

1996

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Recommended Citation

Mary Pat Williams Silveira & Barbara Ruis, *International Law for Sustainable Development: An Attempt at Definition*, 2 LAW & BUS. REV. AM. 12 (1996)
<https://scholar.smu.edu/lbra/vol2/iss1/6>

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International Law for Sustainable Development: an Attempt at Definition

Mary Pat Williams Silveira*

with Barbara Ruis

I. The Rio Conference and International Law

In 1997, the General Assembly will review progress made in the implementation of Agenda 21, the Programme of Action for Sustainable Development.¹ Part of that review will be focussed on the development of international law for sustainable development.

Three years ago in Rio de Janeiro, in June of 1992, the United Nations Conference on Environment and Development (UNCED), adopted Agenda 21, a comprehensive and integrated approach to virtually all of the sectoral and cross-sectoral issues² that define our lives. The United Nations Framework Convention on Climate Change³ was also opened for signature. The call of the signatories was the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The Convention on Biological Diversity⁴ was opened for signature as well, with the objective of protecting species against extinction and sharing equitably in the benefits flowing from the earth's biological diversity.

Two soft-law instruments, in addition to Agenda 21, were adopted by consensus. These are the Rio Declaration on Environment and Development⁵ and the Statement of

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1. *United Nations Conference on Environment and Development*, Agenda Item 21, U.N. Doc. A/CONF.151/PC/100/Add.1 (1992)[hereinafter Agenda 21]
 2. Agenda 21 is divided into forty chapters which range from such cross-sectoral issues as combating poverty (Chapter 3) and changing consumption patterns (Chapter 4) to sectoral issues such as protection of the atmosphere (Chapter 9) and promoting sustainable agriculture and rural development (Chapter 14).
 3. *United Nations Conference on Environment and Development*, U.N. Framework Convention on Climate Change, U.N. Doc A/AC.237/18 (Part II)/Add.1 (1992), reprinted in 31 I.L.M. 849 (1992)[hereinafter Framework Convention on Climate Change].
 4. *United Nations Conference on Environment and Development*, Convention on Biological Diversity, U.N. Doc. DPI/1307 (1992), reprinted in 31 I.L.M. 818 (1992) [hereinafter Convention on Biological Diversity].
 5. *United Nations Conference on Environment and Development*, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 (1992)[hereinafter Rio Declaration].
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Forest Principles.⁶ None of these three instruments is legally binding, but they do reflect the consensus of States.⁷ Not only do they serve now as guidelines for national, regional and international action, but they also provide a basis for establishing the international legal framework to achieve sustainable development.

International environmental law did not begin with the Rio Conference. Over a fifty year period, environmental agreements have addressed conservation and protection of plants, animals, habitats and genetic resources; the marine environment and resources; pollution of the seas and atmosphere; safe and healthy working conditions; and the transport and dumping of hazardous waste.

The Rio Conference did introduce the concept of international law for sustainable development. Agenda 21 is divided into forty chapters. Of these, Chapter 39 specifically addresses international legal instruments and mechanisms. It identifies, as one of its bases for action, "the further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns," [para 39.1(a)], and it gives as one of its eight specific objectives, the following:

to set priorities for future law-making on sustainable development at the global, regional or subregional level, with a view to enhancing the efficacy of international law in this field through, in particular, the integration of environmental and developmental concerns. [para 39.3 (b)]

Parties of existing international agreements are also called upon at periodic intervals to review and assess, *inter alia*, "priorities for future law-making on sustainable development", which may include an examination of the feasibility of elaborating general rights and obligations of States, as appropriate, in the field of sustainable development. One option for carrying out this task, suggested by Agenda 21, is the periodic meeting of legal experts designated by Governments, with a broader environmental and developmental perspective. (Para 39.5)

Before international law for sustainable development can be further developed, or used either to establish priorities or as the basis of future law making, it must first be better understood. An effort to define what is meant by international law for sustainable development, and to differentiate it from international environmental law, has begun. It has played a role in discussions in a number of fora, briefly reviewed below, and is now being brought forward within the context of the work of the United Nations Commission on Sustainable Development.

