

Sustainable Development and the Search for a Better Environment, a Better World: A Work in Progress

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I.

INTRODUCTION

In the ever-evolving development of international sustainable development¹ principles and norms, various analytical approaches have emerged, all with the aim of providing a conceptual framework which embodies the often competing issues of international and national environmental protection and conservation, human rights and economic development. At the global level, the North-South² dynamic has been an inherent component of these scholarly, political and economic discussions, most

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1. One commentator notes that "sustainable development" has been defined at least 70 different ways. Susan Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology and Law*, 31 WILLAMETTE L. REV. 261, 276 (1995). Usually the term describes, in the abstract, an ideal model of development that takes into account and respects the environmental needs of both present and future generations. Ileana Porras, *The Rio Declaration: A New Basis for International Cooperation*, in GREENING INTERNATIONAL LAW 26 (Philippe Sands ed., 1993). To be sustainable, development must possess both economic and ecologic sustainability: it signifies a policy approach rather than a substantive prescription. Lynton Keith Caldwell, INTERNATIONAL ENVIRONMENTAL POLICY: FROM THE TWENTIETH TO THE TWENTY-FIRST CENTURY 275 (3d ed. 1996).

2. This paper's references to the terms "North," "South," "developed countries," and "developing countries" are used freely and interchangeably, notwithstanding major, substantial difficulties in assigning legal definitions. The implications of such legal, and indeed economic classifications are great, particularly with respect to discussions regarding the rights and obligations of "developing" and "developed" coun-

of which have examined or sought to achieve international consensus on the accommodation of what is fair, just and equitable. The task has not been an easy one, to say the least.

One approach has involved the examination and development of a right to environment from a human rights perspective in an attempt to formulate further the international environmental law paradigm which is now inherently interwoven with sustainable development principles. Notwithstanding this valiant and on-going attempt to integrate environmental protection objectives with human rights principles, this paper considers the extent to which the collective human right to development is found in the international environmental law context of sustainable development.

With the aim of continuing and expanding the discussion on sustainable development, this paper focuses on the extent to which specific human rights are integrated into three of the texts that emerged out of the United Nations Conference on the Environment and Development (Rio de Janeiro, June 1992) ("UNCED")³. It is a departure from current analytical approaches which have defined the existence of environmental human rights within the context of the existing human rights regime. Specifically this paper examines some of the right to development provisions of the Rio Declaration, the Convention on Biological Diversity ("CBD") and the United Nations Framework Convention on Climate Change ("UNFCCC"). These collective human rights provide another dimension to environmental protection that is at the core of sustainable development. Both the right to environment and the right to development find their bases in human rights. Both speak to human dignity and the quality of life.

First, Part II of this article examines the development and existence of the right to environment. Its evolution is inherently based upon human rights principles and norms. Its current an-

tries. Nonetheless, reliance on these terms is in accordance with their widespread, common and undefined usage.

3. For ease of reference, this paper refers to the *Rio Declaration on Environment and Development at Rio de Janeiro*, U.N. Doc. A/CONF.151/26 vol. 1 (1992), reprinted in 31 I.L.M. 874 (1992) [hereinafter Rio Declaration]; *Convention on Biological Diversity*, 31 I.L.M. 818 (1992) [hereinafter CBD]; and *United Nations Framework Convention on Climate Change*, U.N. Doc. A/CONF.151/26 vol.1 (1992), reprinted in 31 I.L.M. 849 (1992) [hereinafter UNFCCC], as UNCED texts. Although the CBD and UNFCCC were separately negotiated prior to UNCED, they were both open for signature in Rio.

thropocentric characterization is not without its opponents who argue in favor of a more ecocentric focus.

Next, Part III explores the evolution of the right to development. As with the right to environment,⁴ the right to development is inherently interwoven with human rights considerations, and is ultimately integrated into sustainable development instruments that strive to meet environmental protection and economic development objectives in a fair and equitable way. This part surveys relevant documents, including the Universal Declaration of Human Rights, the United Nations' New International Economic Order ("NIEO") resolutions, the Stockholm Declaration and the UNCED texts, all of which reflect the evolution of the intersection of human rights, the right to development and environmental protection.

Finally, Part IV examines the common goals of international environmental protection, economic development and human rights. It is precisely these linkages that provide a positive and optimistic perspective to the outcomes of UNCED and in the end, another basis for the hopeful furtherance of, and commitment to, the global equity that is the fundamental promise of sustainable development.

II.

ENVIRONMENTAL HUMAN RIGHTS AND THE RIGHT TO ENVIRONMENT

A. *Human Rights Linkages*

Although the "international community has already spilled much ink and consumed forests of paper developing" environmental instruments which hold substantial promise for alleviating some environmental problems, those instruments have not done enough.⁵ In acknowledging this limitation, several approaches have emerged that link human rights and environmental protection.⁶ It has been stressed that just as environmental law derives from the common interest of mankind, so does the international

4. at least from the anthropocentric perspective

5. Neil A.F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUMAN RIGHTS L. REV. 487, 494 (1996).

6. *See id.* at 497-498, in which the author states, "Many aspects of the linkage between human rights and the environment have been explored before but there has yet to be a systematic (albeit not neutral) walk through the legal foundations of the collection of principles that reflect the environmental dimensions of human rights."

recognition of human rights and freedoms.⁷ In general, this linkage focuses on “whether international human rights law can contribute to environmental protection, or conversely, whether international environmental policies can serve human rights concerns.”⁸ One perspective is that it is this overlapping relationship that circumscribes the emergence of a “clearly and narrowly defined international human right to a safe and healthy environment.”⁹ Another perspective is that the right to a healthful environment proceeds out of the international law of human rights itself.¹⁰

One commentator asserts that this right is now a part of existing human rights law,¹¹ and is in fact is well-advanced.¹² If, this right to environment is so well-advanced, what is it? What are its dimensions? Notwithstanding problems of precision,¹³ along with the existence of persuasive arguments that present formulations “are too vague and general in terms of their content, scope and enforceability,”¹⁴ the right to environment has emerged in many human rights documents, as discussed below. It began through attempts to link environmental concerns, both specific and general, with existing international human rights such as the rights to life, health, and an adequate standard of

7. Alexandre Charles Kiss, *An Introductory Note on a Human Right to Environment*, in ENVIRONMENTAL CHANGE AND ENVIRONMENTAL LAW 199 (Edith Brown Weiss ed., 1992).

8. Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 105 (1991).

9. *Id.* at 106.

10. R.S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law*, in ENVIRONMENTAL CHANGE AND ENVIRONMENTAL LAW 242 (Edith Brown Weiss ed., 1992).

11. See Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309, 396 (1998) (in which the *Final Report of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. ESCOR, 46th Sess., Agenda Item 4, at 1, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), revised by U.N. Doc. E/CN.4/Sub.2/1994/9/Corr.1 (1994), (“Ksentini Final Report”), is characterized as arguing that the right to a healthy and decent environment is now part of existing international law).

12. *Id.* at 311.

