



**SUSTAINABLE DEVELOPMENT CONCERNING  
SOCIOECONOMIC RIGHTS:  
A DUTY TOWARDS FUTURE GENERATIONS?  
AN INTERNATIONAL HUMANITARIAN LEGAL RIGHT FOR  
FUTURE GENERATIONS**

Beatriz Esperança<sup>1</sup>

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## **Abstract**

The notion of sustainable development, in international law, is already vastly known, mainly as a principle of environmental international law. Nonetheless, there are still some major questions that must be addressed: is it, or will it ever be, a legal, justiciable principle of international law? What is it, specifically, composed by? In which terms does it surpass the environmental dimension? In the analyses of these questions, this article will procure to clarify the different dimensions of sustainable development, specifically in its socio-economic dimension, its direct connection to future generations in terms of intergenerational equity and the application of this principal in international and national courts.

**Key words:** sustainable development - international public law - socioeconomic rights - future generations.

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<sup>1</sup> Beatriz Esperança,  
Research Assistant  
Lisbon Centre for Research in Public Law  
[beatriz.v.esperanca@gmail.com](mailto:beatriz.v.esperanca@gmail.com)

# INTRODUCTION

The following article provides an overview of the link among sustainable development, socio-economic rights and future generations. It explains how all of these are inextricably intertwined and might culminate in a legal duty towards the protection of future generations.

These are three concepts immersed in controversy regarding their legal dimension: Firstly, sustainable development is regarded by several international legal scholars with negativity; Secondly, economic, cultural and social rights are still interpreted by many as merely second generation rights in comparison with civil and political rights, being considered obligations of means instead of result, which retards their process of implementation. Thirdly, the protection of future generations is hidden amongst several different legal debates, as to the extent of the question on how can we protect those who do not yet exist.

Disregarding these obstacles, it is already undisputable that intergenerational solidarity is installed in the global political and social agenda, having been referred to several times by supranational organizations such as the United Nations and the European Union. Apart from this, there has been an increase of legal scholars and case law stressing the importance of protection of future generations, although they tend to bound their concern to the environmental issue<sup>2</sup>. This text will explore the other two dimensions, social and economic, and emphasize their relevance in the development of protection of future generations. In order to pursue this goal the article will be divided into mainly three parts: The first chapter provides a brief explanation of the concept of sustainable development, following its subdivision into various dimensions – taking into account, specially, its socio-economic strand. The second chapter will address the fact that is more than an “ethical imperative”, being stated in several international instruments and “inferred”, in its various dimensions, from legally binding rights and duties. Lastly, a few examples of case law will be mentioned in order to demonstrate how the concept can be applied in practice.

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<sup>2</sup> PHILIPPE SANDS, as an example, subdivides the definition of sustainable development into four points which connect it to the need of preservation of natural resources, the sustainable exploitation of natural resources, the equitable use of these resources and the integration of environmental considerations into development plans. PHILIPPE SANDS, *Principles of International Environmental Law*, Cambridge, 2<sup>nd</sup> Edition, p. 253.

# 1. CONCEPT OF SUSTAINABLE DEVELOPMENT

One must start by answering the questions of (i) what is sustainable development, (ii) whether it has any legal meaning behind it and (iii) what it means in terms of human rights implementation. In the present article these points will be addressed in specific connection to the rights of future generations

The most common definition regarding sustainable development is the one from the report of the World Commission on Environment and Development with the title *Our Common Future*, as “development which meets the needs of the present without compromising the ability of future generations to meet their own needs”<sup>3</sup>. Through this definition we can already assert how different aspects of society are intrinsic to the concept, specifically in terms of poverty. This is done through the interpretation of the term “need”, which may easily relate to economic and equitable technological development; and the idea of the existence of a limit to the satisfaction of today’s population needs, which remounts to the environmental dimension of the concept.

It was in the Johannesburg Declaration on Sustainable Development that sustainable development was stated as a combination of three pillars: economic development, social development and environmental protection.<sup>4</sup>

Sustainable development could be regarded as a legal sphere of allocation. It is a main principle which generates further rights which then more extensively gives rise to more specified rights. We could resume this simply by stating that there is **one** main principle: sustainable development, briefly described as an equitable and rational balance between every resource,<sup>5</sup> which then divides into three main areas: Society; Economy and Environment, which then further subdivide into a great vast of specific rights.

The balancing of the rights in questions is, without a doubt, not an easy task. It can be followed in several different ways – there is no scientific method for the implementation of this principle. The challenge with sustainable development is, precisely, the challenging implementation of a three-dimensional lens from which to see the world.<sup>6</sup>

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<sup>3</sup> Our Common Future: Report of the World Commission on Environment and Development, in Oxford University Press, A/42/427,1987.

<sup>4</sup> Johannesburg Declaration on Sustainable Development, in World Summit on Sustainable Development, A/CONF.199/20 , 2002, §5.

<sup>5</sup> Our definition.

<sup>6</sup> SHERRI TORJMAN, *The Social Dimension of Sustainable Development*, Caledon Institute of Social Policy, May, 2000, p. 2. Available at: <http://www.caledoninst.org/publications/pdf/1-894598-00-8.pdf>

## 1.1 Sustainable development in international law – its legal meaning

Sustainable development cannot be regarded as mere ethical imperative. It is an emerging principle of international law, as it was not yet recognized by the ICJ as a main imperative and it is still mostly referred to in soft law instruments. Nonetheless, as it will be analyzed with greater detail further ahead, not only certain legal imperative rights, prescribed in international and national instruments, are a derivation from this principle, in any of its three aspects, as well as that there is already a traced path to the acclamation of this principle.

First of all, the principle of sustainable development is stated in several international instruments, at both the international and the regional level. We find early writings regarding the close connection between nature preservation and economic development, which is the central idea of sustainable development, in the 18th and 19th centuries. The modern understanding of the concept though, and its recognition at the International Community level, is largely the result of a vast UN-led promotion operation.<sup>7</sup> This operation officially started in 1972 with the Stockholm Conference on the Human Environment, which refers to the balance between the environmental protection and the economic development, explaining that in order to provide the maximum benefit to the people, the States should integrate economic development with protection of the environment.<sup>8</sup> The legal dimension of the principle was marked by the 1992 Rio Conference on Environment and Development and its famous Declaration of Principles<sup>9</sup>, seeing that the principles are expressed in these documents in strong legal terms.<sup>10</sup> In this Declaration it is stated, in Principle 27: *States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.*

Still, PHILIPPE SANDS explains that the content of the concept given through the existing legal documents is not explicitly clarified, leaving one to wonder whether we are facing a procedural or substantive right<sup>11</sup>. Close after the Rio Declaration, a group of

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<sup>7</sup> VIGINIE BARRAL, *Sustainable Development in International Law: Nature and Operation of an Evolutionary Legal Norm*, The European Journal of International Law, vol. 23, no. 2, p. 379.

<sup>8</sup> Stockholm Declaration on the Human Environment, A/CONF.14/48/Rev. 1.

<sup>9</sup> Report of the United Nations Conference on Environment and Development - Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), 1992. Principle 1: *Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*

<sup>10</sup> See principles 2–7, 10, 11, 13, 15, 17–19 and 27.

