) in the preamble states that any harvesting of Antarctic seals should be regulated so as not to exceed the levels of the "optimum sustainable yield".

69 See Convention for the Protection of Marine Environment of the North-East Atlantic (22 Sept. 1992, reprinted in 32 ILM 1069 (1993) in the Preamble.

70 See Convention on the Protection and Use of Transboundary Watercourses and International Lakes (17 March 1992, 31 ILM 1312) Art.2(2)(b).

certain States, especially the developing countries, from the "irrational and wasteful exploitation and consumption of natural resources"[71].

The principle applies also to shared resources and those resources that are in areas beyond national jurisdiction and to both marine and non-marine resources[72].

However, a source of further limitations on the exercise of permanent sovereignty over natural resources and conflict with the principle of sustainable use concerns the increasing use in international instruments of terms such as "common concern of humankind" and "common heritage of humankind" or "common interest", which have been included also in principle 1 of NDD. These terms concern the use of common resources, the meaning of which has been gradually widened so as to increase even more areas and resources. The main idea is that control over these resources should pass from state to international management.

"Common heritage of humankind" and "common concern of humanity" apply in different situations. "Common heritage of humankind" is mainly concerned with resources existing beyond the national border of any state but its application is relatively limited to the seabed and subsoil[73], Antarctica[74], the moon and outer space[75], the cultural heritage of humanity[76] and plant genetic resources[77]. This has been confirmed by principle 1 of NDD too. Where "common heritage of humankind" applies, it demonstrates the following features: non-appropriation; international

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71 UNGA Res. 3326 (XXVII) (1974) "Report of the Governing Council of the United States Environmental Programme" in the Preamble.

72 See Sands *op.cit.*25, 261.

73 See *United Nations Convention on the Law of the Sea*, 10 Dec. 1982, UN Doc.A/CONF.62/122 21 ILM 1245. The Convention in its Preamble reiterates the principle embodied in UN GA Resolution 249 (XXV) of 1970 according to which the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind.

74 The *Antarctic Treaty* (1 Dec 1959, 402 UNTS 71) establishes a special regime for Antarctica.

75 The *Agreement Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies,* 5 Dec 1979, in Article 11(1) states: "the moon and its natural resources are the common heritage of mankind..."

76 The Convention Concerning Protection of World Cultural Property and Natural Heritage (23 Nov. 1972 U.S.T. 40) states in its Preamble that the "...deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world" and that "...parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole".

77 The "International Undertaking on Plant Genetic Resources" F.A.O Res. 8/83 UN F.A.O. 22nd Sess., UN Doc. C/83/REP (1983) states that plant genetic resources are "a heritage of mankind".

management; shared benefits; and reservation for future purposes[78]. However, the attempts to extend the principle also to resources located within state boundaries met strong opposition. The ideas of shared benefits for all from the exploitation and management of resources promoted by the "heritage" principle, which was supported by developed countries, were not acceptable by resource-rich countries which were unwilling to share the benefits from the exploitation of their resources[79].

"Common concern of humankind", which has long application in the fields of human rights and self-determination of people where it has acquired an *erga omnes* status[80], arose out as a compromise between the opposing sides by promoting the solution that natural resources do not belong wholly to humankind and should be governed by the countries where they are located but the conservation of these resources is of common concern to humankind[81]. The principle embodies substantial obligations, such as burden-sharing, financing, transfer of technology and concerted strategies[82]. The 1992 Biodiversity[83] and Climate Change Conventions[84] were the first international treaties to incorporate the "common concern" concept.

It is clear from the above analysis that compared with "common heritage of humankind", the "common concern" concept has more direct impact on the permanent sovereignty over natural resources by elevating the conservation of these resources to a level which is not controlled solely by the exercise of national jurisdiction[85]. Even if the "common concern" principle does not advance sharing of

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[78] Hunter, Salzman and Zaelke, *International Environmental Law and Policy*, (3nd Ed), Foundation Press, 2007, 485-486.

[79] See Cordonier Segger and Khalfan *op.cit.*54, 120-121; also Hunter et al, *ibid.* 489-490.

[80] See "Draft International Covenant on Environment and Development" (2nd Ed.), *IUCN-The World Conservation Union,* 2000, 34.

[81] See Cordonier Segger and Khalfan *op.cit.*54, 120-121. Common concern to humankind appeared for the first time in the UNGA Resolution 43/53 on "Protection of global climate for present and future generations of mankind" where it is stated that "...climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth".

[82] See Report for the Expert Group *op.cit.*33, para.87.

[83] *Convention on Biological Diversity*, 5 June 1992, 31 ILM 822 (1992). The Convention states in the Preamble that "the conservation of biological diversity is a common concern of humankind".

[84] *United Nations Framework Convention on Climate Change* 9 May 1992, 31 ILM (1992). The Preamble states that "change in the Earth's climate and its adverse effects are a common concern of humankind".

[85] See the Draft Covenant *op.cit.*80, 33-34.

benefits from the exploitation of natural resources between states, as the principle of common heritage of humankind" does, it does though establish further limitations to the exercise of national sovereignty over these resources. Such a development seems to have been inevitable taking into account the increased interdependence between states regarding environmental problems and also the continuous advancement of globalisation, which reduces the role of the states in international affairs[86].

Regarding sustainable development both "common heritage of humankind" and "common concern of humankind" are relating and help to achieve its objectives. The term "humankind" which exists in both terms has been seen as having a long-term temporal dimension by establishing a link between present and future generations[87]. The term "common concern of humankind" has been linked to a number of concepts and principles relating to environment and resources. Its human rights background has linked the concept to a number of environmental rights and principles, such as the principle of intergenerational equity[88]. The concept also advances the duty to cooperate which constitutes "the very anchor of international law"[89]. Lastly, "common concern" has also a spatial dimension which concerns the need to treat earth as a whole and the biosphere in its entirety, which means the necessary involvement of all states in the conservation actions[90]. The spatial aspect of the "common concern" concept accepts another principle related to the sustainable development, the principle of "common but differentiated responsibilities"[91].

"Common concern of humanity" has been suggested to be supportive also of the sustainable use principle by providing the basis for expanding the scope of the latter also to acts within state borders[92].

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[86] See also ibid.

[87] Report of Expert Group *op.cit.*33, para.84.

[88] *Ibid.* para.88.

[89] *Ibid.*

[90] See Draft Covenant *op.cit.*80, 35.

[91] *Ibid.* See also the section about this principle below.

[92] See French *op.cit.*5, 59.

In respect of "common heritage of mankind", the concept has also been seen as embodying many of the concerns for future generations found in "intergenerational equity"[93].

b. Sustainable use of natural resources and sustainable development

The above analysis explained the meaning and the relationship with the main sustainable development concept of the principle of sustainable use of natural resources as presented in Principle 1 of the NDD. The analysis showed that Principle 1 is an independent concept which operates in the area of natural resources and their conservation. The concept in actuality embodies a number of principles and concepts recognised by international law such as the permanent sovereignty over natural resources, state responsibility, sustainable use, "common heritage of mankind", "common concern of mankind", and future generations. The analysis also revealed the links existing between these principles and concepts as well as between them and the sustainable development principle and demonstrated why Principle 1 of NDD has been considered as one of the principles of sustainable development.

Further, the analysis revealed aspects of the conflicts regarding the application and status of the concepts and principles incorporated in Principle 1 and also the problems in the relationships between them. At this point it is necessary to offer some more insight into these problems, as a means to understand why, while Principle 1 of NDD has been used to promote the normative status of sustainable development, the problems surrounding Principle 1 and the incorporated principles may finally undermine such a status.

In particular, regarding sustainable use there is a question if the principle can impose on states a general obligation of sustainable use of natural resources. This question seems to be based on real facts. In particular, the principle as currently stands, applies in specific situations, which poses problems for pinning it down as a norm and giving it a generalised character. In this respect some progress towards raising the legal significance of sustainable use has been made through the growing body of global and

[93] See Catherine Redgwell, *Intergenerational Trusts and Environmental Protection*, Manchester University Press, 1999, 129.

regional treaties dealing with issues related to the conservation and sustainable use of natural resources[94]. Such treaties do impose some obligations which could help to the normative status of sustainable use and their geographical scope is broad, but most of these treaties lack sufficient concreteness or others containing more concrete obligations have only local or regional scope[95]. Similarly, Court decisions supporting the obligation, on the basis of customary international law, of states to co-operate in the direction of the conservation and sustainable use of natural resources concern only specific areas and issues[96]. And while these decisions do contribute to the rise of the legal significance of the principle of sustainable use in international law they could hardly justify the establishment of a general obligation on all states to use their natural resources sustainably.

Further practical issues such as the standards against which a given state practice over its natural resources will be considered as promoting sustainable use or not have not been solved. Also, states, even in cases covered by international treaties to which they are members, retain significant margin of discretion regarding the methods and timing of the implementation of the principle of sustainable use which adds more uncertainty about the real role of the latter principle in international law[97]. The principle of conservation and sustainable use has received some criticism even about the sufficiency and the necessity of its main aims and directions. In particular it has been argued that the fear of depletion of natural resources, especially the non-renewable ones, which has been the main motivation behind the promotion of principles and

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[94] Such treaties cover a variety of issues related to natural resources such as biodiversity, endangered spaces, wildlife conservation and watercourse. For more details see Birnie and Boyle *op.cit.*19, 88-89.

[95] E.g. the Convention on Biological Diversity in Article 6 provides for the development of national strategies, plans or programmes for the conservation and sustainable use of biological diversity but adopts a very flexible approach as to the means for achieving the sustainable use goal which are left to the discretion of the states.

[96] For instance in the *Icelandic Fisheries* cases (ICJ Reps. (1974), 3 and 175) it was supported the customary law obligation to co-operate in the conservation and sustainable use of the common property resources of the high seas. See Birnie and Boyle *op.cit.*19, 88-89.

[97] See the Convention on Biodiversity *op.cit.*83. Vaughan Lowe cites the view of Judge Feliciano in the *Oposa* case that while sustainable use may be a coherent policy it is doubtful whether it is a justiciable legal principle even within a single state (see Vaughan Lowe "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone *op.cit.*15, 29.

policies such as sustainable use, is not real or at least not as serious as presented[98]. According to this view, even if natural resources are exhaustible this may never happen due to the fact that technological innovation could create alternative resources which are more readily available and cheaper thus shifting demand away from the initial resources thus preventing their depletion[99]. This view also argues that this ever changing situation should not lead to serious concerns about future generations for which we cannot be sure about what their needs will be but should lead to changes in the current approach to natural resources by shifting focus from the dependency of states on individual commodities to the conversion of the benefits from resources' exploitation to social and economic capital that will survive beyond the time where the resource is locally depleted or the demand for it has faded away[100]. Similar problems and issues exist also regarding the other principles of Principle 1 such as the principle of State responsibility, whose exact scope and implications also remain largely unclear[101].

The question then arising is why Principle 1 of NDD has been included in the principle of sustainable development and if the latter principle could have any benefit from the inclusion in its scope of rules that are at least controversial and lacking sufficient coherence. A possible answer is that, despite the problems, the principle of sustainable use advances the aims and objectives of sustainable development by bringing together social, economic and environmental issues. The principle also advances international cooperation regarding issues, such as the management and conservation of natural resources, which is advanced by sustainable development as well, because such issues cannot be solved by individual states acting alone and without concerted actions by the international community.

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[98] See Thomas Walde "Natural Resources and Sustainable Development: From 'Good Intentions' to 'Good Consequences'" in N.Schrijver and F.Weiss (Ed.) *International Law and Sustainable Development, Principles and Practice,* Martinus Nijhoff Publishers, 2004, 119.

[99] *Ibid.* 126-129. Walde uses as an example the case of coal which was the feedstock for the industrial revolution. For coal at that time there were fears that it would soon run out thus derailing the economic development. However, these fears never proved true and the economic problems facing the coal producers were not created as a result of the depletion of coal reserves but because technological innovations shifted demand towards oil products which diminished the demand for coal.

[100] *Ibid.* 129.

[101] See French *op.cit.*51, 385.

2. *The principle of equity and the eradication of poverty*

The NDD considers the principle of equity as central for the attainment of sustainable development. Equity refers to intergenerational equity, which concerns the right of future generations to enjoy a fair level of common patrimony, and intragenerational equity which concerns the right of all peoples within the current generation of fair access to the current generation's entitlement to the earth's natural resources.

The current generation has a right to use and enjoy the resources of the Earth but is under an obligation to take into account the log-term impact of its activities and to sustain the resources base and the global environment for the benefit (between others economic, environmental, social and intrinsic benefit) of future generations of humankind.

Developmental policies should be implemented so as to meet the developmental and environmental needs of present and future generations in a sustainable and equitable manner. This includes the duty to co-operate for the eradication of poverty in accordance with Chapter IX on International Economic and Social Co-operation of the Charter of the United Nations and the Rio Declaration as well as the duty to co-operate for global sustainable development and the attainment of equity in the development of opportunities of developed and developing countries.

The States have a primary responsibility to aim for conditions of equity within its own population and to ensure, as a minimum, the eradication of poverty. All States which are in position to do so have a further responsibility, as recognised by the Charter of the United Nations and the Millennium Declaration of the United Nations, to assist States in achieving this objective.

a. <u>The meaning and aims of the principle</u>

Equity and poverty eradication are key themes in the sustainable development concept.

Equity-related principles appear frequently in international environmental instruments. They are particularly useful where legal norms fail to provide detailed guidance about the extent of the rights or obligations. In these cases reference to "fair" and/or "equitable" distribution of duties and benefits provide the general guidance for the later translation of these general norms into concrete rights and obligations[102]. Equity appears also in judicial decisions, such as in the *Gabcikovo-Nagymaros* case where the ICJ ruled that Czechoslovakia by unilaterally assuming control of a shared resource and depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube had violated international law[103].

Poverty eradication has been connected with sustainable development on the basis that poverty increases environmental harm by forcing the poor to overexploit the available resources in order to secure their survival[104]. Poverty also impacts negatively on human rights related to sustainable development such as the right to an adequate standard of living, the right to food, the right to health etc[105]. It is therefore no accident that poverty is mentioned in a number of instruments of international law and especially those related to sustainable development[106]. Also poverty issues have greater impact on the developing countries where the numbers of poor people are bigger and this has played a major role in the north/south disputes regarding the concept and aims of sustainable development[107]. Nevertheless, even if the two sides take different approaches to the applicable methods of eradicating poverty, both agree

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[102] See Sands *op.cit.*25*,* 262-263. By way of example, the Climate Change Convention *op.cit.*84, in Art 3(1) states that the Parties should protect the climate system for the benefit of present and future generations of humankind, 'on the basis of equity'.

[103] *Op.cit.*12, at 56; Also in *Tunisia-Libya Continental Shelf Case* (1982 ICJ 18 at para.4) the ICJ referred to "equitable solutions" in continental shelf disputes.

[104] See WCED, *Our Common Future, op.cit.* 1, at 72.

[105] See Atapattu *op.cit.*54, at 111.

[106] See below.

[107] See the discussion of the North/South disputes in the previous chapter.

that without a solution to the problem of poverty the aims of sustainable development cannot materialise[108].

The roots of the principles of equity and poverty eradication can be found in the *Charter of the United Nations* where it is stated that the UN Member States will take action in cooperation with the UN to create the conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination[109].

Key documents of sustainable development, such as the *Brundtland Report*[110]*,* the *Rio Declaration*[111]*, Agenda 21*[112]*,* the *Millennium Declaration of the United Nations*[113] and the *Johannesburg Plan of Implementation*[114] make specific references to the need to alleviate poverty as an essential prerequisite for sustainable development. Also, these and other related documents propose certain policy steps that need to be taken in the direction of alleviating poverty, such as the provision of some debt relief for

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[108] The compromises reached between developed and developing countries have helped advance the sustainable development cause up to the level existing now. However, as explained in other parts of this thesis, there are still in existence disputes between the two sides regarding many issues which slow or even hinder the pace of progress regarding these issues.

[109] *Charter of the United Nations,* 26 June 1945, Ca. T.S. 1945 No.7, Arts 55-56. In order to achieve these objectives Art.55 provides that the UN will undertake to promote between others higher standards of living, conditions of economic and social progress, solutions of economic, social, health and related problems, and respect for human right and fundamental freedoms.

[110] *Op.cit*.1, at 13 stress that overriding priority should be given to the essential needs of the world's poor.

[111] The 1992 "Rio Declaration on Environment and Development"*,* Report of the United Nations Co Conference on Environment and Development, Un Doc. A/CONF.151/6/Rev.1, (1992), 31 ILM 874 (1992). Principle 5, states that all states should cooperate in the essential task of eradicating poverty "as an indispensable requirement for sustainable development".

[112] "Agenda 21", Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev.1, (1992) 31 ILM 874, para.39(3)(1) where it is stated between others that the struggle against poverty "is the shared responsibility of all countries".

[113] UN GA Res.55/2 (2000) "United Nations Millennium Declaration" dedicates a big part of the Declaration to the eradication of poverty.

[114] "Johannesburg Plan of Implementation", Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 4 Sept. 2002, UN Doc. A/CONF.199/20, section II, para.7, where it is stated that poverty eradication is "...the greatest global challenge facing the world today and an indispensable requirement for sustainable development".

heavily indebted poor countries[115], the provision of assistance that will increase income-generating employment opportunities in poor countries[116], social integration programmes aimed between others at providing marginalised groups with equal access to opportunities[117] and provision of generous development assistance to countries that are genuinely making an effort to apply their resources to poverty reduction[118]. Ambitious plans for halving by 2015 the proportion of the world's people whose income is less than one dollar a day[119], or the proportion of people who do not have access to basic sanitation have been set as well[120].

Regarding equity, the NDD refers to intergenerational and intragenerational equity. Both components seek to ensure that equity will exist between generations and within the present generation as well. Both components have great significance for the promotion of sustainable development, which advances the idea that the resources of the earth should be shared equitably within the present generation and between all generations because they belong to all humans and generations[121]. Also the two "equities" constitute a bridge for recognising the mutual connection between environmental protection, socioeconomic development and human rights which is in the core of sustainable development as well[122].

The connection between present and future generations is reflected in the concept of intergenerational equity. According to NDD, which echoes significant earlier documents such as the Brundtland Report[123], the current generation is under an

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[115]See the "Millennium Declaration" *op.cit.*113, section III, para.15.

[116] *Op.cit.*114, para.22.

[117] See "Declaration on the Tenth Anniversary of the World Summit for Social Development", Commission for Social Development, Report on the Forty-Third Session, E/2005/26, E/CN.5/2005/7.

[118] the "Millennium Declaration" *op.cit.*113, section III, para.15.

[119] *Ibid.* para.19.

[120] *Op.cit.*114, para.25.

[121] The Brundtland Report, *op.cit.*1

[122] See Cordonier Segger and Khalfan *op.cit.*54, 130.

[123] The Brundtland Report, *op.cit.*1

obligation to take into account the long-term impact of its activities and to sustain the resources base and the global environment for the benefit of future generations of humankind[124]. Developmental policies should be implemented so as to meet the developmental and environmental needs of present and future generations in a sustainable and equitable manner.

The past, present and future generations are linked to each other through the use of the common patrimony of the earth[125]. Intergenerational equity gained increasing attention during the last few decades when it became widely accepted that human activity for the first time in human history is capable of causing massive and irreversible alteration to the world thus potentially threatening the existence of future generations[126].

Intergeneration equity seeks to achieve a balance between the interests of present and future generations and ensure that future generations will have a quality of life similar to, if not better than the present generation's[127]. The principle appears in several binding[128] and non-binding documents[129] thus reflecting the emerging consensus that the interests of future generations should be taken into account.

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[124] The strong connection between intergenerational equity and sustainable development is manifest in the famous definition of sustainable development given in the Brundtland Report. According to the definition sustainable development is "...development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs". See also Redgwell *op.cit.*93, 71.

[125] See also "Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility", 84 *Am.J.Int'l L.* 1990, 1990, 1999.

[126] See Cordonier Segger and Ashfaq Khalfan *op.cit.*54, 124.

[127] The basic theory of intergenerational equity has been presented by Edith B. Weiss in *In Fairness to Future Generations: International Law Common Patrimony and Intergenerational Equity,* Tokyo/New York, 1989.

[128] See for instance, the 1992 *Convention on the protection and Use of Transboundary Watercourses and International Lakes, op.cit.*70, Art.2, para.6(c) where it is stated that "water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs".

[129] See e.g. Principle 3 of the Rio Declaration where it is stated that "the right to development must be fulfilled so as to meet developmental and environmental needs of present and future generations".

Intra-generational equity addresses inequity within the present generation. It is relevant in situations and areas where there is no equitable access to resources and their use or where serious socio-economic problems exist. Such situations have negative impact on the environment by forcing the disadvantaged members of society to overexploit their available resources. Intra-generational equity seeks to address these issues by imposing "...a just allocation of resources among human members of the present generation both at domestic and global levels"[130]. In this context the NDD refers to the duty of all states to cooperate "...for the attainment of equity in the development of opportunities of developed and developing countries". Also, NDD refers to the primary responsibility of States to aim for conditions of equity within their own population and to ensure, as a minimum, the eradication of poverty. Intragenerational equity is closely related to poverty eradication.

Like intergenerational equity, intra-generational equity appears in several binding[131] and non-binding documents[132].

b. Equity, eradication of property and sustainable development

Intergenerational and intragenerational equity along with the principle of common but differentiated responsibilities, which is examined below, are all concepts related to the general principle of equity and play significant role in the promotion of sustainable development.

Particular emphasis has been given to the principle of intergenerational equity which concerns the rights of future generations. It has been argued that the principle "...renders sustainable development a distinct objective transcending the rigid

[130] Cordonier Segger and Khalfan *op.cit.*54, 125.

[131] Intragenerational equity appears in several Treaties in various forms and focuses especially in the protection of rights of the developing countries. E.g. the Biological Diversity Convention *op.cit.*83, Art.15(7) establishes a framework enabling developing countries to a fair and equitable distribution of the benefits arising from the use of genetic resources found in their territory.

[132] See e.g. Principle 5 of the Rio Declaration which provides for the development of cooperation to eradicate poverty.

confines of conventional views on economic development and environmental protection"[133]. Also that in its absence "...sustainable development might depend entirely on a sense of noblesse oblige of the present generation"[134].

Similarly there is little doubt that poverty eradication is an issue which if unaddressed could render the achievement of the aims of sustainable development impossible.

However, while it is hardly debatable that the principles of equity and poverty eradication are crucial for the achievement of sustainable development, there are nevertheless serious doubts about their implementation and normative status, which is of particular interest for this thesis.

In particular, while equity itself has been characterised as a well established principle of international law which plays a key role in fields such as social, economic and environmental law[135], it is still a principle without a settled meaning and scope whose implementation has been neither consistent nor uncontroversial. Its implementation has not been the same in the different regions of the world either, whereas its interpretation has often been highly subjective dependent upon the dynamics of the interrelationships between the states involved[136]. This creates a great deal of uncertainty about the exact scope and implementation of the principle even if certain steps in the direction of crystallising its main meaning and scope have been taken. The principle of common but differentiated responsibilities which derives from the main equity principle and which is considered below is an example of an effort to make equity more coherent and immediately implementable.

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[133] Gregory F. Maggio "Inter/Intra-generational Equity: Current Applications Under International Law for Promoting the Sustainable Use of Natural Resources" 4 *Buff.Envtl.L.J.*1996-97, 162, 165.

[134] Edith B. Weiss "Environmentally Sustainable Competitiveness: a Comment" 102 *Yale L.J.,* 1993, 2123.

[135] Cordonier Segger and Khalfan *op.cit.*54, 122.

[136] See Elli Louka *International Environmental Law: Fairness, Effectiveness and World Order,* Cambridge : Cambridge University Press, 2006, 53. Also if one looks into the implementation of Treaties such as the Climate Change and Biodiversity Conventions which use equity, he will see that the implementation of equity in these cases takes in to account the specific circumstances which include the negotiation and adoption of the Conventions and the subsequent states' practice which renders very difficult to draw general conclusions about the meaning the scope of implementation of equity.

Similar problems exist regarding intergenerational and intragenerational equity, the two main components of equity.

Regarding intergenerational equity, a major issue, often cited, appears to be the lack of any precise knowledge and determination of the future generations, their rights and interests. Enforcement issues also arise, as well as issues concerning the distribution of the burdens between states in the current generation[137].

The Philippines Supreme Court in the *Oposa*[138] case sought to provide some answers by accepting the *locus standi* of Filipino children, which acted also as representatives of future generation in an action against the government policy regarding national forests. However, the national character of the case and the fact that intergenerational equity did not have a decisive influence on the final decision limit the significance of the *Oposa* ruling. The greatest contribution of the case could be the provision of evidence of the increasing recognition and significance of intergenerational equity in legal international affairs[139].

Regarding intragenerational equity and poverty, similar problems exist: while states seem to agree in principle that poverty should be addressed, that equitable access to the earth's resources should be granted and that sustainable development could not be achieved without tackling these issues, there are still major disagreements between the developed and the developing countries regarding the practical methods for achieving these aims[140].

The recognition of inter- and intra- generational equity and poverty eradication in binding legal instruments, as shown above does not solve these problems neither guarantees a normative status for these principles. This is because these legally binding texts do not give rise to specific obligations under treaty law whereas the ambiguity surrounding the meaning and scope of these principles deprives them of the

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[137] For a more detailed discussion about these issues see Lowe *op.cit.*15, at 27-29; Birnie and Boyle *op.cit.*19, 91; Redgwell *op.cit.*93, 96.

[138] *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* 33 ILM 173 (1994).