II. *The United Nations Commission on Sustainable Development*

By its Resolution 47/191 of 22 December 1992, the United Nations General Assembly

6. *United Nations Conference on Environment and Development, Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*, U.N. Doc. A/CONF.151/16/Rev.1 (1992), reprinted in 31 I.L.M. 881 (1992)[hereinafter *Statement of Forest Principles*].
7. The Rio Declaration is an international statement of general principles and obligations which was negotiated by a large and representative number of delegations. It must be taken to reflect the consensus in 1992 of values and priorities in environment and development. The principles embodied in the two conventions (i.e., the Framework Convention on Climate Change and the Convention on Biological Diversity) are of course binding for the parties to those treaties.

requested the Economic and Social Council (ECOSOC) to establish a high-level Commission on Sustainable Development (CSD), comprised of Governments, with functions as agreed in paragraphs 38.13, 33.13 and 33.21 of Agenda 21, and recommended, *inter alia*, that the Commission keep under review the implementation of Agenda 21 and activities related to the integration of environmental and developmental goals throughout the UN system. It further requested all UN specialized agencies, and related organizations of the UN system, to strengthen and adjust their activities, programmes and medium-term plans, as appropriate, in line with Agenda 21.⁸

In its Decision 1993/207 of 12 February 1993, ECOSOC established the Commission on Sustainable Development as one of its functional commissions. A secretariat to service the Commission, called the Division for Sustainable Development, was established at UN Headquarters within the Department for Policy Coordination and Sustainable Development (DPCSD).⁹

The CSD meets annually and has held three meetings. Chapter 39 came under its review at its second meeting in 1994. At that time, the Commission, *inter alia* requested the United Nations Environment Programme to undertake further study of the concept, requirements and implications of sustainable development and international law.¹⁰

III. Some Recent (Post-UNCED) Efforts to Identify Principles of International Law For Sustainable Development

Ever since the concept of sustainable development was introduced by the 1987 Brundtland Report¹¹ and transformed into a programme of action (Agenda 21), a number of attempts have been made to understand its meaning in the context of international law. This has been reflected in the many recent publications that have been released during the past three years alone and in meetings and consultations. Among these are the FIELD Consultation on Sustainable Development,¹² the Austrian Symposium on Sustainable

8. G.A. Res. 47/191, U.N. GAOR, 47th Sess., 93rd Mtg., U.N. Doc. A.47/49 (1992).
9. The Department for Policy Coordination and Sustainable Development was established, effective July 1, 1993, to provide substantive support to ECOSOC and the Commission on Sustainable Development, as well as to support specific negotiating processes launched by the General Assembly, such as the Intergovernmental Negotiating Committees on Conventions on Climate Change and Combatting Desertification. It also provides support to the Secretary-General's High Level Advisory Board on Sustainable Development and other expert bodies. It assists the Secretary General in the servicing of the Administrative Committee on Coordination (ACC) and its subsidiary machinery, and it monitors the implementation of Agenda 21. U.N. ESCOR, Organizational Plenary Sess., U.N. Doc. E/1993/INF/2 (1993) [hereinafter Organizational Plenary Sess.].
10. *Report of the Commission on Sustainable Development on its Second Session*, U.N. Doc. E/1994/33; E/CN.17/1994/20, paragraph 8.
11. *United Nations World Commission on Environment and Development Our Common Future* (1987) (Sustainable development is defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs.") [hereinafter Brundtland Report].
12. *Foundation for International Environmental Law and Development (FIELD), Report of a Consultation on Sustainable Development: The Challenge to International Law* (1993). The report was prepared at St. George's House, Windsor Castle, England, on April 27- 29, 1993, with support from the Ford Foundation [hereinafter FIELD Report].

Development and International Law,¹³ the International Covenant on Environment and Development,¹⁴ the Earth Charter Initiative,¹⁵ and the work of the International Committee on Legal Aspects of Sustainable Development.¹⁶ These are briefly surveyed, below.

A. FIELD CONSULTATION ON SUSTAINABLE DEVELOPMENT: THE CHALLENGE TO INTERNATIONAL LAW

In April 1993, the Foundation for International Environmental Law and Development (FIELD) convened a consultation of international legal experts to identify the principal international legal issues requiring further elaboration and development to assist in giving effect to Principle 27 of the Rio Declaration, which calls on 'States and people to cooperate in the further development of international law in the field of sustainable development'.

The experts suggested that, although there is not yet a clearly defined legal concept of sustainable development, it does have certain legal implications, including, *inter alia*, the possibility of subjecting economic development and activities at the national level to international scrutiny, as has occurred with human rights, and a range of issues related to process and institutional arrangements as well as substantive norms.