<sup>11</sup> PHILIPPE SANDS, *International Courts and the Application of the Concept of Sustainable Development*, Max Planck Yearbook of United Nations Law 389, p. 389, available at: [http://www.mpil.de/files/pdf2/mpunyb\\_sands\\_3.pdf](http://www.mpil.de/files/pdf2/mpunyb_sands_3.pdf).

independent legal experts procured to enlighten its content by analyzing legal international instruments, as well as state's practice. They concluded: *The concept of "sustainable development" is now established in international law, even if its meaning and effect are uncertain. It is a legal term which refers to processes, principles and objectives, as well as to a large body of international agreements on environmental, economic and civil and political rights.*<sup>12</sup>

The third pillar of sustainable development, the *social* one, was added into the equation in 1997 and Rio + 5 through a statement by the General Assembly, specifically that *economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development.*<sup>13</sup> This idea was later continued in the Johannesburg Declaration on Sustainable Development<sup>14</sup>. Apart from these, there are still several other documents that can be mentioned<sup>15</sup>, from International treaties to Declarations of States and Resolutions of International organizations. The development of this principle has increased rapidly over the last 20 to 30 years, which is still a relatively short time in terms of international law. One can conclude, though, that the sense of *obligation* is increasing, seeing that the understanding of the same as a *legal* concept is developing as well. Not only in "paper", but also in case law, which will be addressed further ahead.

Secondly, it has already played a major role in a few cases discussed at the ICJ, such as the *Gabcikovo-Nagymaros*, in which it was described as *a need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development*<sup>16</sup>. Apart from this, the principle has also been regarded as a principal of customary law in dissenting opinions, specifically by the famous judge Weeramantry, following the courts' decision of the mentioned case.<sup>17</sup>

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<sup>12</sup> From the Report of the Consultation on Sustainable Development: The Challenge to International Law review of the European Community of International Environmental Law 3 (1994), quoted by PHILIPPE SANDS, *ibidem*.

<sup>13</sup> General Assembly Resolution, S-19/2, *Programme for the Further Implementation of Agenda 21*, A/RES/S-19/2, 1997, paragraph 23.

<sup>14</sup> Johannesburg Declaration on Sustainable Development, *op.cit.* Of particular relevance one can quote the following paragraph, § 5 "we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection (...)"

<sup>15</sup> As a few examples: 1987 Brundtland Report, *op. cit.*; General Assembly Resolutions, such as GA Resolution number 66/288, Rio + Conference "future we want", 1992, UNCED; Johannesburg Declaration and Johannesburg Plan of Implementation; Earth Summit +5; Agenda 21 - Global Programme of Action on Sustainable Development; Statement of principles for the Sustainable Management of Forests; Declaration of Barbados and the Programme of Action for the Sustainable Development of Small Island Developing States; Declaration of the United Nations Conference on the Human Environment (1972); The Dublin Statement on Water and Sustainable Development; Declaration on the Responsibilities of the Present Generations Towards Future Generations; International Law Association New Delhi Declaration on Principles of International Law related to Sustainable Development.

<sup>16</sup> Decision of the International Court of Justice on the case *Gabcikovo-Nagymaros Dam*, 25.09.1997, Hungary v Slovakia, in I.C.J. Rep., 37 I.L.M., 1998, para. 162.

<sup>17</sup> Judge WEERAMANTRY's separate opinion to the 25 September 1997 judgment of ICJ, available at: <http://www.icj-cij.org/docket/files/92/7383.pdf>.

## 2. SUSTAINABLE DEVELOPMENT AND FUTURE GENERATIONS

Now, what does sustainable development have to do with future generations? The answer is simple: everything.

According to the classical definition from the Brundtland report already presented, development is sustainable if *it meets the needs of the present without compromising the ability of future generations to meet their own needs*.<sup>18</sup>

One of the main concerns among the concept of sustainable development in an international dimension is the matter of *exportation of unsustainability*. Environmental, social and economic decision of one State will spill over impacts to all other States. In international law, this falls under the *prohibition of causing transboundary harm*<sup>19</sup>. This exportation of unsustainability can also occur not only between countries, but between generations. There is a conflict of interests between the desires of today's populations and those of tomorrows, seeing that they, for an obvious existential reason, are not allowed to vote or raise their voice in the actions of the current living decision makers. As the World Bank explains *our present day values must be educated enough to reflect their interests as well*.<sup>20</sup>

The Declaration on the Responsibilities of the Present Generations Towards Future Generations<sup>21</sup> recognized that the present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded. It stressed the importance of making every effort to ensure, with due regard to human rights and fundamental freedoms, that future as well as present generations enjoy full freedom of choice as to their political, economic and social systems and are able to preserve their cultural and religious diversity.

We can find these definitions as well in some national legal systems. Two examples are the German and the Norwegian Constitutions. According to article 20 (a) of the first one, the German Constitution is *mindful also of its responsibility toward future generations* and there is a state responsibility *to protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*. It has been argued that this is an

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<sup>18</sup> Brundtland Report, *op. cit.*

<sup>19</sup> PHILIPP SANDS, *Principles of International Environmental Law*, 2nd edition, Cambridge University Press, 2003, p. 250.

<sup>20</sup> TATYANA P. SOUBBOTINA, *Beyond Economic Growth, an introduction to sustainable development*, 2<sup>nd</sup> edition, WBI Learning Resources Series, p. 10.

<sup>21</sup> General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), Paris, 1997.

implicit reference to the **constitutionalization** of sustainable development in German law<sup>22</sup>. The Norwegian Constitution implicitly makes a reference to the concept in Article 110b, *Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.*<sup>23</sup>

Sustainable development is often connected to the *seventh generation principle*, of Native American origin, which explains that every decision we take must take into account its possible effects on our descendants seven generations in the future. This was codified in the *Iroquois Great Law of Peace*. The main goal is that future generations do not have to suffer from the passing on of negative externalities<sup>24</sup>, from social as well as environmental background.

### 3. SOCIO-ECONOMIC DIMENSION OF SUSTAINABLE DEVELOPMENT – THE RELEVANCE OF SUSTAINABLE DEVELOPMENT ON HUMAN RIGHTS IMPLEMENTATION

There is yet a lack of doctrine concerning the social and economic<sup>25</sup> dimension of sustainable development since most connect it to the environmental pillar<sup>26</sup>. Judge Weeramantry from the ICJ, in his dissenting opinion of the *Gabcikovo-Nagymaros Case*<sup>27</sup> describes it as an *intervening principle*, mediating between the application of the right for development and the right for environmental protection.<sup>28</sup>

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<sup>22</sup> CHRISTINA VOIGT, *Sustainable Development as a Principle of International Law, Resolving Conflicts between climate measures and WTO Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2009, p. 23.

<sup>23</sup> *ibidem*

<sup>24</sup> INES OMANN/JOACHIM H. SPANGENBERG, *Assessing social sustainability, The Social Dimension of Sustainability in a Socio-economic scenario*, Sustainable Europe Research Institute SERI, presented at the 7th Biennial Conference of the International Society for Ecological Economics“ in Sousse (Tunisia), 6-9 March 2002, p. 2.