[139] For a more detailed discussion of the *Oposa* case see Lowe *op.cit.*15, at 27-29; Cordornier Segger and Khalfan *op.cit.*54, 128-129.

[140] See in the previous chapter the discussion of the South/North negotiations and conflicts at the negotiations stage of various international law instruments related to sustainable development.

status even of general principles of international law[141]. It may be more appropriate to consider these principles as emerging principles of international law[142], which better reflects the current situation and their future prospects.

3. The principle of common but differentiated responsibilities

States and other relevant actors have common but differentiated responsibilities. All States are under a duty to cooperate in the achievement of global sustainable development and the protection of the environment. International organisations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should cooperate in and contribute to this global partnership. Corporations have also responsibilities pursuant to the polluter pays principle.

Differentiation of responsibilities, whilst principally based on the contribution that a State has made to the emergence of environmental problems, must also take into account the economic and developmental situation of the State.

The special needs and interests of the developing countries and of countries with economies in transition particularly the least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognised.

Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries inter alia by providing financial assistance and access to environmentally sound technology. In particular, developed

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[141] Regarding intergenerational equity Weiss *op.cit.*127, 30 accepts that the principle gives rise only to moral obligations and that the task lies ahead for translating the concerns for future generations into legally binding obligations. V. Koester has argued that the principle performs a dual role as "a source of inspiration for the development and adoption of binding rules at both national and international levels and as the basis for the development of new international customary law" (V.Koester "From Stockholm to Brundtland" 20 *Environmental Policy and Law*, 1990, 14).

[142] This view has been supported by the ILA Committee on Legal Aspect of Sustainable Development, "Searching for the Contours of International Law in the Field of Sustainable Development", Final Conference Report, New Delhi, 2002, 8-10; see also Alhaji B.M.Marong "From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development" 16 *Geo. Int'l. Env'l. L.Rev.* 2003, 21, 61.

countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development.

a. Meaning and scope of the principle

"Common but differentiated responsibilities" ("CDR") is a principle based on the idea that all states have a common responsibility to protect the global environment but this responsibility should not be shared equally between these states. The rationale for such an unequal or "differentiated" allocation of the common responsibility is that certain states have contributed more to the appearance and development of environmental problems than others whereas they also possess greater technical and financial capacity to respond to these problems than others. As a result, these states should assume greater responsibility[143]. CDR is the result of the north/south debate and constitutes a victory for the developing countries which have recognised in this principle the application of the principles of equity and justice, which here means that since developed countries have historically contributed more than the developing ones to the environmental problems they should contribute more to the solution of these problems too[144]. In addition, the developing countries have succeeded in having their economic and developmental situation been taken into account in the implementation of the principle. Reflecting the situation the NDD states that "the special needs and interests of the developing countries and of countries with economies in transition particularly the least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognised".

The CDR has been included in the principles supporting sustainable development because it addresses the balance between environmental problems and economic

[143] These issues are analysed below.

[144] This view was well summarised in the Beijing Ministerial Declaration on Environment and Development (UN Doc., A/CONF.151/PC/85, Annex, 13 August 1991, para.7) which was adopted by 41 developing countries in 1991. In the declaration it is stated that the protection of the environment is in the common interest of the international community but the developed countries should bear the main responsibility for the degradation of the global environment. "Ever since the industrial revolution, the developed countries have over-exploited the world's natural resources through unsustainable patterns of production and consumption causing damage to the global environment, to the detriment of the developing countries".

development which is between the main objectives of sustainable development[145]. CDR is also closely related to other principles supporting sustainable development such as the principle of poverty eradication and equity[146].

In terms of international law, CDR is a relatively new principle which derives from the principle of "common heritage of mankind" and is a particular manifestation of the old principle of equity[147]. CDR also constitutes a departure from another well established international law principle, the principle of sovereign equality which treats all states as equal and sovereign and which promotes an allocation of legal responsibilities on the basis of reciprocity binding all signatory parties in the same way[148]. However, this formal equality between states as promoted by the principle of sovereign equality does not create also substantive equality given that the capacities and capabilities of each state are not equal. Therefore, an equal allocation of responsibilities places the weaker countries at a disadvantage thus resulting in a wider perception of injustice in these countries. CDR seeks to address this problem and establish substantive equality by allowing poor countries to take a lower share of responsibility than rich ones thus narrowing the gap between rich and poor countries. This happens through the development, application and interpretation of international law rules in light of the CDR.

The principle appears in a number of legal documents, but for the purposes of sustainable development particular emphasis should be placed in the Rio Declaration, where Principle 7 expressly endorses CDR for the first time[149]. The principle was further strengthened in the Johannesburg Summit on Sustainable Development where the Johannesburg Plan of implementation indicates between others that the CDR

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[145] See Cordonier Segger and Ashfaq Khalfan *op.cit.*54, 136-137.

[146] See the analysis of these principles above.

[147] See Sands, *op.cit.*25, 285.

[148] The principle of sovereign equality is one of the founding principles of the United Nations. Article 2.1 of the UN Charter states that the UN "...is based on the principle of the sovereign equality of all its members".

[149]Principle 7 of the Rio Declaration states: "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 pressure their societies place on the global environment and of the technologies and financial resources they command".

should be taken into account in implementing Agenda 21 and the internationally agreed development goals, which means that CDR does not cover only environmental protection but also social development roles such as poverty eradication[150]. Also, Article 3 of the Climate Change Convention provides that the parties should protect the climate "...on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities".

At this point it is necessary to mention that NDD refers not only to states but also to other structures and institutions such as international organisations, corporations, non-governmental organizations and civil society which are called upon to "cooperate in and contribute to this global partnership". The NDD also refers to the responsibilities of corporations pursuant to the polluter-pays principle, which imposes an obligation on the persons responsible for causing environmental pollution to bear the costs of pollution[151]. The polluter-pays principle has attracted significant attention and support during the last few decades and appears in several international agreements, but its meaning and scope remains open and depends on the specific situations to which it applies[152]. Its legal status is also debatable though it seems quite certain that it has not acquired the status of a generally applicable principle of customary international law[153]. The polluter pays principle is supportive of sustainable development and therefore it has been included in the NDD as well.

CDR contains two basic elements: the common responsibility of states and the differentiated responsibility of states.

Common responsibility concerns the recognition of the global nature of environmental problems and the necessity to address these problems through concerted action by all States since action by individual states is unlikely to produce satisfactory results. It derives from the principle of "common heritage of mankind"

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[150] *Op.cit.*114, para.81.

[151] The principle has been endorsed by the OECD in a series of recommendations starting in the 1970s and gradually gain increasing support internationally. Its relationship with sustainable development has been confirmed by its inclusion in the Rio Declaration and in Principle 16 of the latter.

[152] This is so because the implementation of the principle has been left to national rather than international action, which renders it difficult to draw more general conclusions about its content and scope especially since the states are given significant discretion. On the issue see also Birnie and Boyle *op.cit.*19, 92-95.

[153] *Ibid*.

and it applies mostly to resources that are not property of one state. For these resources common responsibility imposes certain obligations on all states involved. Though the nature and extent of these obligations depends on the specific situation to which the principle applies, it seems that a common element in all cases is the responsibility of all states involved to prevent harm to the protected resource or interest. However, also regarding the responsibility to prevent harm, its extent may differ between states[154]. Overall, the principle of common responsibilities seeks to ensure that all states will be involved in the efforts to address environmental problems.

Differentiated responsibility concerns the establishment of different standards of contact between states and especially between developed and developing countries. These standards are established using a range of factors, such as the scientific technical and economic capabilities[155] or the economic and developmental needs[156] of the states involved. The NDD refers to the "economic and developmental situation" of the State, and to the necessity to recognise "the special needs and interests of the developing countries and of countries with economies in transition particularly the least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognised". Factors of the past, such as the contribution of the states to the creation of the specific environmental problem must also be taken into account. By setting up differentiated responsibilities the principle seeks to ensure the wide participation of the states in the protection of the environment. This could be especially useful with regard to the developing countries which would hardly agree to assume any environmental responsibility which would impose an equal burden to them and to the developed countries[157]. It is no secret that most environmental problems have been largely created by the developed countries in their efforts to achieve higher growth rates for their economies and therefore placing

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[154] Normally harm prevention is achieved through the adoption of national environmental standards and international environmental obligations which may differ between states. See Sands *op.cit.*25, 287.

[155] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov.13, 1046 UNTS 120, 11 ILM 1294 [1972], Art.11.

[156] See e.g. in the Preamble on the 1982 UNCLOS, *op.cit.*73.

[157] See also Atapattu *op.cit.*54, 384.

an equal burden on all countries regarding the costs of environmental recovery would be unfairly burdensome for the developing countries which would thus prefer to abstain from any common action in this direction[158]. The "differentiated responsibilities" principle, which appears in a number of treaties and other documents[159], seeks to address the concerns of the developing countries and to ensure their participation.

Overall the "double standards" of responsibilities for developed and developing countries, established by the CDR, have two main directions: differentiation regarding substantive standards and obligations and differentiation regarding the timing of the implementation of substantive provisions[160]. The developed countries also undertake to provide financial technical assistance to the developing countries.

b. Common but differentiated responsibilities and sustainable development

CDR, as already explained, helps to achieve a balance between environmental problems and economic development which is absolutely necessary in order sustainable development to succeed. The greatest advantage of the principle is that by establishing differentiated responsibilities between states regarding the protection of the environment and the obligations to address this problem helps to set up a mechanism of compromise between the developed and the developing countries which in turn helps to ensure wide participation in the efforts to tackle environmental problems. By seeking a fair allocation of responsibilities between states on the basis of the individual contributions to the environmental problems and the capabilities for addressing them, CDR takes into account the main concerns of both the developed

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[158] Ibid. About the duty of developed countries to receive a bigger share of responsibility was well summarised is the following principle related to equity: "When a party has in the past taken an unfair advantage of others by imposing costs upon them without their consent, those who have been unilaterally put at a disadvantage are entitled to demand that in the future the offending party shoulder burdens that are unequal at least to the extent of the unfair advantage previously taken in order to restore equality" (OECD Council, 14 November 1974C, 223 (Paris: OECD, 1974) cited in Henry Shue "Global Environment and international inequality" 75 *Int'l Affairs* 1999, 531, 534). See also the Beijing Ministerial Declaration on Environment and Development *op.cit.*143.

[159] See e.g. the London Convention *op.cit.*155, Art. 11.

[160] See also Yoshiro Matsui "Some Aspects of the Principle of 'Common but Differentiated Responsibilities" 2 *International Environmental Agreements: Politics, Law & Economics,* 2002, 151, 156-158.

and the developing countries. In particular, the developed countries through CDR achieve an agreement with the developing nations that the latter will participate in the efforts to tackle environmental degradation which is of great concern in the developed world. On the other hand, the developing countries can see in the CDR some guarantees that the efforts to tackle environmental degradation will not hinder their development prospects which are their first priority for closing the economic gap with the developed countries and achieving prosperity of their peoples. The developing countries also see that CDR places more obligations on the developed countries which is a fair outcome given the latter countries' major contribution to environmental degradation and also that the principle helps to put in the overall equation the social and economic problems that the developing countries face thus helping for seeking a solution to them too. Lastly, the developing countries see in CDR an opportunity to receive technological and financial support by the developed countries in the implementation of the environmental agreements which is beneficial for their economies as well. Overall, the CDR is a mechanism aimed at ensuring that environmental degradation will be tackled without compromising the development prospects of the poor countries which if happened would produce even more environmental degradation. In this way, CDR helps greatly to the achievement of the aims of sustainable development.

However, as is usually the case, the CDR is not uncontroversial. Its content remains largely unsettled and its interpretation depends on the specific situation to which it applies. On the political front the compromise reached between developed and developing countries did not solve all the problems and did not dispel the mutual suspicion existing in the two blocks. The developed countries have worked to ensure that the recognition of their significant contribution to environmental degradation does not amount to a legal responsibility and to ensure greater commitments from the developing countries. The pace of technology transfer to the developing countries has generally been slow, whereas the latter countries have repeatedly expressed their

disappointment for the current state of affairs[161]. As a result, while CDR has gained recognition and acceptance in the international community, a number of problems in the implementation of the principle still exist.

These problems of course could not leave unaffected the issue of the legal status of the principle where the crucial question is if the principle produces legal obligations. Given the disagreements about the exact meaning and scope of CDR and the great variety of ways and instruments in which it has been implemented, the answer is that it cannot be drawn from CDR a general environmental responsibility with binding force based on international law. One has to consider the specific situation to which CDR applies in order to see what the exact role of the principle is[162]. CDR does not appear to meet the requirements of a principle of customary international law since the state practice supporting it does not seem to be either consistent or sufficiently widespread whereas even where the principle applies the states appear to enjoy considerable discretion regarding its implementation[163].

On the other hand, it is clear that CDR plays an increasingly important driving role in treaty creation, interpretation and implementation which render it legally significant,

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[161] For more details about the attitudes of the two opposing blocks regarding CDR see French *op.cit.*5, 88-89 citing UN Doc. A/CONF.151/26 (vol. IV)(1992) 20, and the interpretative statement to Principle 7 of the Rio Declaration issued by the United States; Gunther Handl "Environmental Security and Global Change: the Challenge to International Law" 1 *YIEL,* 1990, 9, 9-10 citing distortion of international trade and impediment of the progress of the developing countries towards a more adequate level of environmental protection if CDR were used; Matsui *op.cit.*160, 158; Cordonier Segger Ashfaq Khalfan *op.cit.*54, 143.

[162]In certain circumstances, the developed countries have even taken steps to ensure that the CDR inclusion in legally binding instruments will not be used to support a status of customary international law for the principle. By way of example, Article 3 of the Convention of Climate Change, which relates to CDR, has been amended by the US delegation so as to ensure that the principle applies only to the parties and only in relation to the specific Convention and that cannot be used as a general principle applicable in other situations as well (see Lavanya Rajamani "The Principe of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime" 9 *RECIEL,* 2000, 120, 124).

[163] For a practice or principle to be granted a status of customary international law, the Statute of the ECJ in Article 38 contains two conditions which need to be met: state practice and *opinion juris* (meaning acceptance of the practice as law). The ICJ in the *North Sea Continental Shelf* cases referred to a number of criteria: a) the provision in question should be of fundamentally norm-creating character and could be regarded as forming the basis of a general rule of law; b) there should be widespread and representative participation in the convention (or in relation to state practice) including the participation of states whose interests were specially affected; and c) although a particular duration is not required, state practice in question should be the result of a conviction that such practice is required by law (1969 ICJ 3). On the status of the CDR see also Christopher Stone "Common but Differentiated Responsibilities in International Law" 98 *Am.J.Int'l.L.* 2004, 276.

especially given the increasing number of states involved in these treaties which makes it virtually impossible to ignore the differences between these states[164].

4. *The principle of the precautionary approach to human health, natural resources and ecosystems*

A precautionary approach is central to sustainable development in that it commits States, international organisations and the civil society, particularly the scientific and business communities, to avoid human activity, which may cause significant harm to human health, natural resources or ecosystems, including in the light of scientific uncertainty.

Sustainable development requires that a precautionary approach with regard to human health, environmental protection and sustainable utilisation of natural resources should include:

a. Accountability for harm caused (including where appropriate State responsibility);
b. Planning based on clear criteria and well-defined goals;
c. Consideration in an environmental impact assessment of all the possible means to achieve an objective (including in certain instances, not proceeding with an envisaged activity); and
d. In respect of activities which may cause serious long-term or irreversible harm, establishing an appropriate burden of proof on the person or persons carrying out (or intending to carry out the activity.

Decision-making processes should always endorse a precautionary approach to risk management and in particular should include the adoption of appropriate precautionary measures.

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[164] In this respect see also Atapattu *op.cit.*54, 429. As Rajamany correctly notes without the existence of CDR which seeks to restore justice, the developing countries would hardly agree to sign agreements which they perceive as unfair whereas even if they did signed them they would hardly implement them (see Rajamani *op.cit.*162, 123).

Precautionary measures should be based on up-to-date and independent scientific judgment and be transparent. They should not result in economic protectionism. Transparent structures should be established which involve all interested parties, including non-state actors, in the consultation process. Appropriate review by a judicial or administrative body should be appropriate.

a. The meaning and scope of the principle

The precautionary principle plays a crucial role in the promotion of sustainable development. The principle establishes a requirement that states should take measures to protect the environment from uncertain, potential or hypothetical threats.

The latter feature, namely action to protect the environment against hypothetical threats is the new addition to international law made by the precautionary principle. A threat is hypothetical when there is no sufficient scientific evidence that the threat will finally materialise.

Before the emergence of the precautionary principle, states according to international law were free to apply their own policies respecting the environment in the context of the national sovereignty principle. Their only duty was to ensure that their activities taking place within their jurisdiction would not cause significant damage to the environment of other states or areas beyond their national jurisdiction. The damage to the environment under this approach was assessable, calculable and certain[165]. Precaution changed this regime by holding that where there are reasonable grounds for concern that serious and/or irreversible damage to the environment may happen, then action must be taken to prevent such damage even if there is not scientific certainty that the damage will finally materialise[166]. So precaution is a mechanism of risk reduction, which takes into account all risks whatever their degree of certainty. Further, due to its ability to support decisions that do not depend on scientific certainty, precaution allows also for taking into account a broad range of factors in

[165] See Nicolas de Sadeleer *Environmental Principles: from Political Slogans to Legal Rules,* Oxford University Press, 2005, 91.

[166] See Arie Trouwborst "The Precautionary Principle in general International Law: Combating the Babylonian Confusion" 16 *RECIEL,* 2007, 185, 194.

decision-making including economic and social factors and not only environmental ones. Also, the precautionary principle goes beyond harm prevention in that it does not cover only transboundary harm but also harm within the states' own national jurisdictions[167].

By way of example, global warming is an environmental phenomenon having potential damaging effect to the environment and whose existence has been confirmed by scientific evidence. Science, though, has been unable so far to provide accurate and reliable information about all the causes of the phenomenon, the exact mechanism under which it operates, its exact consequences and how it will evolve in the future. Such a lack of scientific certainty about global warming, in the absence of precaution, could potentially justify some countries' unwillingness to take measures to address the problem since the measures proposed by the scientists are costly and do not guarantee a solution[168]. The application of precaution, though, changes this situation by imposing an obligation on these countries to act even in the absence of certainty.

Precautionary principle is a new principle originating in German law[169]. At the international level the principle was used for the first time in the North Sea Ministerial Conferences in the 1980s and since then it has met worldwide recognition and support, thus appearing in a number of treaties and soft law documents[170]. The principle has also gained some judicial recognition and strong support by state practice whereas it has been incorporated in domestic law of most states[171]. While the

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[167] *Ibid.*

[168] Birnie and Boyle *op.cit.*19,chapter 10, cite a number of instances where various countries have used such an argument to delay the negotiation of measures to tackle the risk of global warming, ozone depletion and acid rain.

[169] Sadeleer *op.cit.*165, 93.

[170] See e.g. The *Final Declaration of the Second International North Sea Conference* (25 Nov.1987, 27 ILM 835 (1988), Art. VII) where it is stated that "...in order to protect the North Sea from possible damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence"; the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, ILM 1312 (1992) in Art.2(5) states that the parties shall be guided "..a) by the precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the grounds that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact on the other hand". Virtually all international environmental documents adopted after Rio at the international level, mention the precautionary principle in one way or another. The principle appears also in other areas of law such as trade law.

[171] About state practice and judicial recognition see the discussion of the legal status below.

meaning and scope of the principle is still subject to a dispute between scholars and largely depend on the specific situations to which the principle applies, it seems that there is broad support for Principle 15 of the Rio Declaration which describes its core elements:

"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"

The criteria for the application of the principle as presented by Principle 15 could be summarised as follows: a) threats to the environment must be serious or irreversible; b) the measures adopted to confront the threat must be cost-effective; and c) the capabilities of the states will be taken into account.

Regarding the first of the criteria, while the meaning of "irreversible harm" is quite straightforward, the meaning of "serious harm" is not and therefore its application depends on the provisions of the relevant law or treaty[172]. However, there are Treaties which do not require the harm to be "serious" or "irreversible" to trigger action[173]. Also, while there is no need for full scientific certainty about the existence of a risk of harm, there must still be some scientific basis for predicting such a risk. The degree of certainty is often expressed through terms such as "reason to assume" or "reasonable grounds of concern"[174]. Further, the application of the principle depends on the relationship between the magnitude of harm and the likelihood of risk that this harm will happen. This relationship is inversely proportionate meaning that for "serious and irreversible harm" (e.g. loss of human lives) lower likelihood of risk would be required to trigger the principle than when the harm threatened is not serious or irreversible (e.g. human lives are not threatened). In the latter cases higher likelihood

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[172] See Atapattu *op.cit.*54, 210;

[173] By way of example, the treaties on the marine environment do not require such harm. In particular the 1992 Helsinki Convention of the Protection of the Marine Environment of the Baltic Sea Area (1992) in Article 3(2) refers to "hazards". For more detailed discussion about the level of harm see de Sadeleer *op.cit.*165, 161-167.

[174] E.g. the Helsinki Convention *ibid.* refers to "reason to assume".

of risk would be required[175]. Overall, compared with harm prevention, precaution lowers the standard of proof required for action against environmental threats.

In respect of the standard of proof, in certain cases precautionary principle "reverses" that standard by requiring from proponents of potentially harmful activities to prove that their activities pose no threat to the environment in order to gain approval of their plans. The extent of lowering or reversing the standard of proof depends on the specific circumstances to which the principle applies[176].

Regarding cost-effectiveness, the second criterion mentioned in Principle 15, it offers flexibility to the governments seeking to apply the principle by calling for only "cost-effective" measures. If the proposed measures are not cost-effective, the governments could refrain from acting without bearing any responsibility. This "cost-effectiveness" condition can be used as a counterbalance to the "scientific uncertainty" rule: if science cannot guarantee the success of the proposed measure why should states adopt it? Certain states have argued that in such cases only cost-effective measures should be adopted so as to avoid placing the states in unnecessarily burdensome situations[177]. While this position is not unjustified, the cost-effectiveness rule has been used by many states as a justification for delaying or avoiding taking preventive measures as required from the principle.

Lastly, the third condition mentioned in Principle 15 concerns the capabilities of states. States should apply the principle in accordance with their capabilities. This sounds also sensible given that, as mentioned also about the CDR principle above, states do not possess the same capabilities and have not contributed equally to the creation of environmental problems. However, it was also mentioned in the discussion of CDR that the differentiation of capabilities does not mean that states could use it as an excuse in order to escape fulfilling their environmental obligations. States have also common responsibilities to protect the environment, to make sustainable use of their natural resources, whereas there is also the duty to prevent harm, which applies

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[175] Cordonier Segger and Khalfan *op.cit.*54, 145-46 have included tables demonstrating the precautionary thresholds and the application of proportionality. See also De Sadeleer *op.cit.*165, 161-167.

[176] For more details about the standard of proof see Birnie and Boyle *op.cit.*19, 119; Trouwborst *op.cit.*166, 192.

[177] This view has been consistently supported by the United States (see Atapattu *op.cit.*54, 210).

to all states. As a result, the criterion of "state capabilities" mentioned in Principle 15 should be read alongside the provisions of other related principles[178]. As a new principle, precaution has continued to evolve since the UNCED and the 2002 WSSD reaffirmed Principle 15 and focused on further issues regarding its scope and implementation[179].

b. Precautionary principle and sustainable development

The relationship between the precautionary principle and sustainable development is very obvious given that precaution first and foremost seeks to prevent environmental damage which is between the main objectives of sustainable development. Precaution also takes a place in the core of sustainable development by integrating both environmental social and developmental issues. Using tools such as environmental risk assessments precaution does not seek to prevent the development of economic activities but only to ensure that such activities do not develop at the expense of the environment. This is exactly what sustainable development seeks to do as well. Precaution offers a further advantage by providing environmental protection not only from certain and calculable risks but also from uncertain and incalculable ones.
Further, by preventing harm to the environment precaution works also for the benefit of future generations which are between the core priorities of sustainable development and the principles of inter- and intra-intergenerational equity[180].

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[178] About the interrelationship between precautionary principle and other principles of sustainable development see also Birnie and Boyle, *op.cit.*19, 120.

[179] According to Cordonier Segger and Khalfan (*op.cit.*54, 155) the WSSD advanced acceptance of precaution in three ways: it clarified the debates; it took developing country perspectives further into account; and it resulted in broader definition of the principle as part of international law. However, problems such as those hindering the recognition of the principle as a customary law appeared also in Johannesburg. About these problems and the final responses to them in WSSD see Franz Xaver Perrez "The World Summit on Sustainable Development: Environment, Precaution and Trade-A Potential for Success and/or Failure" 12 *RECIEL,* 2003, 12.

[180] According to Paul Stein "The Precautionary Principle needs to be considered in the broader context of the wider principles and philosophies forming the concept of ecologically sustainable development (ESD)....In essence ESD is development which aims to conserve and effectively manage the environment for the benefit of future generations" (see P. Stein "Are Decision-Makers too Cautious with the Precautionary Principle?" 17 *Environmental Planning and Law Journal,* 2000, 3, 7).

Generally, sustainable development can rely on precautionary principle to support its case about the promotion of economic policies which take into account environmental concerns and work in the benefit of both the present and future generations.

However, in order to provide a more complete account of the utility of the precautionary principle for sustainable development it is necessary to refer also to certain controversies and limitations existing regarding the concept as well as to its legal status in international law.