The consultation identified four core elements of the concept of sustainable development, including: (1) the idea that the needs of the present and future generations should be taken into account; (2) the need to ensure that renewable and non-renewable environmental resources are conserved and not exhausted; (3) the requirement that access to and use of natural resources must take equitable account of the needs of all people; and (4) a recognition that issues of environment and sustainable development must be treated in an integrated manner. Participants in the consultation expressed a range of views, but several of the principles elaborated in the Rio Declaration were "frequently invoked as having a particular significance or, possibly, a higher legal status".¹⁷ These included, but were not limited to: (1) the precautionary principle; (2) the polluter pays principle; (3) the principle of inter-generational equity; (4) the principle of common-but-differentiated responsibility; and (5) principles relating to public participation and rights of access to information and to judicial and administrative proceedings. The concept of common concern of mankind and equitable global partnership were also considered to have certain legal consequences.

B. SYMPOSIUM ON SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW

The Symposium on Sustainable Development and International Law was held in April 1994 in Baden bei Wien, Austria, at the invitation of the Austrian Government. The

13. "Report of the International Symposium on Sustainable Development and International Law," held in Baden bei Wien, at the invitation of the Austrian Ministry of Foreign Affairs, 14-16 April 1994, as appearing in the Appendix, *Sustainable Development and International Law* (Winfried Lang, ed. 1995).
14. *International Covenant on Environment and Development*, Prepared by the Commission on Environmental Law of the World Conservation Union (IUCN) in cooperation with the International Council of Environmental Law (March 1995), and launched at the United Nations Congress on Public International Law held at New York, New York on 13-17 March 1995.
15. The goal of the Initiative is to elaborate an Earth Charter, which is still in the process of being drafted.
16. International Law Association, Buenos Aires conference, 14-20 August 1994: International Committee on Legal Aspects of Sustainable Development, First Report. Dr. Kamal Hossain (Bangladesh), Chairman and Dr. Nico Schrijver (The Netherlands), General Rapporteur.
17. FIELD Report, *supra* note 12, at r9.

Symposium constituted the contribution of Austria to the preparatory process for the second session of the Commission on Sustainable Development and did not address itself only to the subject of principles.

It was noted that sustainable development is an evolving and flexible concept, taking gradual shape through a number of international agreements and likely to benefit from periodic review. Although it was felt that the content and status of principles of international law related to sustainable development are still uncertain, it was agreed that such principles, could, through a process of refinement, facilitate the general evolution of international law.

C. INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT

The Commission on Environmental Law of the IUCN (World Conservation Union), in cooperation with the International Council of Environmental Law, issued in March 1995 a Draft International Covenant on Environment and Development. This Covenant aims to be a comprehensive draft agreement on sustainable development and "international legal instrument of general scope, addressing the whole field of environment and development."¹⁸ Moreover, the covenant is to serve as the basis for intergovernmental negotiations resulting in the creation of binding obligations for state parties.

As stated in Article 1, the objective of the Covenant is "to achieve environmental conservation and sustainable development by establishing integrated rights and obligations." In Articles 2 through 10, it distinguishes a number of fundamental principles¹⁹ to guide the Parties in achieving the objective of the Covenant and in implementing its provisions. These include: respect for all life forms (art 2); common concern of humanity (art 3); interdependent values (art 4); inter-generational equity (art 5); prevention of environmental harm (art 6); precaution (art 7); the right to development (art 8); eradication of poverty (art 9); and the elimination of unsustainable patterns of production and consumption and the promotion of appropriate demographic policies (art 10). A number of other principles are implicit in the articles contained in ensuing sections of the Covenant as well.

D. THE EARTH CHARTER INITIATIVE

The Earth Council was established in an attempt to maintain the momentum reached at the United Nations Conference on Environment and Development. The Earth Council has identified as a priority the development of an Earth Charter setting out the moral imperatives of sustainable development as well as norms and standards for state and interstate behavior. The Earth Council formed a partnership with the Green Cross, and together they began in April 1994 the Earth Charter Initiative.

The goal of the Initiative is to elaborate an Earth Charter, which should contain "the basic principles for the conduct of nations and peoples with respect to environment and development to ensure the future viability and integrity of the Earth as a hospitable home for human and other forms of life,"²⁰ and which could serve as a general soft-law umbrella for future development of national and international law in the field of environment and development.

18. *International Covenant on Environment and Development*, *supra* note 14, at xi.

19. These fundamental principles are called "the most widely accepted and established concepts and principles of international environmental law," *Id.* at xiv.

20. Secretary-General of the United Nations Conference on Environment and Development (UNCED) to the first meeting of the Preparatory Committee of UNCED, as cited in the Report of the Earth Council/Green Cross joint Earth Charter Initiative, April 1994.