<sup>25</sup> Social and economic rights are amongst the so-called “third generation” of human rights, or “solidarity” rights, which relate to a collective responsibility for the realization of human rights. The traditional difference between civil and political rights and social, economic and cultural rights deals with the fact that the first ones do not require the use of State resources to be implemented whereas the second ones do, but this distinction is now mostly obsolete.

<sup>26</sup> For more on this point: KEVIN MURPHY, *The social pillar of sustainable development: a literature review and framework for policy analysis*, available at:

[http://sspp.proquest.com/static\\_content/vol8iss1/1008-041.murphy.pdf](http://sspp.proquest.com/static_content/vol8iss1/1008-041.murphy.pdf).

<sup>27</sup> Judge WEERAMANTRY’S separate opinion, *op. cit.*

<sup>28</sup> AGGARIN VIRIYO, *Principle of Sustainable Development in International Environmental Law*, p. 6: available at <http://ssrn.com/abstract=2133771>

Nonetheless, the analysis of every dimension of sustainable development is of extreme importance, since all of them, on its own, are necessary preconditions for obtaining the objectives of the other two amongst the sustainability paradigm<sup>29</sup>. From a sociological and economic perspective, this aspect of sustainable development is usually regarded as a fight against poverty and of assuring life quality. M. B.M. ALJAHJI describes the second sphere of sustainable development as a means of poverty alleviation<sup>30</sup>. At the declaration *Our Common Future* it was stated that *Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life.*<sup>31</sup> In the Millennium Declaration States recognized that in order to pursue the right to development it is necessary to *create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty.*<sup>32</sup>

A further evidence of the great importance of the socio-economic dimension is that in the Rio + 20 Conference from 2012, the World Leaders decided to give a key role to the Economic and Social Council (ECOSOC) to balance the integration of the three pillars of sustainable development.<sup>33</sup>

As result, ECOSOC plays a dominant part in what it considers to be the building blocks of sustainable development, namely “Energy; Food Security and Nutrition; Natural resource management; Poverty eradication; Sustainable Urbanization and Water”. These ideas are also implicit, as further example, in EU’s goals in terms of sustainable development, which involve “Climate change and Clean energy; Sustainable Transport; Sustainable Consumption & Production; Conservation and Management of Natural Resources; Public Health; Social Inclusion, Demography and Migration and Global Poverty and Sustainable Development challenges.”

There are those who divide this second and third sphere of sustainable development into social and institutional sustainability<sup>34</sup>. Whereas social sustainability would involve personal aspects such as education, skills, experience, consumption, income and employment, institutional sustainability would deal with interpersonal processes like democracy and participation (institutional mechanisms), distributional and gender equity (institutional orientations) or independent and pluralistic sources of information (organizations).<sup>35</sup>

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<sup>29</sup> INES OMANN/ JOACHIM H. SPANGENBERG, *op. cit.*

<sup>30</sup> AGGARIN VIRIYO, *op. cit.*, footnote 2.

<sup>31</sup> Brundtland Report, *op. cit.*, § 16.

<sup>32</sup> United Nations Millennium Declaration, General Assembly Resolution 55/2, UN GAOR, 55th Session, Supp. No. 49, at p. 4, UN Doc. A/55/49 (2000), at para. 12..

<sup>33</sup>As described in the webpage of the United Nations Economic and Social Council, available at: <http://www.un.org/en/ecosoc/about/sustainable.shtml>.

<sup>34</sup> INES OMANN/ JOACHIM H. SPANGENBERG, *op.cit*, p. 2.

<sup>35</sup> *Ibidem*.

The question one must now put is, how can these presented goals be transformed into legal imperatives?

UNDP has adopted a specific policy on human rights: Integrating Human Rights with Sustainable Human Development. A rights-based approach focuses on the conciliation between the two stakeholder groups in question: the right-holders and the duty bearers – the institutions obligated to fulfilled the holders’ rights<sup>36</sup>. The goal is to strengthen the capacity of the duty-bearers and empower the rights holders. Human rights and institutional responsibilities are regarded in terms of empowerment, accountability and capacity development. These are the core elements to the human rights based approach to development. In terms of the same approach applied to *sustainable* development one can expand it by integrating the pillars of economic, social and environment.<sup>37</sup>

The principle of sustainable development, legally speaking, can be inferred, in its *socio-economic dimension* from different international legal frameworks. The relationship between sustainable development and human rights can be found within the UN Commission on Human Rights which, in 2003, [r]eaffirm[ed] that *peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity are essential for achieving sustainable development and ensuring that sustainable development benefits all, as set forth in the Plan of Implementation of the World Summit on Sustainable Development*.<sup>38</sup>

In order to explore the practical implications of this one must start by analyzing the sub-principles that derive from the principle of sustainable development and, secondly, specific *imperative* rights that develop from these sub-principles.

### **3.1 Sub-principles that derive from this sphere**

This sphere of sustainable development firstly divides into a few sub-principles. In order to find the necessary principles one can recall the International Law Association

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<sup>36</sup> More about this topic can be found under the United Nations Development Group website, namely: [http://www.undg.org/content/programming\\_reference\\_guide\\_\(undaf\)/un\\_country\\_programming\\_principles/human\\_rights-based\\_approach\\_to\\_development\\_programming\\_\(hrba\).](http://www.undg.org/content/programming_reference_guide_(undaf)/un_country_programming_principles/human_rights-based_approach_to_development_programming_(hrba).)

<sup>37</sup> SUSTAINABLE CAPACITY INTERNATIONAL INSTITUTE (SCII), available at: <http://www.sciinstitute.org/capacity.html>

<sup>38</sup> BERLIN CONFERENCE 2004, *International Law on Sustainable Development*, International Law Association, footnote 23: “UN Commission on Human Rights (Resolution 2003/71) (‘Human rights and the environment as part of sustainable development’) para. 1”.

New Delhi Declaration<sup>39</sup> from April 2002 regarding Principles of International Law Relating to Sustainable Development. This declaration in itself does not have any binding legal value, nonetheless, the Declaration was composed through committee work from several prominent international lawyers whose doctrine is a complementary source of international law.<sup>40</sup> The New Delhi Declaration constitutes an attempt to codify the area of international law related to sustainable development and it can be regarded as a secondary source of secondary law. The Declaration, regarding sustainable development as a primary concern of humanity, places human rights in the center of the concept.<sup>41</sup>

Mainly, the relevant principles in question, regarding the social and economic dimension of sustainable development, are those of (i) **equity and poverty eradication**; the principle of (ii) **good governance**, the (iii) **The principle of public participation and access to information and justice** and the (iv) **principle of integration and interrelationship**. The principles of equity and poverty eradication refer both to intergenerational equity and intra-generational equity.

The principle of equity and poverty eradication (i) finds its roots immediately on the preamble of the UN Charter<sup>42</sup> where one of the goals mentioned is the promotion of *social progress and better standards of life in larger freedom*. Its impact on sustainable development derives from the already mentioned report *Our Common Future*<sup>43</sup>. In the conclusions of this report it is stated that there should be given *overriding priority to the concept of needs, in particular the essential needs of the world's poor*<sup>44</sup>. This principle was further stressed at the 2002 World Summit on Sustainable Development

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<sup>39</sup> The ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2.04.2002, is based on seven core principles:

- 1) The duty of States to ensure sustainable use of natural resources;
- 2) The principle of equity and the eradication of poverty;
- 3) The principle of common but differentiated responsibilities;
- 4) The principle of the precautionary approach to human health, natural resources and ecosystems;
- 5) The principle of participation and access to information and justice;
- 6) The principle of good governance; and
- 7) The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

<sup>40</sup> GYULA BÁNDI/ MARCEL SZABÓ, ÁKOS, SZALAI *Sustainability, Law and Public Choice*, Europa Law Publishing, Groningen, 2014, p. 13.