Regarding controversies, they can be found in virtually all aspects of the principle. In particular, precaution calls for action in the absence of scientific certainty about environmental risks, which could give rise to hazards of adoption of decisions and policies that may prove to be wrong. This could be so because precaution, by acting without support by scientific certainty, necessarily resorts to political, economic and societal considerations for taking shape, which is a highly subjective process vulnerable to interference by powerful political, societal or economic groups that could alter precaution's main aim which is the protection of the environment[181]. It is certain that precaution, as already mentioned, should not and cannot ignore economic and societal needs but takes them into account. However, the great flexibility attributed to the application of the concept along with scientific uncertainty surrounding the proposed measures always entails certain risks that the outcome of the process may be in the wrong direction. The potential adoption of wrongful decisions could cause significant harm to society due to the high costs often associated with the application of precaution which could produce financial or other negative consequences for the population, such as job losses and decline of the living

[181] See also Birnie and Boyle *op.cit.*19, 119;

standards[182]. Thus, precaution's efforts to eliminate an uncertain environmental risk if not carefully designed and executed could give rise to other risks real ones[183].

In addition, the legal definition and elements of precaution are not fully settled yet and their interpretation depends on the specific situation in which they apply. This along with the substantive issues mentioned above result in the application of the principle lacking sufficient concreteness and objectivity commonly found in legal norms and sliding towards subjectivity and vagueness, which could undermine its credibility.

Such arguments have been taken further to the burden of proof as well. If precaution can have also negative collateral effects on society or the environment why not apply the same burden of proof of no harm currently imposed on the industry also on regulators seeking precaution measures[184]?

Further, it has been argued that useful innovative products and techniques might be wasted from precaution's insistence that some unproved risks might materialise from their use[185].

Such criticism, while not completely unfounded does not seem very convincing either. It has been correctly argued that precaution is about the application of common sense, which means that when you try something new which may have an impact on the environment you need to check what this impact might be and take measures to ensure that no harm to the environment will be caused by it[186]. Such a process is necessary, given the serious consequences that environmental damage could have for

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[182] See Jaye Ellis "Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle" 17 *Eur.J.Int'lL.,* 2006, 445, 455. See also, Frank B. Cross "Paradoxical Perils of the Precautionary Principle", 53 *Wash. & Lee L.Rev.* 1996, 851, 859.

[183] As Cross *ibid.* 860, puts it "the truly fatal law of the precautionary principle is the unsupported presumption that an action aimed at public health protection cannot possibly have negative effects on public health". He accepts that these unanticipated adverse effects are demonstrably common and explains further his position by arguing that "[b]ecause the precautionary principle counsels for action against even those uncertain hazards that might be non-existent, the presence of real adverse health effects consequent to that action means that the regulation will often cause more health harm than good". He further cites John D. Graham and Jonathan B. Wiener, *Risk Versus Risk: Trade-Offs in protecting Health and Environment,* (arguing that regulation under the precautionary principle can do more harm than good).

[184] See Cross *op.cit.*182, at 861.

[185] As de Sadeleer *op.cit.*165, 223, puts it, "interpreted in too radical a manner the precautionary principle could sacrifice innovation to security".

[186] See Atapattu *op.cit.*54, 279.

the population and society (e.g. losses of human lives, natural disasters etc). Regarding the argument about "scientific uncertainty", proponents of precaution have argued that scientific evidence is always incomplete or uncertain and that this justifies the broad use of precaution[187].

At this point it is necessary to stress that the application of precaution is dynamic and flexible meaning that it evolves and changes in the light of newer evidence[188]. This was stressed in the NDD principle as well where it was stated that precautionary measures "should be based on up-to-date and independent scientific judgment". Thus, if a product is banned today as an environmental risk, this ban could be recalled tomorrow if new evidence appears showing that such a risk does not actually exist or that it is minimal. The NDD also called for a transparent process which will involve all the interested parties and which could be subject to appropriate judicial or administrative review. Transparency helps reducing risks of the adoption of arbitrary decisions and safeguards that the decision-making process will be subject to appropriate controls.

In general it is submitted, that while no one can exclude the possibility that the application of precaution could in certain instances end up in the wrong direction and be subject to interference by powerful interest groups, thus leading to unfair solutions, this by no means cancels the utility of the principle, which helps to protect the environment from threats having at least some scientific basis.

This useful role of precaution has awarded it a worldwide recognition and has initiated discussions for granting it a normative status even if it is a relatively new principle. There is even support for the view that precaution has already acquired the status of a principle of customary international law[189].

Such an argument relies mostly on apparent evidence of significant existing state practice and *opinio juris* supported by the increasing use and recognition of the

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[187] See also Trouwborst *op.cit.*166, 187; Atapattu *op.cit.*54, 279.

[188] De Sadeleer *op.cit.*165, 222 argues that "irreversible decisions are the antithesis of precautionary principle".

[189] See also Trouwborst *op.cit.*166, 187-188.

concept at the international level[190]. One major obstacle for the normative status of the principle, though, is that so far the ICJ has not affirmed its customary status yet even if there are certain dissenting opinions of judges who favour such a status[191]. In any case, the principle appeared before international courts or tribunals on several occasions and even in cases dealing with issues other than the environment[192], whereas it has been argued that the principle is not different in major aspects from other principles that have already acquired the status of customary law[193]. Thus according to this view it would be possible to accept that precaution is already a customary norm.

Close to this view is the argument that even if precaution has not acquired the status of customary law it is still an emerging customary norm waiting to be accepted as such by "the international community as a whole"[194].

Conversely, views arguing against the legal status point out that while the principle has been incorporated in state practice across the globe, the incorporation is not uniform neither consistent which along with the lack of recognition by the ICJ makes

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[190] Trouwborst in an earlier 2002 study seeking to prove that precaution has already acquired a customary status included a vast number of materials about state practice and environmental law and policy (see Arie Trouwborst *Evolution and Status of the Precautionary Principle in International Law*, Kluwer Law International, 2002). However, as explained below, the argument that sufficient state practice supporting the customary status of precaution exist has not been widely accepted.

[191] E.g. Ad Hoc Judge Vinuesa in a Dissenting Opinion appended to the ICJ Order of 13 July in *Pulp Mills* (Argentina v. Uruguay) stated that "the precautionary principle is not an abstraction or an academic component of desirable soft law, but a rule of law within general international law as it stands". Also in the *Nuclear Tests* case *op.cit.*54, and in the *Gabcikovo Nagymaros op.cit.*12, Judge Weeramanty in his Dissent Opinion referred to precautionary principle as one of the emerging principles of international environmental law. For an analysis and critique of the last two cases see Owen McIntyre and Thomas Mosedale "The Precautionary Principle as a Norm of Customary International Law" 9 *Journal of International Law* 1997, 221, 231-235.

[192] Precaution has appeared between others in several cases considered in the context of WTO and the International Tribunal for the Law of the Sea (for more details see De Sadeleer *op.cit.* 165, 100-109).

[193] Trouwborst *op.cit.*166, 187-188.

[194] See Laurence Boisson de Chazournes, "The Precautionary Principle in Precaution from Rio To Johannesburg", Proceedings of a Geneva Environment Network Roundtable, 2002.

it difficult to accept its normative status[195]. It has also been contented that there is not even uniform understanding of the meaning and scope of the principle between states, while the latter seem to have different views also about the normative status of the principle which could further justify the ICJ's hesitance to grant such a status to it[196].

So overall, the current consensus seems to be that precaution does not have a customary status yet. This though may not necessarily be a problem given the great influence that the principle already enjoys at the national and international levels, by providing guidance regarding the interpretation and application of various international and domestic norms, and the fast pace of its evolution, which permits a prediction that its acceptance as a customary norm is only a matter of time[197].

5. *The principle of public participation and access to information and justice*

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[195] According to Dupuy, the absence of authoritative recognition of the principle's customary status, along with the ambiguous evidence of state practice makes it difficult to decide the question (cited in Jaye Ellis *op.cit.*182, 448). Atapattu (*op.cit.*54, 283) cites Marr's survey of the domestic provisions in several countries who concluded that while various countries have incorporated precaution into their national legislation mostly as a legal principle, the provisions vary from country to country and countries with a tradition of providing for environmental protection have a sophisticated legal framework while others may only have the bare bones in place. Nevertheless, according to Marr it is possible to identify common denominators such as that the principle in most cases is provided as a deliberation-guiding principle (Simon Marr, *The Precautionary Principle in the Law of the Sea: Modern Decision Making in International Law,* 2003, 99)

[196] Birnie and Boyle *op.cit.*19, 118 states that the European Union has accepted precaution as a principle of customary law or alternatively a general principle of law; Canada has accepted it as an emerging principle of International law, but the United States do not accept any legal status for the principle. These diverse views between states regarding the legal significance of the precautionary principle have been reflected on the terminology used to describe it. In particular, precaution has been described either as a principle or as an approach. Most scholars use these two terms interchangeably giving little significance to the difference, but others can see some difference in that the "approach" offers greater flexibility compared with the more restrictive "principle". The latter term also could implicitly refer to the legal status of precaution as opposed to "approach" which could hardly be related to such status. The United States favour the term "precautionary approach" rather than "precautionary principle". The different terminology used could reflect the different views between states about the meaning and scope of the principle, which reinforces the argument that current state practice regarding precaution, while widespread, has not yet achieved the uniformity and consistency required in order to satisfy the customary law criterion.

[197] As Ellis *op.cit.*182, 449 puts it, "...there are two features of precaution that tend to reduce the significance of the customary law issue: first of all a number of features that it shares with most principles, namely its vagueness and generality, and the absence of positive obligations; second the immense influence that the principle already enjoys....[The principle] has generated a veritable flurry of law-and-policy-making at both the domestic and international levels, and has been applied by judges in a number of international tribunals".

Public participation is essential to sustainable development and good governance in that it is a condition for responsive, transparent and accountable governments as well as a condition for the active engagement of equally responsive, transparent and accountable civil society organisations including industrial concerns and trade unions. The vital role of women in sustainable development should be recognized.

Public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas. It also requires a right of access to appropriate, comprehensive and timely information held by governments and industrial concerns on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, without imposing undue financial burdens upon the applicants and with due consideration for privacy and adequate protection of business confidentially.

The empowerment of peoples in the context of sustainable development requires access to effective judicial or administrative procedures in the State where the measure has been taken to challenge such measure and to claim compensation. States should ensure that where transboundary harm has been, or is likely to be, caused, individuals and peoples affected have non-discriminatory access to the same judicial and administrative procedures as would individuals and peoples of the State in which the harm is caused.

a. <u>The meaning and scope of the principle</u>

Public participation is a key factor for the achievement of the aims of sustainable development. Without public participation, support and commitment objectives, such as environmental protection and social and economic development, which are

promoted by sustainable development, would hardly be achieved[198]. Public participation is also crucial for safeguarding transparency in decision-making and good governance. It covers not only participation by individuals but also by interest groups and NGOs.

The principle, as presented in NDD, could be broken into three parts. The first part concerns participation in decision-making processes and activities affecting directly humans' own lives and living standards. Such participation could be either through contribution to the debate or through active participation in the final decision thus influencing its outcome[199]. The second part, concerns access to information and is a condition for both the first and the third part, which is access to justice. The public should be provided with sufficient information about the environmental debate as well as the government's decisions and activities. Only in this way will the public be able to contribute to the decisions and to the measures taken to implement the decisions. Also, basic environmental law principles and processes such as precaution could not achieve their objectives without the provision of sufficient information to those involved[200]. Moreover, access to information enables the public to exercise control over the activities of the government. Due to the importance of the right, the NDD states that those applying for information should not be subject to undue financial burdens. The third part concerns access to justice which would allow the citizens to contest decisions violating their rights and seek compensation. In respect of the latter and for cases involving transboundary harm, the NDD calls for non-discriminatory access to the same judicial and administrative procedures as would individuals and peoples of the State in which the harm is caused.

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[198] There are various reasons which make public participation crucial for the promotion of sustainable development. One of these reasons is that national governments have limited resources available to them to deal with the difficult and complex issues posed by sustainable development and to ensure adequate monitoring of citizens compliance with environmental rules and regulations. The cooperation of citizens is therefore crucial for helping the government to enforce environmental norms and spot deviations from these norms. On the issue see also Hunter et al *op.cit.*78, 442; John C. Denbach "Sustainable Development as a Framework for National Governance", 49 *Case W.Res.L.Rev.* 1998, 1, 41.

[199] See also Alexandre Kiss "The Right to the Conservation of the Environment" in *Linking Human Rights and the Environment,* Romania Picolatti & Jorge Daniel Taillant (Eds.), 2003, 31, 36.

[200] In this respect see also De Sadeleer *op.cit.*165, 283.

The right of public participation, due to its great importance, appears in various international human rights instruments[201] and also in UN Documents[202]. Regarding sustainable development, it appears in all the main sustainable development documents.

The Brundtland Report clearly stated that the pursuit of sustainable development requires "...a political system that secures effective citizen participation in decision-making"[203], whereas Principle 10 of the Rio Declaration contains far-reaching provisions which refer to the right of people to have access to information regarding the environment, access to judicial and administrative proceedings and participation in decision-making processes. Principle 5 of the NDD reflects Principle 10 of Rio which has been reflected in other documents as well[204].

Principle 5 of the NDD also demonstrates the close relationship between the right of participation with other human rights and the promotion of democracy by stating that "public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas"[205]. Principle 5 also calls for the recognition of the vital role of women.

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[201] E.g. the Universal Declaration of Human Rights, (10 Dec. 1948, G.A.Res.217 A, U.N.GAOR, U.N.Doc. A/810 (1948)) in Article 21 states that (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives, (2) Everyone has the right of equal access to public service in his country (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

[202] See e.g. the UN General Assembly Declaration on the Right to Development (41/128 of 4 December 1986) in Article 1 states that the right to development "is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in...economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised".

[203] Para.28.

[204] Se e.g. para.23(2) of Agenda 21.

[205] As J. Ebbesson puts it "...the increased confidence in public participation as a means for pursuing environmental interests reflects an expansive notion of democracy. This means that the involvement of citizens and NGOs in governance not only furthers the self interests of each participant actor but also may contribute to promoting public interests and concerns. Understood in this way, public interests may be invoked not only by governmental or administrative institutions but also by the "public" – usually defined as "one or more natural or legal persons"-itself (Jonas Ebbesson "The Notion of Public Participation in International Environmental Law 8 *YIEL,* 1997, 51, 56).

In respect of documents adopted after Rio, special reference should be made to the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters which constitutes "the first comprehensive effort at the supra-national level at putting Principle 10 of the Rio Declaration into operation"[206]. The Convention, which was signed in 1998 and entered into force in 2001[207], is a regional instrument which contains binding legal obligations related to the exercise of the right of public participation in environmental matters and therefore has attracted broad attention[208].

In particular, the Convention establishes an obligation on the parties to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters "...in 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 well-being"[209]. The Convention provides detailed provisions for each of the three areas (access to information, participation in decision making and access to justice) which are covered by it, and also calls upon the parties to make the rights protected by the Convention enforceable by a national court or independent tribunal[210]. It also provides for access to justice "to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"[211]. The Convention has a compliance mechanism which allows for public involvement[212]. In respect of the latter, particular reference should be made to elevation of the role of NGOs which are given the power to participate in

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206 See Elisa Morgera "An Update on the Aarhus Convention and its Continued Global Relevance" 14 *RECIEL,* 2005, 138,138.

207 Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters UN Doc. ECE/CEP/43 (1998).

208 For a more detailed analysis and discussion of the provisions of the Convention and its significance for environmental matters see Ebbesson *op.cit.*205, 51; Hunter *op.cit.*78, 438-445; Sands *op.cit.*25, 118-120; Vera Rodenhoff "The Aarhus Convention and Its 'Implications or the Institutions' of the European Community 11 *RECIEL,* 2002, 343. For updates on evolution of the implementation of the Convention see Elisa Morgera *op.cit.*206, 138; Carine Nadal "Pursuing Substantive Environmental Justice: The Aarhus Convention as a 'Pillar' for Empowerment" 10 *Env.L.Rev.*2008, 28.

209 See the Preamble.

210 Art.9.

211 Art.9(3).

212 Art.15.

decision-making on behalf of the public. NGOs are also given rights in respect of access to information and access to justice.

Moreover and in an effort to demonstrate the global role of the Convention the Parties undertake to promote the principles of the Convention "in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment"[213].

In Johannesburg, efforts were made to broaden the scope of the principle. The Johannesburg Declaration reiterated the commitment of the states to the principle as a necessary condition for achieving sustainable development and promised to continue to work for stable partnerships with all major groups respecting the independent, important roles of each of them[214]. The Plan of Implementation between others also contains commitments to "further Principle 10 of the Rio Declaration on Environment and Development, taking into full account principles 5, 7 and 11 of the Declaration"[215]. The addition of Principles 5 (poverty eradication), 7 (common but differentiated responsibilities) and 11 (environmental standards) of the Rio Declaration helps to achieve a more appropriate implementation of the public participation principle by taking into account the specific needs of the various regions or states. Another relevant development, the so-called "Type II" outcomes of the Johannesburg Summit, concern partnership agreements for sustainable development which involve civil society and governments in the context of follow up activities.

b. Public participation and sustainable development

The crucial role of public participation for the achievement of sustainable development has already been raised and partly explained: public participation enhances the prospects of the achievement of the aims of sustainable development by

[213] Art.3(7).

[214] Johannesburg Declaration on Sustainable Development, in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26Aug-4 Sept.2002, A/CONF.199/20 (New York: United Nations, 2002), para.26.

[215] JPOI, *op.cit.*114, para.128.

mobilising the people to work alongside their governments in devising policies and implementing international agreements related to sustainable development. It also offers to the government the necessary popular support and legitimacy required for the implementation of such agreements many of which have considerable impact on the lives of their citizens.

However for the effectiveness of public participation in this context what matters most is not a limited citizens' participation, taking the form of the mere participation in the implementation of policies relating to sustainable development adopted by the governments[216], but a more decisive one which would take the form of direct involvement in policy- and decision-making and control mechanisms and which ensures that the decisions adopted at the top level do not adversely affect the public interest and societal needs[217]. Further, such participation ensures a system of checks and balances regarding the operation of the governments by enhancing transparency and accountability, thus promoting democracy and human rights, which are essential for achieving several of the objectives of sustainable development[218].

In this context documents, such as the Rio Declaration and the Aarhus Convention, should be seen as tools promoting direct and decisive participation of the public in the promotion of the aims of sustainable development and therefore should be applauded. However, in the legal field, the application of these instruments is not without problems. Even if public participation, as explained above, is not aimed at a radical decentralisation of decision-making, which still remains largely in the hands of the governments, but merely at a more active involvement of the citizens in sustainable development issues, many governments have demonstrated hesitation in meeting the

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[216] Limited participation exists when the citizens and civil society take part in the implementation of sustainable development policies without though being in position to influence the formulation of these policies. For more details on the issue see French *op.cit*.5, 31.

[217] *Ibid*. at 32.

[218] Gillespie *op.cit.*46, 8 argues that regarding environmental issues democracy is important because "it is believed it will help lead to decentralisation, 'appropriate scale' development and direct control over the processes that affect people's lives. This approach should allow people and communities to resume responsibility for their own development, rather than having it imposed upon them from above...This is necessary, as it is believed that the best social enhancements and environmental protections will come from those who live and depend upon their surrounding environments and communities"

relevant requirement[219]. One possible reason is that the levels of public participation established by such norms as principle 10 and the Aarhus Convention, even if they do not lead to radical decentralisation, are still considered high even for certain democratic states[220]. Moreover, many states have not seen favourably the international involvement in areas which traditionally belonged to their national jurisdiction[221]. As a result, it is no surprise that the Aarhus Convention which contains legally binding rules relating to public participation and which is closely linked to principle 10 of Rio Declaration has been signed by only a few countries mostly European ones, which due to the EU involvement are stronger advocates of human rights than other countries. In the American continent, principle 10 was implemented by the Organisation of American States in a non-binding document entitled Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development[222].

In general, regarding the extent of the influence and effects that international law instruments on public participation have on state policies and practices, one should look at the legal norms at the specific regional or national level given that many international law instruments relating to the issue are not legally binding. As for the legally binding ones, one should look at the extent of the afforded protection in the specific document as well as at the compliance mechanisms. However there is support of the view that the components of public participation have become part of

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[219] Most environmental instruments seeking to increase public participation in environmental issues, such as principle 10 of the Rio Declaration and the Aarhus Convention, do not challenge the leading role of the governments regarding these issues. Nevertheless, even in this way, the requirements for increased public participation existing in these instruments are not seen favourably by countries around the globe having non-democratic regimes or having weak democracies. These countries favour non-binding documents regarding public participation. See also below.

[220] See also French *op.cit*.5, 31.

[221] Issues such as the level of public participation, access to information and justice and the administrative procedures are considered by many states as belonging to their own exclusive competence on the basis of state sovereignty, especially given that local political and legal cultures play crucial role in shaping these issues. On the issue see Ebbesson *op.cit.*205, 55.

[222] See Hunter et al, *op.cit.*78, 535.

customary international law[223] which raises further the significance of the principle for the promotion of sustainable development.

6. *The principle of good governance*

The principle of good governance is essential to the progressive development and codification of international law relating to sustainable development. It commits States and international organisations:

(i) to adopt democratic and transparent decision-making procedures and financial accountability;

(ii) to take effective measures to combat official or other corruption;

(iii) to respect the principle of due process in their procedures and to observe the rule of law and human rights;

(iv) to implement a public procurement approach according to the WTO Code on Public Procurement.

Civil society and non-governmental organisations have a right to good governance by States and international organisations. Non-state actors should be subject to internal democratic governance and to effective accountability.

Good governance requires full respect for the principles of the 1992 Rio Declaration on Environment and Development as well as the full participation of women in all levels of decision-making. Good governance also calls for corporate social responsibility and socially responsible investments as conditions for the existence of a global market aimed at a fair distribution of wealth among and within communities.

a. <u>The meaning and scope of the principle</u>

The concept of "good governance" is subject to various definitions. This can be explained on the basis that there are disagreements about both the scope and the

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[223] According to Atapattu *op.cit.*54, 184, "access to information, participation in the decision-making process and the right to remedies in relation to environmental issues are now considered as being part of customary international law".

elements of the term. These disagreements could be justified taking into account the inherent generality of the term and the controversy often surrounding the meaning and scope of its basic elements and the relationship between them[224].

Though the term is not new[225], it was popularised by certain international financial institutions. According to the World Bank, good governance stands for "...the exercise of political power to manage a nation's affairs"[226]. Good governance in this context includes a reliable and independent judicial system, public accountability, respect for individual liberty and the existence of the rule of law[227]. The International Monetary Fund (IMF) set as a condition for the provision of financial assistance to poor countries the existence of good governance in these countries[228]. The United Nations Development Programme refers to good governance as "...the exercise of economic, political and administrative authority to manage a country's affairs at all levels"[229] and cites a number of characteristics that good governance has: participation, rule of law, transparency, responsiveness, consensus orientation, equity, effectiveness and efficiency, accountability and strategic vision[230].

The preference of the financial and development institutions for good governance could be explained from the fact that good governance has been associated with better economic performance, though this cannot be always guaranteed[231]. Similarly there is a trend especially in developed countries to associate good governance with the

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[224] What constitutes good governance has been perceived different in the developing and the developed world. While it seems that it is possible to identify some common elements in most definitions, such as transparency and accountability, democratically elected governments and rule of law, there are different approaches about how good governance could be achieved and what a satisfactory level could be. For more details on the issue see Francis N. Botchway "Good Governance: the Old, the New, the Principle and the Elements" 13 *Fla. J.Int'l L.* 2001, 159; Ibrahim J. Wani "Poverty, Governance, the Rule of Law, and International Environmentalism" 1 *Kan. J.L.&Pub.Pol'y* 1991, 37.

[225] The history of the term could be traced back in the beginning of the twentieth century and the work of Max Weber who outlined the functions of the bureaucracy and even before the twentieth century in works of classical philosophers such as Thomas Hobbes. On the issue see Botchway *ibid.* 165.

[226] See World Bank "Sub-Saharan Africa: From Crisis to Sustainable Growth" 1989, 60.

[227] *Ibid*. at 22.

[228] See International Monetary Fund, *Code of Good Practices on Fiscal Transparency-Declaration of Principles,* 16 April 1998, 37 ILM 942 (1998) at 942.

[229] See United Nations Development Programme, *Governance Policy Paper* (New York: UNDP, 1997) at 12.

[230] *Ibid.* 15-16.

[231] See Wani *op.cit.*224, 39.

existence of a democratic regime. Aims such as transparency, accountability, and rule of law can be better achieved in democratic states rather than in autocratic ones where public institutions are not accountable to their citizens and phenomena of nepotism and corruption appear more frequently. However, what is a democratic regime and how it should operate is a debatable matter whereas there has also been argued that autocratic governments by facing less public resistance are sometimes in a better position to carry out the necessary reforms for achieving development and environmental goals and that there are cases where such governments have been successful in the achievement of development goals[232].

The NDD accepts the view, which currently prevails, that democracy is a necessary prerequisite for good governance, which includes also transparency regarding decision-making, accountability regarding financial issues, respect for human rights and the rule of law and respect for the rules of free trade regarding public procurement[233]. The NDD includes also the NGO, women and corporations in the meaning and scope of good governance. Especially for corporations the NDD raises the issue of corporate responsibility aimed at promoting fair distribution of wealth among and within the communities.

Lastly, it has to be mentioned that the requirement of good governance does not apply only to the national but also to the international level by requiring international organisations and bodies to respect the principles of good governance and function in a democratic way[234]. This approach has been explicitly endorsed in the *Johannesburg Plan of Implementation* where it is stated that "[g]ood governance within each country and at the international level is essential for sustainable development"[235].

