ONE SPECIES, ONE PLANET:
Environmental Justice and Sustainable Development

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In December 1984 in Bhopal, India, a toxic cloud of deadly methyl isocyanate was released from a Union Carbide chemical plant, an incident that, to date, has resulted in thousands dead and many more injured. Eighteen years after the disaster, people are still suffering severe health effects and have not been adequately compensated.

The name Cancer Alley refers to the area along the Mississippi River between Baton Rouge and New Orleans, Louisiana, USA. Here, over a hundred chemical and oil companies have set up along the river, often near poor and/or minority communities. Residents in these areas suffer disproportionate exposure to the environmental hazards that come with living near chemical waste. Cases of rare cancers are reported in these communities in numbers far above the national average.

In Nigeria's Ogoniland, Shell Petroleum Development Corporation continues to reap profits from oil exploration – almost none of which reach the local peoples who instead suffer from oil spills, contamination of drinking water supplies, erosion of land, adverse health effects, and displacement.[1]

I. LINKING SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL JUSTICE

Sustainable Development

Sustainable development has become a key obligation and aspiration in various national and international legal instruments. It is the international community's agreed-upon goal for improving human well-being and environmental management. Sustainable development is often invoked as a means for reconciling important objectives that might

[1] For more information, see: http://www.sierraclub.org/human-rights/Nigeria/links.asp.

sometimes appear to compete. These include respect for human rights, promotion of socially and environmentally sustainable economic growth, and protection and wise use of the natural environment. Paragraph 6 of the 1995 Copenhagen Declaration on Social Development expresses these interconnections. It states:

> We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people. . . .[2]

Despite the Copenhagen Declaration's advance in defining the term, sustainable development frequently means different things to different people. One of the most oft-quoted definitions is from *Our Common Future* (also known as the Brundtland Report), which defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[3]

In addition to policy integration and concern for future generations, the Brundtland Report's vision of sustainable development contains within it two other key concepts: "the concept of "needs," in particular, the essential needs of the world's poor to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs."[4]

Some argue that sustainable development should also include the following components:

- efficient resource allocation to meet basic human needs;
- equitable and just allocation of resources and benefits arising from their use;
- ecological sustainability – maintaining the long-term viability of supporting ecosystems;
- social sustainability – fulfilling people's cultural, material, and spiritual needs in equitable ways;
- increased accountability in institutions of governance;
- increased and meaningful public participation;
- strengthening of local democracy;
- focus on environmental rights;
- economic viability; and finally,
- greater sensitivity to conditions in the Global South.[5]

The concept of sustainable development described in the proceedings of a 1999 Seminar of the Organisation for Economic Co-operation and Development (OECD) on *Social and*

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[2] *Copenhagen Declaration*, World Summit on Social Development, 1995, Copenhagen, Denmark, U.N. Doc A/CONF.166/7/Annex (1995), a*vailable at* http://www.un.org/esa/socdev/wssd/.
[3] World Commission on Environment and Development (WCED), *Our Common Future*, 3 (Oxford University Press, 1987).
[4] *Id.* at 43.
[5] *For more information, see*: http://www.sd-commission.gov.uk/events/apr01/unpack/.

Environmental Interfaces focuses on the quality of human life now and in the future. The report stressed:

> If the primary goals of environmentally sustainable development are freedom from poverty, secure livelihoods, good health and quality of life, then socially responsible development has to deal with such needs as food, basic housing, access to good water, health care (especially for children and older members of society), sanitation, education, energy in the form of fuel, transport, etc.[6]

According to the World Conservation Union, sustainable development means achieving a quality of life (or standard of living) that can be maintained for many generations because it is:

- socially desirable, fulfilling people's cultural, material, and spiritual needs in equitable ways;
- economically viable, paying for itself, with costs not exceeding income; and
- ecologically sustainable, maintaining the long-term viability of supporting ecosystems.[7]

Environmental protection is now perceived as an essential part of the process of socio-economic development and an integral feature of international law. International environmental law, in particular, has elaborated various rules and principles for promoting sustainable development. These norms are codified in conventions, guidelines, and declarative texts. Use of the term sustainable development in these instruments has enriched legal and policy dialogue and in some respects, has modified responsibilities and behavior.[8]

Article 1 of the Convention on Biological Diversity (CBD), for example, promotes conservation along with sustainable utilization and equitable sharing of benefits derived from the use of biological resources. Operational regulations of the United Nations Commission on Human Rights, United Nations Environment Programme (UNEP), United Nations Development Programme (UNDP), World Bank, Inter-American Development Bank, United States Agency for International Development, and other multilateral and bilateral institutions concerning tropical forestry, involuntary resettlement, and indigenous peoples, have also begun to emphasize a sustainability approach with a strong environmental component.

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[6] *OECD Seminar Social and Environmental Interface Proceedings,* ENV/EPOC/GEP (99) 13, (September 22-24, 1999), *available at* http://www.olis.oecd.org/olis/1999doc.nsf/LinkTo/env-epoc-gep(99)13 [hereinafter *OECD Seminar*].

[7] IUCN-World Conservation Union, *Guide to Preparing and Implementing National Sustainable Development Strategies and Other Multi-sectoral Environment and Development Strategies*, prepared by the IUCN's Commission on Environmental Strategies Working Group on Strategies for Sustainability, the IUCN Secretariat and the Environmental Planning Group of the International Institute for Environment and Development, pre-publication draft, 1993.

[8] Gregory Maggio and Owen J. Lynch. *Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society*, report prepared for the Earth Council, Costa Rica and the World Resources Institute (1996), *available at* http://www.omced.org/wri/om_wri.htm.

Various efforts aimed at addressing environmental degradation now accord significance to socio-economic concerns. This transformation in thinking is reflected in documents arising out of the United Nations Conference on Environment and Development (UNCED), the North American Agreement on Environmental Co-operation, the United Nations Convention to Combat Desertification, and a host of guidelines, action plans, and legal documents of the various United Nations organizations and other institutions.

All mainstream definitions of sustainable development share three characteristics. First, achieving sustainable development requires integrating policies related to social justice, environmental protection, and economic development. Second, the interests of future generations must be taken into account. And third, transparency and public participation at all levels of decision-making, from local to global, are essential to achieving sustainable development. The international community has recognized these characteristics, for instance, at the 1995 World Summit on Social Development[9] and at the 1992 United Nations Conference on Environment and Development.[10]

Environmental Justice

Environmental justice has often been defined with reference to the right to a safe, healthy, productive, and sustainable environment for all, where "environment" is considered in its totality, including ecological (biological), physical (natural and created by human labor), social, political, aesthetic, and economic conditions. The term implies that environmental "injustice" exists and highlights the need for socio-political initiatives to address these problems.

That environmental justice has an economic aspect is clear both from the fact that it must be achieved in the context of environmentally sustainable economic activity and from international instruments such as the 1995 Copenhagen Declaration, in which the second and third sentences of Paragraph 6 state:

> Equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice. [11]

For environmental justice to be attained, five basic principles should be adhered to:

- A disproportionate burden of protecting the environment should not be borne by any particular group, especially not vulnerable populations;
- The benefits of environmental protection, such as clean water and clean air, should be equally available to all;

[9] *See generally Copenhagen Declaration supra* note 2.
[10] *See generally Rio Declaration on Environment and Development,* 1992, U.N. Doc.A/CONF.151/26; 31 I.L.M.874 (1992), *available at* http://www.unep.org/unep/rio htm.
[11] *Copenhagen Declaration supra* note 2, at Para. 6.