13. ALEXANDRE KISS AND DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 23 (1991).

14. Taylor, *supra* note 11, at 351; see also Pathak, *supra* note 10, at 205, 209-10 (wherein various jurists' views are noted and it is ultimately concluded that the scope of the definition of the right to environment will remain uncertain as it will vary with local social, economic and cultural values).

living.¹⁵ In general, and with limited exceptions, an environmental human right is essentially an anthropocentric concept, to the extent that environmental protection serves solely human interests.¹⁶

International human rights law offers a functional purpose. In responding “to threats to human dignity and existence by upholding the fundamental, immutable foundations of human rights,” international human rights law shields the individual from the ordinary political process and thus significantly limits the “political will of a democratic majority as well as dictatorial minority.”¹⁷

Concomitantly, to the extent that “the ultimate aim of environmental protection remains anthropocentric,”¹⁸ environmental human rights cut across the spectrum of human rights and include civil, cultural, economic, political and social rights of both a positive and a negative character.¹⁹ Ultimately, it is argued, the right to a healthful environment is rooted in the right to an acceptable quality of life, which, in certain circumstances, extends to the right to life itself, the central core of human rights.²⁰ This being the case, the right to environment can find a place as a “first-generation” right, as a “second-generation” right, and also as a “third-generation” right, each of which coexist and interact.²¹

Further, as with all human rights, an essential aspect of protecting one’s right to the environment involves the creation of procedures that permit ensuring respect for these rights.²² Thus,

15. See Taylor, *supra* note 11, at 338-42. The author generally examines numerous international declarations and statements that recognize the fundamental connection between environmental protection and respect for human rights, beginning with *Problems of the Human Environment*, G.A. Res. 2398, U.N. GAOR, 23d Sess., Supp. No. 18, at 2, U.N. Doc. A/7218 (1968), to the Ksentini Final Report, U.N. ESCOR, 46th Sess., Agenda Item 4, at 1, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), revised by U.N. Doc. E/CN.4/Sub.2/1994/9/Corr.1 (1994).

16. Taylor, *supra* note 11, at 311.

17. Shelton, *supra* note 8, at 107.

18. *Id.* at 110.

19. See Popovic, *supra* note 5, at 504.

20. Pathak, *supra* note 10, at 213.

21. *Id.* at 216-17. It is well beyond the scope of this paper to explore and discuss the “generation of rights” aspect of the evolution of the right to environment. For further discussion, see *id.* at 215-19 and Taylor, *supra* note 11, at 317-19, 362-70.

22. Kiss, *supra* note 7, at 201. Primarily due to length constraints an elaboration of this due process strand of the right to environment cannot be accommodated. See generally, *id.* at 201-202 for a discussion on the procedural aspects of the right to environment, including rights to participation in the decision-making process, access

“environmental rights, understood as procedural guarantees of information and political participation which have been reformulated and extended specifically to cover environmental decisions, can effectively protect the environment only if coupled with substantive international regulation.”²³ In other words, procedural rights are necessary for the full realization of substantive rights in that they represent the building blocks for democracy; they are enabling rights for the facilitation of other environmental human rights.²⁴

At the global level, where do we find the right to environment?

Out of the 1972 United Nations Conference on the Human Environment (“Stockholm Conference”), emerged a clear, express linkage between human dignity and environmental quality.²⁵ Principle 1 of the Stockholm Declaration states that

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.²⁶

The Stockholm Declaration established the relationship between the quality of the environment and the realization of fundamental human rights. It contemplates the quality of the

to information, redress, and the role of NGOs both inside States and at the international level.

23. Shelton, *supra* note 8, at 120.

24. Popovic, *supra* note 5, at 544.

25. Neil A.F Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 Stan. Envtl. L.J. 338, 348 (1996) [hereinafter *Environmental Justice*]. Also emerging out of the Stockholm Conference was the linkage of the environment to another human right, the right to development, discussed *infra* at Part III. See generally, Louis Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L. L. J. 423, for an exhaustive examination of the Stockholm Conference and Stockholm Declaration, the latter in which, “the international community will find . . . a source of strength for later, more specific action.” *Id.*

26. *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, preamble and principle 1 (1972) (hereinafter *Stockholm Declaration*).

environment as a necessary condition, even “essential,” to the dignity and well-being of humans.²⁷

Evolving from the Stockholm Declaration, several international and regional human rights instruments adopted since 1980 have included various statements of a right to environment.²⁸ Legal provisions with a mandatory character have appeared in a very significant way in conventions aimed at the protection of economic, social and cultural rights. Article 24 of 1981 African Charter of Human and Peoples’ Rights²⁹ expressly recognizes the rights of “all peoples” to a “generally satisfactory environment favorable to their development.”³⁰ Likewise, Article 11 of the Protocol of San Salvador³¹ provides that “Everyone shall have the right to live in a healthy environment and . . . State Parties shall promote the protection, preservation and improvement of the environment.”³² This right is also expressed in national legislation as well.³³

In 1987 the World Commission on Environment and Development (“the Brundtland Commission”) specifically called for recognition of an environmental human right within a new charter for the environment, proposing that “all human beings have the fundamental right to an environment adequate for their health and well-being.”³⁴

27. Marc Pallemarts, *International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process*, 15 J. L. & COM. 623, 644 (1996).

28. Shelton *supra* note 8, at 125.

29. Organization of African Unity: Banjul Charter of Human and People’s Rights, 21 I.L.M. 58 (1982).

30. It has been suggested that “all peoples” refers to the entire population of a party State, rather than any particular ethnic or other group within it. But what the consequences of this might be is not clear. R.R. Churchill, *Environmental Rights in Existing Human Rights Treaties*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 106, (Alan Boyle & Michael Anderson, eds., 1996).

31. Organization of American States: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 28 I.L.M. 156 (1989).

32. Kiss, *supra* note 7, at 200. One commentator has noted that this provision is rather weak since it requires party States essentially to do no more than what they feel able to do, in the light of their available resources, to promote a healthy environment. See Churchill, *supra* note 30, at 100.

33. Kiss, *supra* note 7. For example, in the United States, Section 101(c) of the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), expresses the Congressional recognition that “each person should enjoy a healthful environment,” cited in Pathak, *supra* note 10, at 210 n.11).

34. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

“Within the United Nations framework, human rights instruments have stopped short of declaring an [express] right to environment,”³⁵ yet contain provisions that implicate a healthy environment. Among these instruments are: the Convention of the Rights of the Child which, in Article 24 requires States to implement the child’s right to health “taking into consideration the dangers and risks of environmental pollution;”³⁶ and the International Labor Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries which refers to environmental protection.³⁷

In 1989, the United Nations formally addressed the issue of human rights and environment through the United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities. Out of this activity emerged the Ksentini Final Report.³⁸ The Ksentini Final Report noted the widespread acceptance in both international and domestic law of the linkage between human rights and environment.³⁹ Based on the work of international organizations, national constitutions, case law and the writings of scholars, Mrs. Ksentini reported on the growing international consensus on the existence and legally binding character of the fundamental human right to a healthful environment.⁴⁰

B. *Intrinsic Value of the Environment*

Against this human rights backdrop exists another approach to environmental protection which advocates for a more ecocentric approach with less emphasis, if any at all, on the human right to environmental protection.⁴¹ One commentator discusses the cur-

35. Shelton, *supra* note 8, at 126.

36. *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 24, U.N. Doc.A/RES/44/25, reprinted in 28 I.L.M. 1465-66 (1989).

37. *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, General Conference of the International Labour Organisation, Convention 169 (1989), reprinted in 28 I.L.M. 1382 (1989) (cited and discussed in Shelton, *supra* note 8 n.94).

38. *Ksentini Final Report*, *supra* note 11.

39. *Environmental Justice*, *supra* note 25, at 349.

40. *Id.* (citing Shelton, *supra* note 8). The Ksentini Final Report also firmly links environmental human rights and the right to development. *Infra* at Part III.3.D.