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[232] *Ibid*.

[233] See the UN Agenda for Development A/48/935 of May 6, 1994, para.129 stating: "The mandate of the people to govern provides legitimacy; it does not carry with it, however, the guarantee of skill or wisdom. Democracy cannot instantly produce good governance, nor will democratic government immediately lead to substantial improvements in growth rates, social conditions or equality. By providing channels for participation of people in decisions which affect their lives, democracy brings government closer to people. Through decentralisation and strengthening of community structures local factors relevant to development decisions can more adequately be taken into account".

[234] See T.M. Frank *Fairness in International Law and Institutions,* Oxford University Press, 1995, 84 arguing that democracy is becoming an entitlement in international law; also Botchway *op.cit.*224, 164.

[235] *Op.cit.*114, para.4.

b. Good governance and sustainable development

The relationship between good governance and sustainable development is very close as has already been made clear. Sustainable development relies heavily on public participation in order to achieve its objectives and such participation cannot be achieved in countries governed by autocratic regimes where the citizens and civil society have no access to decision-making or where they are denied the necessary access to information and justice that secure effective monitoring of the policies regarding the protection of the environment and socioeconomic development. Also, good governance by ensuring transparency and accountability especially in the developing countries helps to ensure that the financial support provided to these countries by the developed ones for socioeconomic and environmental purposes does not fail to meet its target by corruption, which often dominates in autocratic regimes. This seems to imply that for good governance to exist democracy is necessary as also explained above. However, and given that at the international level democracy is either weak or does not exist in a considerable part of the planet and especially in many developing countries, the latter have reacted negatively to the persistent international pressure to alter their political regime towards more democracy and openness. Some developing countries have seen it as another attempt by the developed countries to impose on them their wishes[236].

However, and regardless the debate about the necessity of democracy, some other elements of good governance remain essential for sustainable development. As for the main "good governance" principle it remains to be seen whether it will acquire a customary law status as such.

7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

[236] On the issue see also Pearson Nherere "Conditionality, Human Rights and Good Governance: a Dialogue of Unequal Partners" in *Sustainable Development and Good Governance*, Konrad Ginther, Erik Denters & Paul J.I.M. de Waart Eds., 1995, 289, cited in Atapattu *op.cit.*54, 180.

The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind.
All levels of governance-global, regional, national, sub-national and local and all sectors of society should implement the integration principle which is essential to the achievement of sustainable development.
States should strive to resolve apparent conflicts between competing economic, financial, social and environmental considerations, whether through existing institutions or through the establishment of appropriate new institutions.
In their interpretation and application, the above principles are interrelated and each of them should be construed in the context of the other principles of this Declaration.
Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter of the United Nations and the rights of peoples under the Charter.

a. Meaning and scope of the principle

The NDD principle refers to the integrative relationship existing between the various aspects of the principles forming the sustainable development concept and offers guidance on how this relationship should translate into action.
This need to integrate the policies regarding environmental protection and development became clear when it was realised the close link that existed between environment and development: environmental degradation has been largely attributed to development activities which led to the overexploitation of natural resources and environmental pollution[237]. However, environmental degradation is not limited to countries demonstrating strong development activities but also in countries where such activities are weak. The reason in this case is that slow or negative development

[237] These issues were discussed in the analysis of the other principles related to sustainable development (especially the principle of sustainable use and common but differentiated responsibilities).

trends fuel economic and social problems, such as inefficient economic conditions and poverty which also cause environmental degradation[238].

The problems of environmental degradation exist in almost all countries mostly because development either strong or weak requires use of natural resources. These problems have global dimension also because the environmental impact from development activities has often such an extent that it is not limited to the national borders of the individual states but spreads to nearby areas or even globally[239].

As a result, there is a global need to address developmental and environmental issues in an integrated manner not only in order to prevent the further degradation of the environment, which has direct impact on the quality of life of the habitants of the earth, but also in order to preserve the global development potential in the future since continuous environmental degradation finally undermines future economic development[240].

It is obvious that, given the nature of the needed intervention, action must be taken at both national and international levels. This has been confirmed in various documents including Principle 4 of the Rio Declaration[241], Agenda 21[242] and the Johannesburg Plan of Implementation[243] and appears also in the NDD principle where it is stated that "all levels of governance-global, regional, national, sub-national and local and all sectors of society should implement the integration principle".

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238 *Ibid*.

239 *Ibid*.

240 If for instance economic growth is based on the overexploitation of natural resources, it is inevitable that at some point in the future the overexploitation will result in the exhaustion of these resources, thus effectively cancelling the potential of further economic development.

241 Principle 4 states: "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".

242 *Op.cit.*112, chapter 8 where the principle is analysed. In chapter 39 where institutional arrangements are discussed it is stated that "[t]he overall objective is the integration of environment and development issues at national, subregional, regional and international levels, including in the United Nations system institutional arrangements".

243 *Op.cit.*114. The need for action at different levels has been confirmed in various parts of the plan. Indicatively para.21 refers to the need to "Promote an integrated approach to policy-making at the national, regional and local levels for transport services and systems to promote sustainable development..."

Moreover, whereas the term "development" is closely related to economic development, its meaning, as can be seen from the NDD, is not limited to such a development but covers also social, financial, and human rights' aspects. The Johannesburg Declaration refers to three pillars of sustainable development to which an integrated approach needs to be adopted: economic development, social development and environmental protection[244]. It is possible to identify also other areas to which integration should apply, such as trade, agriculture and energy[245]. Integration has a temporal dimension as well by integrating in a single framework the needs of both current and future generations.

However, while it is possible to define the meaning of integration and interrelationship, it is much harder to make the principle operational. For instance, a question arising is how should the various economic, environmental, social and other factors be integrated into a single process? Which factor should be given priority? The Draft International Covenant states that the core obligation is for "'full and equal consideration' of environmental, economic, social, and cultural factors meaning that each imperative is considered in a fair manner without priority of one over another"[246].

On the other hand, Principle 4 of the Rio Declaration has often been criticised as favouring either the environmental or the developmental aspect depending on how some people interpret the principle.[247]. There is also a practical dimension concerning how to integrate in the process certain controversial issues, such as the needs of future generations, which are hard to ascertain, whereas, given the increased numbers, strenuous complexity and frequent uncertainty of the factors that need to be integrated in a single decision-making and implementation process, it is often hard to achieve

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[244] Para.2.

[245] Para 8.2 of Agenda 21 mentions economic, social, fiscal, energy, agricultural, transportation, trade and other policies.

[246] *Op.cit.*80, 57.

[247] Birnie and Boyle *op.cit.*19, 87.

fair balance between all these factors and determine what appropriate integration might be[248].

It is therefore no surprise that the application of the principle has not always been consistent or harmonious. Following an examination of the practical application of the principle as appearing in various international legal instruments, it has been argued[249] that it is possible to identify four degrees of integration: a) separate spheres where the level of integration is limited; b) parallel yet independent where "a core agreement in one field of law exists in parallel with additional complementary accords in the other area of law"[250]; c) Partially integrated spheres; and d) highly integrated new regimes.

At the national level the principle of integration has been implemented through environmental impact assessments (EIAs), which are aimed to ensure that proposed development activities will not cause unacceptable environmental harm. EIAs are generally very popular between states.

A possible conclusion from the above analysis is that while the principle of integration seems to have broad acceptance and recognition, its application depends largely on the specific situation in which it applies.

Lastly, it has to be mentioned that due to the existence of a number of principles supporting sustainable development, the principle of integration should be interpreted and applied alongside these principles and not in isolation from them.

b. <u>The principle of integration and interrelationship and sustainable development</u>

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[248] John Dernbach explains well the situation: "[I]ntegrated decision-making....does not supply specific substantive environmental or social goals toward which decision-making process should be directed, either in the short term or for future generations. Of equal importance, integrated decision-making by itself does not tell the decision-maker how to handle scientific uncertainty, what time horizon he or she should employ, whether to involve others in the decision-making process, how developed countries should take the lead, or how to answer various questions that are addressed by other parts of the sustainable development framework" (John C. Dernbach "Achieving Sustainable Development: the Centrality and Multiple Facets of Integrated Decision-Making" 10 *Ind. J. Global Legal. Stud.,* 2003, 247, 258).

[249] See Marie-Claire Cordonier Segger and Ashfaq Khalfan *op.cit.*54, 106-109.

[250] *Ibid.* 107.

It is obvious that sustainable development by seeking to bring together in a single decision-making process different aspects of public policy, relies heavily on the principle of integration and interrelationship. It is therefore no exacerbation to say that without this principle sustainable development would hardly exist[251].

It is often said that the principle of integration is a practical one, a principle "most easily translated into law and policy"[252]. While this is true, and as a matter of principle one would hardly disagree that development policy should incorporate in a single framework other crucial issues such as environmental and social protection, the practical difficulties are not insignificant.

Here therefore, comes the issue of the normative status of integration and interrelationship. Is it possible to oblige states to apply integration when they consider development options?

At this point it should be mentioned first that not all development policies affect the environment, even though they mostly do, and also that not all environmental issues are related to development[253]. As a result, the issue of integration arises where environment and development need to be incorporated in a single framework regarding decision-making and implementation. In these cases as it was shown above the approach to integration in the various international law instruments varies and depends on the specific situation thus reflecting the lack of consensus at the international level about the exact scope and implementation of the principle, whereas states seem to enjoy often wide discretion regarding the latter. As a result, it is difficult to say that the principle of integration has acquired the status of customary norm. Nevertheless, its key role for the promotion and implementation of sustainable development renders integration a critical legal principle which provides practical guidance helping to the achievement of the objectives of sustainable development.

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[251] According to Dernbach, *op.cit.*247, 258, "[w]ithout integrated decision-making, sustainable development is simply an odd assortment of unrelated principles".

[252] *Ibid.* 248.

[253] See Boyle and Freestone *op.cit.*15, 6.

D. Conclusions

One of the strongest arguments against the normative status of sustainable development is that the concept is hard to define and, as a result, its meaning and scope remain largely uncertain[254]. Thus, according to this view, the term lacks what has been characterised as a "fundamentally norm-creating character", which deprives it of the status of customary norm[255]. In simple words the available definitions and guidance of sustainable development, do not indicate if states are obliged to develop sustainably and what the legal consequences are in case they do not act this way. It is also not clear what "developing sustainably" means and how states could meet the standard in case sustainable development was accepted as a customary norm. Further, it has been argued that even the components of sustainable development, which are used to assist in concretising the concept and support its normative status, also fail to meet the normativity test, by being imprecise as well.

The analysis above, which looked into the definitional issue, confirmed that sustainable development is still hard to define with certainty. Overall, while sustainable development has made serious inroads in the recent past and its popularity expanded between scholars and the Courts, it is still plagued by significant vagueness, which raises obstacles to the efforts to grant the concept a normative status in international law. Some scholars argue, and the courts seem to accept, that the level of vagueness in the concept is such that it is currently fatal to the efforts to grant a normative status to it in international law. However, in the next chapter this thesis will explore possible solutions that would help to overcome this problem, which is not necessarily without solution, so as to enable sustainable development to promote more effectively its goals.

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[254] See Lowe *op.cit.*15, 28, arguing that "there is...no clear meaning that can be ascribed to the concept of sustainable development. It is subject to considerable uncertainty as to its exact meaning and scope".

[255] I*bid*. at 29, argues that "[f]or these reasons I find it hard to see that the concept of sustainable development can be regarded as having sufficient identifiable normative meaning to be capable of generating a self-contained norm of customary international law, no matter what its utility as a description of policy goals in international treaties might be. It lacks, in my view, a fundamentally norm-creating character". According to Voigt *op.cit.*23, 115 "...the high degree of uncertainty...in my view...is one of the fundamental impediments to the concept's development as a binding legal obligation".

The analysis of the principles of sustainable development in the New Delhi Declaration presented above demonstrates another aspect of the problem: the lack of consensus about what the precise principles supporting the sustainable development concept should be and also about their position in international law. Given that sustainable development itself is an umbrella term incorporating many other principles, the ability to identify these principles and their position in international law, would offer great support in the efforts to define sustainable development's meaning as well. However, it seems that even this method of defining the umbrella concept through its components is not very effective either. What the analysis of the components could offer to the debate about the legal status of sustainable development is that despite inherent controversies and strong opposition, the components of sustainable development make continuous progress in international law and for some of these components it is a matter of time before they acquire a normative status. This conclusion strengthens also the standing of sustainable development in international law and facilitates the efforts of its supporters to grant it a normative status.

At this point it has to be mentioned once more that the New Delhi Declaration constitutes only one of the available non-binding documents of international law referring to the principles forming the umbrella term of sustainable development and it was used only as a tool of study of these principles and of their possible role in the promotion of sustainable development.

In respect of the legal status of sustainable development, while the prevailing opinion in international law appears to be that sustainable development has not acquired the status of customary norm, there is still wide acceptance that the concept is associated with significant legal effects and it is necessary to look at these views as well. By way of example, it has been argued that "there can be little doubt that the concept of 'sustainable development' has entered the corpus of international customary law, requiring different streams of international law to be treated in an integrated manner". Another view argues that "[w]hether or not...a legal obligation...it does represent a goal which can influence the outcome of cases, the interpretation of treaties, and the

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Sands *op.cit.*25, 254.

practice of states and international organisations, and it may lead to significant changes and developments in exiting law"[256]. These views appear to imply that the inability to provide a precise definition of sustainable development may not be such a big problem as presented whereas the possibility of the customary status may not be the only option available to sustainable development in order to promote is case in international law.

So if it is not a customary norm and if the definitional problem is not that serious in what capacity could sustainable development produce legal effects in international law? And how do the continuous advances that the concept makes in terms of approval in the world stage affect the discussion of its legal status?

The answers to these questions along with the thesis proposals for the legal status of sustainable development in international law will be discussed in the subsequent chapters.

[256] Birnie and Boyle *op.cit.*19, 96-97.

Chapter 4

The legal status of sustainable development

A. Introduction

Having discussed in the previous chapters the evolution of the concept of sustainable development in international law and policy, the definitional issue and the principles supporting the concept, it is now time to discuss in more detail the legal status of sustainable development. The analysis in the previous chapters revealed why the landscape of sustainable development remains fragmented and largely unsettled. Political factors, such as disagreements between the developing and developed countries about the directions of sustainable development, and concerns about the costs and the efficacy of the proposed policies have contributed to the current nebulous situation. These problems have influenced legal developments and led to the current situation where sustainable development is considered a concept surrounded by considerable uncertainty and which fails to meet the criteria for legally binding norms.

Having focused so far on issues relating to the political landscape and the concept itself, it is now time to move to a discussion of sustainable development from an international law perspective. In particular, this chapter will explore the current landscape in international law and how ideas and proposals on the legal status of sustainable development fit into existing legal structures. Through such an analysis the thesis will seek answers to a number of important questions such as: is sustainable development alone responsible for the its failure to become a legally binding norm or are there in existence also unfavourable factors relating to the current structure and operation of international law? Is international law in its current form well positioned to address modern challenges such as the challenges set by sustainable development? Are there any alternative tools in international law that sustainable development could use in order to achieve its aims without having to become a customary norm?

This chapter will seek answers to these questions through reference to and analysis of the current structures and theories of international law, existing proposals for reform of the system as well as ideas and proposals about the legal status of sustainable development in international law.

The analysis will continue in the next chapter where the thesis's conclusions and proposals will be presented.

B. The international lawmaking process

The international legal order does not demonstrate the features traditionally existing in national legal orders especially the western ones, such as clear identification of legislative, executive and judicial bodies and separation of powers between the three branches of state in a way that safeguards the functional independence of each branch and a system of checks and balances seeking to ensure that none of the branches will abuse its powers at the expense of the other branches. Regarding lawmaking bodies, at the national level such bodies are clearly identified in the national constitutions and their lawmaking powers are clearly articulated.

International legal order operates differently. Unlike national level where the constitution shapes the national legal order, at the international level it is the consent of states that shapes the international legal order[1]. In this context, international law comprises primarily rules seeking to regulate the relationship between states. The extent to which these rules are binding on states depends on the nature of the rule: some rules included in certain sources such as treaties and custom are treated as binding whereas other rules are not. As for the lawmaking process it is a complex one often involving in addition to states international organisations and non-governmental organisations (NGOs). The negotiations –and sustainable development is an illustrative example- have a strong political character whereas, in terms of international law, rules of international custom are often used to offer legitimacy to

[1] See also Ian Brownlie, *Principles of Public International Law*, (6th Ed.), Oxford University Press, 2003, 3.

the process. In order to better understand the rules and the lawmaking process at the international level, it would be useful to briefly refer to certain basic theories, which influence the developments in international law and affect both the lawmaking practice and the normative status of the rules.

1. *Theories of international law*

The international legal order is not static but dynamic, evolving daily in response to new challenges posed by the changing international conditions. Many theories, old and new, have been created to address these challenges and explain the law-making process and the status of the rules at the international level.

a. Natural law theory: This theory is the oldest and laid the foundations of contemporary international law. Ideas and principles such as justice, equity, the peaceful resolution of disputes, the right of self-defence and humanitarian concerns originate in the natural law theory which in its basic form proclaims that "there exists a body of divinely promulgated law superseding the wills and acts of man"[2]. This body of law "...is eternally there, only waiting to be expressed in explicit jural form"[3]. This law is absolute and can be discovered through the exercise of reason[4]. The natural or moral law appears in various treaties and other international law instruments often providing "guiding values...both to fill gaps in the law and to temper harsh application of legal principles"[5]. The greatest natural law contribution, though, is international custom, which traditionally has been seen as representing an expression of natural principles with universal reach. However, while natural law offered "universal principles for the determination of relations between states" it

[2] John Kuhn Bleimaier "The Demise of Public International Law" 23 *Cath. Law.*1978, 79, 80.

[3] Michael W. Reisman "International Lawmaking: A Process of Communication", The Harold D. Lasswell Memorial Lecture, 75 *Am. Soc'y. Int'l L. Proc.* 1981, 101, 104.

[4] A.G. Chloros "What is Natural Law?" 21 *Mod. L. Rev.* 1958, 609.

[5] Alan Boyle and Christine Chinkin, *The Making of International Law,* Oxford University Press, 2007,11.

cannot offer "any blueprint for its derivation, verification or guidance for detailed regulation"[6].

b. Positivist law theory: This theory arose as an alternative to natural law contenting that rights to humans have been created as a result of the government's acts rather than from the discovery of natural principles[7]. At the international level norms, according to positivism, are created though states consenting on the content of the rule. The binding nature of the rules is due to the either express or tacit consent of the states as expressed directly through the participation in international treaties or indirectly through state practices supporting international custom[8]. Generally, positivists accept the authority of rules to which states have given consent, such as those accepted in formal documents, whereas they do not accept soft law documents[9]. Treaties are accepted as binding only upon the contracting parties whereas the existent of an international custom can be identified through an objective determination of facts. State act is the only relevant conduct whereas the role of non-state actors in lawmaking is not accepted.

c. The New Haven School: This theory[10] does not focus on the rules but on the process which creates these rules. The process is dynamic and serves specific policy objectives. Such an approach to international lawmaking is considered more appropriate because the law is perceived by this theory as "a constantly evolving process of decision-making and the way that it evolves will depend

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[6] *Ibid.* For a more detailed analysis of natural law see A.G. Chloros *op.cit.*4; Jeremy M. Miller "Doctrinal Perspectives on International law" 8 *St. Luis U. Pub. L. Rev.* 1989, 141; "Symposium on Method in International Law" 93 *AJIL* 1999, 291.

[7] Miller, *ibid.* 143.

[8] Vaughan Lowe, *International Law,* Oxford University Press, 2007, 26; Bruno Simma and Andreas L. Paulus "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View" 93 *AJIL* 1999, 303, 305.

[9] *Ibid.* 304; Boyle and Chinkin *op.cit.*5, 12.

[10] For a more detailed analysis of the New Heaven theory, see Reisman *op.cit.*3; Myres S. McDougal, Harold D. Lasswell and W. Michael Reisman "The World Constitutive Process of Authoritative Decision" 19 *J. Legal Educ.,* 1967, 253; Myres S. McDougal "Some Basic Theoretical Concept about International Law: A Policy-Oriented Framework of Inquiry" 4 *Journal of Conflict Resolution* 1960, 337.

on the knowledge and insight of the decision-maker"[11]. The theory, therefore, places more emphasis on the social interaction taking place in the lawmaking process and takes into account not only the actions of states or state officials, but also of other actors such as the NGOs and the media[12]. Pressures and influences of the values supported by the national or international community or of the interests affected must be taken into account[13]. In general the New Haven theory accepts that a plurality of factors influences the lawmaking process and they need to be taken into account by the "authoritative decision-makers", that is, persons who finally choose between the different options[14]. The promotion of human dignity is proposed by the theory as the overriding and determinative value, whereas the entire process is considered as scientific[15]. These issues, though, have raised criticism that the theory unduly minimises the legal content of the subject and that it ignores the fact that states generally accept international norms as they are without entering into such a vast analysis of social interaction[16]. Also the reference to values weakens the objectivity required in a scientific analysis and falls in the area of subjectivity[17]. It has even been proposed that the theory's adherence to human dignity is favouring the promotion of the interests of certain states, particularly the United States[18]. Lastly, given the great complexity and the vast numbers of interests and influences operating at the international level it becomes increasingly hard to record and analyse them as proposed by the theory.

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[11] See Malcolm Shaw, *International Law,* (5th Ed.), Cambridge University Press, 2003, 57-58. According to Iain Scobbie, "[t]he New Haven School displaces the conception of law as a system of rules in favour of one where law is a normative social system which revolves around trends of authoritative decisions taken by authorised decision-makers...." (Iain Scobbie "Wicked Heresies or Legitimate Perspectives? Theory and International Law" in Malcolm Evans (Ed.), *International Law,* (2nd Ed.), Oxford University Press, 2006, 83, 94.

[12]Boyle and Chinkin *op.cit.*5, 13.

[13] Shaw *op.cit.*11, 58.

[14] *Ibid.*

[15] Boyle and Chinkin *op.cit.*5, 13.

[16] Shaw *op.cit.*11, 59.

[17] Boyle and Chinkin *op.cit.*5, 13

[18] *Ibid.* Also H. Koh "Why do Nations Obey International Law?", 106 *Yale LJ* , 1996-1997, 2599, 2623.

d. International legal process: This theory especially the New International Legal Process focuses on understanding the role of international law in constraining decision-makers and affecting the course of international affairs[19]. By focusing onto how international law operates in actuality, the theory seeks to find ways to improve the operation of international law. Also, the theory emphasises the role of institutions which should be given authority to make decisions in support of the normative values accepted and promoted by the society, even if these institutions will have to go beyond the consent of the states or even in the outcome is not supported by treaties or custom[20]. The institutions draw their legitimacy from the states or the organisations of states which established them and granted them decision-making powers[21].

e. Critical legal studies: critical legal studies (CLS) adopt a critical approach to international law by seeking to reveal "inconsistencies and incoherences" in it[22]. CLS does not seem to accept the basic proposition that law is based on rationality, neutrality, objectivity and that it follows specific principles[23]. According to CLS, international law suffers from contradictions and biases of various types. On issues relating to sustainable development, the criticism often raised by developing countries against the developed ones for using the law to maintain colonial-era influences over the exploitation of natural resources falls within this category[24]. Also, gendered-based criticism is a CLS-related method. In general, CLS emphasizes the need to take into consideration the nexus between state power and international legal concepts and the way in which such concepts in themselves reflect political factors[25].

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[19] Steven Rathner and Anne-Marie Slaughter "Appraising the Methods of International Law: A Prospectus for Readers" 36 *Stud. Transnat'l Legal Pol'y*, 2004, 1, 6.

[20] Mary Ellen O'Connell "New International Legal Process" 93 *Am. J. Int'l L.* 1999, 334, 334, 349; Boyle and Chinkin *op.cit.*5, 13.

[21] *Ibid.*

[22] Shaw *op.cit.*11, 61.

[23] Boyle and Chinkin *op.cit.*5, 14.

[24] See also *ibid.*

[25] Shaw *op.cit.*11, 62.

Compared with other theories CLS does not focus on the rules or the process but on "sociological enquiries into causal relationships and political enquiry into acceptable forms of containing power"[26].

f. International law and international relations theory: this theory proposes and interdisciplinary approach by incorporating elements of international relations theory into international law. Actually this theory seeks to demonstrate the close relationship existing between international law and international relations[27].

Even more theories of international law could be presented to explain the law-making process at the international level. The great complexity of the process and the ever changing situation in international affairs offer fertile ground for a continuous flow of new theories and ideas. However, it is not possible to identify in any of these theories a sufficiently comprehensive and accurate account of the way in which international law-making evolves given that the dynamics in this evolution are hard to fully identify and determine. Nevertheless, all theories offer useful insights and their role is not immaterial. In respect of sustainable development, certain of the above principles such as positivism, the new Haven and critical legal studies could help to explain the lawmaking process in this area and also to assess the legal significance of the concept in international law.

2. "Hard law" and "soft law"

Before referring to the sources of international law it is necessary to briefly refer to "hard law" and "soft law" a distinction often made between rules of international law and which is particularly relevant in the case of sustainable development.

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[26] Boyle and Chinkin *op.cit.*5, 14.

[27] For a more detailed account of the theory see Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood "International Law and International Relations Theory: a New Generation of Interdisciplinary Scholarship" 92 *AJIL,*1998, 367.