- There should be transparency and the opportunity for meaningful public participation in decision-making;
- Everyone should have access to effective remedies for violations of environmental rights, and laws should be enforced irrespective of the political or economic power of wrongdoers; and,
- A level of environmental protection adequate to sustain human health and well-being, and ecosystem equilibrium should be achieved and maintained.

Environmental justice recognizes the need for a special concern for special groups, such as vulnerable populations, as was acknowledged in the internationally negotiated text of the 1996 Second United Nations Conference on Human Settlements (Habitat II).[12] The OECD Seminar on *Social and Environmental Interfaces*, referred to above, stressed that environmental justice focuses on distributional inequities in the exposure to environmental risk.[13]

Linking Sustainable Development to Environmental Justice

The concepts of sustainable development and environmental justice share many critical and defining characteristics. Each requires taking into account and integrating policies relating to social justice, environmental protection, and economic development. Furthermore, each involves focusing on real life conditions now facing individuals and local communities, while also addressing the impacts that different policy options may have in the future – to ensure, on one hand, that development is sustainable and, on the other, that policy choices not only achieve equitable results in the short term, but also do not cause or perpetuate injustice in the longer term. Similarly, achieving sustainable development requires transparent decision-making processes and meaningful opportunities for public participation, as does environmental justice.

The international community recognized most aspects of the challenges posed by environmental justice at Habitat II in 1996, though it did not specifically use the term "environmental justice" and did not address the topic comprehensively.[14] The First National People of Color Environmental Leadership Summit adopted 17 principles of environmental justice.[15] Principle 3 emphasizes the inextricable link between environmental justice and sustainable development:

> Environmental Justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.

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[12] *Istanbul Declaration on Human Settlements,* UN Conference on Human Settlements (Habitat II) in Istanbul, Turkey, June 3-14, Annex 1, U.N. Doc. A/CONF 165/15 (part) (1996), *available at* http://www.agora21.org/HABITAT2/a01a.html. *See also Id. at* paras. 72, 75, 79, 82, 94, 95, 96, 97.
[13] *OECD Seminar supra* note 6, at 19.
[14] *See Habitat II Agenda supra* note 12 at paras. 72, 75, 79, 82, 94, 95, 96, and 97.
[15] *Principles of Environmental Justice,* Proceedings of the First National People of Color Environmental Leadership Summit (October 24-27, 1991), *available at* http://www.igc.org/saepej/Principles html.

As this report demonstrates, sustainable development and environmental justice are entirely compatible. Moreover, because sustainable development is the overarching framework for improving the quality of life, environmental justice can be seen as an integral component of sustainable development. This is evident in the definitive Paragraph 6 of the Copenhagen Declaration (quoted above), which emphasized the linkage.

Sustainable development and environmental justice, thus, are symbiotically related and should be pursued in tandem. Only then will sustainable development be achieved at the ground-level where all biodiversity reservoirs, carbon sinks, watersheds, forests, pasturelands, and coastal and marine resources are located, often in close proximity to hundreds of millions of human beings directly dependent on these vital resources for their lives and livelihoods.

The relationship between sustainable development and environmental justice is further reinforced by the universality of human rights and by the close relationship between human rights and the environment.

1. The Universality of Human Rights

Human rights are the inherent rights of all human beings. The Preamble to the Charter of the United Nations states:

> We the Peoples of the United Nations [are] determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.[16]

Human rights exist, and are invoked, to protect and to promote human life and dignity.[17] In this report it is understood that all human beings by virtue of being human—not on the basis of citizenship, education, levels of melanin in their skin, or access to wealth—are entitled to have their human rights respected and protected. As such, human rights are general rights in that they pertain to all human beings, and while the understanding of them may vary from region to region and from culture to culture, the concept of human rights remains universal.

The evolving nature of our understanding of human rights, and especially the lack of complete agreement on the extent and precise definition of human rights, has contributed to the assertion by some people that human rights are relative, not universal. Attempts to resolve the universalism debate were made in 1993 at the United Nations World Conference on Human Rights in Vienna. The declaration that emerged from these negotiations reaffirmed the universality of human rights but also acknowledged contextual aspects. It declared that "all human rights are universal, indivisible and

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[16] *Charter of the United Nations*, June 26, 1945, pmbl., 59 Stat. 1031, *available at* http://www1.umn.edu/humanrts/instree/aunchart htm.

[17] *For a thorough listing of currently acknowledged human rights see*: http://www1.umn.edu/humanrts/links.

interdependent and interrelated. . . " while also noting that ". . . the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind."[18]

In the 1993 Bangkok NGO Declaration on Human Rights, more than 100 non-governmental organizations (NGOs) reaffirmed the universality of human rights and undermined the claims of many authoritarian governments of the need to understand so-called "Asian values." While by no means resolving the argument, the Bangkok Declaration did weaken some of the opposition to universality, although the debate has continued.

The other aspect of universality is whether rights apply to everyone equally. While this is much less controversial in theory than whether we all define a particular human right the same way, in practice the problem is significant and bears directly on environmental justice. In 1995, at the Fourth World Congress on Women, which was held in Beijing, the international community recognized that women's rights are human rights.[19] This formally resolved one issue in favor of universality.

It is also clear that discrimination on the basis of ethnicity or skin color violates human rights.[20] One commentator, Barbara Rose Johnson, wrote that "human environmental rights abuse occurs because it is socially, culturally, and legally acceptable to protect the health of some people while knowingly placing other humans at risk."[21] This aspect of the problem is clear from the World Bank's infamous memo on toxic industries,[22] the international dumping of hazardous wastes,[23] and the prevailing tendency to locate polluting industries in minority and economically disadvantaged neighborhoods[24] or in the Global South.[25]

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[18] World Conference on Human Rights, Vienna, 14-25 June 1993. *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, June 14-25, 1993, Para. 5, U.N. Coc. A/CONF.157/23 (1993).

[19] *See Beijing Declaration and Platform for Action,* Fourth World Conference on Women, Beijing, China, September 15, 1995, U.N. Doc. A/CONF. 177/20 (1995) and A/CONF. 177/20/Add.1 (1995), *available at* http://www1.umn.edu/humanrts/instree/bejingmnu.htm.

[20] *See e.g.* International Covenant on the Elimination of All Forms of Racial Discrimination, entered into force Jan. 4, 1969, 660 U.N.T.S. 195, *available at* http://www1.umn.edu/humanrts/instree/d1cerd.htm [hereinafter *ICERD*].

[21] Barbara Rose Johnson, "Human Environmental Rights" in *Who Pays the Price? The Sociocultural Context of Environmental Crisis*, 101 (Barbara Rose Johnson, ed. 1994). Johnson contributed to the work of the Special Rapporteur on Human Rights and the Environment.

[22] Internal memo titled "Dirty Industries" from Larry Summers to the staff of the World Bank dated December 12, 1991 that said: "Just between you and me, shouldn't the World Bank be encouraging more migration of the dirty industries to the LDCs [Less Developed Countries]?"