<sup>41</sup> *ibidem*

<sup>42</sup> Charter of the United Nations, signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, entered into force on 24 October 1945.

<sup>43</sup> J. HEPBURN/ A. KHALFAN, *The Principle of Equity and the Eradication of Poverty, A Legal Working Paper in the CISDL "Recent Developments in International Law Related to Sustainable Development" Series*, March, 2005, p. 3.

Available

[http://www.worldfuturecouncil.org/fileadmin/user\\_upload/papers/CISDL\\_P2\\_Equityetc.pdf](http://www.worldfuturecouncil.org/fileadmin/user_upload/papers/CISDL_P2_Equityetc.pdf)

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<sup>44</sup> Brundtland Report, *op. cit.*, § 4.

and in Chapter II of the Johannesburg Plan of Implementation.<sup>45</sup>

The principle of good governance (ii) doesn't have a fixed definition which is an aspect that contributes to its application in practice. Good governance is linked to the way public institutions conduct political choices, taking into account specifically the correct application of socio-economic rights<sup>46</sup>. Under this principle one can mention the adoption of transparent and democratic decisions, the respect of human rights and the rule of law in procedural matters and the insurance of financial accountability.

The principle of public participation and access to information and justice (iii) is crucial to sustainable development. Through this principle a fair access to public opinion is ensured in the implementation of sustainability measures, as well as a future access to justice in case of a misapplication of these measures. Relevant international documents on this principle are the 989 Convention concerning Indigenous and Tribal Peoples in Independent Countries<sup>47</sup>; Principle 10 of the Rio Declaration; Agenda 21<sup>48</sup> and Aarhus Convention <sup>49</sup> developed by the United Nations Economic Commission for Europe .

The principle of integration and interrelationship (iv) is perhaps the core concept of sustainable development, since it refers to the adequate balance that must be ensured by societies in the prosecution of all three pillars of sustainable development. It is the principle that regards sustainable development as the whole of international and national legal norms, thriving to reach the same purpose.

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<sup>45</sup> J. HEPBURN/ A. KHALFAN, *ibidem*. In this document there is the following description of poverty: *Poverty has various manifestations, including lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characteri[s]ed by a lack of participation in decision-making and in civil, social and cultural life.*

<sup>46</sup> More Information can be available on the website of the Office of the High Commissioner for Human Rights:

<http://www.ohchr.org/en/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>.

<sup>47</sup> Specifically Article 15, Indigenous and Tribal Peoples Convention, 1989.

<sup>48</sup> Agenda 21, Report of the United Nations Conference on Environment and Development, in A/CONF.151/26 (Vol. I-III), 1992, §§ 8.3 (d), 8.4 (e) and 23.2.

<sup>49</sup> The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 25.06.1998.

After the New Dehli Declaration there was another meeting in Sofia, by ILA, which procured to create a more precise guide of these principles.<sup>50</sup> The wording of this second document interprets sustainable development as part of *jus cogens*, as it is stated in Art. 2<sup>51</sup>. Also, it is not only a principle, but a corollary to the application of other relevant international legal principles, since *treaties and rules of customary international law should be interpreted in the light of principles of sustainable development*.

### **3.2 Written proclamation of these principles: the rights**

As we can conclude from the previous points, sustainable development is a principle that is applied through the correct implementation of further principles and concrete legislation. It is not only inferred from these rights, but is deduced from them.

In this point a few examples of rights which are *legal imperatives* and directly remount from the concept of sustainable development will be analyzed.

#### **3.2.1 The principle of sustainable development and the Covenant on Economic, Social and Cultural Rights**

The direct connection between Sustainable Development and Human Rights Law can be inferred from the rights themselves distributed through various documents. An instrument of great importance, directly related to the principle of equity and poverty eradication, is the International Covenant on Economic, Social and Cultural Rights.<sup>52</sup> The Covenant refers to rights that fall under the scope of the socio-economic dimension of sustainable development, such as the rights to health, education, development, food, water and housing. All of these have a direct implication on the combined analysis of sustainable development with future generational rights. Through the commentaries of the Committee on Economic, Social and Cultural Rights one can understand that there is a direct link between the implementation of these rights by States and the fulfillment of the principle of sustainable development and, specifically intergenerational equity. In view of the Committee, the right to development and economic, social and cultural face challenges regarding a) poverty eradication; b) the empowerment and active participation of women, disadvantaged and marginalized individuals and groups;

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<sup>50</sup> 2012 SOFIA Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, annex to Resolution No. 7/2012.

<sup>51</sup> *Ibidem*, Art. 2.

<sup>52</sup> International Covenant on Economic, Social and Cultural Rights, in 993 U.N.T.S. 3.12.1966, entered into force 3.01. 1976. The status of ratifications, reservations and declarations can be found under the United Nations Human Rights Treaty Database. Available at:

<https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

Up to this point the Covenant has 70 Signatories and 162 Parties.

c) the employment and fair distribution of income; d) the provision of an adequate standard of living, including food and housing; health services; and education; and f) the access to and the enjoyment of culture which relate to similar challenges of sustainable development<sup>53</sup>. Article 2, paragraph 1 of the Covenant requires States to take steps progressively to realize economic, social and cultural rights. States have an obligation to move as expeditiously and effectively as possible towards the goal of full realization, using the maximum available resources<sup>54</sup>. Quoting the Special Rapporteur on the human right to safe drinking water and sanitation, *The Committee on Economic, Social and Cultural Rights affirmed the link between this obligation of progressive realization (meaning that States must achieve rights over the long term), and the way progressive realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations. In fact, **the spirit of all international human rights instruments is intergenerational: human rights instruments do not have expiration dates.***<sup>55</sup>

The committee is of the view that there is a minimum core obligation in order to ensure the provision of the minimum essentials of each right by the every State Party. General Comment No. 3 declares that, in general, a State will be in violation of the ICESCR if there is a *significant number of individuals [who are] deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.*<sup>56</sup> It is important to take into account that we are not in the presence of static obligations, seeing that these must be respected in the long term, namely for future generations .

In times of scarcity, such as those during a financial crisis, States must still fulfill specific legal requirements in order for them to exempt themselves from the progressive fulfillment of these obligations. We can find a few examples of commentaries to the Covenant that express this view.

### a) Article 11

Article 11 is one of the most relevant articles when considering the interrelationship of sustainable development – future generations – and human rights law as the socio and economic dimensions of sustainable development. In this Article it is stated that *The*

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<sup>53</sup> DZIDEK KEDZIA, *A Panel Intervention at the Roundtable “The Right of Development: Constraints and Prospects”*, Geneva, 19.10.2011, available at:

[http://www.ohchr.org/Documents/Issue/Development/Statement\\_Kedzia.pdf](http://www.ohchr.org/Documents/Issue/Development/Statement_Kedzia.pdf).