The main distinguishing feature between hard law and soft law is that hard law has a binding effect on the parties involved whereas soft law does not have such an effect[28]. Treaties constitute the best example of hard law, since they are binding upon the parties involved. However, the treaties acquire a binding effect only after they have entered into force[29]. Soft law includes such documents as the Rio Declaration and United Nations General Assembly Resolutions and has no binding effect, whereas it is closely related to acts of international organisations and NGOs[30]. Generally, there is a variety of international law instruments which are used as soft law documents and their greatest utility is that they provide solutions in cases where reaching consensus about a binding treaty is not possible. Soft documents do not require ratification by national parliaments, do not impose serious non-compliance penalties and are more flexible allowing for an easy alteration of their content and scope, which makes them more adaptive to changing international conditions[31]. For these reasons they are increasingly popular and reaching consensus on a soft law document has always been easier than on a hard law one. The utility of soft law has been made greatly manifest in the case of environmental law and especially of sustainable development where the great complexity of the issues involved, the conflicting interests between the developed and the developing countries and the use of theories and principles appearing for the first time in international law to support the concept have prevented the use of hard documents for defining the content and the aims of sustainable development[32]. Instead, soft law document such as the Brundtland Report and the Rio Declaration have been used not only to help reach international consensus on the

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[28] A good definition of soft law is that "...soft law expresses a preference and not an obligation that states should act, or should refrain from acting, in a specified manner" (Joseph Gold *Interpretation: The IMF and International Law,* Kluwer Law International, 1996, 301 cited in Cynthia Crawford Lichtenstein "Hard Law v. Soft Law: Unnecessary Dichotomy?" 35 *Int'l L.* 2001, 1433, 1433).

[29] See below.

[30] Antonio Cassese, *International Law,* (2dn Ed.), Oxford University Press 2005, 196; Pierre-Marie Dupuy "Soft Law and the International Law of the Environment" 12 *Mich. J. Int'l L.* 1991, 420, 420-421.

[31] See also Alan Boyle "Soft Law in International Law-Making" in Malcolm Evans (Ed.), *International Law,* (2nd Ed.), Oxford University Press, 2006, 141, 142-145.

[32] These issues were discussed in detail in the previous chapters.

concept but also to guide national and international policies in the direction of sustainable development[33].

Obviously, most states prefer to sign soft agreements because they are not bound to implement them, however, this does not diminish the practical utility of soft law. The latter helps to harmonise political and legal aims and guidelines, which paves the way for the conclusion of binding rules at a later stage. Soft law also aids in the interpretation and application of legally binding agreements in cases where uncertainties or disputes arise. Its practical utility may be even higher if the enforcement and compliance problems often associated with treaties and custom, the traditional tools for establishing binding norms, are taken into account. As a result of these problems, which are considered in more detail in the next chapter, the use of traditional hard law, associated with punishment mechanisms for ensuring enforcement and compliance, is not always effective and soft law may be a viable and effective alternative, especially given the strong moral authority that some soft law documents, such as the Rio Declaration, exercise.

At this point it should be mentioned that whether a rule is a soft law or a hard law one does not depend on the form of the document to which the rule belongs ("declaration", "treaty" etc) but on the substance of the rule and the intention of the parties[34]. This often creates difficulties of distinguishing between soft and hard rules which further is a source of legal uncertainty. Such problems which increase by the day due to the ongoing expansion of soft law have given rise to arguments that soft law "...contributes to the crumbling of the entire legal system" and that the diminishing use of formalities in lawmaking removes a barrier protecting against arbitrariness[35]. However, and despite the existence of such problems and risks, the increasing popularity of soft law between lawmakers internationally strengthens the argument that soft law performs a useful function.

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[33] *Ibid*. Regarding the utility of soft law for international environmental law see Dupuy *op.cit.*30, 420.

[34] Cassese op.cit.30, 196.

[35] See Jan Klabbers "The Undesirability of Soft Law" 67 *Nordic J. Int'l L.* 1998, 381, 391 arguing that "...we need to insist on a degree of formalism, because it is precisely this formalism that protects us from arbitrariness on the part of the powers that be"; Jan Klabbers "The Redundancy of Soft law" 65 *Nordic J. Int'l L.* 1996, 167.

3. *Sources of International law*

Any discussion of the legal status of sustainable development involves as a preliminary stage a necessary reference to the sources of international law and to the currently acceptable lawmaking process. Such a reference will help to determine then the legal position of sustainable development in international law.

Any discussion of the sources of law starts with Article 38(1) of the Statute of the International Court of Justice (ICJ), which refers to four sources: a) treaties, b) custom, c) general principles of law, and d) subsidiary sources including judicial decisions and the teaching of publicists. In addition to these sources, binding decisions of international organisations have been proposed as being particularly relevant concerning environmental issues[36].

a. Treaties

Treaties constitute the most popular way for creating binding legal obligations in international law. Other terms such as "convention", "protocol" and "pact" have also been used as alternatives to treaties. What matters for the classification of a document as a treaty is the substance of the document not the form of it[37]. The essence of a treaty is that the parties expressly consent to the creation of legally binding rules. This is a reflection of positivism, which emphasises the consent of States as the only source of international law[38].

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[36] Philippe Sands, *Principles of International Environmental law,* (2nd Ed.), Cambridge University Press, 2003, 123.

[37] See Birnie and Boyle, *International Law and the Environment*, (2nd Ed.), Oxford University Press, 2002, 13.

[38] The 1969 Vienna Convention on the Law of Treaties (23 May 1969, 8 ILM 679 (1969), which concerns written treaties and codifies the relevant law defines in Article 2(1)(a) a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation".

The treaty-making process involves four basic stages: a) identification of needs and goals; b) negotiation, c) adoption and signature, and d) ratification[39].

This process is lengthy and complex and is regulated by rules of customary law and the Vienna Conventions[40]. Treaties are concluded between states or states and organizations or between organisations and do not include individuals or non-state actors. However, such actors are normally actively involved in the process especially in the earlier stages[41]. Treaties come into force following ratification by the involved parties or a number of them specified in the treaty (in case of multilateral treaties). States are free to attach reservations to specific articles of the treaty, unless the treaty prohibits such reservations[42].

A distinction often drawn is between "lawmaking" and "contractual" treaties. Law-making treaties are mostly multilateral establishing a regime "towards all the world rather than towards particular parties"[43], whereas contractual treaties establish "reciprocal" or "concessionary" obligations[44]. Normally, lawmaking treaties are formed to address important international issues which concern large numbers of states. Regarding environmental issues both types of treaties have been used since environmental issues have both local (which are addressed through bilateral treaties) and regional (or global) effects (which require the use of multilateral treaties).

Concerning environmental matters, states also use as a first stage the so-called framework treaties (or conventions), which lay down general rules and obligations and provide the basic framework on which specific rules later build through the

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[39] Hunter, Salzman and Zaelke, *International Environmental Law and Policy*, (3nd Ed), Foundation Press, 2007, 293-309.

[40] There are two Vienna Conventions. The 1969 Convention on the Law of Treaties *op.cit.*38 and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (25 ILM 543 (1986)), which constitutes an extension of the 1969 Convention.

[41] Hunter et al. *op.cit.*38, 292.

[42] For more details see Sands *op.cit.*36, 134-135.

[43] Sir Gerald Fitzmaurice, *Second Report on the Law of Treaties,* UN Doc.A/CN.4/107, YILC 1957, Vol.II, p.54 cited in Catherine Brolmann "Law-Making Treaties: Form and Function in International Law" 74 *Nordic J. Int'l L.*2005, 383, 384.

[44] *Ibid.*

adoption of specific protocols[45]. A framework treaty is useful for establishing a first general consensus between states in the direction of the recognition of the need to address a specific international problem and the protocols that follow provide the specific arrangements that need to be made in order for the problem to be addressed. Framework Treaties have been commonly used in respect of environmental problems because the complexity of the problems and the need for action by all states, often with conflicting interests, to address them renders the immediate adoption of specific rules very difficult[46].

Two more issues of particular importance for the discussion of the legal status of sustainable development concern the relationship between treaties and customary law, another traditional source of law, as well as the issue whether treaties can be binding on third parties.

Regarding the relationship between treaties and custom, treaties may codify in their provisions existing customary rules or contribute to creation and development of new customary rules. The recognition of a treaty provision as reflective of customary law has the practical significance that it is binding upon states beyond these signing the treaty[47]. Such recognition is possible if the treaty provision is "...of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law"[48]. Also the provision must satisfy the two requirements for customary law, that is, state practice and *opinio juris*[49]*,* which reflect international consensus that the rule incorporated in the treaty provision has a broader binding effect which is independent of the treaty provision[50].

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[45] Elli Louka *International Environmental Law: Fairness, Effectiveness and World Order,* Cambridge University Press, 2006, 22.

[46] Sands, *op.cit.*36, 128.

[47] See e.g. *North Sea Continental Shelf Case* ICJ Rep.3, para.71.

[48] *Ibid.* para.72.

[49] *Ibid.*

[50]Hunter et al, *op.cit.*38, 316; Boyle and Chinkin *op.cit.*5, 234-236.

However, even if the treaty provision does not qualify for a customary status by itself, it can still be an important factor in a decision to grant such a status to a rule[51].

In respect of the treaties' ability to bind third states, it has first to be said that treaties' effects are based on two fundamental principles: a) the principle *pacta sunt servanta,* meaning that there must be respect for the agreements, establishes the binding effect of the treaties[52] and b) the principle *pacta tertiis nec nocent nec prosunt* meaning that the treaties do not create either rights or obligations for third parties without their consent[53]. So the rule is that third parties are not bound by treaties unless they have consented.

However, there are exceptions to this rule which allow treaties to be binding on third parties. The most obvious case is where the rule of the treaty reflects international custom in which cases all states are bound[54]. Also, the Vienna Convention provides for the possibility of an obligation been imposed on a third party if this is the intention of the parties to the treaty and the third party expressly accepts this obligation in writing[55]. Treaties may also confer rights on third states if the latter assent and there is the agreement of the parties to the treaty[56]. Regarding rights, there is no obligation for the assent to be in writing[57].

There are, however, certain treaties which create *erga omnes* obligations binding on all states such as those establishing a boundary or an international legal regime[58]. Moreover, the Vienna Convention refers to the concept of a peremptory norm ("*jus cogens*"). A peremptory norm is "...accepted and recognised by the international

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[51] If the rule appears also in other treaties or soft law documents and is supported by sufficient state practice this could lead to the recognition of the rule as customary norm. An example could be principle 21 of Stockholm Declaration which was examined in the previous chapter in the analysis of the principle of sustainable use which supports sustainable development.

[52] This rule is reflected in Article 26 of the Convention 1969 Vienna Convention where it is stated that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".

[53] Article 34 of the 1969 Convention.

[54] See the analysis above.

[55] Article 35.

[56] Article 36.

[57] *Ibid*.

[58] Boyle and Chinkin *op.cit.*5, 239. The concept of *erga omnes* refers to obligations which are deemed as being owed to the entire international community.

community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"[59]. A treaty conflicting with a peremptory norm is void[60]. However, if the treaty reflects such a norm then it can be binding on a third state even without the latter's consent.

In case where there are overlapping or conflicting provisions between two or more treaties the Vienna Convention provides solutions[61] and the same happens where there are issues of interpretation of the treaties[62].

Lastly, an issue of particular practical importance concerns the possibility of amending the treaty. This is crucial for environmental issues where the continuous evolution of environmental problems and the frequent appearance of new scientific evidence and methods render necessary regular adjustments of the rules to the new conditions. The use of various tools such as framework treaties, which provide only general guidance and leave the adoption of specific rules to the protocols attached to them at a subsequent stage, offer some solutions but there is also need of a formal system for amending the treaties. In practice very often the treaties' texts contain provisions for amendment procedures[63] whereas the Vienna Convention also offers solutions. A useful technique for updating the treaties without having to resort to formal amendments is evolutionary interpretation, which allows for taking into account in the interpretation subsequent relevant treaties or other rules of international law[64].

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[59] Article 53 of Vienna Convention.

[60] *Ibid.*

[61] Article 30.

[62] Article 31.

[63] For Instance the 1992 Convention on Climate Change 31 ILM (1992) establishes in article 15 a mechanism for amending the Convention. The amendments much be approved either unanimously or by majority of three fourths.

[64] See Art. 31(3)(c) of the 1969 Convention. About the pros and cons of evolutionary interpretation see Boyle and Chinkin *op.cit.*5, 244-247.

b. Custom

Custom is the oldest source of international law. According to Article 38 of the Statute of the International Court of Justice, a norm will acquire a customary status if it meets two requirements: a) it is supported by general state practice, and b) it is supported by *opinio juris* meaning that states accept the rule as obligatory under international law.
The requirement of general state practice is satisfied if there is available evidence from external or internal acts[65] of the states that these states comply with the proposed norm in a relatively uniform manner. Though the term "general practice" implies the involvement of all states, in practice this almost never happens. Most customary rules are based on evidence of state practice from a limited number of states, especially the largest ones, which in addition seem to exert greater influence on the formulation of the content and the application of the customary rule than other states[66]. The lack of broad state participation may be caused by lack of interest of certain states[67] on the rule or lack of awareness about the process for the formulation of the rule[68]. Moreover, there is often lack of sufficient evidence about the practice of many states.
The requirement of *opinio juris* helps to distinguish between state acts creating customary norms and others that do not create such norms. It is satisfied if there is sufficient evidence that sufficient numbers of states accept the obligatory character of the norm. States often accept such a character either manifestly through positive acts or impliedly by not opposing the rule[69].

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[65] Internal acts include acts of domestic courts or tribunals, government officials, the parliament, publications in the local press etc.

[66] According to Louka *op.cit.*45, 23 "...it is possible for custom to develop if a number of states follow consistently a practice that has had an impact on international relations because of the authoritative influence of these states". By way of example Louka notes the role of maritime powers in the establishment of the law of the sea.

[67] In many cases where the norm concerns regional issues it is possible the creation of regional custom.

[68] The process does not follow formal rules and there are no deadlines. It is generally unknown how long it will take for a norm to satisfy the requirements of custom, since much depends on how fast and uniform the evolution of state practice and *opinio juris* will be.

[69] The terms used to describe such a situation is "acquiescence" and covers not only situations where a state knowingly chooses not to object to the rule but also situations where the state fails to act because it is unaware that a new customary rule is being formed. For a more detailed analysis on acquiescence see Jonathan Charney "Universal International Law" 87 *Am.J.Int'l L.* 1993, 529, 537-538.

A state may escape compliance with a customary norm if it proves that it is a persistent objector. The requirement is fulfilled if the state has persistently objected to the establishment of the rule while the latter was created and continued to object after the establishment of the rule[70]. However, new states created after the establishment of the rule or states who failed to satisfy the persistent objector test are bound by the rule[71].

Multilateral treaties and state acts in the context of international organisations are valuable sources of state practice and *opinio juris*. However, the whole process for the establishment of a customary norm is often lengthy and complex whereas it does not have a standard form or specific deadlines. These problems along with the involvement of a limited number of states, mostly great powers, in the formation of the rules are between the sources of strong criticism against custom, which according to some views fails to meet the needs of the 21st century[72].

However, and despite the criticism, custom remains one of the main pillars of international law and its role cannot be ignored.

c. General principles of law

General principles of law (GPL) have been included in Art.38 of the Statute of the ICJ as an independent source of law existing in addition to treaty and custom[73]. One of the greatest utilities of GPL is that they fill gaps in international law[74], which is especially important given the increased complexity of the international political environment posed by accelerated globalisation and the rigidities and limitations associated with the implementation of custom and treaties, the two main sources of international law. Also GPL have established in international law certain very significant principles

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[70] Ibid. 538-543.

[71] R. Jennings and A. Natts, *Oppenheim's International Law,* Vol.I, Longman Horlow, 1992, 29.

[72] See between others Oppenheim, *ibid.* 31; Charney, op.cit.69; Bodansky "Customary (and Not So Customary) International Environmental Law" 3 *Ind.J. Global Legal Stud.* 1995, 105; Geoffrey Palmer "New Ways to Make International Environmental Law" 86 *Am.J.Int'l L.* 1992, 259.

[73] Art.38(1)(c) refers to "the general principles of law recognised by civilised nations".

[74] Boyle and Chinkin *op.cit.*5, 286.

such as good faith and equity which have broad application, whereas they can be used to modify the application of existing rules[75].

GPL can be found in national legal systems or international law. The issue though is surrounded by some uncertainty due to the existence of two rival views. One arguing that GPL reflect natural law, which is objective and are therefore applicable independently of the free will of states and one arguing that the principles derive their legitimacy from the free will of states, that is, the national legal systems. The latter view supported by developing countries argues that Article 38 reflects national principles.

Article 38 does not provide guidance concerning methods of identification and implementation of GPL, which is therefore left to the discretion of the judges. This, according to some views, leaves to the judges the power within certain limits to work to create new principles of international law by analogy to national systems as a means to fill gaps in international law[76]. Such an interpretation could be useful in the area of international environmental law where many principles (e.g. sustainable development, precaution etc) do not have a settled status and the involvement of judges could help clarify these principles. However, the international courts and tribunals do not seem to openly promote such an idea, which could imply the existence of some lawmaking powers in these courts. While they do often use in their decisions GPL that do not necessarily derive from national rules or state practice thus implying some lawmaking activity, they award to these GPL a supportive role with the relevant decisions relying mainly on other bases[77]. The lawmaking role of the courts though is clearer in other areas.

d. Subsidiary sources

i. *Court decisions*: they are considered by the Statute of the ICJ as subsidiary sources because the courts do not have lawmaking powers. Their role is to

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[75] See also Oppenheim *op.cit.*71, 40.

[76] Birnie and Boyle *op.cit.*37, 19.

[77] Ibid. at 20.

identify and apply existing law. However, the operation of international courts and tribunals and especially of the ICJ, which is the supreme court of the United Nations[78], challenges in many cases the above rule and indicates that the Courts do exercise some decisive influence over the lawmaking process at the international level. In particular, in the increasingly complex global environment the absence of a formal lawmaking mechanism, the problems associated with the interpretation and application of the treaties and custom, which constitute the two main sources of international law, and the great difficulties in codifying the existing rules of international law, raises the role of courts which are called upon to provide solutions. And while the ICJ insists that it cannot legislate[79], its decisions are widely accepted by governments, international organisations and NGOs[80], thus indicating that the effect of Court's rulings is not limited to the parties involved in the dispute on which the Court issued these rulings but has broader effect. Moreover, while it is generally accepted that there is no rule of precedent in international law and therefore judicial decisions are binding only on the parties in the specific dispute, the current judicial practice indicates that the Courts do rely on their previous decisions whereas the parties themselves may complain if the decision adopted by the Court is unpredictable[81]. In general, and in a rather chaotic international environment where continuously changing and often conflicting interests shape state behaviour and practice thus posing serious challenges in the evolution of international law, the presence of the Courts, could offer islands of stability, consistency and impartiality which could help to ease differences and achieve consensus between states something absolutely necessary for the further development of the rules of international law. It will be therefore no surprise if states use judicial decisions by international courts

[78] The status of the ICJ derives from the Charter of the UN (Articles 7(1) and 92).

[79] In the *Legality of the Use of Nuclear Weapons* para.18 the ECJ states: "The Court cannot legislate... [I]ts task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules..."

[80] Boyle and Chinkin *op.cit.*5, 293.

[81] Ibid., 302.

to build state practice and *opinio juris* supporting new customary rules. In the area of environmental law the decisions of courts and tribunals have made significant contributions to the establishment and development of significant environmental principles[82]. However, in the area of sustainable development the court's involvement is limited.

At the national level the decisions of national courts could be especially good indicators of state practice and *opinio juris* in the process of the identification of a new customary norm[83].

ii. The writings of publicists: the Statute of the ICJ includes "the teachings of the most highly publicists of the various nations" in the subsidiary sources of international law. Though the role of the publicists regarding the contribution to the adoption of decisions by the Courts has not proved in practice to be that significant it cannot be ignored either since the views of scholars and experts such as those forming the International Law Association or the World Commission on Environment and Development has been repeatedly used by the Courts in many of their decisions whereas these views has been used to popularise and give legal significance to such terms as sustainable development, precautionary principle and the polluter pays principle[84].

e. Binding acts of international organisations

International organisations are set up usually by international treaties, from which they draw their legitimacy. These organisations could produce legally binding obligations if the treaties on which they are based grant them such powers[85]. This could concern issues internal to the members of the organisation or external ones concerning the relationship with other states or organisations[86]. International

[82] For more details see the analysis of the principles of sustainable development in the previous chapter.

[83] See also Oppenheim *op.cit.*71, 40.

[84] See also Louka *op.cit.*45, 27.

[85] By way of example EU is granted by the Treaties forming it, powers to create legally binding law.

[86] The EU case is relevant here as well. Also, certain resolutions of the UN Security Council adopted by virtue of Article 25 of the UN Charter are binding.

organisations could also issue authoritative interpretations of treaty provisions which could then be used to promote the creation of new customary rules[87].

C. Ideas and proposals on the legal status of sustainable development in international law

Having considered some basic issues relating to the international lawmaking process it is now possible to discuss certain ideas and theories seeking to address the problem of the legal status of sustainable development in international law. Given the great uncertainty about the meaning and scope of the concept it is no surprise that various views about its legal status exist. These views offer a wide array of solutions from the denial of any binding character to the concept up to an acceptance of such a character. It is impossible to cite all the ideas and proposals or even many of them here. However, a brief reference to some of these ideas and proposals will be illustrative of what the main arguments are and pave the way for the proposals of this thesis. Particular emphasis will be placed on the views of Judge Weeramantry and Vaughan Lowe who exemplify the arguments of the two opposing sides: one arguing for the normative character of sustainable development and one arguing against such a character.

1. The thesis of Judge Weeramantry

Judge Weeramantry expressed his view in a Separate Opinion in the now famous *Gabcikovo-Nagymaros* case considered by the ICJ[88]. The Separate Opinion is not legally binding and therefore its legal significance is limited. However, judge Weeramantry's view and the *Gabcikovo-Nagymaros* case constitute the first instances

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[87] See Philippe Sands "Environmental Protection in the twenty-first Century: Sustainable Development and International Law " in R.S. Axelrod, D.L. Downie and N.J. Vig, *The Global Environment: Institutions, Law and Policy,* (2nd Ed.), CQ Press, Washington, D.C. 2005, 116, 122.

[88] 1997 ICJ 7.

where the issue of the legal status of sustainable development in international law has been raised before the ICJ and it is also the first time that arguments for the normative status of the concept have been expressed by a judge at the highest level. The Court in its decision referred to "...new norms and standards" that have been developed "during the last two decades" in a great number of instruments[89]. These new norms, according to the Court should be taken into consideration and these new standards should be given proper weight. The need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. However, the Court did not go on to elaborate on the above statements therefore leaving the issue of the status of sustainable development open. However, Judge Weeramantry, dissenting, argued for the normative status of the concept.

In particular, Weeramantry argued that in that case, which involved a dispute between Slovakia and Hungary over a joint project relating to the production of hydroelectricity, the management of the navigation and the protection of the banks against flooding on the Danube river, sustainable development was particularly relevant since it could balance the environmental claims of Hungary against the developmental claims of Slovakia[90]. The right to development and the right to the protection of the environment are "important principles of international law" and in major projects such as Gabcikovo-Nagymaros which had great developmental and environmental consequences there was need to balance the two principles through sustainable development which, according to Weeramantry, is a principle with a "normative value", "integral part of international law" and crucial for the determination of the case[91].

Weeramantry argues that each of the two principles, which both belong to the contemporary human rights doctrine, cannot be given a free rein and that the absence of another principle harmonising them would result in a state of "normative anarchy" where the environmental and developmental rights would operate in collision with

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[89] Para 140 of the Judgment.

[90] 1997 ICJ, p.88.

[91] *Ibid.* 89.

each other, which would have unsatisfactory effects[92]. Weeramantry considers that law does not permit such anarchy and therefore necessarily contains within itself the principle of reconciliation[93].

The principle of sustainable development according to Weeramantry can be traced back beyond the Stockholm conference of 1972 to such events as the Founex meetings of experts in June 1971; the conference on environment and development in Canberra 1971 and the United Nations General Assembly Resolution 2849 (XXVI). He also cited Principle 11 of the Stockholm Declaration, which by stressing the essentiality of bearing environmental considerations in mind in the development process gave "a powerful impetus" to sustainable development[94].

Similarly, other principles of the Stockholm Declaration provided a setting for the development of the concept of sustainable development, which since then "...has received considerable endorsement from all sections of the international community and at all levels"[95]. Weeramantry cited multilateral treaties, international declarations and other international instruments which according to his view testify for the general recognition of the concept.

Thus, the principle of sustainable development "is...a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community"[96]. Moreover, the components of the principle come from well established areas of international law such as human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights and good neighbourliness[97].

Further, Weeramantry contends that while the general support for the term does not mean that each and every state has given its express and specific support to the principle, such a support is not needed for the establishment of a principle of

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[92] *Ibid.* 90.

[93] *Ibid.*

[94] *Ibid.*92.

[95] *Ibid.*

[96] *Ibid.*95.

[97] *Ibid.* 92.

customary international law[98]. The test of custom could be satisfied with less than that[99]. Weeramantry considers that the evidence appearing in international instruments and state practice amply supports a contemporary general acceptance of the concept.
To offer additional support to its argument that sustainable development is deeply routed in international law and the lives of nations, Weeramantry cited a number of ancient practices from various parts of the world regarding irrigation which demonstrate the commitment of the ancient populations to the scope of sustainable development.