[23] *See e.g.* Gustovo Capdevila, *Dumping of Toxic Waste is a Human Rights Issue,* (IPS) (April 18, 1998), *available at* http://users.westnet.gr/~cgian/toxwaste.htm.

[24] *See e.g.* Asgar Ali, *A Conceptual Framework for Environmental Justice Based on Shared but Differentiated Responsibilities,* 14 (2001), *available at* http://www.uea.ac.uk/env/cserge/publications/wp/edm/edm01_02.pdf.

[25] *See* Capdevila *supra* note 23.

The universality of human rights reinforces the conclusion that environmental justice needs to be a universal phenomenon, especially since environmental injustices are largely perpetuated on the basis of differentiation. Emphasizing that environmental justice is a prerequisite for sustainable development serves, among other things, to challenge unfair discrimination in the treatment of human beings.

2. Building on the linkage between human rights and the environment

Evidence around the world supports the claim that environmental and human rights issues are closely linked and often exist simultaneously. In addition, human rights abuses often have ramifications that translate into environmental abuses as well. For instance, in Burma, the ruling military regime continues to use slave labor and wreak havoc in the country's vast teak forests. Moneys from timber sales reportedly go to support military assassinations of ethnic and religious minorities opposed to the destruction of their land and communities. [26]

Similarly, abuses against the environment generally affect the human rights of people who live in those environments. The World Bank-financed Chad-Cameroon oil pipeline project threatens local communities and fragile ecosystems – the rainforests of Cameroon and agricultural farming land in Chad. There are also serious concerns about the capacity of both national governments to uphold basic human rights standards in the pipeline region. Already, security forces in Chad have killed more than 200 people in skirmishes in the oil field region.[27]

Another report, "Forests of Fear," published by the UK-based environmental group Fern clearly links the disappearance of the world's forests with the horrifying catalogue of human rights abuses taking place as a result of conflicts between forest peoples and the powerful government and corporate interests within forests. The report calls for prioritizing the defense of human rights as the primary solution to solving the forest crisis.[28] It is most probably the case that environmental injustices are generally more prevalent in nations where human rights protection mechanisms are weak.

The United Nations has initiated efforts to raise the profile of human rights and environmental issues to that of international soft law. These include the creation of a Special Rapporteur on Human Rights and the Environment in 1994. In January 2002, the United Nations High Commissioner for Human Rights and the Executive Director of the United Nations Environment Programme organized a Meeting of Experts on Human Rights and the Environment. The Conclusion of the Final Text emphasizes the need

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[26] *See* http://www.sierraclub.org/human-rights/Burma/ (describing the abuses committed by the Burmese government in support of Unocal's and Total's oil pipeline project).

[27] *See* http://www.sierraclub.org/human-rights/Chadcam/index.asp (describing the human rights and environment situation surrounding the construction of the Chad Cameroon pipeline).

[28] *Forests of Fear: The Abuse of Human Rights in Forest Conflicts*, Fern Report, November 2001, *available at* http://www.wrm.org.uy/peoples/fear.html.

> To recognize the environmental dimension in the effective enjoyment of human rights protection and promotion, and the human rights dimension in environmental protection and promotion, in part by developing rights-based approaches to environmental protection and promotion of sustainable development. . . .[29]

The 1994 Draft Declaration of the Principles on Human Rights and the Environment, prepared in Geneva by an international group of experts on human rights and environmental protection, also sought to highlight the inextricable linkage between these two areas. The Draft Declaration emphasizes the environmental dimensions of established human rights, including the rights to life, health, and culture. It likewise describes the procedural rights necessary for realization of substantive rights, including the right to participation.[30]

While the linkage between human rights and the environment is being recognized as an obvious one and has been gaining international support over the last decade, the equally important relationship between sustainable development and environmental justice has not been explored as much. As has already been demonstrated, by definition, sustainable development—an encompassing concept that leads to overall development and justice—cannot be attained unless environmental justice is also realized. The attainment of environmental justice is thus a fundamental prerequisite – a necessary condition for the realization of true sustainable development.

Protecting human rights requires preserving the environment, and safeguarding the environment requires respecting human rights. Meeting these goals leads to environmental justice. The pursuit of environmental justice will strengthen the realization of sustainable development while stressing that the economic, social, and cultural rights of citizens are integrally linked to their civil and political rights, such as the right to freedom of speech and association and the right to life.

II. EXPOUNDING ON LEGAL RELATIONSHIPS BETWEEN SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL JUSTICE

Recognition of the linkages between sustainable development and environmental justice is fairly recent, especially in international and national laws. The past ten years, in particular, have witnessed an increasing willingness by global, regional, and national bodies to re-interpret procedural rights to due process, political participation, and access to information[31] in reference to concerns regarding environmental justice, as well as other

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[29] Meeting of Experts on Human Rights and the Environment, 14-15 January 2002, Section 18, Final Text, (2002), *available at* http://www.unhchr.ch/environment/conclusions html.

[30] The 1994 Draft Declaration of Principles on Human Rights and the Environment, May 16, 1994, *available at* http://www.tufts.edu/departments/fletcher/multi/www/1994-decl.html.

[31] *See e.g.* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters "The Aarhus Convention," 4th UNECE Ministerial Conference. Aarhus, June 25, 1998, UN Doc. ECE/CEP/43, *available at* http://www.unece.org/env/pp/documents/cep43e.pdf [hereinafter *The Aarhus Convention*].

more specific or substantive rights.[32] These latter rights include: minority rights;[33] freedom from racial discrimination;[34] the right to self-determination, subsistence and free disposal of natural resources;[35] the right to own property;[36] religious rights;[37] the right to life;[38] the right to health;[39] and the rights to protect the home, family, and private life.[40] Among the areas that highlight the legal nexus between sustainable development and environmental justice, three are key. These are:

- the right to life, including the right to a healthy environment;
- the traditional and customary property rights of indigenous and other local communities, especially those in the Global South; and
- participatory and procedural rights.

This section explores these three areas in more detail.

1. Right to a Healthy Environment

The right to life is the most basic human right, and is *jus cogens,* i.e., a peremptory norm that takes precedence over other international law. By its nature it must, at least implicitly, include the right to a healthy environment. If it did not, the right to life could be freely abrogated by way of environmental contamination and degradation. In this

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[32] Such a reinterpretation reflects what a growing global consensus in agreement with ICJ Vice President Weeramantry's statement that "protection of the environment is *sine qua non* for numerous human rights such as the right to health and the right to life itself." *Judgment in Case Concerning the Gabcikovo-Nagyamaros Project* 37 I.L.M. 201, para. 206 (1997) (P. Weeramantry concurring).

[33] *See International Covenant on Civil and Political Rights (ICCPR)*, Dec. 16, 1966, art. 27, 993 U.N.T.S. 3 (1976), *available at* http://www.unhchr.ch/html/menu3/b/a_cescr htm [hereinafter *ICCPR*]; *Convention on the Rights or the Child* (*CRC),* November 20, 1989, Art. 3, 1577 U.N.T.S. 3 (1990), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm [hereinafter *CRC*] (making special mention of indigenous peoples).

[34] *See* art. 2 *ICERD supra* note 20.

[35] *See ICCPR supra* note 33, at art. 1.