41. Space and content limitations necessarily limit this discussion of ecocentric environmental rights. A brilliant elaboration of this topic is found in Christopher Stone’s classic treatment of nature’s rights: *Should Trees Have Standing? Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972), and Christopher Stone, *Should Trees Have Standing Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. . . . CAL. L. REV. 1

rent development of international environmental law as regressive because the anthropocentric view of environmental protection fails to protect the integrity of the biosphere in and of itself.⁴² It is thus the intrinsic value of the environment that is the focus of the ecocentric approach to environmental protection.

Some commentators advocate legally enforceable rights for nature, while others argue for the requirement that humanity take "into account the interests of nature and to accord these interests a priority that might not otherwise be granted."⁴³ The World Charter for Nature⁴⁴ is viewed as "the first international document to introduce eco-centrism"⁴⁵ with the intrinsic value of the environment is its foundational basis. Its preamble refers "to mankind as *part of nature*, to civilization as rooted in nature, to every form of life being unique and *meriting respect regardless of its worth to man*, and to the need for man to be guided by a code of moral action."⁴⁶ This independent basis for environmental protection, that is the intrinsic value of nature, is viewed as either ignoring or risking conflicts with the human rights agenda.⁴⁷

(1985). Another perspective can be found in Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L. 21 (1991).

42. Pallemarts, *supra* note 27, at 674. Another analysis is that the "dam of anthropocentrism has clearly been breached" given the increasing awareness of the interconnectedness of human beings and the environment and of the intrinsic value of the latter. Catherine Redgwell, *A Critique of Anthropocentric Rights*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 87 (Alan Boyle & Michael Anderson, eds., 1996).

43. Taylor, *supra* note 11, at 372. Further, she presumptively asserts that "[t]he international community of environmental lawyers has for a long time questioned the fundamentally anthropocentric character of environmental law. They are calling for an ecocentric turn-around." *Id.* at 396. Taylor fails to distinguish whether this "community" is representative of a Northern, as opposed to Southern, environmental lawyer's perspective. For a representative example of quite a different viewpoint, see Dr. Mahnoush H. Arsanjani, *The Sacred and the Profane: Second Annual Academic Symposium in Honor of the First Americans and Indigenous Peoples Around the World: Environmental Rights and Indigenous Wrongs*, 9 ST. THOMAS L. REV. 85 (1996) (wherein she argues that the minimum requirements of environmental protection for indigenous people are best addressed through human rights instruments that treat environmental concerns as human rights problems).

44. *General Assembly Resolution on a World Charter for Nature*, G.A. Res. 37/7, U.N. Doc A/RES/37/7 (1983).

45. Taylor, *supra* note 11, at 328.

46. *Id.* Shelton adopts a different perspective to the extent that she argues that "the apparent conflict between human utility and [the] intrinsic value of the environment does not exist because it is impossible to separate the interest of mankind from the protection of the environment." Shelton, *supra* note 8, at 109.

47. Shelton, *supra* note 8, at 107.

In sum, the common goal of environmental protection and human rights is to achieve and maintain the highest quality of human life.⁴⁸ The ultimate problem becomes one of balancing competing rights: human rights depend upon environmental protection and environmental protection depends upon the exercise of existing human rights such as the right to information and the right to political participation.⁴⁹

This overlapping of goals and balancing of competing rights also exists in another human rights-environmental protection context - the right to development, discussed next in Part III.

III.

THE RIGHT TO DEVELOPMENT

A. *Sources of the Right to Development in Human Rights*

The legal character of the language of the "right" to development is hotly debated.⁵⁰ Objections to this language are, for the most part, based upon developed countries' opposition to the imposition of a duty to promote the economic development of poor nations: the objection is to the use of the language of human rights and "the machinery of human rights, of which Western countries approve, into an area, international economic relations, where the same countries do not wish to tread."⁵¹ Others assert that a right to development of states is nothing more than the right of a state to have the benefits of the international duty to cooperate, to regenerate and to have faith toward mutual social and economic development: it is a human right that promotes the utility of traditional human rights in one form or another.⁵²

48. *Id.* at 138.

49. *Id.*

50. See generally Anthony Carty, *The Third World Claim to Economic Self-Determination: Economic Rights of Peoples: Theoretical Aspects*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 43-48 (Subrata Roy Chowdhury, et al., eds., 1992). In addition, "development" appears to be a term everyone understands and no one is able to satisfactorily define. CALDWELL, *supra* note 1, at 269. As a practical matter, it is defined by what it is in actual practice: development is as development does. *Id.*

51. Carty, *supra* note 50, at 43. Cf. Paul J.I.M. de Waart, *Implementing the Right to Development: the Perfection of Democracy*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 194 n. 19 (Subrata Roy Chowdhury, et al., eds., 1992) (discussing opposition to the concept of the right to development among developed nations).

52. Rajendra Kumar Nayak, *Evolving Right to Development as a Principle of Human Rights Law*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 145 (Subrata Roy Chowdhury, et al., eds., 1992).

The promotion of economic and social advancement is one of the primary goals of the United Nations.⁵³ Development is defined in the Charter of the United Nations in terms of, *inter alia*, higher standards of living, well-being, and political and economic advancement that are based upon constructive, international cooperation.⁵⁴ Several international legal documents use similar categories that enrich the UN Charter with such concepts as international economic stability, self-determination, free choice of development and economic security.⁵⁵

One such document is the Universal Declaration of Human Rights.⁵⁶ It is a source of development law inasmuch as it calls for the realization of the rights prescribed, notably those concerned with improving the basic conditions of life, through the processes of development.⁵⁷

1. Permanent Sovereignty Over Natural Resources

In 1962 the United Nations General Assembly adopted the Resolution on Permanent Sovereignty over Natural Resources.⁵⁸ The Resolution reflects a principle that evolved after World War II. During this period, the decolonization process had taken place and newly independent states sought to develop new principles and rules in order to assert and strengthen their position in international relations and to promote their social and economic development.⁵⁹ This principle was introduced in United Nations' debates in order to underscore the claim of colonial peoples and developing countries to the right to enjoy the benefits of resource exploitation and in order to allow "inequitable" legal arrangements, under which foreign investors had obtained title to exploit resources in the past, to be altered or even to be annulled *ab initio*, because they conflicted with the concept of permanent

53. U.N. Charter preamble.

54. Prabodh Dinkarrao Desai, *Right to Development: Improving the Quality of Life*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 37 (Subrata Roy Chowdhury, et al., eds., 1992).

55. *Id.* at 38.

56. *Universal Declaration of Human Rights*, G.A. Res. 217, at 71, U.N. Doc A/810 (1948).

57. James C.N. Paul, *Symposium: The United Nations: Challenges of Law and Development: The United Nations and the Creation of an International Law of Development*, 36 *HARV. INT'L L.J.* 307, 311 (1995).