<sup>54</sup> Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990), para. 2

<sup>55</sup> United Nations, General Assembly, Human Rights Council Twenty fourth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, p. 5

<sup>56</sup> CESCR, General Comment No. 3: The Nature of States Parties’ Obligations, UN ESCOR, 1990, UN Doc. E/1991/23 at § 10 [CESCR, General Comment No. 3]

*States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living condition. The UN Committee on Economic, Social and Cultural Rights has expressed that the the notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations* <sup>57</sup>. The right is fulfilled once all people have *physical and economic access at all times to adequate food or means for its procurement* <sup>58</sup>.

## **b) Safe drinking water and sanitation**

The legal basis to the right to water derives, first of all, from the mentioned Art. 11 of the International Covenant on Economic, Social and Cultural Rights <sup>59</sup>. Its connection to the constant trio procured in this article - sustainable development – future generations – human rights law as the socio and economic dimension of sustainable development – is also easily found. We can start by quoting UN’s Special Rapporteur who stated that “while the benefits of access to safe water and sanitation have been widely pronounced, the international community is currently failing to ensure the availability of safe water and sanitation for all, without discrimination, including for future generations.”

The inclusion of the right to water and sanitation in this article has been done through all states that have signed the ICESCR in political declarations<sup>60</sup>. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>61</sup> enforces governments to ensure that rural women have access to sanitation. Other sources of the legal implementation of this right are the Convention on the Rights of the Child (CRC), which recognizes the right of all children to an adequate standard of living, to which the UN expert body responsible for its monitoring has clarified that this entitlement includes access to clean drinking water and latrines and the resolution of March 2008 by the UN Human Right Council emphasizing that international human rights law contains obligations regarding the access to sanitation.

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<sup>57</sup> United Nations, General Assembly, *op.cit.*, p. 3

<sup>58</sup> CESCR, General Comment No. 12: The Right to Adequate Food, UN ESCOR, 1999, UN Doc. E/C.12/1999/5 at § 6 [CESCR, General Comment 12] quoted by J. HEPBURN A. KHALFAN, *op. cit.*, p. 7

<sup>59</sup> International Covenant on Economic, Social and Cultural Rights, *op. cit.*

<sup>60</sup> Information Portal on the Human Right to Water and Sanitation, The legal basis to the right to sanitation, found at:

<sup>61</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, Decemeber 1979

CATARINA DE ALBUQUERQUE, special rapporteur on the human right to safe drinking water and sanitation sees sustainable development as a fundamental principle in the implementation of human rights law. The author regards this principle with a *holistic* point of view, as the *direct counterpart to retrogression*.<sup>62</sup>

She explains that, in relation to the right to safe water, in order for it be ensured to future generations, services and facilities must be continuously provided for by States. Once they have positively provided and improved, there must be a guarantee that there is no retrogression to the process, in order for future generations to be able to positively benefit from this right. This continuous provision of water rights is the means to achieve the principle of non-retrogression as predicted in the Covenant for Economic and Social Rights.

The right to water and sanitation is also a great example to the required balancing of all three dimensions of sustainable development. Water must be provided in protection for the natural environment and the respect for the non-exploitation of resources. On the other hand, the purpose of raising revenue from the provision of services must be done with respect of the decent access by all branches of society, in respect with the principle of equity and poverty eradication.

In this point we can also recall the principles of good government and public participation and access to information and justice. The service must be provided in a transparent way and with open access to responsibility and accountability from the institutions. All relevant stakeholders must be provided the needed opportunities participate in these processes.<sup>63</sup>

### 3.2.2 The principle of sustainable development and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Another written proclamation of the principles mentioned above is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>64</sup>. In the third article it is stated *States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women*. This convention has the main purpose of equalizing women's rights to health, education and employment

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<sup>62</sup> CATARINA DE ALBUQUERQUE, *op. cit.*, § 20, p. 8

<sup>63</sup> *Ibidem*

<sup>64</sup> *Ibidem*

and setting<sup>65</sup>. These rights should be implemented in accordance with the human rights based approach to development, guaranteeing that the rights are being used as a means of promoting development.

The convention stands for the purpose of sustainable development regarding future generations in several different ways. First of all, it sets out measures such as the right to access an adequate reproductive health care system<sup>66</sup>, the elimination of discrimination against women in economic and social matters<sup>67</sup>, as well as the possibility to benefit from social security programmes<sup>68</sup> or the access to all types of education<sup>69</sup> which directly promotes socio-economic rights of future generations – with an increase of women’s health care and economic backgrounds there will be positive pregnancies and consequent protection of children. Secondly, there is an influence on today’s generation’s education and consequent empowerment of women for the future.<sup>70</sup>

### 3.2.3 The principle of sustainable development and the Convention on the Rights of the Child and further documents

A further international treaty that could be mentioned in this point is the Convention on the Rights of the Child<sup>71</sup> which preamble recognizes *the importance of international cooperation for improving the living conditions of children in every country, in particular, developing countries*. In this convention one can encounter, once again, several rights that have to be analyzed in a human rights based approach of sustainable development, such as health<sup>72</sup>, social security<sup>73</sup>, adequate living<sup>74</sup> and education<sup>75</sup>. The same principles of positive implementation and non retrogression, as regarded above, can be applicable in order to correctly pursue a sustainable development approach of this convention.

In terms of regional instruments one can still refer to the European Social Charter, the Charter of the Organization of American States (OAS Charter) and the African Charter on Human and People’s Rights.

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<sup>65</sup> J. HEPBUN/ A. KHALFEN, *op. cit.*, p. 8

<sup>66</sup> CEDAW, *op. cit.*, Article 12

<sup>67</sup> CEDAW, *op. cit.*, Article 13

<sup>68</sup> CEDAW, *op. cit.*, Article 14, § 2, sub-clause c

<sup>69</sup> CEDAW, *op. cit.*, Article 14, § 2, sub-clause d

<sup>70</sup> HUMAN RIGHTS ADVOCATES, *Addressing gender discrimination and violence against women and girls; the responsibility of states for fulfilling the right to education*, P.O.Box 5675, Berkeley, CA 94705 USA, February 2013, p. 1

<sup>71</sup> UN Convention on the Rights of the Child, GA Res. 44/25, UN GAOR, 44th Sess., Annex, Supp. No. 49, UN Doc. A/44/49, 1989

<sup>72</sup> UN Convention on the Rights of the Child, *op. cit.*, Article 24 and 25

<sup>73</sup> UN Convention on the Rights of the Child, *op. cit.*, Article 26

<sup>74</sup> UN Convention on the Rights of the Child, *op. cit.*, Article 27

<sup>75</sup> UN Convention on the Rights of the Child, *op. cit.*, Article 28

Related directly with the principle of intra- and intergenerational equity there are also a great deal of documents that can be mentioned. In terms of intra-generational equity we can quote the preamble of the United Nations Convention on the Law of the Sea when it refers to “the equitable and efficient utilization” of marine resources<sup>76</sup>. In terms of responsibility towards future generations we can recall, once again, the preamble of the Charter of the United Nations, which aims to *save succeeding generations from the scourge of war*; The United Nations Framework Convention on Climate Change, declaring that *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*; the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes refers that: *water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their needs*; and the Convention Concerning Protection of World Cultural Property and Natural Heritage (World Heritage Convention) mentions that the *State has the duty to ensure the transmission to future generations of cultural and natural heritage*.<sup>77</sup>