2. *The thesis of Lowe*[100]

Lowe moves in completely different direction than Weeramantry. His main point is that the argument of Weeramantry that sustainable development is now a binding norm is not sustainable and that "...there is a sense in which the concept of sustainable development exemplifies another species of normativity which is of great potential value in the handling of concepts of international environmental law"[101]. This species of normativity is a meta-principle that is derived from outside the international legal system but which has legal value[102].
In more detail, Lowe rejects the judge's propositions that sustainable development has already acquired a normative status due to its necessary presence as a principle of reconciliation within international law and due to its broad acceptance by the international community.

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[98] *Ibid.*

[99] *Ibid.* Here Weeramantry cites J Brierly, *The Law of Nations*, 6th Ed. 1963, 61: "It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognised a certain practice, just as in English law the existence of a valid local custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practiced the custom. The test of general recognition is necessarily a vague one; but it is of the nature of customary law whether international or national..."

[100] Vaughan Lowe "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone (Eds), *International Law and Sustainable Development*, Oxford University Press, 1999, 19.

[101] *Ibid*. 21.

[102] *Ibid.*

According to Lowe, there are any number of principles and concepts in international law which are actually or potentially in conflict without the necessity to exist a principle extraneous to and independent of the conflicting principles themselves and which can be invoked in order to resolve those conflicts. In these cases solutions could be provided simply by the precise determination of the inherent limits of the conflicting principles themselves. Thus, in a potential conflict between development and environmental protection the solution, according to Lowe, could be provided by determining that the right to development does not extend to this or that activity.

In any case, argues Lowe, such problems may be illusory because the right of development and environmental protection may not even be legal principles but merely goals or aspirational standards in which cases there is no compelling need to reconcile them in any decision. The point made by Lowe here illustrates the controversy surrounding also the right to development and environmental protection, which equally to sustainable development have been broadly criticised between others as being too vague, lacking normative status etc[103]. If such views about these rights are accepted, then there is no need of using a reconciliation principle to reconcile two non-justiciable principles.

Lowe also contested Weeramantry's argument that sustainable development is a norm of international law. According to him, even if sustainable development has been incorporated in multilateral treaties as judge Weeramantry had argued, there is yet no evidence that the principle has been applied to reach "a binding determination" that states have acted unlawfully. He further argued that while sustainable development has been evidently used frequently in multilateral treaties there is no clear evidence that the authors of these treaties regarded that principle as one of customary law.

Moreover, Lowe cited the ICJ's ruling in the 1969 *North Sea Continental Shelf*[104] cases where the Court stated that before looking for state practice and *opinio juris* in order to grant the customary status to a provision, it is necessary that provision to be of "a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". He further cited the Court's investigation of the rule in

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[103] See Sumudu A. Atapattu, *Emerging Principles of International Environmental Law,* Transnational Publishers, 2006, 158.

[104] 1969 ICJ 3

question in the 1969 cases where the Court found between others considerable controversies regarding the exact meaning and scope of the rule and that the rule operated at the second stage of a process, which raised doubts and seemed to deny the norm-creating character of the rule. Lowe pointed to the similarities existing between that rule and sustainable development which is also surrounded by controversy regarding its meaning and scope and concluded that the latter term does not have a norm-creating character. According to him sustainable development "at best...looks like a convenient umbrella term to label a group of congruent norms..."[105]

He further contested Weeramantry's argument about the components of sustainable development which according to the judge were drawn from well-established areas of international law. According to Lowe, these components face similar problems to the main term.

He also contended that sustainable development cannot be soft law either because according to him there are no great differences between hard and soft law and therefore the lack of norm-creative character prevent the term from being a soft law instrument, which exercises also some constraining influence on the conduct of states.

Lowe proposed instead the operation of sustainable development as a meta-principle acting upon other legal rules and principles "a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap with each other"[106]. Such norms, which are used to modify primary norms, do not need to satisfy the requirements of state practice and *opinio juris* and are applied by judges as element of the process of judicial reasoning.

He argued that the vagueness of the concept, which prevents it from having a norm-creating character and becoming a primary source of law, is no obstacle to this process because as a goal or policy sustainable development is "perfectly adequate to offer some guidance to judges in their approach to establish priorities and accommodations between conflicting primary norms".

3. Other views

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[105] *Op.cit.* 100, 26.

[106] *Ibid.*, 31.

Alhaji Marong[107] commending on Weeramantry's and Lowe's views contends that by placing emphasis on state structures, that is, the state and the courts and the power of sanction in enforcing compliance with legal rules, they represent manifestations of positivist legal thinking, which fails to capture the entire development of international law, which in these days involves factors beyond state such as NGOs, epistemic communities and individuals all interacting with each other[108]. The interaction of these factors, according to Marong, has played role also for the development of the concept of sustainable development, which should not be attributed exclusively to state action.

Further Marong argues that sustainable development could be normative "...in the sense of a guide to practical reasoning (i.e. discourse and deliberation) in a variety of decision-making contexts at both international and domestic law levels"[109]. This perspective allows Marong to make the further argument that the legal notion of sustainable development implies a "legitimate expectation derived from international discourse since 1972, that states and other actors should conduct their affairs in a manner consistent with the pursuit of economic development social development and environmental protection as equal objectives"[110]. The legitimate expectation argument according to Marong does not require sustainable development norms to be binding international law.

Birnie and Boyle accept that the normative uncertainty coupled with the absence of justiciable standards, indicate that sustainable development does not create legal obligations[111]. They note though that even if international law does not require development to be sustainable it does require development decisions to be the

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[107] Alhaji B.M.Marong "From Rio to Johannesburg: Reflections on the Role of International legal norms in Sustainable Development" *Geo.Int'l.Env'l L.Rev.* 2003, 21.

[108] Ibid. 45.

[109] Ibid.

[110] Ibid.

[111] *Op.cit.*37, 96

outcome of a process which promotes sustainable development. They cite the *Gabcikovo-Nagymaros* case where the ICJ, "while not questioning whether the project was sustainable, [it] did require the parties in the interests of sustainable development to 'look afresh' at the environmental consequences and to carry out monitoring and abatement measures to contemporary standards set by international law"[112]. The practical significance of such an approach according to Birnie and Boyle is that it "enables international courts to further the objective of sustainable development in accordance with the Rio Declaration while relieving them of the impossible task of deciding what is and what is not sustainable"[113].

Sands, also uses the ICJ decision in *Gabcikovo-Nagymaros* case to support his argument that sustainable development is legally significant. In particular, he argues that by invoking the concept of sustainable development the ICJ indicates that the concept "has a legal function and both a procedural/temporal aspect (obliging the parties to look afresh at the environmental consequences of the operation of the plan) and a substantive aspect (the obligation of result to ensure that a 'satisfactory volume of water' be released from the by-pass canal into the main river and its original side arms)"[114]. Sands further argues that while the ICJ does not provide further details as to the practical consequences, some guidance could be obtained from the Separate Opinion of Judge Weeramantry considered above, who joined in the majority judgment and whose hand may have guided the drafting of the relevant part of the decision[115]. The above thesis of Sands does not make clear if sustainable development's legal function indicates that the concept has a normative status. In another part of his work he seems to imply it hasn't such a status but that it is legally significant[116]. What can this mean? Atapattu interprets Sands's position as indicating

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[112] Ibid.

[113] Ibid.

[114] *Op.cit.*36, 255.

[115] Ibid.

[116] Ibid., 289, Sands says "This chapter illustrates the extent to which the practice of states, international organisations and other members of the international community has given rise to a body of discrete principles and rules which may be of general application. Their legal status, their meaning and the consequences of their applications to the facts of a particular case or activity *remain open"*.

that the legal status of sustainable development "falls somewhere between a legal norm and a concept"[117].

The latter conclusion seems to be also Attapattu's herself: "Sustainable development is neither a concept nor a principle but falls somewhere between the two. It is more than a mere concept for the reason that states increasingly look to it in relation to development activities and it has greatly influenced the decision-making process. However, it is not a principle because it lacks normative quality. If it were a legal principle, the failure would result in the invocation of state responsibility. The better approach is to consider sustainable development as a goal rather as a principle and apply its components in order to achieve sustainable development. To the extent that the components of sustainable development have acquired normative status –and some components have- the failure to give effect to them could entail responsibility"[118].

Other views, which seem to reflect newer thinking in international law and also the evolution of international environmental law, stress that it may be no longer necessary to refer to traditional sources of international law, such as custom, in order to assess the lawmaking process in international law. International environmental law's development since the Stockholm Declaration has relied upon the use of highly specific treaties dealing with problems in specific target areas. In certain areas where treaty-making has been unable to provide solutions states and international organizations have proceeded seeking decisions that use tacit consent and tools such as multilateral forums and soft law documents to formalise these decisions and the new rules. Sustainable development could potentially rely on these tools and procedures in order to achieve a normative status in international law. These views are considered in more detail in the next chapter because they fall in the core of this thesis's proposals.

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[117] Atapattu *op.cit.*103, 188.

[118] Ibid., 186-187.

D. Conclusions

This chapter examined certain basic theories of international law, the current situation in international law in terms of structure and operation, and certain ideas and proposals about the legal status of sustainable development in the international context.

The discussion of these issues along with the conclusions and the thesis's proposals will continue in the next chapter. The conclusion that could be reached from the analysis in this chapter is that whereas there are in existence uncertainties and disagreements about the legal status of sustainable development there are also disagreements and debate in regard to the current structure and operation of international law. So the causes of the problem of the legal status of sustainable development do not appear to concern only the concept itself but also the way that international law operates.

Chapter 5

The thesis's views on the legal status of sustainable development

A. Introduction

This thesis favours the promotion of sustainable development's cause in international law as a necessary means of supporting consistent and effective policies in the areas promoted by the concept. In respect of the international law tools available for such a purpose the achievement of customary status is not the only option. Developments in the international law in recent years have opened up new options and opportunities which could be used as well. The main guiding strategy for the proponents of sustainable development, according to this thesis, is to select these tools and opportunities helping the concept to achieve its policy aims and not methods that merely satisfy the strict legal requirement of traditional international law. If achieving legal certainty under traditional treaty or custom law does not help to achieve compliance and cooperation of the states, then other options should be considered.

Some of these options have already been either explicitly or implicitly mentioned in various parts of the thesis though in an abstract manner. It is now time to put all these options together, to assess them and then to seek to create an integrated proposal that will help to elevate the sustainable development's position in international affairs and ensure the implementation of relevant existing agreements.

The analysis below will explain this thesis's positions and proposals by reference to general international law and environmental law. The definitional problem will also be touched upon and solutions will be proposed.

B. International law as a facilitator of the normative status of sustainable development

Sustainable development, as recognised by the ICJ in the *Gabcikovo-Nagymaros* case, belongs to these "...new norms and standards" that have been developed "during the last two decades"[1]. There are various reasons why sustainable development, whose origins can be traced back in ancient history, attracted the interest of international law so late. Apart from the late recognition of the seriousness of the problem of environmental degradation and the failure of the developed and developing countries to reach an agreement on the ways of tackling it once its existence was finally confirmed, it should be also mentioned that sustainable development has still many aspects which are largely unknown due to the inability of science whose role in the implementation of agreed policies such as global warming is critical, to provide an absolutely credible assessments of the causes of the environmental problems and of possible solutions. As a result, the proposed policies suffer often from credibility deficit and strong opposition by those affected negatively by the proposed measures, which explains also why international law is late and slow regarding the recognition of sustainable development as a binding norm.

The use of methods such as the promotion of precautionary principle, which is used to justify action even where there is uncertainty as to the risk and the methods for addressing it, is aimed at justifying such policies but it is not always certain that such an approach helps sustainable development to meet the standards of certainty and accuracy that law requires in order to support the concept's obligatory status.

Scientists and decision-makers hope that, as the rapid advancement of science and technology reveals everyday new information about the problems targeted by sustainable development, they will manage one day to adopt effective scientific and political plans of actions that will further help to concretise both the meaning of sustainable development and its practical implementation. Until that day, though,

[1] Para 140 of the Judgment.

international community will have to settle with methods and policies only partly successful[2].

The complexity and difficulty of the issues could potentially discourage all those seeking practical solutions to the problem of the meaning and scope of sustainable development from taking further action in this direction but due to the enormous significance and impact of the concept on the daily lives and the future of all human beings, humanity could hardly afford to dump it or even relegate it to something trivial. So the need for sustainable development is present and requires action on a daily basis even if this action is subject to significant uncertainty regarding the results to be achieved. It also requires flexibility in decision and policy-making which will allow for the immediate accommodation into the existing framework of all new methods and policies developed by science and experts aiming at helping find a workable solution. Finally, it requires a coherent and reliable legal framework at the international level that will enable the rigorous and timely implementation of the agreed policies. Such a framework will also need to be flexible in order to enable regular modifications and amendments in existing rules reflecting adjustment in policies necessitated by new developments. In simple words, international law should be able to provide some solutions and support the case of sustainable development despite the objections existing due to the existing uncertainty about its meaning and scope because this would be in the interests of humanity.

Then, the question for international law is the following: does international law currently offer an effective mechanism which sustainable development, despite its inherent difficulties, can use to build its legal status? From the analysis in the previous chapters it could be inferred that the available mechanisms of international law have so far either facilitated or spoiled the efforts in regard to the legal status of sustainable development. Some mechanisms such as international forums operating under international law rules and producing soft law documents have facilitated such efforts by allowing international legal procedures and rules to be used to establish and promote the case of sustainable development in international affairs. The Stockholm and Rio Conferences, various UN and other international processes as well as

[2] About action adopted under scientific uncertainty see also the analysis of the precautionary principle in the chapter 3.

principles and documents of international law, fall in this category: they have all enabled the recognition of the concept of sustainable development at the international level and offered platforms for promoting its case. Conversely, other mechanism such as treaty and custom laws have denied a formal normative status to the concept thus spoiling the efforts to adopt a more rigorous policy at the global level based on obligatory norms that will ensure the compliance of all states and will promote the case of sustainable development which is beneficial for all human beings.

The next question arising then is: should the latter international law mechanisms take all the blame for the failure of sustainable development so far to acquire a normative status or should the blame be placed only to the concept itself and the great uncertainty surrounding its precise meaning and scope with the associated difficulties of adopting a coherent and workable policy that would promote its case?

A partial answer to this question was given in the previous chapter where certain problems existing in relation to treaties and custom were considered. It was explained there that these traditional mechanisms of the creation of legally binding norms face various problems thus implying that sustainable development may be victim of these problems. It is now time to further elaborate on this issue in order to provide a more complete and firmer answer focusing on how serious these problems are and what are the possible alternatives for sustainable development if the problems persist.

1. The utility of treaties and custom

It was explained in the precedent analysis that treaties constitute the most favourable way for creating legally binding obligations of states at the international level because these documents record specific obligations and the express consent of the states involved. Hundreds of thousands of treaties, both bilateral and multilateral, exist that seek to regulate the relationships between states on bilateral or multilateral basis. However, it was also shown in the analysis that treaties face several challenges and flaws, which could compromise their efficacy. Such challenges and flaws include, for instance, the lengthy and complex nature of the treaty-making process caused by the

diversity of interests and the big number of states often involved. Especially regarding issues having a global impact and requiring flexible and quick decisions, such as sustainable development, reaching consensus between nearly two hundred states comprising currently the community of states becomes even more difficult if not impossible. Further, treaties do not bind states before the latter ratify them through domestic procedures which could also take time, whereas for the entry into force of a treaty its ratification by all the signatory parties or a significant part of them needs to take place first[3]. Lastly, the amendment of existing treaties can be also a lengthy and complex process, even if the relevant procedure is usually simpler than the drafting procedure and there is normally no need for a new ratification by the signatory parties or even the consent of all of them[4].

In addition to these problems which concern mostly the treaty-making procedures many international scholars point also to other issues preventing the treaties from being an effective tool for imposing legal obligations on states.

Compliance to the treaties by their signatory states is one such issue. Compliance levels in certain cases appear to be low and contrary to the traditional perception that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'[5]. Recent statistical data from empirical studies in the field of human rights seem to indicate that states do not fully implement the treaties they have signed whereas, even more alarmingly, there are circumstances where the signatory states of human rights treaties, following ratification of these

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[3] Some of the problems associated with the state participation and the procedures for creating a legally binding treaty were well summarised by Oscar Schachter: "However, treaties have not fully met the needs of the new law. For one thing, the processes of treaty negotiation are often slow and cumbersome. It is easy to see why. The increase in the number of States, the diversity of interests, the novelty of the problems faced, the shortage of competent officials, are factors which combine to delay and complicate the treaty-drafting negotiations and ratifications. The difficulty of obtaining ratifications and accessions, even for states that had supported and signed the treaties has been a discouraging feature. Even when multilateral treaties obtained the requisite number of parties, a substantial number of countries remained outside the treaty though they had no significant substantive objections and voted for its adoption by the drafting conference" (O.Schachter "New Custom: Power, Opinio Juris and Contrary Practice" in *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Krzysztof Skubiszsweski,* Cambridge: Cambridge University Press, 1995, 531, cited in C.G.Weeramantry "Achieving Sustainable Justice Through international Law" in M.C. Cordonier Segger and C.G. Weeramantry (Eds), *Sustainable Justice: Reconciling Economic, Social & Environmental Law,* Koninklijke Brill NV, 2005, 15, 22).

[4] See also the analysis about treaties in the previous chapter.

[5] L.Henkin, *How Nations Behave-Law and Policy*, (2nd Edition), Columbia University Press, 1979, 47.

treaties, have failed to demonstrate any improvements in their human rights ratings or have demonstrated worse ratings[6].

Another disappointing conclusion from the empirical studies is that states are more likely to join human rights treaties which they are less likely to comply with, whereas they are less likely to join such treaties if they can easily comply with them[7]. One reason for these surprising trends appears to be that countries joining the treaties but failing to comply with them have relatively poor human rights records, and weak domestic legal and political institutions which actually prevent these countries from achieving much progress towards the implementation of the treaties[8]. Also, such treaties, lack effective legal enforcement mechanisms that could force all non-compliant states to take measures to comply with them[9]. The current edifice of international law is founded on national sovereignty and any participation in and compliance with treaties is voluntary for states whereas the enforcement mechanisms, through sanctions, are weak[10]. Consequently, states with weak human rights records could join human rights' treaties in order to enjoy the benefits (e.g. by raising these countries' international prestige) without feeling the need to pay the costs[11], which explains the low level of treaty compliance demonstrating these countries.

As for states with strong human rights records, such states may decide not to join the treaties if they believe that they will have no serious benefits from joining, which is usually the case with such treaties[12].

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[6] Oona Hathaway "Do Human Rights Treaties make a difference?" 111 *Yale L.J.* 2002, 1935, 1994.

[7] Ibid.

[8] Oona Hathaway "Between Power and Principle: An Integrated Theory of International Law" 72 *U.Chi.L.Rev.* 2005, 469, 474.

[9] Ibid.

[10] A possible exception to this rule can be found in the law about international trade where trade sanctions could be used as a retaliation by those affected. In the context of human rights law though where the violations of international law concern mostly domestic citizens the possibility of retaliation by other states against the violator state is less likely to occur. See also Haathaway ibid.

[11] According to Hathaway *Ibid.* "such countries by displaying their (sometimes insincere) commitment to human rights, increase their standing among other nations, international bodies, private investors, domestic actors, and others and thereby obtain significant collateral benefits".

[12] *Ibid.*

Additional statistics indicate that reporting and complaint regimes established by human rights treaties in order to check compliance of states do not seem to be working[13]. Lastly, many countries in order to agree to sign a treaty very often attach reservations, understandings and declarations to the acceptance, which allow them to escape or modify the application of treaty provisions that may be detrimental to their national interests[14]. The use of such tools practically means that states seek only to gain the benefits from the treaties and avoid incurring the costs. Such a state attitude, though, should not be viewed as completely unreasonable or caused by state efforts to protect national interests. The law of the treaties by establishing uniform obligations on all signatory states follows a perception of the existence of equality between states, which though in actuality does not exist, since some states are weaker than others in various aspects. So the lack of compliance with treaties by certain states may be the result of perceptions existing in these states that the treaties' provisions are not fair to them even if they typically subject these states to the same obligations as other states[15].

If the compliance problems for treaties mentioned above are true and it seems that more rather than less they are because compliance problems exist also in other areas beyond human rights, such as the environment, then the question arising is, should sustainable development use treaties in order to acquire a normative status creating legal obligations on states? Or to put it differently, is the fact that there is no treaty so far establishing the normative status of sustainable development a serious reason for not granting that principle a normative status? It is submitted that the answer to these questions could depend on what one considers most important: the substance or the form of the rule? Is it better to establish the normative status of sustainable

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[13] According to Goldsmith and Posner, who cite evidence from human rights treaties, many such treaties have relatively undemanding reporting obligations which has been exploited by states that do not take seriously their obligation to submit reports. More than 70 percent of parties to such treaties have overdue reports. Also the citizens in these countries do not take advantage of the rights created by these treaties to file complaints against their governments. As a result the report and complaint mechanisms of human rights treaties are highly ineffective (see Jack L Goldsmith and Eric A. Posner *The Limits of International Law,* Oxford University Press 2005, 120 cited in Harlan Grant Cohen "Finding International Law: Rethinking the Doctrine of Sources" 93 *Iowa L.Rev.* 65, 2007, 93).

[14] See Cohen *ibid*, 94.

[15] For a more detailed discussion of the issue see Gabriella Blum "Bilateralism, Multilateralism and the Architecture of International Law" 49 *Harv. Int'l L.J.* 2008, 323, 340.

development through the stringent lawmaking procedures of creating a treaty, whose implementation due to the complexity of the policies involved, the diverse national interests of the signatory parties and the lack of serious enforcement mechanisms will be placed into serious doubt or is it better to consider other ways less stringent ones, such as the "soft" document of Rio Declaration, as sufficient to establish the normative status of the principle? One could argue that treaties by creating legal obligations could be potentially enforceable in courts but what about, for instance, the implementation of the Vienna Convention on Ozone Layer, which has been difficult at least[16]?

Similar problems exist in respect of customary law, which compared to treaty law, has the additional disadvantage that it lacks the certainty and accuracy that treaty law enjoys. Customary rules normally are not recorded on written documents but have to be extracted from state practice and *opinio juris*, which refers to how states perceive these rules[17]. As explained in the precedent analysis establishing state practice and *opinio juris,* is not an easy task. State practice frequently is not consistent or uniform whereas there is often lack of sufficient evidence about the practice of many states thus raising additional obstacles to the efforts to identify and concretise the customary rules. Moreover, regarding *opinio juris*, there is strong criticism in respect of the methods used to identify state's acceptance of a rule as binding[18].

The traditional approach to custom[19] relies primarily on state practice to identify a customary rule, with *opinio juris* playing secondary role seeking merely to distinguish between legal and non-legal obligations. This approach has been described as evolutionary using an inductive process to identify custom through instances of

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[16] About the problems with implementation and compliance of treaties regarding ozone layer, climate change and air pollution see Alexander Gillespie "Implementation and Compliance Concerns in International Environmental Law: The State of the Art Within Three International Regimes" 7 *N.Z.J. Envt'l L.*, 2003, 53. About general compliance issues facing treaties see Blum *ibid*.

[17] See the precedent analysis on custom earlier in this chapter.

[18] These problems of custom, as shown in the previous chapter have led judge Weeramantry in Gabcikovo-Nagymaros case to the conclusion that sustainable development already meets the existing vague criteria for custom.

[19] For the more detailed analysis of international custom and its problems see Anthea E.Roberts "Traditional and Modern Approaches to Customary International Law: A Reconciliation" 95 *Am.J. Int'l L.* 2001, 757; Jorg Kammerhofer "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems" 15, *Eur. J.Int'l L.* 2004, 523.

specific state practice[20]. However, this process is slow, which could raise doubts about its utility for sustainable development's case. It has also been characterised as inherently conservative and backward looking[21]. Further, it has been argued that the inductive approach by equalling law to the description of reality violates the duality of norm and fact: law is not necessarily a description of reality[22].

The more modern approach to custom focuses primarily on the *opinio juris* part of the test. This process is considered deductive because it "begins with general statements of rules rather than instances of practice"[23]. This focus on statements allows for the use of evidence from written instruments, such as multilateral treaties or declarations by international institutions and organisations such as the United Nations General Assembly, which may contain reference to existing customs, crystallize emerging customs or generate new customs[24]. Unlike the traditional approach which relies on practice by relatively few and powerful states to establish custom, the modern approach allows the involvement of more states in the custom-creating process which thus appears to be more democratic[25]. Under this approach which is more flexible and allows for the rapid development of new customary rules, a rule acquires a customary status if it has been phrased in declaratory terms, is supported by an international body representing a wide array of states and is supported by state practice[26].

This modern approach seems to have been endorsed by the ICJ[27] and could be potentially more useful to sustainable development, which relies so far heavily on declaratory statements by international bodies to promote its case. However, this

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[20] Roberts ibid, 758.

[21] Alan Boyle and Christine Chinkin, *The Making of International Law,* Oxford University Press, 2007,21.

[22]See Kammerhofer *op.cit.*19, 537.

[23] Roberts *op.cit.*19, 758.

[24] *Ibid.*

[25] *Ibid.* at 768.

[26] Michael Akehurst, "Custom as a source of International Law" *Brit. Y.B. Int'l L.* 1974-75, 67, cited in Roberts *op.cit.*19, 758.