58. *Permanent Sovereignty over Natural Resources*, G.A. Res. 1803, U.N. GAOR 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

59. NICO SCHRIJVER, *INSTITUTE OF SOCIAL STUDIES, SOVEREIGNTY OVER NATURAL RESOURCES* 1 (1997).

sovereignty.⁶⁰ Developing nations sought to use permanent sovereignty as a shield against infringements upon their sovereignty by foreign states or companies.⁶¹

One of the basic tenets of permanent sovereignty is the “sovereign” right of a state to dispose freely of its natural resources and wealth within the limits of national jurisdiction.⁶² This tenet is closely related to the principle that every state has the right to adopt the social and economic system which it deems most favorable to its development.⁶³ It is now commonly accepted that the principle of permanent sovereignty precludes a state from derogating from the essence of the exercise of its sovereign rights over its natural resources, but that a state may, by agreement freely entered into, accept a partial limitation of the exercise of its sovereignty in respect to certain resources in particular areas for a specified and limited period of time.⁶⁴

The right of free disposal of natural resources and wealth is the seminal source of a series of corollary rights of the state, including the right to freely determine and control the prospecting, exploration, development, exploitation, use and marketing of its natural resources and to subject such activities to national laws within the limits of its exclusive economic jurisdiction under prevailing international law.⁶⁵

In sum, permanent sovereignty is expected to serve a host of causes which include promoting the economic development of developing countries, contributing to the attainment of self-determination of peoples and effectuating state economic sovereignty, promoting respect for peoples’ and human rights and, as later formulated in the Stockholm Declaration and subsequent sustainable development instruments, the optimal utilization of the world’s natural resources.⁶⁶

In 1969 the Declaration on Social Progress and Development “rightly considered permanent sovereignty over natural resources as one of the primary conditions of social progress and development.”⁶⁷

60. *Id.*

61. *Id.* at 24.

62. The CBD reaffirms this right, discussed *infra* at Part III.E.2.

63. SCHRIJVER, *supra* note 59, at 260 n.8.

64. *Id.* at 264.

65. *Id.*

66. *Id.* at 29.

67. de Waart, *supra* note 51, at 194-95. The United States was the sole dissenting voice.

2. New International Economic Order

Not long after this, the United Nations called for the establishment of a New International Economic Order (hereinafter NIEO). The 1974 Special Session of the UN General Assembly was exclusively devoted to the problems of development and raw materials; the developing countries set out to correct inequalities and redress existing injustices, making it possible to eliminate the widening gap between the developed and the developing countries, both procedurally and substantively.⁶⁸ In a concrete sense, the notion of distributive economic justice was at issue. Being that the NIEO resolutions were primarily a developing country initiative, they contained specific references to “equity” as a standard for ensuring fairness in access, consumption and receipt of the benefits of environmental, financial and technical resources among nations as the means for ushering in the NIEO.⁶⁹ This initiative further reflected efforts to obtain greater control over natural resources.⁷⁰

The adoption of the resolutions took place in an atmosphere of confrontation.⁷¹ Not surprisingly, developed countries opposed the establishment of the NIEO on the basis that it reflected a deep confusion between “political objectives” and “legal obligations,”⁷² in that the profound difference between the two addressed the political objectives of development assistance for developing countries which may include political, economic, and even moral commitments, but not legal obligations.⁷³

Thus, while it has been said that the NIEO declaration, together with the Charter of Economic Rights and Duties of States (“CERDS”), were among the most important instruments in international law that were of primary significance for the formation of principles of a new legal order,⁷⁴ it has also been said that “Third World resentment over perceived economic injustices . . .

68. Desai, *Right to Development: Improving the Quality of Life*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 34 (Subrata Roy Chowdhury, et al., eds., 1992).

69. Gregory Maggio, *Inter/intra-generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources*, 4 *BUFF. ENVTL. L. J.* 161, 204-205 (1997)(citations omitted).

70. *Id.* (citations omitted).

71. SCHRIVJER, *supra* note 59, at 83.

72. Maggio, *supra* note 69, at 228-229.

73. *Id.*

74. Maria Magdalena Kenig-Witkowska, *Development Ideology in International Law*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 37 (Subrata Roy Chowdhury, et al., eds., 1992).

found expression in an effort among developing nations to establish" the NIEO.⁷⁵

Nonetheless, the NIEO documents emphasized the importance of achieving greater unity in international economic relations, affirming the major role of human rights in development and stressing the need to eliminate the differences existing between developed and developing countries and to accelerate the economic and social development of poor countries.⁷⁶ In fact, the preamble of the CERDS directly refers to the principle of equity: "[T]he Charter shall constitute an effective instrument towards the establishment of a new system of international economic relations based on equity."⁷⁷

With respect to the environment, the CERDS distinguishes responsibilities regarding environmental protection between developing and industrialized countries⁷⁸ and further sets forth temporal elements of equity, now commonly referred to as intra- and inter-generational equity, by providing:

The protection, preservation and enhancement of the environment for present and future generations is the responsibility of all States. All States shall endeavor to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development of developing countries.⁷⁹

This language concerning "state responsibility" anticipates what has come to be called "common but differentiated responsibilities" and was partially expressed in the Stockholm Declaration and more recently in the Rio Declaration and the UNFCCC.⁸⁰ From the standpoint of developing countries, the impact of common but differentiated responsibilities is to transform the normative character of financial and technical resource transfers between industrialized and developing countries from

75. CALDWELL, *supra* note 1, at 274-275. All sixteen States abstaining from the General Assembly vote on the adoption of the CERDS were developed countries, and only six OECD countries supported it. SCHRIVVER, *supra* note 59, at 102.

76. MILAN BULAJIC, *PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW* 251 (2nd ed. 1993).

77. *Id.* In this regard, Bulajic notes that there is no consent in the world community concerning the notion of equity. *Id.*

78. Maggio, *supra* note 69, at 205.

79. G.A. Res. 3282, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974).

80. Maggio, *supra* note 69.

the realm of “aid” to the category of international legal obligation.⁸¹

In addition, Article 2 of the CERDS provides, that “[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.”⁸² Further, Article 7 provides that “each State has the right and the responsibility . . . fully to mobilize and use its resources” in order to “promote the economic . . . development of its people.”⁸³

Finally, Article 13 provides that with every state’s “right to benefit from the advance and developments in science and technology for the acceleration of its economic and social development” is a corresponding duty of all States to “promote international scientific and technological cooperation and the transfer of technology” and that all states “should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries.”

3. Declaration on the Right to Development

Another relevant document is the 1986 United Nations Declaration on the Right to Development which provides 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, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁸⁴

Thus, the ultimate objectives of development are to bring about sustained improvement in the well-being of the individual, bestow benefits on all and eliminate undue privileges, extremes of wealth and social injustices.⁸⁵ Accordingly, the establishment of NIEO was mentioned in the preamble to the Declaration on the Right to Development in the context that “efforts to promote and protect human rights at the international level should be ac-

81. *Id.* at 206-207.

82. Art. 2, G.A. Res. 3281, *supra* note 79.

83. *Id.* at Art. 7.

84. *Declaration on the Right to Development*, G.A. Res. 41/128, Art. 1, U.N. GAOR, annex. (1986).

85. Desai, *supra* note 68, at 32.

accompanied by efforts to establish a New International Economic Order.”⁸⁶ Thus in Article 1, the Declaration provides, “States should fulfill their rights and duties in such a manner as to promote a New International Economic Order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.”⁸⁷ In this regard, the right to development withdraws development cooperation from the ambit of charity⁸⁸ and is result-oriented both as a principle of human rights law and as a principle of international law.⁸⁹

Other key sources of international human rights law address the processes of development, including the International Covenant on Economic, Social and Cultural Rights,⁹⁰ and the International Covenant on Civil and Political Rights.⁹¹ Intended to mandate the promotion, as well as protection, of the rights prescribed as interdependent means and ends of development,⁹² Article 25 of the International Covenant on Civil and Political Rights and Article 47 of the International Covenant on Economic, Social and Cultural Rights both formulate the inherent right of peoples to enjoy and utilize fully and freely their natural wealth and resources.

Instead of yielding consensus, the proposals for a NIEO were perceived unsympathetically by the developed states as an unacceptable threat to their interests.⁹³ Nonetheless, the underlying concerns which led to the proposals for an NIEO were elucidated in the Declaration on the Right to Development to the extent that it focused on the “human person” as the central subject of development and sought to find the basis of an international obligation on the part of the states and of the international community to promote development by relying on respect for the basic

86. *Declaration on the Right to Development*, *supra* note 84, at preamble.