[36] *See Universal Declaration of Human Rights (UDHR)* art. 3, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948) *available at* http://www.unhchr.ch/udhr/lang/eng.htm [hereinafter *UDHR*], *African Charter* on Human and Peoples' Rights, Banjul, June 27, 1981 at OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art. 14 (1982) [hereinafter *African Charter*]; *American Convention on Human Rights "Pact of San Jose, Costa Rica,"* art. 21, June 18, 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, a*vailable at* http://www.oas.org/juridico/english/Treaties/b-32 htm (including the right to compensation if involuntarily disposed) [hereinafter *American Charter*], art. 21.

[37] *See UDHR supra* note 36 at art. 18; *ICCPR supra* note 33 at art. 18; *CRC supra* note 33, at art. 14; *African Charter supra* note 36, at art. 18; *American Convention supra* note 36 at art. 12.

[38] *See UDHR supra* note 36, at art. 3; *ICCPR supra* note 33, at art. 6; *CRC supra* note 33, at art. 6(1) *African Charter supra* note 36, at art. 4, *American Convention supra* note 36, at art. 4.

[39] *See UDHR supra* note 36, at art. 25; *International Covenant on Economic, Social and Cultural Rights*, *entered into force* Jan. 3, 1976, art. 12, 993 U.N.T.S. 3, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr htm [hereinafter *ICESCR*]; *CRC supra* note 33, at art. 24.

[40] *See UDHR supra* note 36 at art. 16; *ICCPR supra* note 33, at art. 23; *ICESCR supra* note 39, at art. 10; *African Charter supra* note 36, at art. 18; *American Convention supra* note 36, at art. 17; *European Convention for the Protection of Human Rights and Fundamental Freedoms,* art. 8, Sept. 3, 1953, art. 8, 213 U.N.T.S. 222 as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and November 1, 1998 respectively, *available at* http://www1.umn.edu/humanrts/instree/z17euroco.html [hereinafter *European Convention*].

context, therefore, the right to a healthy environment is binding on all states, and the environment must be construed as the broad physical environment upon which human well-being depends. The right to a healthy environment implicitly emphasizes adequate access to "vital needs," which are those needs that provide the necessary conditions for reaching and maintaining a decent standard of living.

The constitutions of many countries now recognize the right to a healthy environment.[41] Several countries have established judicial precedents that extend the fundamental right to life to encompass the right to a healthy environment.[42] Environmental rights include the right to a clean and safe environment and the concomitant right to act to protect the environment through the right to organize; the right to a safe and healthy workplace; the right to an adequate standard of living; and the right to information, access to justice, and to participate in environmental decision-making.

An early mention of the relationship between sustainable development and environmental justice in an international instrument is in Article 12(2)(b) of the 1966 International Covenant on Economic and Social Rights. It calls on states to improve "all aspects of industrial and environmental hygiene" in order to help people realize their right to "the enjoyment of the highest attainable standard of physical and mental health."[43] The 1972 Stockholm Declaration on the Human Environment recognizes the link between human rights and environmental protection stating 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."[44]

The 1981 African Charter on Human and Peoples' Rights expressly recognizes that "all peoples shall have the right to a generally satisfactory environment favourable to their

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[41] More than 60 nations have adopted constitutional provisions recognizing the right to a healthy environment. Fatma Zohra Ksentini, Human Rights and the Environment: Final Report, Annex III, U.N. ESCOR, Hum. Rts. Comm., at 81-89, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994). For instance, the Constitution of South Africa explicitly states in Section 24 of Chapter 2 that "Everyone has right to (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. *See* http://www.polity.org.za/govdocs/constitution/saconst html. Article II, Section 16 of the Philippine Constitution mandates that "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." *See* http://www.supremecourt.gov.ph/Constitution/Constitution html. *See also* Carl Bruch, et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (Washington, DC: Environmental Law Institute, 2000), *available at* http://www.eli.org/store/rr00africa html.

[42] For example, in India, in Subhash Kumar v. State of Bihar, the Supreme Court affirmed that the "right to life . . . includes the right of enjoyment of pollution-free water and air." (Supreme Court of India, 1991 A.I.R. 420); and in Pakistan, Human Rights Case (Environment Pollution in Baluchistan), 1994 P.L.D. 102 (Sup. Ct. of Pakistan), the Court declared that dumping nuclear waste in coastal areas could violate the right to clean environment, included in right to life.

[44] *ICESCR supra* note 39, at art. 12.

[44] *Report of the United Nations Conference on the Human Environment "Stockholm Declaration,"* 1972, U.N. Doc. A/Conf.48/14.

development."[45] The Organization of American States introduced the right to a healthy environment in its 1988 Protocol of San Salvador. Article 11 of the Protocol recognizes that "everyone shall have the right to live in a healthy environment."[46] The 1994 Draft Declaration of Principles on Human Rights and the Environment stressed the intrinsic link that exists between the preservation of the environment, development, and the promotion of human rights. Principle 2 of the Draft Declaration states:

> All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.[47]

In Europe, the Organisation of Economic Co-operation and Development (OECD) has stated that a "decent" environment should be recognized as one of the fundamental human rights.[48] Furthermore, the United Nations Economic Commission for Europe (UNECE) has drafted the Charter on Environmental Rights and Obligations,[49] which affirms the fundamental principle that everyone has the right to an environment adequate for general health and well-being. The World Commission on Environment and Development proposed that as a fundamental legal principle, "all human beings have the fundamental right to an environment adequate to their health and well-being."[50]

More than any declaration or judicial decision, the murders of Chico Mendes, a Brazilian labor union activist, and Ken Saro Wiwa of Nigeria drew international attention to the inextricable interrelationships between sustainable development and environmental justice. These tragedies highlighted the immediate human toll of environmental destruction and showed how this toll has usually been borne disproportionately by the people least able to cope with it – people already on the margins of society who lack sufficient resources to defend themselves.

As noted above, the area of human health demonstrates the connection between sustainable development and environmental justice. UNICEF estimates that over 40,000 children aged twelve and under die every day of preventable causes, including water-borne diseases.[51] Water pollution is conventionally seen as an environmental issue, while health is a human rights issue; it is almost glaringly evident, therefore, that the right to clean drinking water is an environmental human right.

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[45] *African Charter supra* note 36, at art. 2

[46] *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol Of San Salvador," entered into force* Nov. 16, 1999, art. 11, O.A.S. Treaty series No. 69 (1988), *available at* http://www.cidh.oas.org/Basicos/basic5 htm.

[47] *Draft Declaration of Principles on Human Rights and the Environment*, *supra* note 30.

[48] Organisation for Economic Cooperation and Development, *Responsibility and Liability of States in Relation to Transfrontier Pollution*, reprinted in *13 Environmental Policy and Law* 122 (1984).

[49] 1990 ECE Charter on Environmental Rights and Obligations: Adopted by the Experts Meeting held in October in Oslo, Norway, Oct. 29-31, 1990.

[50] World Commission on Environment and Development (WCED), *Our Common Future*, 348 (Oxford University Press, 1987).

[51] UNICEF, *World Summit for Children Declaration*, Sept 30, 1990, *available at* http://www.unicef.org/wsc/declare.htm.