The basic elements of the Earth Charter are to be identified during 1995, followed by consultations and a final text in 1997. Once the final text is completed, the Charter will be distributed widely and submitted to the UNGA special session for review. The final text of the Charter should be endorsed by all governments in the year 2000.

G. THE INTERNATIONAL COMMITTEE ON LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT

The International Law Association constituted in 1992 the International Committee on Legal Aspects of Sustainable Development. Its work programme includes, *inter alia*, the elucidation of specific principles which could provide a normative framework for sustainable development, with particular reference to specific legal aspects of sustainable development in both developing and industrialized countries, and principles which would enable the measuring and monitoring of the relevant policies of international organizations.

As core elements of the law of sustainable development, the Committee emphasizes the right to development and the right to good governance. It states that the right to development should be elaborated in the context of other collective and individual human rights and the alleviation and elimination of poverty is its most important feature. Regarding good governance, its promotion should primarily focus on improving negotiating skills and norm-compliance by removing inconsistencies in the law, by strengthening the stringency of obligations, and by enhancing capabilities of authorities in respect of treaty management and dispute settlement.

IV. Principles in International Law for Sustainable Development: the Basic Assumptions

The foregoing discussion illustrates two important points. The first is that there is considerable interest in understanding the legal implications of sustainable development and in giving it more profound legal grounding. The second point is the degree of consensus among these different exercises. It is true that they do not converge on every point. Nonetheless, there is a relatively clear core of principles on which consensus is emerging. And there does appear to be agreement for the need to reach an international consensus — among legal experts and among Governments — on a benchmark set of principles for sustainable development.

There also appears to be agreement that international law for sustainable development can be distinguished from international environmental law. As the FIELD Consultations noted, “international law in the field of sustainable development does not replace or supersede international environmental law; however international environmental law is a part of international law in the field of sustainable development and is, itself, being transformed by the concept and requirements of sustainable development.”²¹ In fact, the concept of sustainable development represents a paradigmatic shift away from more linear thinking, mirroring the interdependence of environmental, social, economic and institutional factors in the “real world”. It is precisely because of the complexity of this interdependence that more clarity is required as a basis for international agreement and the establishment of a set of benchmarks for judicial review and future negotiations.

For this purpose, the United Nations Department for Policy Coordination and Sustainable Development (DPCSD), Division for Sustainable Development, convened an

21. FIELD Report, supra note 12, at r6.

Expert Group meeting,²² with the following objectives: to identify basic principles of international law for sustainable development, consider possible classifications of such principles, and assess their potential practical implications in a legal context, including their role in the interpretation and application of existing international law in the field. The principles considered were not limited to traditional public international law relations but were also relevant to private international law (conflict of laws with regard to transnational relations between individuals and various kinds of organizations, whether incorporated or not) and international administrative law (with regard to relations between individuals or organizations and public authorities).

In carrying out its tasks, the Expert Group worked within the framework established by the Rio Declaration on Environment and Development and Agenda 21. It was agreed that these instruments provided the essential basis for identifying and assessing principles of international law for sustainable development. Nevertheless, it was clear from the practice of States, and other members of the international community since UNCED, that certain principles set forth in those instruments had acquired a particular relevance in their international legal consequences. The Expert Group considered it appropriate to take into account that practice, as reflected in the activities of States and other members of the international community before international legislative fora, international courts, tribunals and other dispute settlement fora, and developments in national law which sought to implement the Rio Principles.

Apart from the Rio instruments, the Expert Group also based its deliberations on prior work carried out in the period after UNCED, as discussed above.

It was understood that the legal status of each of the principles varies; that, in the absence of judicial authority and conflicting interpretations under State practice, it is often difficult to establish the parameters or the precise international legal status of each of the principles. Some of the principles reflect customary international law; others may reflect emerging legal obligations; and yet others might have an even less developed legal status. Many of the principles are stated in differing forms, and no attempt has been made to choose among the varying expressions. Each principle should also be interpreted in the light of other relevant principles.

V. Identification of Principles of International Law for Sustainable Development

With the understandings expressed above, the following principles have been identified by the Expert Group as those which constitute the Principles of International Law for Sustainable Development. They have been grouped into five major categories for purposes of organization only. The order in which the Principles appear do not in any way reflect their value or ranking.

22. Expert Group Meeting on the Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September 1995. The full text of the final Report of this meeting will be available only in January 1996. The discussion and conclusions which follow in the remainder of this article are largely taken from the draft report.

Principle 1 of the Rio Declaration states that "Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." This Principle reflects the fundamental human right to a life with dignity. All the principles included below should be construed so as to give effect to this Principle.