87. *Id.*, at Art. 1, para. 5.

88. Subrata Roy Chowdhury and Paul J.I.M. de Waart, *Significance of the Right to Development: An Introductory View*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 13 (Subrata Roy Chowdhury, et al., eds., 1992).

89. *Id.*

90. 993 U.N.T.S. 3 (1976).

91. 999 U.N.T.S. 171 (1976), 6 I.L.M. 368 (1976).

92. Paul, *supra* note 57, at 311.

93. Kamal Hossain, *Sustainable Development: a Normative Framework for Evolving a More Just and Humane International Economic Order*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 260 (Subrata Roy Chowdhury, et al., eds., 1992).

human rights of all persons.⁹⁴ Later, as discussed below, other international endeavors would likewise focus on the critical link between development, human rights and environment.

B. *The Stockholm Declaration*

Although the Stockholm Declaration addressed the right to environment, national sovereignty issues were also evident. Principle 21 of the Stockholm Declaration provided that, "States have, in accordance with the Charter of the United Nations and the principle[s] of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies."⁹⁵ This principle was reinforced by the sovereignty provision in Principle 24 which stressed international effort and cooperation "in such a way that due account is taken of the sovereignty and interests of all States."⁹⁶ The social and economic ills intended to be addressed through the Declaration of Human Rights, the NIEO resolutions, and the Declaration on the Right to Development comprised the historic chasm between the North and the South — a chasm founded in their shared imperial past and one which "rose to haunt" delegates at Stockholm.⁹⁷ Developing nations were initially quite skeptical about the proposed environmental gathering at Stockholm inasmuch as development and escape from crippling poverty were uppermost in the minds of Southern governments, not environmental clean-up and conservation.⁹⁸

Prior to Stockholm, developing countries did not favor the idea that the cooperation of all countries was necessary to protect the environment.⁹⁹ As the victims of decades of economic deprivation, the developing nations inevitably focused on the legacy of colonial rule and its relation to environmental degradation.¹⁰⁰ Their former imperial masters, now enjoying the status of developed countries, were less anxious to bring these political

94. *See id.* For a concise summation of development ideology, *see also* Kenig-Witkowska, *supra* note 74, at 35-41.

95. *Stockholm Declaration*, *supra* note 26, at Principle 21.

96. *Id.* at Principle 24.

97. 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* 215, 226 (1993).

98. *Id.* at 248.

99. KISS AND SHELTON, *supra* note 13, at 49.

100. Panjabi, *supra* note 97.

issues of the past to the surface in what had been termed an "environmental discussion."¹⁰¹

From this perspective, deterioration of the environment was assimilated to industrial pollutants, a perspective that has not disappeared.¹⁰² Thus at Stockholm, "Third World statements, often paralleled by First World mea culpas, reiterated the thesis that the foremost environmental problem of the world was Third World poverty caused almost wholly by the exploitive practices of the developed nations."¹⁰³

Further, the Stockholm Declaration correlated economic and social development with the environment in Principle 8 by stating that such development is essential for an environment favorable to human beings. This is followed by: Principle 9 which points out that "environmental deficiencies generated by the conditions of underdevelopment and natural disasters" can best be remedied by accelerated financial and technical assistance; and Principle 12 which repeats that more resources should be made available to preserve and improve the environment, especially for developing countries.¹⁰⁴

Assessments of the Stockholm Conference vary widely. One commentator asserts that the text places sovereignty over natural resources in an environmental context, but it does not substantially limit it; but in the same breath states that the Stockholm Declaration stipulates that sovereignty over natural resources must be exercised in an environmentally responsible way and for the benefit of both the present and future generations.¹⁰⁵ Another scholar notes that the Stockholm Conference legitimized environmental policy as a universal concern among nations and so opened a place for environmental issues on many national agendas where previously they had been unrecognized.¹⁰⁶ By doing so, nation-States joined together their sovereignty and jurisdiction to resolve collectively issues that previously would have been definable only within the limits of particular national jurisdictions.¹⁰⁷

101. *Id.*

102. KISS AND SHELTON, *supra* note 13, at 49.

103. CALDWELL, *supra* note 1, at 65.

104. SCHRIJVER, *supra* note 59, at 124.

105. *Id.* at 127.

106. CALDWELL, *supra* note 1, at 48.

107. *Id.* at 63.

C. *The Brundtland Commission*¹⁰⁸

Development issues were also at the heart of the 1987 Brundtland Commission. The Commission's mandate was to examine critical environmental and development issues and to formulate realistic proposals for dealing with them.¹⁰⁹ As a result, the Brundtland Commission called upon a group of legal experts to draft a series of principles for codifying the general principles of international environmental law, inscribing them in a universal convention for the protection of the biosphere.¹¹⁰ What emerged was not only the recognition of an environmental human right, but a definition of sustainable development that serves the needs of the environment and places the burdens of environmental protection more heavily on the developed countries with the accrual of economic benefits flowing to the underdeveloped South.¹¹¹ In this regard, the Brundtland Commission did not envisage environmental protection as resulting automatically from economic growth, but rather as a necessary condition of sustainable development.¹¹²

Further, Maggio points out, the Brundtland Commission's consideration of equity recognized that:

[R]ealizing intra-generational considerations may present adverse implications for inter-generational concerns. This point is highlighted in [its] characterization of "sustainable development" in terms of meeting present needs without compromising the ability of future generations to meet their needs. It therefore acknowledged that there are limits on how present needs are met in order to fulfill the parallel objective of leaving sufficient resources for future generations to meet their needs. It also pointed out that achieving intra-generational equity required a transformation in resource use patterns and decision-making structures between wealthy industrialized and poor developing countries.¹¹³

108. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *supra* note 34.

109. KISS AND SHELTON, *supra* note 13, at 51.

110. Pallemarts, *supra* note 27, at 628.

111. Alan Boyle, *Economic Growth and Protection of the Environment: The Impact of International Law and Policy*, in ENVIRONMENTAL REGULATION AND ENVIRONMENTAL GROWTH 177 (Alan Boyle, ed., 1994).

112. Pallemarts, *supra* note 27, at 633.

113. Maggio, *supra* note 69, at 187.

D. *The Ksentini Final Report*¹¹⁴

As discussed previously,¹¹⁵ the Ksentini Final Report not only set forth substantive environmental rights that involve the promotion of a certain level of environmental quality in recognition of the vital character of the environment as a basic condition of life, but it also stressed the close link between the right to a satisfactory environment and the right to development.¹¹⁶ In fact, it noted that since the 1972 Stockholm Declaration a large number of national, regional, and international instruments had been drawn up that stress "the intrinsic link that exists between the preservation of the environment, development and the promotion of human rights."¹¹⁷ The following discussion examines some of these linkages.

E. *The UNCED Texts*

Several analyses of the Rio Declaration, the CBD and the UNFCCC reflect the broad spectrum of environmental protection, human rights and development issues and positions that are reflective of the UNCED process. Like the Stockholm Conference, the UNCED process resulted in declarations that were not legally binding, but their acceptance at both conferences was by

114. Ksentini Final Report, *supra* note 11.

115. *Id.* at Part II.A.