[27] In *Nicaragua v. U.S.,* Merits, 1986, ICJ Rep. 14 the ICJ derived customary norms regarding non-use of force and non-intervention from statements, such as United States General Assembly Resolutions.

approach is not unproblematic either. It has been characterised as improvable whose arguments are based on anything but the law[28]. Other scholars contend that there is in existence a big gap between rules which have acquired customary status under the modern procedure and state practice. As with treaties, states often seem to ignore compliance with customary norms, which thus appear to play a merely aspiration function[29]. Even norms of *jus cogens,* which are supposedly obligatory for states, fail to ensure their compliance[30].

Given the contradictions existing in both the traditional and modern approaches other theories have been used to bridge the gap between the two. These theories offer some assistance to the efforts to reconcile the traditional and modern approaches and thus to achieve some consistency in the process of the recognition of customary norms[31]. However, these theories do not offer a final solution to a problem, which at the moment appears insolvable.

Overall, and as a result of the abovementioned problems, customary international law struggles to meet modern challenges resulting from a global political and legal environment that demonstrates unprecedentedly rapid expansion that further leads to an unprecedented level of interaction and interdependence between states. It has been argued that in the absence of consensus about the elements of custom "...the binding norms of customary international law will reflect only the most basic, noncontroversial rules of conduct"[32] thus raising questions about the utility of custom for the promotion of sustainable development, which concentrates features that are inherently controversial.

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[28] Kammerhofer *op.cit.*19, 537.

[29] Roberts *op.cit.*19, 758. According to Goldsmith and Posner, customary international law does not affect state behaviour (see Jack Goldsmith and Eric Posner "A Theory of Customary International Law" 66 *U. Chi. L.Rev.* 1999, 1113).

[30] Arthur A Weisburd, "The Emptiness of the Concept of *Jus Cogens* as illustrated by the War in Bosnia-Herzegovina" 17 *Mich.J.Int'l L.,* 1995, 49 cited in Roberts *op.cit.*19, 758.

[31] By way of example, Roberts cites Frederic Kirgis's approach, which seeks to rationalise the divergence in custom by analysing the components of state practice and *opinio juris* on a sliding scale: the lower the level of frequency and consistency of state practice the stronger the showing of *opinio juris* will be required (Frederic Kirgis Jr "Custom on a Sliding Scale", 81 *AJIL*, 1987, 146, cited in Robert, *op.cit*.19, 760).

[32] Beth Stephens "The Law of Our Land: Customary International Law as Federal Law after Erie" 66 *Fordham L. Rev.* 1997, 393, 455.

In respect of environmental problems, which are particularly relevant in the case of sustainable development, it has been argued that customary law, cannot be used to solve these problems because the latter require the existence of a regulatory system containing precise rules and prohibitions and monitoring mechanisms, which customary law cannot provide[33]. It has been proposed therefore that other mechanism should be developed to respond effectively to environmental challenges[34].

A fundamental factor which underlies both treaties and custom is state consent. Without state consent, according to the still prevalent international law theory, no treaty or custom exist and in effect no formal international law. However, the failures mentioned above and especially the existence of evidence that states often do not comply with treaties or customs even if they have formally accepted them, raises the crucial question about the factors that lead a state to a decision to obey (or not) international law. This is a crucial question for which if a proper answer is found it could explain the current inconsistency often noted in state practice and could offer some solutions.

On the issue, various ideas and theories have been proposed. Two of these theories often cited are rule legitimacy and rational choice[35].

Rule legitimacy concerns a normative belief that a rule must be obeyed. The validity of the rule depends on the latter's perceived legitimacy. Legitimacy was explained by T. Frank as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process"[36]. Frank has suggested four criteria that could determine the legitimacy of a rule[37]: determinacy, meaning "the ability of the text to convey a clear message, to appear transparent, in the sense that one can see

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[33] Geoffrey Palmer "New Ways to Make International Environmental Law" 86 *Am.J.Int'l L.* 1992, 266.

[34] *Ibid.*

[35] H. Koh "Why do Nations Obey International Law?", 106 *Yale LJ* , 1996-1997, 2599.

[36] T. Frank *The Power of Legitimacy Among Nations,* New York, 1990, 24.

[37] T.Frank "Legitimacy in the International System" 82 *AJIL,* 1988, 705.

through the language to the meaning"[38]; symbolic validation by ritual and other formality procedures; coherence; adherence to a normative hierarchy. State practice does not seem to play a role for the legitimacy of the rule[39].

The above criteria are not the sole determinants of the legitimacy of rules.

Additional criteria have been offered by a variety of sources especially international organisations and institutions such as the World Bank which proposed between others, procedural transparency, democratic decision-making, reasoned decisions and review mechanisms as factors reinforcing the legitimacy of the lawmaking process and thus the compliance with the rules at the international level[40].

However, the legitimacy of the rules and the lawmaking process is often strongly tested by reality, which demonstrates several features undermining not only the legitimacy of the rules but also of the entire international law edifice. By way of example international customary law which in a big part has been formulated by a small number of powerful states has been often referred to as undemocratic for this reason[41]. This then can be used as an excuse by states for not complying with rules of customary law which do not serve their interests. The same applies to treaties where powerful states have been greatly influential in the lawmaking process.

In recent years new trends have emerged. The advances of globalisation and the rise of new states following the end of the cold war have increased the number of the states involved in the lawmaking process at the expense of the more powerful states which now see their influence being reduced in certain areas[42]. The involvement of more states in the lawmaking process concerning both treaty-making and custom-making could potentially increase the legitimacy of the processes thus reinforcing compliance of states. However, powerful states still retain significant influence, which was potentially further expanded following the rise of United States' unilateralism

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[38] *Ibid.*, 713.

[39] Niels Petersen "Customary Law Without a Custom? Rules, Principle and the Role of State Practice in International Norm Creation" 23 *Am. U.Int'l L. Rev.* 2008, 296.

[40] See Boyle and Chinkin *op.cit.*21, 27.

[41] *Ibid*., 29.

[42] *Ibid.*

after the terrorist attacks in 2001 and the subsequent declaration of the war on terror by the sole superpower[43].

In support of the legitimacy of international law, various liberal ideas and theories have been promoted advocating that liberal states are more likely at comply because such states have domestic structures which are more supportive of international law[44]. In a typical "liberal" state there are in existence mechanisms such as a representative government, a legal framework guaranteeing the protection of basic civil and political rights, influential civil society groups and strong judicial control, which all favour compliance with international norms. In this respect it is no accident that sustainable development has been more actively promoted in developed western countries which demonstrate most of the features of a liberal democracy.

Rational choice is based on the perception that states use international law to promote their self-interests and therefore comply with international agreements only if they are convinced that these agreements will serve these interests[45]. Within this context, nations use at the international level strategies of cooperation that seek to achieve long-term national interests and the level of compliance with international legal norms is the result of the interaction with other states in the context of a reiterated "prisoner's dilemma" game[46]. Theorists of this approach use sophisticated models to prove their case whereas there are many variations of the theory.

In terms of international law, the rationalist approach by focusing exclusively on the promotion of national interests as the sole motivating factor behind a state's decision to comply reduces significantly the binding influence of law. Some theorists have gone as far as to argue that international law is not effective at all in safeguarding state compliance[47], whereas others, while not denying some influence of international

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[43] For a more detailed discussion of the issue see Milena Sterio "The Evolution of International Law" 31 *B. C. Int'l & Comp. L. Rev.* 2008, 213.

[44] See also Koh op.cit.35, 2633.

[45] *Ibid*.

[46] See e.g. Goldsmith and Posner *op.cit*.29.

[47] *Ibid. cf.* George Norman and Joe Trachtman "The Customary International Law Game" 99 *AJIL,* 2005, 541. The authors argue that customary international law exercises some influence by modifying the payoffs associated with the behaviour of some states at the international level.

law, they consider it as being limited[48]. The theory has faced some criticism from other scholars focusing between others on the theory's inability to explain satisfactorily why states often sign treaties, such as environmental ones, associated with significant costs and limited benefits; or why states often enter into treaties which require surrendering part of their sovereign rights[49].

Regarding sustainable development, this approach could offer certain answers about the current state of affairs and possible solutions. For instance, regarding the application of Kyoto Protocol, which seeks reduction of greenhouse gas emissions in an effort to tackle climate change, the United States is the only major western country that has not ratified it. The motivation behind the US decision is obviously the protection of its national interests since the application of the Protocol would be associated with significant costs for the US economy.

Similarly, regarding sustainable development itself, the north/south dichotomy which has been so far the major factor behind the inability to pursue a more rigorous and effective policy in the area, should be attributed primarily to the clashes of interest between developed and developing countries[50]. Such clashes of interest have at least in part prevented the adoption of the normative status of sustainable development through the conclusion of a binding treaty or the development of a customary rule.

Regarding the normative status issue, though, an interest-based approach might offer some solution to the problem: if states' decisions regarding compliance are determined by the latter's perceptions about their national interests then there is little practical importance in a discussion of the legal status of sustainable development. This is so because the biggest advantage of a normative status, that is the ability of the rule to bind states through the threat of sanctions, will hardly influence the states' behaviour guided by national-interest considerations. States will comply with

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[48] According to Andrew T. Guzman, international law can influence state behaviour "because states are concerned about the reputational and direct sanctions that follow its violation". He suggests to include in international law not only treaties and custom but also "...any promise that materially alters state incentives" including soft law. However, he recognises that reputational sanctions have an impact only when stakes are relatively modest, otherwise there is no impact. Guzman considers that environmental issues belong to the category of areas where international law exercises some influence (see Andrew T. Guzman "A Compliance-based Theory of International Law" 90 *Cal. L.Rev.* 2002, 1823, 1825).

[49] For a critique of rational choice theories see Hathaway, *op.cit.*8, 478-480.

[50] These issues were considered in more details in the previous chapters.

sustainable development rules only if their national interests guide them in this direction. And obviously in such a case it will be the state's free will and not the binding nature of the rule that will guide state action. Non-binding rules, such as soft law documents could also be used to achieve the same aim if favourable state interests exist. On the issue, someone could possibly argue that the binding nature of obligatory rules such as treaty and custom by threatening punishment and therefore harm to the national interests of violators would ensure higher level of compliance than soft law documents which offer no punishment. However, while this is potentially true much depends on the nature of the proposed punishment (e.g. if the punishment is capable of exceeding the possible benefits from non-compliance or if it will actually be used).

The issues discussed above about treaties and custom demonstrate that the existence of punishment mechanism in these instruments does not guarantee compliance.

On the other hand, there are soft-law documents, such as the Stockholm and Rio Declarations, which do not provide for a punishment mechanism against violators but which have nevertheless helped to achieve some rather significant compliance levels. The entire edifice of international environmental law which has made significant progress is founded in a great extent on such soft-law documents. Therefore, for achieving the compliance of states with sustainable development law, it is more important to convince states that compliance serves their national interests rather than it is to use instruments threatening punishment such as treaties and custom.

Concluding, it could be said that interest-based theories seem to offer some useful insight as to why states comply (or not) with international law, which could be used to offer some ideas about how the problem of the legal status of sustainable development could be solved.

There are many more compliance theories that could be cited, some of which are related also to the theories of international law mentioned in the previous chapter. All these theories offer useful insights into why states comply with international law. However, the validity of these theories can be confirmed only through empirical research in the field, which will test their assumptions and suggestions. For the purposes of this thesis, compliance theories are useful for helping to explain the

current state practice towards sustainable development and for providing possible directions which the discussion of the legal status of the concept should take.

It should be noted though that achieving a high level of compliance cannot and should not be the sole determinant for a decision on the legal status of sustainable development. Law in this area needs to achieve very ambitious policy goals the costs of which may not render the relevant legal rules as popular between states and the level of compliance, regardless of the form that the law may take (binding or non-binding rules), may be low in the beginning. However, this should not be a reason for not taking action at the legal level to address the issues raised by sustainable development, which, as already said, are crucial for securing decent life conditions for our children and the future generations. What compliance theories could offer to the law in this area are potentially some insights regarding current states' motives and behaviour which could help locate the problems that the law will face if applied and seek to address them, if possible, at an early stage.

A last parameter about international law, which should be taken into account, is that despite problems with lawmaking and implementation of treaties and custom, the corpus of international law demonstrates a steady expansion in recent years. The rise of globalisation has helped to reduce the role played by national borders and has increased interdependence between states thus promoting transnational and international law. As a result of these developments, the impact of international law on the lives of states and individuals across the globe has steadily increased. In order to meet the new challenges which have had an unprecedented scale, international law has to abandon certain old traditions and perceptions and develop new ideas, tools and processes. Though international law had always been viewed as the result of a continuous evolutionary process, which was reflecting developments on the national and international scenes and the current balance of interests between usually a few powerful states, this seems to have changed now. The rapid advances of globalisation and technology in recent years have reshaped the international political scene so fast and radically that traditional international law, based on such ideas as state sovereignty, consent and unanimity or the central role of powerful states, struggles to

evolve in an equal pace and catch up with reality[51]. The sharp criticism of custom and treaty law, which constitute the backbone of traditional international law, should be seen in this context especially since new actors such as non-state entities have appeared on the scene seeking to challenge the role of states as the only actors at the international lawmaking field[52]. But even if the traditional ideas seeing state consent in the centre of international law are to be followed, it is still clearly visible that states nowadays cannot act with the same level of independence that they used to act in the past. In a globalised world featured by increased interdependence, the ways that a state can act to promote and protect its national interests may have an impact exceeding national or regional borders and touching upon the interests of many other states or even the international community as a whole, which could cause strong reaction by the latter. States nowadays have to think twice before deciding to implement policies that may challenge other nations or the international community as a whole. Thus, international interdependence exercises significant constraining influence on the adoption of national policies and the promotion of national interests,

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[51] The slow pace of adaptation to reality that international law faces can be seen in the ICJ's caselaw which largely reflects the situation existed in the international relations long ago but no more. By way of example, regarding the emergence of a new customary norm the ICJ has held in *North Sea Continental Shelf Cases* ((1969) ICJ Rep. 3, para.74) that when state practice of states 'whose interests are specially affected' that is, the interests of the powerful states, is an 'indispensable' requirement' in the process. A few powerful states have also played great role also in shaping the law of treaties. The change that has happened on the international scene today is not that these few powerful states have ceased existing but that a great number of new states, most of which former colonies or states that emerged as a result of the end of the cold war, have appeared which play an increasingly important role in international affairs and whose role in shaping international law cannot be ignored. International law therefore needs to accommodate the increasing role of these states by modifying the lawmaking process as appropriate. On the issue see also Boyle & Chinkin *op.cit.* 5, 29-30.

[52]The central role of non-state entities such as NGOs and international organisations particularly the UN can be clearly seen in the developments in the field on international environmental law, in which these non-state entities have played a crucial role in all stages of the developments not only by seeking to influence the decisions of the governments but also by taking active part in the formulation of the rules. The Rio and Johannesburg summits and the documents adopted therein could be used examples of the effective participation of non-state entities in the formulation of rules relating to the protection of the environment and the promotion of the case for sustainable development. These issues were discussed in detail in chapter 2.

which in turn has a direct impact on the practical meaning and scope of state consent in international law[53].

In addition, the rise of new actors and efforts to relax the criteria for establishing customary rules, remove some of the rigidities associated with the application of treaty law and develop more flexible instruments and processes such as soft law and the procedures in international organisations for proliferating international legal norms should be seen as responses to the new trends and to the need that international law catches up with reality[54].

However, as international law grows bigger by the day risks of creation of a legal system dysfunctional and ineffective also emerge. It has been argued that "[t]oday's challenge is not the insufficiency of the rules but rather that they may be too many, that they are frequently vague and open-ended and...that rules addressing different subject-matters may frequently be in conflict with each other"[55]. Such risks become even more visible given the multifaceted evolution of international law: there are norms having a global impact, norms regulating regional relationships and others having a bilateral nature. Such a diversity of scope does not concern only the number of states affected by the norms but also the subject-matters of the norms. In the latter context, special legal regimes have been created to deal with specific and sometimes technical issues. These legal regimes have been defined as "self-contained", "self-referential" systems of law, which are governed by sets of principles and rules that either exclude or modify international law to accommodate the needs of the particular

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[53] Some critiques of the doctrine of state sovereignty and consent which reflects positivist thinking, have gone as far as to question the need for consensual lawmaking international law. The use of such lawmaking which would result in establishing legal obligations on states without their consent could have some benefits but also costs with the overall equilibrium still being open for consideration since the utility of such a measure has not been fully studied. What appears to be almost certain is that non-consensual lawmaking would increase participation of states in the lawmaking process but most likely will not increase the levels of compliance with the agreed norms. However, regarding treaties amendments, as explained earlier in this chapter, can be adopted by a majority decision and without the need for unanimity. For more details on the issue see Laurence Helfer "Nonconsensual International Lawmaking" *U. Ill. L. Rev.* 2008, 71.

[54] According to Boyle and Chinkin *op.cit.*21, 22, the more flexible law-making processes adopted include decision-making by consensus, institutional procedures and the use of Framework Conventions and subsequent Protocols to create new substantive obligations, to bring additional matters within the scope of the original treaty, and to create new procedures.

[55] Philippe Sands "Turtles and Torturers: the Transformation of International Law" 33 *N.Y.U. J. Int'l L & Pol.*, 2001, 527, 549.

regime[56]. Some of these regimes have their own institutions and have even developed their own judicial systems that are separate from those of general international law or other legal regimes[57]. As a result, the conflict within international law does not concern only conflicting rules but also conflicting legal regimes and even courts.

The situation has led to a fragmented landscape of international law whereas the existence of conflicts between various legal regimes, which given the rapid ongoing expansion of international law should be expected only to increase in the future, constitute one of the great challenges that international law faces. The significance of these conflicts though should not be overestimated. International law is a rather amorphous legal system which unlike national and regional systems does not have institutions entrusted with lawmaking powers whereas there are no prescribed rules regarding the lawmaking process. As a result, it should be no surprise that conflicts within this amorphous system arise. What matters most is that despite the conflicts and the setbacks, international law keeps making important advances at the international and domestic levels whereas it has managed to keep the conflicts and the special legal regimes under control. Besides the latter regimes do not seem to be departing from fundamental rules and principles under which general international law operates.

2. Conclusion

Returning to the question whether international law has to take the blame for the fact that sustainable development has not acquired a formal normative status the complete answer is "yes", at least in part, because the rigidities associated with current treaty and custom rules, which follow the traditional positivist approach, raise a significant barrier that sustainable development with the inherent complexity and controversy it carries could hardly overcome.

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[56]Boyle & Chinkin, *op.cit.*21, 23.

[57] The case of WTO, the EU and the legal regime of the European Convention of Human Rights could be cited as examples of legal regimes targeting specific issues or regions and having their own institutions and courts to make law and solve disputes.

However, the preceded analysis in addition to existing problems in the international law edifice revealed also some ongoing efforts to make the traditional international law doctrines more flexible in order to adapt to the situation on the ground. The appearance of certain new flexible tools and paths of development, which was driven by the new reality, has opened up a new window of opportunity for sustainable development. Sustainable development could receive support also from international institutions and the NGOs, who are stronger advocates of its normative status than states are and whose roles in the international lawmaking process in the new reality demonstrates a steady rise.

In any case and given that there are serious compliance problems in international law, it is submitted that sustainable development should not necessarily opt for its formal recognition via a legally binding instrument. What matters most is not so much to enforce compliance by threatening punishment, which as explained above does not guarantee success anyway, but by convincing states that compliance is necessary. In this context the proponents of sustainable development should use all possible tools and opportunities available by international law, including soft law, to convince states to comply without focusing exclusively on treaty and custom.

C. The role of international environmental law

International environmental law is one of the legal regimes mentioned above that operate alongside general international law in a relatively autonomous format. Sustainable development is closely related to environmental law since environmental protection is one of its pillars and sustainable development emerged in the context of environmental negotiations. In addition, environmental law, like sustainable development, has a relatively brief history in international law and its evolution could help understand the evolution and future development of sustainable development as well.

In general, environmental law demonstrates certain features and patterns of development that differentiate it from the traditional international law in several aspects. One of these patterns is that international environmental law does not demonstrate any international legal document incorporating principles and rules of general application that could help set up a general context in which environmental law should operate. In contrast, there are a huge number of documents of varying form and legal significance which provide environmental rules and principles in a disparate and fragmented way and in this way shape international environmental policies.

Though attempts have been made to create some documents and processes that could help to concretise a foundational legal framework and modes of action, such as the UNCED, the CSD and the Rio Declaration, these efforts did not fully meet the aims since the participants failed to agree to establish rules binding, in one way or another, on all states. The complexity and the huge scale of environmental problems which touch upon the entire community of states coupled by the lack often of reliable scientific methods to support the proposed policies creates a potentially explosive mix which constitutes the greatest deterrence in the efforts to concretise broadly acceptable general rules and principles. However, given that the complexity of environmental problems and scientific uncertainty are in large parts created by factors inherent to the global environment and by natural scientific and technological limitations it could be logically argued that environmental law by its inception had to live and evolve in a challenging environment where every step would be surrounded by controversy and opposition by those affected negatively. The opponents usually occupy a big part of the community of states, since the costs (financial, political or other) of implementation of the environmental policies are generally very high having a top-bottom impact that touches upon the daily practices not only of the governments but also of the individuals in any corner of this planet[58].

As a result of the situation, international environmental law has used more flexible tools to develop its corpus of rules. Soft law documents, such as the Stockholm and Rio Declarations, which demonstrate flexibility and facilitate the achievement of

[58] These issues have already been considered in detail in various parts of this thesis.

broad consensus by not associating non-compliance with sanctions, have been used to advance environmental agreements and policies.

International or regional courts and tribunals, such as the ICJ, the WTO Appellate Body and the ECJ have been used as well even if the decisions of these courts do not have the binding significance that supporters of environmental movement would have liked them to have.

In terms of the traditional international law tools, that is treaty and custom, they have been used in a manner serving the aims of environmental law. Regarding treaties, it was explained in the previous chapter that the framework-protocol method has been widely used. The method involves the creation, as a first step, of a framework treaty which sets up guiding rules and principles about specific environmental problems and following its ratification by the signatory states, is followed, as a second step, by the adoption of more detailed rules creating specific obligations for the states. The great advantage of this method is that it promotes the gradual establishment of obligation in a manner that helps to achieve consensual agreements between states: the framework treaties by containing only general obligations lacking specificity are easier for governments to accept whereas the subsequent production of additional documents containing specific obligations can be more effective in achieving consensus since the states have already committed themselves to the aims of the treaty. In this way by splitting the process in two stages states are given time to reflect and prepare themselves for the adoption and implementation of the specific rules that will follow the establishment of the general framework.

Moreover, the process demonstrates flexibility also regarding the amendment of these treaties, which often can be carried out by a simple or qualified majority vote and without the requirement of further ratification[59]. Such flexibility is necessary given that the situation in the global environment and the methods addressing the problems there, change very quickly and there is need for speedy action and maximum flexibility in decision-making. The case of the Vienna Convention for the Protection of the Ozone Layer and the subsequent Montreal Protocol, which seek to address the problem with the ozone layer are widely used examples of the successful

[59] These issues where discussed in more detail earlier in the chapter.

implementation of the framework-protocol method. This method offers therefore a workable tool for promoting environmental agreements even if problems of compliance along with the inability of science often to propose clear and effective methods for addressing environmental problems still creates considerable uncertainty[60]. Lastly, it should not be forgotten that this method concerns regulation of specific issues related to the environment and does not provide the so-much-needed legal framework on which environmental rules of general application would be developed.

Regarding custom, its role has been less important than treaties and soft law. This could be in part due to the role of customary law as a form of law creating obligations for all states, which in environmental law is hard to achieve. Another reason may be the difficulty in proving state practice in an area of law, such as the environment, where state policies are fragmented and often inconsistent. However, certain doctrines and principles of international environmental law have been created via custom[61].

Another distinct feature of environmental law is the declining role of the state and, as a result, the rising involvement in the law-making process of international organisations and NGOs. International environmental law constitutes one of the areas of international law where the declining role of states in the international level can be seen more clearly mostly because it has become increasingly important that environmental problems affecting all human beings living on earth cannot be solved through unilateral state action. As a result, the rising significance of international organisations such as the UN and the Commission on Sustainable Development, which provide the forums in which international community can design and promote collective agreements and plans of action, is justified. Equally justified is the rising role of the NGOs in the international law-making process since the NGOs are generally viewed as the best representatives of civil society which is called upon to actively participate in the implementation of environmental agreements. The participation of NGOs is crucial not only for supporting the implementation of these

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[60] For compliance issues relating to the Vienna Convention for the Protection of the Ozone Layer and two other environmental regimes see Gillespie *op.cit.*16.

[61] For more details about the use of custom by international environmental law see Bodansky "Customary (and Not So Customary) International Environmental Law" 3 *Ind.J. Global Legal Stud.* 1995, 105.

agreements but also for exerting pressure on governments and interest groups, which oppose the adoption of environmental measures protecting the environment due to the high cost of these measures[62].

The increased involvement of international organisations and NGOs in the lawmaking process about environmental issues and the inevitable decline of state power in this area challenge the established tradition of general international law, which focuses on treaty and custom and considers states as the only acceptable actors in the international lawmaking field.