The first "group" of principles is, in fact, a single, fundamental principle of sustainable development, that is: "The Principle of Interrelationship and Integration."²³ The second group contains "Principles Relating to Environment and Development" and includes the following principles: (1) The Right to Development; (2) The Right to a Healthy Environment; (3) The Eradication of Poverty; (4) Equity; (5) Sovereignty over natural resources and responsibility not to cause damage to the environment of other states or to areas beyond national jurisdiction; (6) Sustainable use of natural resources; (7) Prevention of environmental harm; (8) Polluter pays; and (9) the Precautionary Principle.

The third group, "Principles of International Cooperation," includes: (1) Global Partnership, and, as sub-principles: (a) Common concern of humankind, (b) Common but differentiated responsibilities, and (c) Special treatment of developing countries, small island developing states and countries with economies in transition; (2) Common heritage of humankind; and (3) Cooperation in a transboundary context, and, as sub-principles: (a) Equitable and reasonable use of transboundary natural resources, (b) Notification to and consultations with neighboring and potentially affected states, (c) Environmental impact assessment in a transboundary context, (d) Prior informed consent, and (e) Cooperation to discourage or prevent the relocation and transfer of activities and substances that cause severe degradation or are harmful to human health.

The fourth group, "Principles of Participation, Decision-Making and Transparency" is comprised of the following principles: (1) Public participation; (2) Access to information; (3) Informed decision-making; (4) Environmental impact assessment; and (5) Cooperation to combat abuse of public office for personal gain.

Finally, the fifth group, "Principles of Dispute Avoidance, Resolution Procedures, Monitoring and Compliance," includes: (1) Peaceful settlement of disputes in the fields of environment and sustainable development; (2) Equal, expanded and effective access to judicial and administrative proceedings; (3) Adoption of effective national environmental legislation and measures to implement international commitments; and (4) Monitoring of compliance with international commitments.

Principles may perform a variety of functions in the international legal process, including the following: (1) to assist in the development of new legal instruments; (2) to assist in the interpretation and application of treaty and other obligations; (3) to establish norms of a substantive nature; (4) to establish obligations of a procedural nature; (5) to assist in the elaboration of detailed obligations; and (6) to assist in the development of evidentiary rules for decision-making.

The role of principles in the interpretation and application of existing legal obligations, particularly treaty obligations, is especially important. Of particular relevance here are the general rules of international law governing the interpretation of international treaties and other sources of legal obligation. Article 31 of the 1969 Vienna Convention on the Law of Treaties, which must be taken in its entirety, is relevant for the role of principles

23. Annotations are being prepared for each of these principles. These will be contained in the final Report of the Expert Group.

and the issue of interpretation: Article 31(3)(c) states that "any relevant rules of international law applicable in the relations between the parties" to be taken into account in the interpretation of treaties. This rule calls upon courts, tribunals, other dispute settlement bodies and all those involved in the interpretation of treaties, such as GATT/WTO Panels, to take into account applicable obligations arising under treaty and customary law. This allows an integrated approach to be applied in practice. The Expert Group welcomed this as an important contribution which sustainable development might itself make to the progressive development of international law.

In addition, the principles of interrelationship and integration (as reflected in Principles 3 and 4 of the Rio Declaration) form the backbone of international law in the field of sustainable development. They reflect a recognition of the need to move away from the treatment of fields of international law (relating to, i.e., human rights, economic relations, environmental protection) as self-contained, towards the development of general rules of international law in which these separate fields retain their distinct characters but are subject to an interconnected approach. In this way each field can and must, through the process of legislative and judicial development, take account of legal developments in other fields and assure the cross-fertilization of values. This approach is not intended to result in the distinct fields of international law being subsumed into international law for sustainable development, and it is without prejudice to the general rules of international law concerning the hierarchy of norms, especially between treaty and custom.

VI. Conclusion

This is new work, and it is understood that changes, refinements, even deletions may be made to this "list," particularly as governmental representatives have an opportunity to reflect on the work of the Expert Group and other bodies through the deliberations of the United Nations Commission on Sustainable Development. Nonetheless, this is an important attempt at definition. It gives substance to the ephemeral. One of the most important bridges that led from magic to science was in the naming and classification of things. To be meaningful, sustainable development must make that move from incantations to legal and policy frameworks that can serve as the driving force of concrete action. It is hoped that, as understanding proceeds, a set of benchmark principles may be agreed upon and taken into account either in the formulation of new international legal instruments, or in the interpretation and application of existing international legal instruments relating to sustainable development.