116. Boyle, *supra* note 111, at 48-49.

117. Popovic, *supra* note 5, at 491 (quoting *Review of Further Developments in Fields with Which the Sub-Commission has been Concerned, Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. ESCOR Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994)). It must also be pointed out that development, particularly development projects, often create violations of human rights and harm to the environment: the World Bank loan portfolio often supports unsustainable development projects with damaging social and environmental impacts in spite of projects that ostensibly aim to improve the standard of living in developing countries. Brian McAllister, Note, *The United Nations Conference on Environment and Development: An Opportunity to Forge a New Unity in the Work of the World Bank Among Human Rights, the Environment, and Sustainable Development*, 16 HASTINGS INT'L & COMP. L. REV. 689, 701-02 (1993).

Of course, the World Bank's response is predictable: "The legal department of the Bank is trying its utmost to increase the consciousness of the relevance of the human rights issues . . . A safe environment and economic development are inseparable from human rights, the promotion of which becomes the ultimate objective of the development process." Ibrahim Shihata, *Environment, Economic Development and Human Rights: A Triangular Relationship?*, 82 AM. SOC'Y INT'L. PROC. 40, 42, 61 (1988). For a discussion on the World Bank's inability to carry out its own policy directives, at least with respect to the environment, see Jake Werksman, *Greening Bretton Woods*, in GREENING INTERNATIONAL LAW 65-84 (Philippe Sands ed., 1993).

no means easy because the discussions and debates over principle drew forth the full panoply of argument on the North-South divergence and the developed versus developing conflict.¹¹⁸ As bluntly stated by Panjabi: "The original idea [of an Earth Charter] 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."¹¹⁹

What happened in Rio? While the environment was the dominant organizing motif,¹²⁰ the grand purpose of UNCED was to reconcile environmental and developmental objectives (i.e., primarily but not exclusively economic) in national and international policymaking.¹²¹ Caldwell takes the position that while the "conference was not a pathbreaker . . . it built upon and carried forward the work of the Stockholm Conference, which legitimized and initiated environment as a focus of international policy."¹²² Pallemmaerts' view is not quite as rosy: he argues that the operative words of the Rio Declaration "in fact proceed to unravel the Stockholm Declaration, which it ironically was pretending to reaffirm."¹²³

Somewhere in between these two perspectives is the thoughtful observation that the response to the paradoxical feature of Rio which was the crucial challenge of "indissolubly integrating environment and development," was to express this relationship in such a way as to suggest that development may sometimes take precedence over environment.¹²⁴ Also, in answering the call for a new globalism, sovereignty was reaffirmed, while at the

118. Panjabi, *supra* note 97, at 220. Panjabi notes: "That so much thundering rhetoric accompanied the formulation of declarations never meant to be legally binding indicates that delegates at both Conferences were keenly aware of the ultimate significance of creating a body of environmental principles." *Id.* at 220-221.

119. *Id.* at 221 (citations omitted).

120. Porras, *supra* note 1, at 20.

121. CALDWELL, *supra* note 1, at 114.

122. *Id.* at 104.

123. Marc Pallemmaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?*, in GREENING INTERNATIONAL LAW 4 (Philippe Sands ed., 1993).

124. Porras, *supra* note 1, at 21-22. Porras continues: "The Rio Declaration is a text of uneasy compromises, delicately balanced interests, and dimly discernible contradictions, held together by the interpretative vagueness of classic UN-ese and may be judged as a victory from the developing country perspective, in so far as there is evidence of a shift away from the practice of developed country dominance of the process of dictating international norms and priorities." *Id.* at 22.

same time there was the highlighting of “‘different contributions to global environmental degradation’ as the bases for international cooperation in sustainable development.”¹²⁵

1. The Rio Declaration

That human beings were placed in the center of UNCED is expressly evidenced in Principle 1 of the Rio Declaration, which states, “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”¹²⁶ Such anthropocentrism is equally evidenced in Principle 2 which contained the language of Principle 21 of the Stockholm Declaration with a new addition: “States have . . . the sovereign right to exploit their own resources pursuant to their own environmental *and developmental* policies.” (Emphasis added)

In spite of Pallemmaerts’ scornful lamentation that this formulation of the principle of sovereignty “reveals a skillfully masked step backwards [and that this] addition of two words is anything but innocent,”¹²⁷ this formulation incorporates the historical underpinnings of the right to development so forcefully asserted by developing countries during the NIEO era. To them, the inclusion of developmental considerations in conjunction with the sovereign right to exploit their own resources can be seen as nothing but a reinforcement of each state’s right “to identify its own priorities, and adopt national environmental and developmental policies based on those priorities,”¹²⁸ subject to:

- Principle 3’s intergenerational approach that assumes the recognition of the right to development, to wit: “the right to development must be fulfilled so as to equitably meet devel-

125. *Id.* at 21 (quoting *Our Common Future, Report of the World Commission on Environment and Development* (“*The Brundtland Commission Report*”) U.N. Doc. A/42/427, para. 27).

126. Rio Declaration, Principle 1. Most developed countries opposed this formulation because they preferred to stress that human beings should be at the service of the environment rather than to suggest that the environment was at the service of human beings. Porras, *supra* note 1, at 24. Pallemmaerts’ comparison of Principle 21 of the Stockholm Declaration and Principle 1 of the Rio Declaration is that the latter “sounds like the triumph of a delirious anthropocentrism.” Pallemmaerts, *supra* note 27, at 642. It is no surprise then to note his comment that the Rio Declaration is “highly disappointing.” *Id.* at 643.

127. Pallemmaerts, *supra* note 123, at 5.

128. Porras, *supra* note 1, at 32.

opmental and environmental needs of present and future generations,”¹²⁹; and

- Principle 4’s integrative directive that, “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”¹³⁰

Principle 3 provoked objections from the United States, which reaffirmed its long-standing opposition to development as a right: in its view development is a goal which “depends for its realization in large part on the promotion and protection of the human rights set out in the Declaration of Human Rights.”¹³¹

Further, the formulation of “common but differentiated responsibilities,” earlier seen in Article 30 of the CERDS,¹³² found new life in the Rio Declaration in Principle 7 which provides for state cooperation in a global partnership to protect the Earth’s ecosystem. Principle 7 also links such cooperation to the common but differentiated responsibilities of developed and developing countries due to the different contributions to global environmental degradation and capacities of states “in view of the technologies and financial resources” commanded by developed countries.¹³³

Porras observes that these elements of differentiated responsibility provide the beginnings of a philosophical basis for international cooperation in the fields of environment and development that allows the characterization of the transfer of resources from

129. Notwithstanding these temporal and environmental conditionalities of the right to development, Porras overreaches a bit in arguing that in Principle 3, “the international community recognizes an unconditional right to development.” Porras, *supra* note 1, at 25.

130. Pallermaerts’ ecocentric perspective perceives this integration of policy objectives as an explicit subordination of environmental policy obligations to the dictates of economic development policy. *Supra* note 123 at 6. His all-or-nothing conclusion fails to acknowledge both developing and developed countries’ commitment to *sustainable* development which inherently requires the equitable balancing of these competing and overlapping objectives.

131. ALEXANDRE KISS AND DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 26 (Supp. 1994), citing *Report of the United Nations Conference on Environment and Development*, U.N. Doc. A/CONF.151/26(Vol.IV), at 20-21 (1992).

132. *Supra* Part III.B.1.