The extensive use of soft law in international environmental agreements could be seen in this context. Soft law typically does not impose legal obligations and this enables actors other than states to participate and contribute in the lawmaking process, but in practice soft-law provisions are often well respected and finally lead to the adoption of legally binding rules, similar to those in treaty and custom. Soft law also serves the aim of stimulating adoption and enforcement of domestic environmental legislation, which is crucial for achieving environmental goals[63]. For these reasons the claim that soft law is a "subdued form of integration" which "tends to downplay the role of legislation and to dilute the responsibility of public authorities in formulating and implementing public policies"[64] is not completely justified. There has also been criticism of NGOs and international organisations arguing that these actors, unlike national governments which are elected by the people, lack sufficient democratic credentials and their operation is not transparent, thus lacking legitimacy, a problem which threatens also the legitimacy of the entire edifice of international environmental law[65]. In the same way, the use of framework treaties, which contain only general

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[62] For a discussion of the declining role of states and the rise new actors such as international organisations and NGOs in the area of environmental law see Alexander Gillespie, *The Illusion of Progress, Unsustainable Development in International Law and Policy,* Earthscan, 2001, 141-145. See also Nicolas de Sadeleer *Environmental Principles: from Political Slogans to Legal Rules,* Oxford University Press, 2005, 234-261.

[63] On the issue see also Nicholas Robinson "Enforcing Environmental Norms:Diplomatic and Judicial Approaches" 26 Hastings Int'l & Comp. L. Rev. 2002, 387 citing Environmental Impact Assessment between international environmental law norms of broad acceptance and implementation despite the usage of disparate rules and procedures between states.

[64] See de Sadeleer, *ibid.* 246.

[65] On the issue of the legitimacy of international environmental law see Daniel Bodansky "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" 93 *Am.J.Int'l Law,* 1999, 596.

principles and policy guidelines leaving to experts the task of defining the ways in which these principles and policies are to be implemented, has been viewed as encouraging "...the proliferation of fragmentary and unstable implementing measures"[66].

While these lines of criticism of the NGOs and the new lawmaking tools are not completely unfounded, they are not confirmed by practice since states still possess significant power, and non-state actors have failed so far to be recognised formally as equal participants in the law-making process.

However, the criticism of international environmental law does not come only from the side of those sceptical to the rising role of non-state actors and the decline of states. Criticism comes also from those who see in the current format the failure of environmental law to sufficiently constrain state policies harmful to the environment and thus to reverse the acute problem of environmental degradation. The current framework, in which international environmental law operates, is, according to this approach, ineffective failing to achieve its main aims and objectives[67]. The case of sustainable development, which could provide solution to the problem of environmental degradation but has thus far failed to achieve a formal normative status in international law, is cited as an example of this failure.

Lastly, the disagreements extend also to the nature of the rules adopted by international environmental law. International environmental law through the extensive use of framework treaties and declarations has produced a vast number of principled laws which are laws stated in general and abstract terms that provide only general policy directions. Such laws are necessary because they offer flexibility that helps to coordinate or integrate rules coming from different areas of law. They also help to update legislation by allowing the incorporation into it, through the adoption at a second stage of specific rules in accordance with the principles, the latest scientific methods and techniques aiming to tackle environmental issues. Lastly general principles have been used to harmonise law with other disciplines, such as economics and sociology, which are also necessary for the implementation of the

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[66] De Sadeleer *op.cit.* 62, 248.

[67] Gillespie *op.cit.* 62, 141.

agreed policies. All this flexible and extensive use of environmental principles has been viewed by certain scholars as violating the traditional system of international law by challenging the hierarchical approach to the norms, creating rules which lack coherence and consistency, and harming the operation of law as an autonomous system. In other words the way that international environmental law operates has been viewed as ineffective and irrational creating a chaotic and fragmented international legal environment[68].

While it is hard to fully disagree with these views, it is submitted that the situation should not be overestimated either. The current situation, however chaotic it may be, it is not the result of the current flexible nature of the lawmaking process and the rules of international environmental law but of the Herculean task that the latter law has undertaken. Tackling the problem of environmental degradation requires efforts of unprecedented scale and also action having significant costs and being subjected to significant uncertainty about the methods to be used since science does not provide adequate answers to the fundamental question of how environmental degradation should be addressed. Moreover, and given that environmental degradation has an impact not only on the current generation but also on future generations it is necessary to insert into the equation the rights of those generations regardless of the lack of sufficient knowledge about what form these generations will have and what their real opinion might be[69]. All these issues which are inherent to all aspects of environmental action would inevitably be reflected in legislation. International environmental law remains to a large extent chaotic because of the chaotic situation in the factors underlying its existence and not because of flaws in the rules themselves. Rules in this area could become more coherent and consistent only if the underlying factors become more coherent and consistent, which though at the moment is unrealistic for objective reasons. As a result, it should not be expected that international environmental law will become less chaotic in the foreseeable future. Nevertheless, even in such a chaotic legal environment, environmental law has managed to produce significant progress in many areas which leaves hope for a more positive future.

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[68] See de Sadeleer *op.cit.*62.

[69] The principle of intergenerational equity and the uncertainty surrounding its application were considered in the previous chapter where the elements of sustainable development were examined.

As for the violation of the traditional hierarchical structure of the norms by environmental law, it is submitted that this may not be necessarily a problem. The hierarchical structure of the norms undoubtedly offers stability and certainty which helps international law to survive in a generally chaotic and anarchical environment characterising international relationships between states and thus to retain its functions. However, adding some flexibility to its traditional structure by inserting new elements does not necessarily destroy the edifice of international law as feared by some scholars. In contrast, it is submitted that new developments in the lawmaking area even if they challenge the traditional structure of international law, are justified reflecting current developments in international relations which through the advancing globalisation reshape the global landscape. In such a context traditional international law, which built its edifice in an era when international law was understood as encompassing acts by a small number of powerful states and colonial powers, does not serve current needs and should either adapt or limit itself to a place in the history of twentieth century as an old and outdated model.

Therefore, when seeking to reconcile environmental principles with the traditional legal structure of international law, the focus should not be on trying to fit these principles in the traditional structure but on reforming the traditional structure in a way that will make it possible to accommodate these new principles in it without altering their nature[70]. In this context there have been proposals for creating international organisations with broad powers and compulsory jurisdiction that could be used to overcome the voluntary participation of states in international agreements[71]. However such a solution creates compliance problems whereas it does

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[70] By way of example, when seeking to incorporate environmental principles into the traditional system of customary norms, the focus should not be on making these principles compatible with the traditional perceptions about state practice and *opinio juris* but on making the criteria for custom more flexible. The reason is that the principles better reflect current realities and needs than the traditional structure.

[71] Such a possibility is discussed by Gillespie *op.cit.*62. See also Roseann Eshbach "A Global Approach to the Protection of the Environment: Balancing State Sovereignty and Global Interests" 4 *Temp. Int'l & Comp. L.J.,* 1990, 271, 302 (...it is becoming increasingly apparent that a neutral, independent organization should be established to encourage uniform compliance among all nations through the use of education, financial assistance, and sanctions, instead of providing enforcement merely at the national level"). Joyeeta Cupta Global Sustainable Development Governance: Institutional Challenges from a Theoretical Perspective" 2 *International Environmental Agreements: Politics, Law and Economics,* 2002, 361.

not seem to be realistic at the moment because it actually stands for the creation of a global government with compulsory authority on environmental matters. While such a government may be created at some point in the future, such a possibility is not realistic now and will not be realistic in the foreseeable future either. For this reason it is submitted that strengthening the position of environmental rules and principles and incorporating them in the formal (and enlarged) hierarchy of norms of international law is a more realistic alternative. All that is needed is some extra flexibility in both sides and especially in the traditional structure of international law.

Such a method if materialised would offer support also to the case of sustainable development which seeks to acquire a formal normative status in international law. The utility of this method has been already confirmed by practice because certain environmental norms despite compliance and other problems, have already acquired customary status thus becoming part of the traditional hierarchy of international law norms[72]. The extensive use by environmental law of treaties, which have a place in the traditional hierarchy, also proves the utility of this method.

Sustainable development would only benefit from such a development since the latter would facilitate its rise to a formal normative status in international law.

D. The problem of the "lack of fundamental norm-creating character"

The problem of the lack of fundamental norm-creating character emphasised by Lowe in his thesis and which according to him constitutes one of the basic reasons for denying a normative status to sustainable development concerns mainly the concept itself and not how international law treats it, even if these two are closely interrelated.

It is beyond any doubt that sustainable development is a concept hard to define for various reasons, subjective and objective ones, which were explained in detail in this

[72] It was shown in the previous chapter that certain principles related to sustainable development have acquired a customary status.

thesis[73]. It is also beyond any doubt that the lack of a widely acceptable and precise definition of the term creates problems to its recognition by international law, which are relevant regardless of the view (positivist or other) that someone may have about the latter law.

Law requires precision and accuracy in the legal concepts because in this way it becomes easier for the lawmakers and the courts to use them in a coherent and consistent manner in the legislative process and the judicial decisions respectively. Precision also helps legal concepts to find a place in the hierarchy of norms which traditionally has been viewed as the backbone of a well structured legal system. Similarly, all those affected by the incorporation of legal concepts into a legal system are more likely to comply with the relevant norms if they know their meaning and scope. Legal certainty and predictability are major advantages of legal norms and sustainable development by lacking a precise definition lacks these properties.

However, and despite these problems with the concept which are well documented anyway, the question which does not seem to have been answered adequately is whether the vague and contested meaning of the term is so extensive that it is fatal to the concept's ability to acquire an obligatory status in international law.

In answering the question a number of factors should be taken into account. One of these factors is that the existence of vagueness has not prevented many other legal concepts from acquiring a normative status. Domestic legal systems are flooded with abstract ideas and principles that are used to impose directly or indirectly obligations on individuals and institutions[74]. Similarly, in international law the extensive use of framework treaties, which contain a number of abstract ideas and principles, provide

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[73] It was shown in the previous chapter that difficulties associated with the nature of the issues dealt with by sustainable development, political disagreements and the high costs of implementation of the proposed policies have all contributed to the inability to reach an agreement about the precise meaning and scope of sustainable development. Nevertheless, the definition of the concept given by the Brundtland Report according to which "sustainable development" is development that "…meets the needs of the present without compromising the ability of future generations to meet their own needs" has been broadly used as a workable definition.

[74] By way of example, in the English legal system the "rule of law" doctrine which is one of the cornerstones of the English constitution is a concept hard to define.

another demonstrative example that the inability to define precisely a concept is not necessarily an obstacle to the efforts to grant it a normative status[75].

In respect of sustainable development it has been argued that the lack of precision in its meaning is an "asset" because in this way the concept offers flexibility necessary to help bridge differences between states seeking to reach consensus on a difficult and complex issue[76]. Besides, flexibility is the only way for bringing onboard the entire community of the nearly two hundred states which exhibit hugely diverse interests and political, cultural and legal traditions. Flexibility also helps to update legislation, which is particularly relevant in the case of sustainable development where the constant reassessment of policies and objectives is absolutely necessary for achieving the stated aims.

It is submitted that even if it was possible to provide a precise definition of the term and thus to establish coherent and consistent legal norms for its implementation, it would still be unrealistic to expect major breakthroughs regarding state compliance. As was explained earlier in the chapter, compliance cannot be necessarily achieved through the use of means that are traditionally perceived as obligatory, such as treaties and custom. Therefore the biggest problem of sustainable development is not to force compliance through the partly ineffective treaties and custom but to ensure voluntary compliance and in this sense the lack of precision in the concept by offering flexibility which helps to build up international consensus, is more likely to be an asset rather than a liability for it. This becomes apparent from the fact that sustainable development gains increasing support through its incorporation into international agreements and treaties, which demonstrates that the concept's imprecision has not prevented the expansion of its popularity between states and international organisations.

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[75] As Jutta Brunnee correctly points out notwithstanding disagreements on whether the concept of common concern is a customary norm and what its legal effects are, treaty-based regimes have developed around common concerns such as ozone depletion, climate change and biological diversity (see Jutta Brunnee "International Environmental Law: Rising to the Challenge of Common Concern?" in *International Environmental Law in the Beginning of the 21st Century,*100 *Am.Soc'y Int'l L. Proc.,* 2006, 307, 308).

[76] Christopher D. Stone "Deciphering Sustainable Development" 69 *Chi-Kent L.Rev.*1994, 977, 978.

In any case the lack of precision in the meaning of the concept may be less practically important than it might have been expected given that judicial involvement in matters involving general international law is not as extensive as in domestic or regional matters. The ICJ, which could be deemed the "supreme court" of public international law, though it has contributed to the development and evolution of general international law, it does not demonstrate the authority and the level of engagement with the daily application of international law that domestic or regional courts such as the ECJ of the European Union demonstrate. Also, the ICJ lacks sufficient enforcement mechanisms like the ones enjoyed by national or regional courts. On the other hand, regional courts and tribunals (e.g. the ECJ) or those dealing with specific matters (e.g. international trade in the context of WTO) while more actively involved in practical matters than the ICJ, they do not necessarily promote a unified approach to major issues as sustainable development is. These courts potentially help to popularise the concept at the national or regional level, but by using different principles and techniques and by establishing special legal regimes within international law, do not necessarily offer the support required according to the traditional conception of international law, for adopting a unified approach on the definition and status of sustainable development in international law[77]. As a result, even if the ICJ and other international courts and tribunals recognised sustainable development as a customary norm of international law, that practical significance of the recognition might not be as important and would most likely be effective only regarding specific areas where sustainable development has already attracted strong interest.

In terms of practical application, what matters most is whether decision and policy makers as well as states are able to understand the essence and aims of sustainable development and the methods of implementing it even if rigorous standards do not exist. The increasing use of the concept in the daily state practice and international agreements confirms that states and policymakers understand the essence and the basic aims of the concept. What they do not seem to understand is the best way of

[77] As explained earlier in this chapter, international legal regimes following their own rules and having their own courts contribute to the creation of a fragmented international legal landscape, which could pose problems in the orderly recognition of international law.

achieving these aims without having to use policies of doubtful efficacy and bear the high implementation costs. However, this is not necessarily a legal problem. Besides, the law, by introducing certain principles such as the principle of common but differentiated responsibilities and the inclusion of poverty eradication and human rights in the core of sustainable development, offers some solutions that facilitate the efforts for improving implementation rates.

As a conclusion, it could be said that the argument that sustainable development lacks precise meaning is valid but it cannot exclude the possibility of granting a normative status to the concept. It could be argued that the extent of the imprecision, which does not prevent it from being increasingly used in treaties and other international agreements as well various other factors indicate that the problem could be overcome.

E. The thesis's final proposals regarding the legal status of sustainable development in international law

Following an extensive analysis throughout the thesis of the current debate on the legal status of sustainable development in international law the following conclusions and proposals could be reached:

i. Sustainable development is a concept seeking to address at the global level in an integrated manner some of the most fundamental problems and challenges currently facing humanity, such as environmental degradation, poverty eradication and the ever increasing gap between poor and rich countries. The task is Herculean due to the enormous extent of the targeted problems and the involvement of the entire international community currently comprising nearly two hundred states. Also the proposed policies, for the first time, have to take into account the interests of future generations meaning that they must promote sustainable solutions whose impact should extend beyond the present and deep into the future which further means careful planning and implementation of the agreed policies.

ii. The task undertaken if accomplished would alter completely the global landscape and the view of the world, which would feature harmonious socioeconomic development that would not harm the environment and which would respect the rights of future generations. The size and unprecedented nature of the challenge lead many people to believe that the target is unrealistic and impossible to achieve. This thesis shares the view about the unrealistic nature of the task, at least for the foreseeable future, but it strongly supports the sustainable development's case because the concept helps to shape the direction which humanity should follow in the future[78]. Humanity needs a vision and a mission for the future because the current needs and the technological and scientific advances of the twentieth and twenty first century allow for undertaking tasks whose impact goes far beyond the current generation. Never before humanity had such an opportunity and therefore the current situation should be fully exploited, despite the lack of previous experience and the potential uncertainty, which as with any innovative project, feature sustainable development. The opposition raised by those negatively affected by the proposed policies, while not unfounded or irrelevant, does not justify holding back the project. What should happen as a result of the existing opposition is more extensive negotiations that would help bring on board the opponents. In this context some refinements of existing ideas and policies and elimination of errors have place in the agenda not only for convincing the opponents but also for improving the efficacy of the proposed project.

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[78] In this respect the thesis fully embraces the following argument:
"While the concept of sustainable development holds promise and is seen as a necessity, there are major challenges in its implementation. While technological optimists hope that this goal can be achieved by stimulating technological development, there is growing evidence to show that the environment Kuznets curve [according to the Kuznets curve, as societies get richer the pollution per unit of production will decrease, and thus promises the possibility of sustained growth] may be a myth especially in relation to global environmental problems. The concept is also held to have given the existing development paradigm a new lease of life, but having failed to achieve more than that in terms of operational definition and in terms of reconciling development goals with environmental goals. Nevertheless, sustainable development is the term of choice for the global community" (Cupta *op.cit*.71, 363).

The project though should move forward because it is based on the only available and relatively well-defined idea which seeks to establish a firm connection between the present and the future of humanity. It is necessary to know where we are coming from and especially where we are headed to in order to maintain an orderly development of humanity which currently suffers from conflicts of interest between states and generally an anarchical political environment.

iii. The historical evolution of sustainable development in international law and policy as described in chapter two of this thesis reflects clearly the above-mentioned underlying situation: the community of states despite existing differences has recognised in principle almost unanimously through the broad recognition of sustainable development the need for some vision for the future of humanity and the goal of reconciling socioeconomic development and environmental protection. However, for reasons already explained they have been unable to reinforce this recognition with legally binding agreements or with the development of consistent state practice that would justify the establishment of a customary rule. States seem to prefer slow and cautious moves which will be carried out in accordance with their own resources and capabilities and without excessive pressure by external factors such as legally binding legal instruments. However, overall, they do not seem to doubt that sustainable development is a fully acceptable goal to whose success they are committed.

iv. In the light of these developments, the current prevalent opinion in international law is that the concept does not have an obligatory character in international law. However, most scholars agree that sustainable development is not legally irrelevant. The question then is what its precise legal status might be. Various proposals have been made: by way of example, Lowe argued that sustainable development is a meta-principle, an interstitial norm, whose main role is to modify existing rules in specific

areas in the direction of the aims of sustainable development. There are arguments favouring a "legitimate expectations" status and others which do not precisely define that status. Lastly, there are views arguing that the traditional structure of international law, based on treaties and custom, is outdated and therefore sustainable development does not need to rely on this structure to promote its case. The concept could use new tools available, such as soft law documents and innovative interpretation of the criteria for treaties and custom that seek to shift away these constructs from their traditional and inflexible form, to achieve its objectives.

v. The thesis researched these arguments and discussed their validity. In particular, in chapter three there was an extensive analysis of the meaning and scope of sustainable development and its components whereas in chapters 4 and 5 the current situation in international law and the tools available for promoting international norms were considered. The conclusions that could be reached are as follows:

First, there is truly a definitional problem but this problem, even if important, is not by itself fatal to the efforts to grant an obligatory status to the concept. The reason is that similar uncertainty exists with many other concepts which nevertheless have been recognised as obligatory norms by domestic and international legal systems. Moreover, the thesis accepts the view that uncertainty in this case may be in the benefit of sustainable development because it offers flexibility necessary for achieving consensus between nearly two hundred states currently constituting the international community and which demonstrate a great diversity of interests and political cultures. The research also showed that uncertainty about the meaning of the concept has not prevented thus far the expansion of its use internationally, which means that in reality the vagueness associated with the exact meaning of sustainable development is not such a big obstacle as argued.

The same applies also to the components of sustainable development. As shown in the analysis in chapter three, sustainable development is an

umbrella term which incorporates a variety of principles, substantive and procedural alike, which enjoy a free standing in international law. Some of these principles face similar problems to sustainable development in terms of meaning, scope and legal status but others face fewer problems. What is common, though, in all these principles is that, like sustainable development, they make continuous progress in terms of acceptance and many have almost reached the level of their official recognition as customary norms by general international law, given that in specific areas of activity they already enjoy such a status. Consequently, the strengthening and recognition of the components of sustainable development strengthen also the position of the latter.

Second, the thesis's research of the current state of affairs in international lawmaking, which would help to explain better the current approach towards sustainable development and to identify options and opportunities for advancing its case, revealed that the established lawmaking edifice founded on treaties, custom and state consent is shaking for good. The reason is that this edifice was established in the twentieth century and in a period within that century where international community was guided almost exclusively by a few powerful states and comprised a relatively small number of states. Also during that period the level of state interdependence as well as the entire corpus of international law were limited compared to the current situation. Thus, treaties, custom and state consent were working well and were helping to maintain a relatively acceptable international world order. The legal edifice relied on a normative hierarchy and on relatively strict criteria regarding the recognition of rules acceptable in international law.

However, such a structure, the thesis's research found out, does not fully meet current realities. The number of states has greatly increased, which shifts the balance away from the few powerful states, the advance of globalisation has raised the level of interdependence between states, which has expanded the reach of international law, whereas new actors beyond

states such as NGOs and international organisations have appeared on the international stage.

This trend has resulted in demands being raised for reforming the international legal order in order to incorporate the new developments. Treaty, custom and state consent, at least in their traditional form do not seem to satisfy current needs.

Sustainable development could benefit greatly from a transformation of international legal order since the lack of state consent and the rigid rules associated with treaties and custom following the established system have thus far prevented the concept from being incorporated into the formal international law edifice as a binding norm. If international legal order is transformed or at least if the strict criteria for custom and state consent are relaxed and new tools such as soft law are recognised as sources of binding norms then the case of sustainable development would be advanced. The indication is that the tide in international law, slowly but steadily may be turning in a direction favouring sustainable development.

Third, if it is true that treaties, custom and state consent, in their traditional form, will be marginalised in the future then the current debate of the legal status of sustainable development in international law, which is largely based on traditional perceptions, becomes increasingly irrelevant. Treaties and custom already face significant credibility problems since compliance levels with them by states are not satisfactory whereas the role of states as an international actor is subject to constant pressure. As a result, the fact that sustainable development has been denied a normative status for not satisfying traditional rules about treaties and custom and state consent is not as practically significant as one might have thought.

Fourth, there are certain new tools that have been developed to address modern needs. These tools, such as the rise of declarative law and the extensive use of framework-protocol for treaties associated with the adoption of a common but differentiated responsibilities principle, have helped to promote international consensus and bring states in-line with

their promises. International legal regimes, such as international environmental law, have heavily relied on these tools to successfully promote recognition of their cause.

vi. In the light of these findings the final proposals of the thesis regarding the legal status of sustainable development in international law are as follows:

First, given that the concept itself is innovative and many of its elements and policies have not been fully tested, its proponents should seek first and foremost to maintain the flexibility of the term. This practically means that the meaning of the term should remain flexible so as to accommodate the continuous policy adjustments that will necessarily take place for a long time to follow.

Second, law requires certainty and accuracy in the legal terms because in this way the efforts to create justiciable standards which could be enforced by courts against states, NGOs and individuals in a clear and predictable way, would be greatly facilitated. On the other hand, though, in order to achieve accuracy and clarity the lawmakers might have to cut into the flexibility that sustainable development enjoys and which is one of its basic advantages for bringing the international community onboard. In addition, reduced flexibility could also harm the concept's mission by cutting into its main aims and objectives, since the potential precise legal definition is likely to be underinclusive of the concept's actual meaning and scope[79].

Consequently, it is submitted that there is no need to push for the creation of a precise definition of the term which would not fully describe what sustainable development is but would only satisfy the courts or the lawmakers. In such a case the legal obligations that would be created as a result would be of little benefit because either states would not comply or, even if they did, their compliance would not be sufficient to achieve the objectives of sustainable development. So in the thesis's view, there should

[79] Precise definitions, that would clarity and legal certainty usually equal to short definitions. In the case of sustainable development, though, a short definition is unlikely to fully describe the essence of the concept and the exact obligations that the addressees of the concept will have to undertake.

be no rush to precisely define sustainable development as long as the current situation helps sustainable development to evolve and achieve broad consensus between states. This obviously does not mean that the concept will have to remain without adequate legal protection. Such protection is necessary to achieve sustainable development's aims. However, it is submitted, that it is the duty of law to help provide such protection to the concept, through using existing or new legal tools, rather than wait until sustainable development evolves into a concept which the law in its traditional structure could use. Societies change over time, as well as political and cultural perceptions and law needs to follow suit.

Third, the aim therefore for sustainable development should not be on fulfilling the traditional inflexible conditions for custom but on seeking all possible ways, including alternatives to pursue its policy objectives. It goes without saying that the traditional doctrines such as customs, treaties or state consent cannot and should not be ignored because they still prevail in international law and it seems that it will take a long time before they become irrelevant, if this ever happens. Therefore, sustainable development's recognition by the traditional, positivist, international law should always be in the agenda. However, it should not be necessarily the first priority. Such a priority should be to build an international consensus between all relevant actors and achieve broad participation regarding the implementation of the agreed policies and these aims can be only achieved through a combination of means which would necessarily include sticks and carrots. The use of obligatory tools, that threaten sanctions, such as treaties and custom, could be the stick but other tools such as consensual lawmaking, common but differentiated responsibilities and use of non-binding tools would be the carrots needed in order to help remove some genuine concerns that many states have regarding the costs of the proposed policies as well as about the allocation of this cost between states, which may not always be fair enough. Threatening sanctions would not be productive in the latter case but organising international forums where

participation in good faith and constructive dialogue would be promoted is more productive. The ability to reach consensus regarding international agreements and their implementation is the key for the effectiveness of rules relating to sustainable development because the alternatives proposed, such as the creation on international institutions with compulsory jurisdiction and powers to create legally binding rules do not appear to meet current realities.

Overall, the aim for sustainable development should rely on using realistic tools and methods and on seeking to exploit all the opportunities made available to it by international law. As for international law, the need for change in certain areas is generally obvious and this does not apply only to the treatment of sustainable development. In order to achieve change there is no need to destroy the traditional structure that has led international community to the current positive level of state interaction. However, some corrective measures to improve this structure in order to accommodate new developments are needed.

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