Article 24 of the 1989 Convention on the Rights of the Child provides that a child has the "right to enjoy the highest attainable standard of health" through the "provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution."[52] The Inter-American Commission on Human Rights specifically recognized in the Yanomami Case of Brazil, that negative environmental effects connected with deforestation violate the right to health and well-being of affected indigenous peoples.[53] International environmental instruments, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989)[54] and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991),[55] protect the right to health by prohibiting or regulating the transportation and disposal of toxic substances.[56] The recent Stockholm Convention (2000) is a global treaty to protect human health and the environment from persistent organic pollutants (POPs).[57] The Convention calls on governments to take measures to eliminate or reduce the release of POPs into the environment.[58]

2. Community-Based Property Rights (CBPRs)

The rights of individuals and indigenous and other local communities to the natural resources on which they depend, is another fundamental issue linking sustainable development and environmental justice. The International Covenant on Economic, Social and Cultural Rights unequivocally states in Article 1 that:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and

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[52] *CRC supra* note 33, at art. 24(2)(c).

[53] *For more information on the decision, see* Case 79, La Communidad Mayagna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/serie_c/Sentencia.html.

[54] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes,* March 22, 1989, 1673 U.N.T.S. 57, *available at* http://www.basel.int/.

[55] *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, Jan. 30, 1991, 30 I.L.M. 773 (1991), *available at* http://www.tufts.edu/departments/fletcher/multi/texts/BH984.txt.

[56] International trade regimes, however, often facilitate the transfer of toxics around the world. Officially, only a small amount of toxic waste is exported to developing countries, but there is evidence of widespread unofficial movement. Trade in European waste to India, for example, is particularly brisk, due to disposal costs in the latter being US $2500 per ton cheaper. India, however, presently lacks the environmental standards and/or inspection capacities over its hazardous waste sites to ensure reasonably safe disposal (Vandana Shiva, "The World on the Edge," in Hutton, W. and Giddens, A. (eds.), *Global Capitalism,* (New Press, 2000)).

[57] POPs are chemicals that remain intact in the environment for long periods, become widely distributed geographically, bio-accumulate in the fatty tissue of living organisms and are toxic to humans and wildlife. POPs circulate globally and can cause damage wherever they travel.

[58] *See Final Act of the Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants* (*Stockholm Convention* included at Appendix II), December 10, 2000, *available at* http://www.chem.unep.ch/sc/.

> international law. In no case may a people be deprived of its own means of subsistence.[59]

Despite this fundamental mandate of international law, natural resource-dependent populations, while comprising large majorities in many developing countries, are often still legally marginalized by national governments and neglected by international institutions. Many nation-states claim ownership over all or most land and other natural resources, while ignoring the rights of people who live in closest proximity to natural resources. These states typically fail to recognize indigenous and other local communities as rightful owners of the natural resources they have cultivated and managed, often over many generations.

National laws (many which originate in colonial times) continue to be mostly hostile to rural constituencies directly dependent on natural resources in the Global South, while international law still largely overlooks them. Moreover, rural constituencies often lack knowledge of state-created legal rights and of legal processes that they can avail of. Similarly, they typically do not have access to lawyers, research materials, or corridors of power in their countries. As such, indigenous and other local communities have little, if any, say in law and policy-making processes that directly impact their lives and livelihoods.

The concept of community-based property rights (CBPRs) was purposefully developed to contribute to more effective advocacy on behalf of local communities and their rights to manage and control natural resources. It is intended to be more pro-community and more equitable than widely used terms such as "common property" and "community-based natural resource management," which is also known by the acronym CBNRM. The concept of CBPRs provides an intentional and strategic conceptual contrast to CBNRM, common property, and other concepts such as co-management and joint management.[60] The objective is to help indigenous and other qualified local communities gain formal legal recognition by the state of the natural resources they consider to be theirs, in the belief that this will contribute to sustainable development and environmental justice.[61]

Community-based property rights *by definition* originate in and are enforced by communities. The *distinguishing feature* of CBPRs is that their exercise derives its authority from the community in which they exist, not from the state where they are located. Formal legal recognition or grant of CBPRs by the state, however, is generally desirable because it removes doubt about their existence and can help to ensure that

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[59] *See ICESCR supra* note 36 at art. 1 (2) supra note 39. While Agenda 21 is not considered to be hard law in the international sense, Chapter 26 states that "… The lands of indigenous peoples and their communities should be protected from activities that are environmentally unsound or that the indigenous peoples concerned consider to be socially and culturally inappropriate. . . .

[60] *See for more background on CBPRs:* Owen J. Lynch and Emily Harwell, *Whose Natural Resources? Whose Common Good? Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia* (CIEL, 2002), especially Chapter I. *Available at* http://www.ciel.org/Publications/publac.html.

[61] A map prepared by the World Wildlife Fund listing identifiable ethno linguistic groups shows significant overlap of the world's biodiversity-richest areas with high concentrations of indigenous cultures. *See* http://www.panda.org/resources/publications/sustainability/indigenous3.

CBPRs are respected and used in pursuit of the public interest.

References to CBPRs (as well as CBNRM) should be used only with regard to initiatives that are primarily controlled and authorized from within a community. Externally initiated activities with varying degrees of community participation should not be referred to as community-based, at least not until the community exercises primary decision-making authority. Unfortunately, the term "community-based" is loosely used and applied too often to initiatives that have limited involvement and support of local communities.

In contrast with widely used and largely uniform Western concepts, CBPRs within a given local community typically encompass a complex, and often overlapping, bundle of rights that are understood and respected by a self-defined group of local people. As with common property, CBPRs are not equivalent or even similar to "open access" regimes that by definition are subject to no management rules and are therefore non-exclusionary.

CBPRs often include, but are not limited to, common property. They can also encompass various kinds of individual rights and kinship rights, such as inherited rights to agricultural and fallow fields, gardens, planted or tended trees or rattan clusters. CBPRs can also include rights to land, wildlife, water, forest products, fish, marine products, or intellectual property. CBPRs may vary in time and place to include rights to seasonally available resources such as fruit, game, fish, water, or grazing areas. They often specify under what circumstances, and to what extent, certain resources are available to individuals and communities to inhabit, to harvest, to hunt and gather on, or to inherit.

Some positive moves towards the development of norms for legally recognizing CBPRs are underway, but much more is needed.[62] The leading global instruments with provisions that deal explicitly with the property rights of indigenous and other local communities and considered to be legally binding are: the International Labour Organisation's (ILO) Convention No.169 on Indigenous and Tribal Peoples, 1989; the Convention on Biological Diversity, 1992; the Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994; and the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001.[63] Only ILO Convention No. 169 and the Desertification Convention, however,

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[62] *See e.g.* Andy White and Alejandra Martin, *Who Owns the World's Forest?* (Washington, DC: Forest Trends, 2002), *available at* http://www.forest-trends.org/whoweare/publications.htm; J. Mayers and S. Vermeulen, *Company-Community Forestry Partnerships: from raw deals to mutual gains?* (London: International Institute for Environment and Development, 2002), *available at* http://www.iied.org/psf/publications_def html#partnerships.