133. States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. Principle 7, Rio Declaration.

developed to developing countries as “obligation” rather than as “aid.”¹³⁴ This observation is not so far removed from that which places development cooperation outside of the ambit of charity¹³⁵ within the context of the right to development as seen in the NIEO resolutions and, to some extent, in Principle 9 of the Stockholm Declaration.¹³⁶

2. The Convention on Biological Diversity

The CBD signaled the emergence of a more integrated approach to nature conservation by specifically addressing the conservation of biological resources, their sustainable use, access to genetic resources, sharing of benefits derived from the use of genetic material, and access to technology. To the extent that biological diversity is recognized as a common concern of humanity¹³⁷ and the economic dimensions of genetic resources and their exploitation is detailed in the CBD,¹³⁸ one of its principal functions is to allow countries where biological resources are found to realize or recapture some of the value of those resources, and thereby provide them an incentive to engage in conservation.¹³⁹ Inherently intertwined with this is the providing for intergenerational equity in its preamble and operative provisions¹⁴⁰ as well as development assistance¹⁴¹ and equity in access, consumption and distribution of environmental resources and their benefits to facilitate sustainable development.¹⁴² The CBD’s preamble explicitly reaffirms “that States have sovereign

134. Porras, *supra* note 1, at 29.

135. Chowdhury & de Waart, *supra* note 88.

136. Nonetheless, Porras ignores this aspect of the right to development: “In the absence of Principle 7 . . . the transfer of resources from developed to developing countries would have had to be justified on the basis of the ‘need’ of developing countries.” Porras, *supra* note 1, at 139. Of course, this view reflects the North’s perspective to the extent that developed countries for the most part, do not recognize the right to development nor any financial obligations that may flow from such a right.

137. Negotiators rejected proposals to label it as the common heritage of mankind because of concern for national sovereignty - the latter of which is emphasized in Article 3 which repeats verbatim Principle 21 of the Stockholm Declaration — without the reference to development concerns found in the Rio Declaration — and in Article 15 on access to genetic resources. KISS AND SHELTON, *supra* note 13, at 103.

138. Pallemmaerts, *supra* note 27, at 660.

139. Daniel Bodansky, *The Meaning of Biodiversity: International Law and the Protection of Biological Diversity*, 28 VAND. J. TRANSNAT’L. L. 623, 626-627 (1995).

140. CBD, *supra* note 3.

141. *Id.* at 830.

142. *Id.* at 829-830.

rights over their own biological resources.”¹⁴³ This reaffirmation is also contained in:

- Article 3, in which States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction; and in
- Article 15, paragraph 1 which states, “[R]ecognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.”

Article 15 also recognizes economic equity considerations in providing that countries of origin of genetic resources are to benefit from the commercial development and use of products derived from such resources.¹⁴⁴ This recognition mirrors the objectives sought by developing countries in their support of the UN Declaration on Permanent Sovereignty over Natural Resources and the CERDS, both of which sought to establish global economic equity in a post-colonial era.¹⁴⁵

The principle of common but differentiated responsibilities is reflected in the language that links differentiated responsibilities with the capacities of parties and also in the very express references to the distinctions between developing and developed states. Moreover, implementation must take into account the overriding priority that developing countries place upon economic and social development and eradication of poverty.

143. *Id.* at 822.

144. The economic incentive aspect of Article 15 is also reflected in Article 10, the latter of which contemplates that individual countries and private parties may, by contractual arrangements, develop biodiversity resources. The landmark, and well-publicized, Costa Rican Merck-INBio agreement is one example. *See, e.g.,* Christopher Hunter, *Sustainable Bioprospecting: Using Private Contracts and International Legal Principles and Policies to Conserve Raw Medicinal Materials*, 25 B.C. ENVTL. AFF. L. REV. 129 (1997) (discussing how bioprospecting agreements can achieve the sustainable use and conservation of biodiversity).

145. The U.S. objected to these provisions, as well as those addressing intellectual property rights and biotechnology. David Bell, *The 1992 Convention on Biological Diversity: The Continuing Significance of U.S. Objections at the Earth Summit*, 26 GEO. WASH. J. INT'L L. & ECON. 479, 507 (1993). Although the U.S. has yet to ratify the CBD, it described itself as an “original proponent” of a biodiversity treaty and refused to sign the CBD at Rio based on its objections. *Id.*

The facilitation of implementing the CBD is also at the heart of the financial mechanism for the use of developing countries to be applied to meet the "full incremental costs"¹⁴⁶ deriving from measures needed to implement their obligations, the adequate funding of which is expressly linked to their fulfillment.¹⁴⁷ For the South, the financial burden of compliance with these treaty obligations is obvious, especially if developing countries are being asked to forego, or at least limit, their economic development because it is destructive of biodiversity.¹⁴⁸ On the other hand, developed countries are wary of providing developing countries with (what is perceived as) a blank check.¹⁴⁹

Further, notwithstanding those criticisms that the UNCED process failed to build upon the Stockholm Conference, it is of particular significance that at least 11 of the CBD's articles, and its preamble, reiterate five principles of the Stockholm Declaration, most notably in the areas of access to genetic resources and technology, technical and scientific cooperation, and financial resources.¹⁵⁰

3. The United Nations Framework Convention on Climate Change

The UNFCCC resulted from a difficult negotiation process in that it was a subtle exercise in tight-rope walking over the underlying themes of the tension between national sovereignty and collective responsibility for the protection of the planet's environment, and between development and environment.¹⁵¹ Enabling "economic development to proceed in a sustainable manner"¹⁵² is explicitly recognized and guided by the principles set forth in Article 2. As with the CBD, all parties to the UNFCCC do not have the same obligations. This is seen in the provisions in which the developed countries agree to take the

146. CBD, *supra* note 3.

147. It is quite apparent that the funding mechanism, the Global Environmental Facility, as a whole is not receiving the amounts pledged. Amanda Hubbard, *The Convention on Biological Diversity's Fifth Anniversary: A General Overview of the Convention - Where Has It Been and Where is It Going?*, 10 TUL. ENVTL. L. J. 415, 436 (1997).

148. Catherine Tinker, *The Rio Environmental Treaties Colloquium: A New Breed of Treaty: The United Nations Convention on Biological Diversity*, 13 PACE ENVTL. L. REV. 191, 211 (1995).

149. Bell, *supra* note 145, at 513.

150. *Id.* at 494 (citations omitted).

151. Pallemarts, *supra* note 27, at 666.

152. UNFCCC, *supra* note 3.

lead in combating climate change and its adverse effects:¹⁵³ Annex I countries to the UNFCCC¹⁵⁴ are committed to adopting policies and measures on the mitigation of climate change by limiting their emissions of greenhouse gases and protecting and enhancing their greenhouse gas sinks and reservoirs.

Differing degrees of implementation obligations are elaborated in Article 3's provisions¹⁵⁵ on common but differentiated responsibilities, the right to development, and the special circumstances of developing country parties. Underscoring these commitments is the recognition of the need for equitable and appropriate contributions to the global effort.¹⁵⁶ To that end, developed countries must provide new and additional financial resources to meet the agreed upon full costs incurred by developing countries in complying with their obligations. Developed countries further agreed to assist the developing countries that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation.¹⁵⁷

A cornerstone of the UNFCCC is the express provision that the extent to which developing countries will implement their commitments depends on the effective implementation by developed countries of their commitments related to financial resources and transfer of technology.¹⁵⁸ This conditional obligatory participation by developing parties emphasizes the necessity of North-South cooperation in fulfilling the convention's objectives, particularly in light of the critical role that development plays in the climate change regime.¹⁵⁹ In this regard, the

153. *Id.*, UNFCCC Article 3(1).

154. Annex 1 countries are "developed Country Parties and other Parties included in Annex 1," (UNFCCC Article 4(2), *supra* note 3) whose specific commitments reflect their developed, industrialized economies.