### 3.3 Justiciability of social rights

Concerning this point one can become inclined to state, simply, that economic, social and cultural rights are not justiciable. There are a number of reasons presented to deny the justiciability of these rights, they have been regarded as “second generation rights” of minor importance with a vague background and implementation<sup>78</sup>. At the Vienna Conference in 1993 it was stated by the chairperson of the Committee on Economic, Social and Cultural Rights:

*The shocking reality... is that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action*.<sup>79</sup>

Even though we are still a long way from a *strong* idea of justiciability, there are argu-

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<sup>76</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1245, entered into force 16 November 1994

<sup>77</sup> For further detail: J. HEPBURN/ A. KHALFAN, *op. cit.*, p. 13

<sup>78</sup> MIRJA A. TRILSCH, *Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte im innerstaatlichen Recht*, Max-Planck-Institut für ausländischen öffentlichem Recht und Völkerrecht, Band 234, Heidelberg 2012, p. 505

<sup>79</sup> U.N. Doc. E/1993/22, Annex III, §5, quoted in EVA BREMS, *Human Rights: Universality and Diversity*, International Studies in Human Rights, Martinus Nijhoff Publishers, 2001 Kluwer Law International, p. 444

ments that be found in favor it, demonstrating an evolving path in this direction. Firstly, regarding the mentioned treaties and covenants, one must take into account that these are international multilateral treaties which are open for signature and ratification, falling under the legal scope of the Vienna Convention on the Law of the Treaties from 1969. Of particular importance from this document is article 26 regarding the principle *pacta sunt servanda* – the parties must respect the treaty in good faith, meaning that they have the obligation to follow the norms to which they have agreed by binding themselves to the Covenant through their ratifications.

The most efficient way to analyze whether or not there is a sense of *justiciability* of social and economic rights that derive from the concept of sustainable development, particularly, in its strand of intergenerational equity, is to analyze the development of case law on this matter, which will be the subsequent point of this article.

## 4. CASE LAW

The justiciability of sustainable development in its strand of human rights protection can be identified in jurisprudence. Even though not all courts mention the concept “sustainable development” *per se*, they refer to rights and sub-principles that, as explained above, derive from the general principle<sup>80</sup>. Nonetheless, in countries such as Australia, India, Philippines or Sri Lanka case law can be found that directly refers to the principle of sustainable development and its sub-principle of intergenerational equity. First of all, though, the following article will make a general excursion through international jurisprudence.<sup>81</sup>

Case law is used by international lawyers to conclude on the customary nature of a rule or principle. For that fact, international judges naturally hesitate on referring the existence of a customary norm since their decisions must be regarded as valid by States.

### 4.1 International Courts

First, one should briefly address jurisprudence from International Courts and its approximation of acknowledgement of the principles customary nature. In the Shrimp–Turtle case, the WTO’s Appellate took into account the importance of sustainable development to resolve the dispute in question, taking legal consequences from it<sup>82</sup>.

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<sup>80</sup> EMELIE FOLKESSON, Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest, ELR November, 2013, No. 2, p. 146.

<sup>81</sup> VIRGINIE BARRAL, *op.cit.*, p. 386.

<sup>82</sup> *Ibidem.*

This case was concerned the import prohibition by the United States of shrimp from Malaysia, India, and Pakistan under the complaint that the form in which it was being harvested was having negative consequences on endangered sea turtles. The WTO ruled that the production of shrimp by the USA was having an impact on turtles. Nonetheless, the reference made to sustainable development still short from its acknowledgement as a norm of customary nature for the simple reason that it was made in a conventional manner, meaning, it was basing itself on the WTO agreement, specifically, on its preamble which makes a direct reference to the principle of sustainable development<sup>83</sup>. In the decision by the Appellate Body it is stated:

*The principle of sustainable development, also laid down in the first paragraph of the preamble to the WTO Agreement, as well as the precautionary principle, play an important role in the implementation of all EC policies.*<sup>84</sup>

On another stance, The ICJ has acknowledged the relevance of sustainable development independently from its inclusion in a treaty<sup>85</sup>. In this case the question was a dispute between Hungary and Czechoslovakia about the construction of two barrages on the Danube which would be operated by both countries. They signed a treaty in 1977 which prescribed the diversion of waters from the Danube onto Czechoslovak territory<sup>86</sup>. In the 1980's political opposition from Hungary began related to the environmental aspects of the construction. Hungary ended up suspending the work, whereas Czechoslovakia sought to proceed in terms of the 1977 Agreement between both countries. The situation worsened once Czechoslovakia split into two countries in January 1993. Having the discussions turned into an impasse, both countries agreed on submitting the case to the ICJ. The ICJ decided on future arrangements, such as the maintenance of the operations of solely one barrage. It was in these terms that the concept of sustainable development was mentioned, specifically:

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<sup>83</sup> Preamble of the WTO Agreement: *The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, (...).*

<sup>84</sup> United States – Import Prohibition of certain Shrimp and Shrimp Products, WT/DS58/AV/R, 1998, at Para. 67.

<sup>85</sup> *Ibidem*.

<sup>86</sup> PHILIPPE SANDS, *op. cit.*, p. 391.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. **This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development**<sup>87</sup>.

PHILIPPE SANDS takes from this paragraph 140 three consequences: i) the invocation of “sustainable development” by the court means that it undeniably has a legal meaning; ii) sustainable development is a concept and not a principle or a rule and iii) as a concept, it has a procedural and a substantive aspect<sup>88</sup>.

Of great relevance, regarding this case, is the dissenting opinion of Judge Weeramantry, as previously mentioned in this article, which he states that the *principle of sustainable development [...] is an integral part of modern international law*<sup>89</sup> and also that *it has an important part to play in the service of international law*<sup>90</sup>. The content of sustainable development though, its procedural and substantive aspects, as SANDS puts it, has remained uncertain.

In the Pulp Mills case, concerning a dispute between Argentina and Uruguay regarding the construction of Pulp Mills on the Uruguay River without prior information from the state of Uruguay, which Argentina sought to be threatening the life of the river and its inhabitants, as well as a violation of the 1975 Statute of the River<sup>91</sup>. In this case, sustainable development developed from being regarded as a “concept” to be acknowledged as an “objective”<sup>92</sup>. This idea is expressed in paragraph 177 of the case:

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<sup>87</sup> 7 Decision of the International Court of Justice on the case Gabcikovo-Nagymaros Dam, 25.09.1997, Hungary v Slovakia, in I.C.J. Rep., 37 I.L.M., 1998, para.140.

<sup>88</sup> PHILIPPE SANDS, *op. cit.*, p. 393.

<sup>89</sup> Separate opinion of vice-president Weeramantry, *op. cit.*, p. 86.

<sup>90</sup> Separate opinion of vice-president Weeramantry, *op. cit.*, page 111.

<sup>91</sup> LAUREN TREVISAN, *The International Court of Justice's Treatment of Sustainable Development and Implications for Argentina v. Uruguay*, Sustainable Development Law & Policy, 2009, pp. 40, 85.