[63] An analogous trend can be seen in the debate over intellectual property and the protection given to it under the Agreement on Trade Related Aspects of Intellectual Property (TRIPs), *Agreement Amending the General Agreement on Tariffs and Trade and Creating the World Trade Organisation*, April 15, 1994 (Annex 1c) 33 I.L.M.1, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf. In the days running up to the failed World Trade Organisation (WTO) conference in Seattle in 1999, industrialized countries voiced their intention to push for greater protection of patents for plant varieties under TRIPs Article 27(3)(b). Article 27(3) provides for states parties to create a *sui generis* system for protection of plant varieties. Developing countries, however, in reaction to a generalized perception that TRIPs favored the interests of developed world investors and encouraged biopiracy, reacted strongly to these efforts. In the

articulate broad normative frameworks that include protections for CBPRs to land, forests, and natural resources, and even these instruments are minimalist in nature.

Perhaps the most promising recent development concerning CBPRs in the realm of international law, at least within the Western Hemisphere, can be found in a 2001 decision by the Inter-American Court of Human Rights. It found that Nicaragua violated the human rights of the Awas Tingni Mayagna Sumo Community when it granted a timber concession to a foreign company on the community's traditional land. The Court ordered the government to recognize and protect the community's collective legal rights to its traditional lands, natural resources, and environment.[64]

3. Participation and Procedural Rights

The fundamental procedural principle forming the basis for both sustainable development and environmental justice is that all human beings, by virtue of being human, have a right to a meaningful say in decisions that directly affect their lives and livelihoods. This principle is especially relevant for the hundreds of millions of human beings living in indigenous and other local communities in the Global South who are directly dependent on natural resources, but all too often have little, if any, voice in official decision-making processes concerning how those resources are to be used. Poor people in urban areas, whose numbers seem to grow almost inexorably, are also in most instances grossly underrepresented and overlooked as problems related to sanitation, access to potable water, and air pollution worsen.

The realization of environmental justice and sustainable development will require the active involvement and support of those most affected by the absence of environmental justice and sustainable development. The best strategy for encouraging and sustaining active involvement and support would be the effective promotion of participatory democracy. This requires the establishment and implementation of procedural rights, such as the right to receive and disseminate information, the right to participate meaningfully in planning and decision-making processes, and the right to effective remedies in administrative or judicial proceedings.

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run up to the meeting a number of different states issued statements in opposition to the developed countries proposals, often emphasizing the rights of local communities guaranteed by the Convention on Biological Diversity Article 8(j) as well as the International Undertaking on Plant Genetic Resources. *See Convention on Biological Diversity,* 31 I.L.M. 818 (1992), *available at* http://www.biodiv.org/convention/articles.asp [hereinafter *CBD*]; *International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRe),* FAO Resolution 3/2001 (2001), *available at* ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/iu/ITPGRe.pdf [hereinafter *ITPGRe*]. The Venezuelan delegation expressed the feeling of these groups most clearly in their call for an establishment of a system of intellectual property protection "with an ethical and economic content, applicable to the traditional knowledge of local and indigenous communities, together with recognition of the need to define the rights of collective holders." Such systems, which embody the content of CBD Article 8(j), are already part of the national regulations of the Philippines, Australia, Bolivia, Colombia, Ecuador, Peru, Venezuela, Brazil, Cameroon, Fiji, Guatemala, India, and Malaysia. Note and Comment: Traci L. McCellan, *The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous Peoples*, 19 Wis. Int'l L.J. 249, 264, fn. 94 (2001).

[64] *See Awas Tingni supra* note 53.

Meaningful consultation and participation are basic tenets of liberal democracies and an essential foundation for guaranteeing human rights. In their absence, the underlying rationale of rights is defeated, as the people whom these rights are supposed to protect are excluded from decision-making processes that directly concern them. Democracy supports the procedural guarantee of human rights, at least in theory. There is a plurality of virtues here, including: first, the intrinsic importance of political participation and freedom in human life; second, the instrumental importance of political incentives in keeping governments responsible and accountable; and third, the constructive role of democracy in the formation of values and in the understanding of needs, rights, and duties.[65]

The right to assemble and to participate politically,[66] the right to information,[67] and the right to fair adjudication of one's rights[68] are well-established fundamental human rights protected by binding global and regional agreements. It is, therefore, not surprising that along with what the International Court of Justice (ICJ) referred to as "new scientific insights and. . . a growing awareness of the risks for mankind for present and future generations,"[69] would come an application of these rights in an environmental context. This application has been articulated in international and regional environmental instruments,[70] the laws of nations,[71] and the policies of international and regional development organizations.[72] It has also been adjudicated in a regional human rights tribunal[73] and recognized as customary international law.

Principle 10 of the Rio Declaration clearly articulates the substance of these rights in the environmental context: "Environmental issues are best handled with the participation of

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[65] Amartya Sen, *Democracy as a Universal Value,* Journal of Democracy 10.3 (1999), *available at* http://muse.jhu.edu/demo/jod/10.3sen html.

[66] *UDHR supra* note 36, at art. 21; *ICCPR supra* note 33, at art. 25, *ICERD*, *supra* note 20, at art. 5(c); *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*, Sept 3, 1981, 1249 U.N.T.S. 13 art. 7 *available at* gopher://gopher.un.org/00/ga/cedaw/convention [hereinafter *CEDAW*]; *African Charter supra* note 36, at art. 13; *American Convention supra* note 36, at art. 23.

[67] *ICCPR supra* note 33, at art. 19; *ICERD supra* note 20, at art. 5(d)(vii); *CEDAW supra* note 65, at art. 10; *CRC supra* note 33 art. 13 *African Charter supra* note 36, at art. 10; *American Convention supra* note 36, at art. 13; *Charter of Fundamental Rights of the European Union*, Dec. 7, 2000, Art 11, 2000/C 364/01, *available at* http://ue.eu.int/df/default.asp?lang=en [hereinafter *European Charter*].

[68] *UDHR supra* note 36, at art. 10; *ICCPR supra* note 33, at art. 14; *African Charter supra* note 36, at art. 7; *American Convention supra* note 36, at art. 8; *European Charter supra* note 66, at art. 47.

[69] *Case Concerning the Gabcikovo-Nagyamaros Project supra* note 32, at para. 314.

[70] *See* note 75 *infra* and accompanying text.

[71] *See* note 81-83 *infra* and accompanying text.

[72] *See* note 84-88 *infra* and accompanying text.

[73] European Court of Human rights held in *Lopez Ostra v. Spain,* 20 EHRR 277 (1994), and *Guerra v. Italy,* 26 EHRR 357 (1998), that the respective state's failure to enforce existing environmental laws constituted a violation of the plaintiffs' rights under Article 6(1) of the European Convention. In both *Guerra,* 20 EHRR 277 (1994) and *LCB v. United Kingdom,* 27 EHRR 212 (1999) the Court held that the respective state was under an obligation to inform the plaintiffs of any environmental risks about which they were aware.

all concerned citizens, at the relevant level. . . .[74] Although the Rio Declaration was non-binding, following its proclamation, numerous global and regional binding[75] legal instruments have reaffirmed the principles it embodied.