155. "[T]he parties shall be guided . . . by the following: 1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed countries should take the lead in combating climate change and the adverse effects thereof." *Id.* UNFCCC Article 3.

156. KISS and SHELTON, *supra* note 13, at 129.

157. UNFCCC Article 4(3)(4), *supra* note 3.

158. UNFCCC Article 4(7), *id.* Pallemmaerts notes that this linkage represents the success of developing countries, which since the end of the 1980s revolted against the "new ecological conditionalities" imposed by certain industrialized countries and their international financial institutions with their development aid: this reversed the mechanism of conditionality. Pallemmaerts, *supra* note 27, at 669-670.

159. See LYNNE JURGIELEWICZ, *GLOBAL ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW* 56 (1996) (discussing the G-77's insistence on including developmen-

UNFCCC has the potential to move huge amounts of public and private capital from the North to the South.¹⁶⁰

IV.

ENVIRONMENTAL PROTECTION, HUMAN RIGHTS AND THE RIGHT TO DEVELOPMENT: THE LINKAGES

The UNCED texts reflect varying, but consistent degrees of the global community's efforts to accommodate equitably in international instruments the competing North-South world views of environmental protection, human rights and the right to development. Historical attempts undertaken by the international community to grapple with fundamental notions of human dignity and quality of life have traveled down various theoretical, political and institutional avenues. These paths have traversed through both the developed and the developing worlds. Along this journey, travelers in search of a better life for their children and the generations that follow, have approached many crossroads. The debates over which road to take have turned on those issues that first divided, but eventually joined, the international community. Global polarization over the principles of permanent sovereignty over natural resources, the preservation and conservation of natural resources, economic development and human rights was consistently an inherent component in the negotiation and adoption of the NIEO resolutions, Stockholm Declaration and UNCED texts. At the same time, these were, and still are, the very same issues that have brought the North and South to the negotiating table with the mutual aim of making this world a better place to live.

The mechanisms for achieving a fair and equitable world order that must necessarily accommodate sovereignty and environmental protection considerations, including sustainable development objectives, are contentious, to say the least. These mechanisms are reflected in the UNCED texts: technology transfer; common but differentiated responsibilities; financing mechanisms; sharing the benefits derived from the use of biological resources; the integration of economic and environmental policies; collective re-

tal policies in the UNCED texts in response to the developed country rhetoric's shift in the direction of globalizing environmental resources).

160. David Hodas, *The Rio Environmental Treaties Colloquium: The Climate Change Convention and Evolving Legal Models of Sustainable Development*, 13 PACE ENVTL. L. REV. 75, 87 (1995).

sponsibility over global resources; and intergenerational equity. They all require the balancing of interests, and in the end, reflect agreement and cooperation. The sense of urgency over environmental protection, that is the foundation of the right to environment, is no less prevalent in the reconciliation of equally urgent human rights considerations, such as global equity and distributional justice.¹⁶¹

The common theme, from the Stockholm Declaration to the UNCED texts, is the need for sustainable development on a national and global scale. Reflected are varying degrees of the global accommodation of environmental initiatives and developmental concerns.

Moreover, certainly the assertion of state sovereignty over natural resources and developmental policies is a jealously preserved area of state sovereignty,¹⁶² but as developed countries need to be reminded, it is one that is steeped in a colonial past of foreign exploitation and human rights violations, and not unconditional in its current formulations. Therefore, it is subject to the obligation not to cause harm beyond one's sovereign jurisdiction. Bearing this in mind, it is no wonder that developing countries perceive that environmental agreements infringe upon their sovereignty; they have, nevertheless, agreed, in the context of the UNCED agreements, to conditionalize their sovereignty.

The arranged marriage of development and environment that exists in the principle and mechanism of sustainable development, will hopefully limit the days when economic development and environmental protection objectives can be viewed and pursued on parallel tracks, at least without some acknowledgment of the adverse implications to humanity and the environment in pursuing separate courses without due consideration of one another. The NIEO-era right to development has evolved into a right that is now substantially modified as a result of the integration of environmental considerations. This reflects the South's recognition that a developmental process that is insulated from environmental concerns results in resource exhaustion and environmental degradation. Otherwise, the quality of life of a coun-

161. The economic development of states continues to be fiercely unequal; inequality of development is also reflected in the state of the environment; the environmental problems of many developing countries are far more serious than those of industrialized countries. Lothar Gundling, *What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Responsibility to Future Generations*, 84 AM. J. INT'L. L. 207, 211 (1990).

162. Taylor, *supra* note 11, at 337.

try's population, and its future developmental capacity,¹⁶³ are ultimately undermined. Similarly, environmental protection measures have incorporated human and economic considerations. The UNCED texts speak loud and clear on this point.

That the outcome of the UNCED process has led one commentator to bemoan that "the planet hardly features as a subject in the Rio Declaration"¹⁶⁴ overlooks the critical intersection of the North's assertion of an environmental right to environment and the South's struggle for recognition of the right to development. In the UNCED context, it is the quality of life, with human dignity at its core, that we seek for ourselves and future generations. This forges a shared journey found, not only in development that is sustainable, but also in the goal of sustainable development. In other words, sustainable development is the agreed mechanism with which to achieve negotiated global ends, and it is also the agreed objective as well.

In this regard, the North and South certainly made their respective concessions and neither "side" got all that they demanded. The modifications to sovereignty over natural resources, together with the accommodation of anthropocentric concerns in the protection of the environment, are evidence of this compromise. Of course, the UNCED texts have not ended the North-South debates over natural resource use and responsibilities, for they will continue so long as economic and developmental inequities exist and natural resource use are global issues. But, out of the competing tensions between the South's assertion of a right to development and developed countries' environmental initiatives over previously-unconditioned sovereign natural resource use, a framework of international cooperation resulted.¹⁶⁵

163. McAllister, *supra* note 117, at 695.

164. Pallemarts, *supra* note 27, at 642.

165. Bulajic warns us nonetheless that although scientific and technology transfer can contribute to closing the economic gap that divides the North and South, the danger of "technology colonialism" by developed countries can preserve the dominant position of industrialized economies and widen the existing North-South gap. BULAJIC, *supra* note 76, at 303. This observation serves to intensify further the justification for international agreement and negotiated cooperation on the issue of technology transfer.

V.

CONCLUSION

The use of human rights principles with the aim of developing a right to the environment attempts to obtain an acceptable quality of life for everyone. Similarly, this same mechanism, through the assertion of the right to development, has been used to facilitate international cooperation and economic equity in order to improve the basic conditions of life.

Bemoaning the gaps in the environmental goals and objectives in the UNCED texts, gaps which are often attributed to developing countries' right to development, does little to address the continuing, and good faith, efforts of those who are trying to find common ground and mutually supportable principles within the context of global sustainable development. Strident assertions that economic development rights create impenetrable philosophical and legal barriers to the means and objectives of global sustainable development may very well be valid, but only to the extent that such assertions are made without due consideration of the intersection of the human rights aspirations of the rights to environment and development.

That the Rio Declaration is less ecocentric than some would consider ideal, or that the UNCED texts place limitations on national sovereignty over natural resources, or that the principle of common but differentiated responsibilities highlights its NIEO origins, does not negate the human rights linkages that exist in the UNCED sustainable development texts. The international community, through its expressions of equitable benefits sharing, common but differentiated responsibilities, technology transfer and intergenerational equity, has agreed: these are the mechanisms by which basic human dignity, which inherently includes an acceptable quality of life, can be achieved. Basic human dignity is at the heart of the right to development, no less than it is at the core of the human right to environment.