<sup>92</sup> VIRGINIE BARRAL, *op. cit.*, p. 387.

Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river **consistent with the objective of sustainable development**<sup>93</sup>.

## 4.2 Regional and domestic courts

It is interesting to observe, as well, the treatment of sustainable development in regional and domestic cases. As it has been explained earlier, in certain countries, sustainable development and its sub-principles are already referred to as a customary principle of international law. A few cases will be analyzed in order to briefly describe the importance of the concept in all of its dimensions.

# EUROPEAN COURT OF HUMAN RIGHTS

The ECHR does not mention the principle of sustainable development *per se*, since it is not specifically enshrined in its legislation. Nonetheless, it is still possible to observe application of the socioeconomic dimension of the sustainable development principle – social and economic rights become relevant in relation with environmental concerns.

In the case *López Ostra v. Spain*<sup>94</sup>, the environmental degradation caused by a waste treatment plant obstructed the applicant's rights to private and family life, under the Article 8 of the ECHR. The court decided that, even though there might not be any severe health risks, a great amount of pollution would affect the well-being of individuals and their right to effectively enjoy their homes.<sup>95</sup>

In the judgment *Guerra and Others v. Italy*<sup>96</sup>, decided 4 year later, the court decided that the responsibility for environmental protection under the scope of article 8 of the ECHR included the obligation of information towards potentially affected people when the results from the environmental degradation can interfere with their private and life.

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<sup>93</sup> Decision of the International Court of Justice on the Pulp Mills on the River Uruguay case, (Argentina v. Uruguay), Judgment, I.C.J. Reports, 2010.

<sup>94</sup> *López Ostra v. Spain*, Application No. 16798/90, Judgment of 9.12.1994.

<sup>95</sup> *ibidem*

<sup>96</sup> *Guerra and Others v. Italy*, Application No. 14967/89, Judgment of 19.02.1998.

Through this decision the European Court has included a procedural element of the environmental pillar<sup>97</sup>.

In the case *Öneryıldız v. Turkey*<sup>98</sup> one can observe a clear linkage between all three spheres of the sustainable development principle, as well as its sub-principals of inter-generational and intra-generational equity. The facts in this case concern an explosion of a municipal garbage tip in the Ümraniye District, province of Istanbul, which caused a landslide and killed two people living in a slum next to the site. The “rudimentary dwellings”<sup>99</sup> surrounding the rubbish tip had been built without State authorization. There were several attempts to implement urban development plans or to regularize the legality of the properties by some of the inhabitants, but these were always dismissed by the authorities. In 1991 the District Council requested experts to determine whether the rubbish tip complied with relevant regulation. The conclusion was that it “exposed humans, animals and the environment to all kinds of risks”<sup>100</sup>. Between requests for provisional measures of safety and counter-requests, the site was kept active until a methane explosion which caused the death of 39 people. The Court held that the settlement next to the garbage tip was not voluntary, but a consequence of the economic situation as well as the lack of town planning by the District Council. People were therefore forced to live next to dangerous areas with potential environmental consequences.

The Court decided that the State had the obligation, under the scope of art. 2 of the ECHR to “govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.”<sup>101</sup>

The State argued that the Court should not interfere with State’s decisions on how to tackle the social and economic problems concerning the Umraniye Slums<sup>102</sup>, seeing that this requires long-term planning and large-scale tasks, as well as complicated plans of design and implementation. The Court conceded that there is a wide margin of appreciation of State’s on these matters<sup>103</sup>. Nonetheless, the Court considers that there are simple preventive measures that could have been taken into account by the State of Turkey. Also, the Court considers that the State of Turkey was under the violation of its

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<sup>97</sup> EMELIE FOLKESSON, *op. cit.*, p. 147

<sup>98</sup> *Öneryıldız v. Turkey*, Application No. 48939/99, Judgment of 30.11.2004.

<sup>99</sup> Decision of the European Court of Justice on the case *Öneryıldız v. Turkey*, Application No. 48939/99, Judgment of 30.11.2004., page 5.

<sup>100</sup> Decision of the European Court of Justice on the case *Öneryıldız v. Turkey*, Application No. 48939/99, Judgment of 30.11.2004., page 6.

<sup>101</sup> *Öneryıldız v. Turkey*, *op.cit.*, p. 31.

<sup>102</sup> *Öneryıldız v. Turkey*, *op.cit.*, p. 27.

<sup>103</sup> *Öneryıldız v. Turkey*, *op.cit.*, p. 35.

article 65 of the Constitution which refers to social and economic protection<sup>104</sup>. Such measures could have “been a much better reflection of the humanitarian considerations the Government relied on before the Court.”<sup>105</sup> Concluding, the Court considered that several aspects lead to the violation of arts 2 (right to life) and 8 (right to privacy and family life) of the ECHR, namely: defective regulatory framework; lack of resolution of town-planning issues as well as uncertainty created around the application of statutory measures

These cases illustrate the court is focused on the individual dimensions of the social and environmental pillars of sustainable development, implicitly recognizing the existence of the principals’ three spheres<sup>106</sup>.

## OPOSA FORESTRY CASE

An innovative domestic court decision on intergenerational equity, in both its "intra-" and "inter-" dimensions, is a 1993 Philippine Supreme Court case, Oposa Forestry Case<sup>107</sup>. In this case, the plaintiffs were minors represented by their parents. They sought an order that the government discontinue existing and further timber license agreements, alleging that deforestation was causing environmental damage and endangering their health, as well as the well-being of future generations to come<sup>108</sup>. The government argued that the plaintiffs had failed to state a cause of action, that the issues raised were non justiciable and political. The trial court upheld the government’s contentions and dismissed the complaint. The plaintiffs filed an action for certiorari asking the Supreme Court to rescind and set aside the dismissal order.

The Supreme Court first dealt with certain procedural matters, including the standing of the minors to bring the proceedings. It held that the case brought by the plaintiffs constituted a class suit, not merely because the plaintiffs were numerous and representative enough to ensure the full protection of all concerned interests but also because the plaintiffs represented present and future generations:

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<sup>104</sup> Article 65 : “The State shall perform the tasks assigned to it by the Constitution in the social and economic fields, within the limits of its financial resources and ensuring the maintenance of economic stability.”

<sup>105</sup> Önerlydiz v. Turkey, *op.cit.*, p. 37.

<sup>106</sup> EMELIE FOLKESSON, *op. cit.*, p. 147.

<sup>107</sup> Minors Oposa v. Secretary of the Department of Environment and Natural Resources ("DENR") G.R. No. 101083, July, 1993.

<sup>108</sup> BRIAN J. PRESTON, *The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific*, Paper presented to the Kenya National Judicial Colloquium on Environmental Law, Mombasa, Kenya, 10-13 January 2006, p. 75.