One of the most significant is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998. The Convention, which covers much of the European Union as well as countries of the former Soviet Union, backs up a broad guarantee of a "right to an environment adequate to her or his well-being"[76] with strong procedural rights applicable to both individuals and NGOs. These include rights of access to information,[77] rights to participation in decision-making,[78] and strong provisions for access to justice in environmental matters, including the enforceability of rights conferred by the Convention in a national court or independent tribunal[79] and guarantees of due process in challenges related to national environmental laws.[80]

This last provision is very similar in form to Article 6(1) of the European Convention of Human Rights; in effect reaffirming the applicability of already guaranteed fundamental procedural human rights in the context of environmental matters.[81]

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[74] *The Rio Declaration supra* note 10, at princ. 10. It goes on to mention: "At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[75] *Convention on Environmental Impact Assessments in a Transboundary Context*, *entry into force September 10, 1997,*Art 2(2), 1989 U.N.T.S. 309 *available at* http://www.unece.org/env/eia/eia htm#article4 [hereinafter *CEIATB*]; *ITPGRe*, *supra* note 52, at art. 9.2(c); *Convention to Combat Desertification in those Countries Experiencing Serious Drought or Desertification, Particularly in Africa*, *entry into force* Dec. 26, 1996, pmbl., art. 3, 5(d), 10, 17(f), 18(2), 19, 21, Annex I, II, III, IV, *available at* http://www.unccd.int/convention/text/convention.php [hereinafter *CDD*]; *CBD supra* note 63, pmbl., art. 14; *Aarhus Convention supra* note 31; *Council of Europe Convention on Civil Liability for Activities Dangerous to the Environment "Lugano Convention," open for signature June 21, 1993,* art. 14-16; *North American Agreement on Environmental Co-operation*, November, 1993 Can-Mex.-USA, Art. 6 (giving persons with a legally recognized interest" the right to bring proceedings to enforce environmental laws and remedy harms), Art. 7 (providing for due process in these proceedings) Arts. 13 and 14 (providing for both individuals and NGOs to complain to the secretariat that a state party is not following its legislation), (there is, however no provision in the document guaranteeing access to information and participation in decision-making), 32 I.L.M. 1480, *available at* http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english [hereinafter *NAAEC*].

[76] *The Aarhus Convention supra* note 31, at pmbl.

[77] *See id.* generally.

[78] *Id.* at art. 3(9).

[79] *Id. at* art. 9.

[80] *Id.*

[81] *European Convention supra* note 40, at art. 6(1). *See also International Law Association, Pre-Conference Report of the Committee on Transnational Enforcement of Environmental Law*, New Delhi Conference 2002, *available at* http://www.ila-hq.org/pdf/Transnational%20Enforcement%20of%20Environmental%20Law/Transnational%20Enforcement%20of%20Environmental%20Law%202002.pdf (describing the proliferation of national legislation and EC directives similar to US Freedom of Information statutes).

At the level of state practice, the legislation of many nations, as well as European Community Directives, guarantee rights to information similar to those embodied in the United States Freedom of Information Act.[82] Additionally, as of 1995, an estimated 86 countries had enacted legislation requiring environmental impact assessments, which generally provide some level of public participation and notification.[83]

The last ten years have seen an increase in provisions for procedural rights of peoples affected by projects of multilateral development banks. Beginning with the World Bank in the late 1980s, the various banks have devised slightly differing policies on environmental impact assessments involving local participation and consultation;[84] on indigenous peoples requiring consultation,[85] and on involuntary resettlement policy, which in the case of the World Bank requires the borrowing government to give land for land exchange.[86] The level of enforcement of these policies, however, makes their significance questionable.

In 1994, the World Bank also established an Inspection Panel to hear complaints from people affected by projects of the International Development Association and International Bank for Reconstruction and Development. The Panel allows for affected people to essentially bypass their national government ministries and appeal directly to the lending institution. Unfortunately, while the Panel has been reasonably effective in promoting internal reform at the Bank, it has not been so effective in remedying situations presented to it.

The International Finance Corporation (IFC) established the position of Ombudsman and Compliance Advisor during 2000. The Ombudsman is empowered to receive direct complaints from affected peoples, but has greater flexibility in the types of remedies it can fashion as well as the sources from which it can draw, which presumably include international human rights norms. Enforcement mechanisms at the regional banks are either non-existent or ineffective, though there is continuing effort at reform, particularly at the Asian Development Bank.[87]

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[82] *See* International Law Association *supra* note 81, at 9.
[83] *See* Erika L. Preis, *The International Obligation to Conduct an Environmental Impact Assessment,* 7 N.Y.U. Envtl. L.J. 307, fn 40 (1999).
[84] *See e.g.* World Bank, *Operations Policy 4.01 (OP 4.01) Environmental Assessments* (Jan, 1999).
[85] *See e.g.* World Bank, *Operations Directive 4.20 (OD 4.20) Indigenous Peoples*.
[86] *See e.g.* World Bank, *Operations Policy 4.12 (OP 4.12) Involuntary Resettlement,* (Jan, 2002), princ. 9, et seq.
[87] Asian Development Bank "Inspection Function", *available at* http://www.adb.org/Documents/Guidelines/Inspection/inspect260.asp; *see also* http://www.adb.org/NGOs/ngocenter.asp; Inter-American Development Bank "Independent Investigation Mechanism", available at http://www.iadb.org/cont/poli/investig htm; African Development Bank, *Environment and Social Assessment Procedures for Public Sector Operations,* (June, 2001), International Finance Corporation, *Environmental and Social Review Procedure* (1998); European Bank for Reconstruction and Development, *Environmental Mandate, Revised* (1996), *available at* http://www.ebrd.com/about/policies/enviro/policy/main htm.

On the issue of access, both the WTO Appellate Body and the International Centre for the Settlement of Investment Disputes (ICSID) arbitration panels have shown some willingness to entertain comments from a wider range of stakeholders. In a significant case regarding environmental standards in the United States, the WTO Appellate Body upheld a domestic US law that banned imports of shrimp harvested in ways that were unduly harmful to turtles; prior to its decision, the appellate body agreed for the first time to receive *amicus* briefs from NGOs.[88] Similarly, an ICSID arbitration panel convened to adjudicate a complaint by a Canadian chemical producer that a California order banning the sale of gas containing MTBE[89] violated the North American Free Trade Agreement (NAFTA) provisions. Over strenuous protestations of the Mexican government and the private party directly involved, the panel held that the board was free to accept *amicus* briefs from NGOs.[90]

These developments within international institutions are another indication of a growing global consensus regarding certain fundamental rights to public participation in environmental and human rights matters. They establish supra-national mechanisms by which a so-far limited number of local peoples can enforce their rights as independent or collective subjects of international law. In order to create an effective enabling environment for more voices to be heard and amplified, however, individual and community participation, as a broad-based political and legal phenomenon needs to be more clearly provided for and enforced.

III. OBSTACLES AND RECOMMENDATIONS

Obstacles

The UN Conference on Environment and Development (Earth Summit) in 1992 highlighted the severity of the global environmental crisis, urged restraint on consumption and waste, and helped initiate better North-South dialogues. Despite a decade of effort by governments, businesses and civil society, and large expenditures of financial resources, far too little has been achieved in tangible terms.

On the eve of the World Summit on Sustainable Development in Johannesburg, the overall global situation has deteriorated on several environmental, human rights, and developmental fronts. The ideals and benefits of sustainable development and environmental justice remain a distant reality for billions of the world's citizens. The reasons are varied and multifaceted and include an array of obstacles that have yet to be overcome.

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[88] *See e.g.* World Trade Organisation: *Report of the Panel on United States-Import Prohibition of Certain Shrimp and Shrimp Products "Shrimp Turtle,"* 37 I.L.M. 832 (May 15, 1998), *description available at* http://seattlepi.nwsource.com/business/case1.shtml.

[89] Methyl tertiary-butyl ether.

[90] *For more information see* http://www naftaclaims.com/. The NAFTA Citizen Submissions on Enforcement Matters Mechanism is described at http://www.cec.org/citizen/index.cfm?varlan=english.

The obstacles merit more in-depth identification and analysis.[91] Some obvious ones, among others, include: differences in perceptions and needs between the Global South and the industrialized North; the growing preoccupation with market strategies; the rise of corporate globalization, including increasing control over mass media; growing disparities in income, wealth, and educational opportunities; widespread corruption; and over-consumption.

Among the foremost challenges are enduring prejudices that divide us. These prejudices are often reflected in and reinforced by excessive nationalism. The ideology of nations and nationalism continues to be strengthened in many political, social, environmental, and economic spheres of life. Nationalism, however, can be a barrier to the realization of a globally shared sense of purpose and responsibility, especially when "competitive nationalism" becomes the modus operandi of governments and citizens.

National sovereignty has been eroded in many respects by the growing trend of corporate globalization, including dramatic increases in international flows of private capital and the sheer size and scope of multinational corporations. Yet some nations remain much more powerful than others, and they strive in various ways to maintain and enhance their power and privileges, including, on occasion, intentionally inflaming prejudice and inter-ethnic tensions. The unilateralism and militarism exhibited by certain nation-states in the past and present are evidence of such unhealthy tendencies.

The lack of gender sensitivity and the failure to pay adequate attention to the rights and needs of women results in women being frequently overlooked in decision-making processes, including those related to natural resources. This led to the reiteration at the Beijing conference[92] that "women's rights are human rights."

Women also tend to bear a disproportionate burden of environmental and natural resource degradation, especially in societies where they are responsible for collecting firewood and water, and providing food for the family. Deforestation, water pollution and resource scarcity result in women having to walk longer distances and working much harder to collect life-sustaining resources for their families. Environmental justice, therefore, has a particular significance for women.

Other very divisive and difficult obstacles are prejudice and discrimination based on skin color, ethnicity, religion, and national origin. These remain formidable barriers to the realization of a globally shared sense of purpose, responsibility, and future. Too frequently, they cause us to forget or fail to appreciate fully the simple fact that we human beings comprise one species on an environmentally fragile planet.[93] Despite some

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[91] CIEL is conducting research and analysis on these and other obstacles towards realizing sustainable development and environmental justice. Comments and suggestions are welcomed.

[92] The United Nations Fourth World Conference on Women, Beijing, 1995. *For more information see supra* note 19.

[93] Insights being generated by research on genetics and DNA corroborate this by demonstrating that there is no gene unique to one so-called race or another, no set of traits that define a particular ethnic group, and that as a species human beings are more or less genetically homogenous. Paradoxically, research on human

positive trends in the twentieth century, prejudice and related discrimination still pose a great global threat to achieving true environmental justice and sustainable development.

Recommendations

Attaining sustainable development in a broad-based and structural manner will require much greater focus on efforts to attain environmental justice. This focus must entail specific actions, including the development of laws, policies, procedures, programs, and projects that strive to harmonize and integrate natural resource protection and management initiatives with efforts focused on promoting equitable and wise use of the natural environment.

The close and profound relationships that many local communities share with the environment must be respected and recognized. This will require creating holistic and integrated approaches that include the meaningful participation of directly affected individuals and constituencies, while simultaneously promoting rights to information and transparency.

New paradigms to address current problems must likewise reflect sensitivity to gender issues and differences in language and culture. Similarly North-South sensibilities need to be taken into consideration, and attempts to reach fair and mutual decisions merit greater support. This involves efforts aimed at building trust and establishing transparent communication channels. Strengthening the independence of the media and providing more diverse and balanced reporting is crucial in this endeavor.

Encouraging sustainable lifestyles in overly consumptive societies is an absolute imperative to ensuring that we achieve levels of development that can support the Earth's current and future populations and equitably address growing inequalities in material wealth and human well-being.

With the rise of corporate globalization and the dominance of free-market ideology, measures to enforce accountability of corporations, international financial institutions, donor agencies, and private individual investors need to be strengthened and enforced,[94] especially since voluntary observance of such norms has proven inadequate.[95] With

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genetics and DNA has been severely criticized as being unethical and discriminatory in its approach. *See e.g.* US National Human Genome Research Institute's homepage at http://www.genome.gov/.

[94] So far, only two international procedures exist that can directly scrutinize the degree to which companies are respecting human rights. These are the implementation principles of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1977, OB Vol. LXI, 1978, Series A, No. 1, *available at* http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/triparti htm, and the OECD Guidelines for Multinational Enterprises, *available at* http//:www.oecd.org/daf/investment/guidelines/. Though officially endorsed by governments, they rely on the voluntary cooperation of multinationals and remain rather weak.

[95] The growing concern regarding corporate accountability is reflected in the Preamble to the Draft UN Fundamental Human Rights Principles for Business Enterprises which states that ". . . transnational corporations and other business enterprises, their officers, and their workers are further obligated directly or indirectly to respect international human rights and other international legal standards." *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises*, February

specific regard to environmental justice, the performance of these institutions must be measured and monitored in terms of adherence to human rights and environmental standards. This includes global institutions such as the World Trade Organisation.

With the strengthening of international financial institutions and corporate power, civil society needs, more than ever before, to network and coalesce its efforts towards promoting democracy, environmental justice, and sustainable development. Governmental and inter-governmental agencies need to work closely with and understand the needs, demands, and struggles of local communities and civil society institutions striving to amplify their voices. The World Summit on Sustainable Development provides an excellent venue to learn, network and coalesce, and to take steps towards these objectives.

Developments in international and national law during the past sixty years have created some spaces for promoting sustainable development and environmental justice. Despite these and other positive developments, much more remains to be done. Throughout much of the world, environmental degradation continues to worsen, and in many places human and environmental rights continue to be violated.

Legal rights can help advance the cause of human rights, but they are not guarantees for the attainment of environmental justice and sustainable development. Legal rights need to be supported by accessible procedures, as well as good governance, political will, and effective implementation.

The strengthening and promotion of a rights-based approach to sustainable development deserves concentrated attention and efforts by all actors. Such an approach would serve to reinforce human rights principles of non-discrimination, gender-equality, non-retrogression, and the right to remedy. UN Secretary-General Kofi Annan in his 1998 Annual Report on the Work of the Organization said: "the rights-based approach describes situations not simply in terms of human needs, or of development requirements, but in terms of society's obligations to respond to the inalienable rights of individuals." It is only by shifting the current focus from a market-based approach to a rights-based one, that some hope for sustainability and justice can be upheld. Existing trends in international law serve to affirm this.

We are but one species living on Earth, albeit a very special one. The sooner we realize and better respond to our common humanity and integrate a deeper understanding and appreciation of this simple truth into our actions, the sooner we will be able to achieve environmental justice and sustainable development.

2002 for discussion in July/August 2002, U.N. Doc. E/CN.4/Sub.2/2002/XX, E/CN.4/Sub.2/2002/WG.2/WP.1, *available at* http://www.business-humanrights.org/UN-Draft-Principles.htm.

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