*We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.*<sup>109</sup> The Court considered that (...)the minors assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.<sup>110</sup>

The Supreme Court ruled in favor of the children, and made extremely innovative statements, such as:

*The right to a clean environment, to exist from the land, and to provide for future generations are fundamental. There is an intergenerational responsibility to maintain a clean environment, meaning each generation has a responsibility to the next to preserve that environment, and children may sue to enforce that right on behalf of both their generation and future generations. The Philippine Constitution requires that the government “protect and promote the health of the people and instill health consciousness among them.” (see Section 15, Article II).*<sup>111</sup>

## ENDOROIS CASE

The African Charter on Human and Peoples’ Rights contains, contrary to the regional documents of the European Union, an explicit right to development<sup>112</sup>, which is consolidated in Article 24 which states that *All peoples shall have the right to a general satisfactory environment favourable to their development.*

The Endorois case<sup>113</sup> was the first one in which the right to development was applied by a court. The Endorois are a pastoralist community<sup>114</sup> of 60,000 indigenous people, who have resided in the Lake Bogoria area of Kenya for the past centuries. Between 1974 and 1979, the Kenyan government forcefully evicted them in order to create the Lake

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<sup>109</sup> *Ibidem.*

<sup>110</sup> *Ibidem.*

<sup>111</sup> Child Rights International Network, available at: <http://www.crin.org/en/library/legal-database/minors-oposa-v-secretary-department-environmental-and-natural-resources>.

<sup>112</sup> Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27.07.1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html>, Article 25 .

<sup>113</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.

<sup>114</sup> As it is stated in a footnote of the case – briefer version :”The Endorois have sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. Under the 1999 census, the Endorois were counted as part of the Kalenjin group, made up of the Nandi, Kipsigis, Keiro, Tugen and Marakwet among others”, footnote of para. 3.

Bogoria Game Reserve. The Endorois filed a legal appeal in 1998 to the high court of Kenya, but the court ruled in favor of the government. Later, in 2003 the Endorois took the case to the African Commission on Human and Peoples' Rights (ACHPR), a *quasi-judicial* body with the purpose of setting into force the African Charter on Human and Peoples' Rights. The final decision was held in 2010 by the Commission confirming the violation of the Endorois' rights by the Kenyan government and thus ordering the government to guarantee the Endorois' access to their ancestral land along with compensation. The ruling read that as indigenous people under the African Charter, the Endorois have been violated in relation to the right to practice religion (article 8); the right to property (article 14); the right to culture (article 17(2) and (3)); the right to free disposition of natural resources (article 21); and the right to development (article 22)<sup>115</sup>. The Commission applied the principle of intra-generational equity through the rejection of the Respondents State's argument that special treatment of indigenous groups could be interpreted as discriminatory <sup>116</sup>:

*The African Commission is of the view that the Respondent State cannot abstain from complying with its international obligations under the African Charter merely because it might be perceived to be discriminatory to do so. It is of the view that in certain cases, positive discrimination or affirmative action helps to redress imbalance.*<sup>117</sup>

As EMELIE FOLKESSON puts it, *this collective approach to social and economic interests of the Endorois community is crucial in the pursuit of sustainable development.*<sup>118</sup>

## YOUTH APPELLANTS' FEDERAL CLIMATE CHANGE CASE

At the moment in the USA there is a pending law suit between 5 teenagers, as well as two non-profit organizations Kids vs. Global Warming and WildEarth Guardians. They have decided to file a law suit against the federal government now pending at the U.S. Court of Appeals for the D.C. Circuit. The purpose of the law suit is to force the federal government to plan for a national climate recovery to decrease our atmosphere's CO<sub>2</sub> to

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<sup>115</sup> United Nations Non-Governmental Liaison Service (UN-NGLS), *The Endorois and their struggle for the realization of the right to development: NGLS interviews Wilson Kipsang Kipkazi of the Endorois Welfare Council and Lucy Claridge of the Minority Rights Group International*, available at: [http://www.un-ngls.org/spip.php?page=article\\_s&id\\_article=3607](http://www.un-ngls.org/spip.php?page=article_s&id_article=3607).

<sup>116</sup> EMELIE FOLKESSON, *op. cit.*, p. 151.

<sup>117</sup> African Commission: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, African Commission on Human and Peoples' Rights, Comm. No. 276/03 (2009), para. 196.

<sup>118</sup> EMELIE FOLKESSON, *op. cit.*, p. 151.

350 parts per million (ppm) by the end of the century, to avoid the scenarios of 2°C of warming. This lawsuit is in line with the legal principle of the *Public Trust Doctrine*, which creates a public legal right to certain environmental grounds, such as land and waters<sup>119</sup>.

Karl Coplan, Professor of Law at Pace Law School in New York wrote an *amicus curiae* in favor of the youths' case:

*This case, which seeks to establish constitutional protections for future generations in the same way that Brown v. Board of Education established equal protection for African Americans, may be the most important appeal the D.C. Circuit Court of Appeals hears for a very long time to come. The sovereign Public Trust principles at issue in the case are part of the constitutional bedrock of our nation, recognized by our founders, and they support the conditions that our youth need in their future. We believe the Constitution was formulated to limit the power of one generation to undercut the endurance of the nation and deprive posterity of the conditions necessary for citizens to survive and prosper*<sup>120</sup>.

One of the Appellants, 13 year old Xiuhtezcatl Roske-Martinez is actually of Native-American origin and procures to set forth the “7th Generation Principle”<sup>121</sup>.

## 5. CONCLUSION: SUSTAINABLE DEVELOPMENT AS A TRUE DUTY TOWARDS FUTURE GENERATIONS

The principle of sustainable development, as it has been submitted, is an arising customary norm of international law. It is, indeed, a malleable and an evolutive concept, seeing that it is not immune to environmental, social and economic evolutions. It varies, actually, *ratione temporis*, *ratione personae* and *rationae materiae*<sup>122</sup>. The temporal variability of the content of sustainable development is also an implicit requirement of the principle of intergenerational equity, which by its nature demands the adoption of a long-term perspective. This is not, though, an obstacle to the legal concept of sustainable development, but a strength, since that, in order for it to be correctly

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<sup>119</sup> Website of the NGO *Our Children's Trust*, available at: <http://ourchildrenstrust.org/US/Federal-Lawsuit>.

<sup>120</sup> *Ibidem*.

<sup>121</sup> Article from “Aljazeera America”, *Youths sue U.S. government over climate inaction*, available at: <http://america.aljazeera.com/articles/2014/5/4/youth-sue-governmentforclimateinaction.html>

<sup>122</sup> VIRGINIE BARRAL, *op.cit.*, p. 6.

applied, the current situation must always be taken into account. The difficulty arises in terms of its substantive definition. And this difficulty is one the reasons why it is not seen by many scholars as a legal term, but merely as a moral or political issue. For our part, we regard it as an “umbrella principle”, carrying, above all, an obligation of means in terms of how the law *should* be implemented.

In terms of socioeconomic rights, the principle is identified in binding international law conventions which portray social and economic rights which are only correctly implemented through the pursuance of sustainable development. The right to water and sanitation, presented above, is only truly guaranteed once it is established in a continuous and *sustainable* manner, benefiting present and future generations. Hence, the principle of sustainable development turns into a mandatory duty towards future generations. Without the respect for this principle, their rights will never be intrinsically guaranteed. The presented idea is not a new one, for it is the direct consequence of the presented theory of the human rights based approach of development.

As we have observed from a few case law examples, it is already seen as an imperative idea in some countries. The question we must now put is: when will it extend to the rest of the world?

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