The Progression of the Sustainability Concept in Environmental Law

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ABSTRACT

Norms in the law have historically been treated as developing from domestic law into international law. Sustainable development, as a recognized legal principle, perhaps as a legal custom, and within treaty law, has had the reverse progression. This paper traces the progression of sustainable development from international norm to independent legal cause of action, as tested in conflict resolution through litigation on four separate continents.

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"Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[1]

Background

Too often discussions of public law look, sound, and feel as though law is limited to the process of law *making*. Worse, the law making is even talked about as policy, making it sound like political science at best, or just a "wouldn't it be a good idea if?" wish list at worst. I too will begin with these, but do so only to bring us to law in practice as *conflict resolution*, not law making. This is the practicing lawyer's entry point to the law. Within conflict resolution is the norm of "sustainability." Sustainability carries numerous connotations, but also a legal denotation. To the layperson, sustainability may mean practices that enable living from day to day or week to week. To the business person, it could imply an investment that will provide for future dividends. To the environmental lawyer, however, "sustainability" means something far more clearly and concretely definable, even if still challenging to put into practice.

The Usual Progression of a Legal Concept: Moving from Domestic to International Law

Since the time of the Enlightenment, legal authority theoretically is said to begin with individuals coming together and relinquishing part of their own rights and liberties to the collective legal entity known as the state.[2] The trajectory of this action—from individual to state—continues when this new and additional legal person known as the "state" then in turn makes a legally-binding and recognizable

[1] Principle 1, Rio Declaration on Environment and Development, http://www.un-documents.net/rio-dec.htm#principle-7

[2] Legal positivists, who would claim that law is the will of the sovereign backed by actual or threatened force, diverge from naturalists who would claim that law is practices based upon a sense or right and wrong that is itself put in place by gods or nature. That distinction does not affect this origin story.

agreement with another state or individual. For most areas of planning and conflict resolution, the individual will however return to the state when he or she is seeking either administration of the legal system or a referee to settle a conflict.

Yet there are some types of problems for which individuals cannot find relief within their own state's legal system. There are two clear territorial jurisdiction reasons for this. The first possible reason is that the territory itself may not belong to any one state, such as in the case of the oceans or Antarctica. In these cases, there simply is not a sovereign that is directly responsible for resolving disputes arising in international territory. In these cases the sovereign can be the referee over a conflict only if one or more of those parties in conflict are citizens of that state.

The second possible reason is that a legal person—natural or artificial—may be present in a state that is not his, her or its state of citizenship. In such cases, the host state might have an agreement with the visitor's home state as to the jurisdiction that governs conflicts. But if the conflict is between the states themselves, then it is unlikely that a state will submit to conflict resolution with another state in that same state's court system. In those instances, we have international courts and tribunals that are themselves not subject to any state's jurisdiction. For this second category of possible reasons, it might also be the case that the conflict itself takes place in more than one state, but one global resolution of all the various problems is sought.

In both of these traditional categories one can see, however, that even when international jurisdiction is needed, the path of the search for legal solutions goes from the individual to the state to international. For ease of understanding, one might say it is bottom-up, not top-down oriented, although one must be careful not to assume, by this tool of understanding, that the orientation is one of vertical power. Were the international legal system a pyramidal structure, international law would be superior to domestic law and that is most definitely not the case. Nor is international law inferior to domestic law. It is simply not a hierarchy, but rather best thought of as parallel paths. Sometimes both paths offer solutions to the same problem, but more often each path is thought of as offering solutions unique to differing problems. And so when it comes to environmental law, the principles known as "the precautionary principle" and the "polluter pays principle" for example, were first made operative norms of domestic law, and then incorporated into international agreements or recognized as international principles of law.[3]

Sustainability as Reverse Progression: Moving from International to Domestic Law

But when it comes to the notion of sustainable development, the norm is first found in international law and then only later applied in domestic law. Nevertheless, as cautioned above, we should not think of the legal principle of sustainable development, despite its rise in international law, as an international principle imposed in a vertical hierarchy from somewhere in the international ether to the states, but rather as a legal principle to solve problems for which the states had simply not found a legal tool. That is to say, the international law principle of sustainable development fills a void in domestic state law (also known as "municipal law"), rather than contradicting or attempting to refute state law. So what void does it fill?

Naming

Historically, harms that would today be addressed by statutory law explicitly dedicated to environmental protection were instead addressed by the general (pri-

[3] Article 38 of the Jurisdiction Statute of the International Court of Justice tells the Court to apply conventions, principles and customs as the three sources of primary law. Judicial opinions and the opinions of scholars are called "secondary."

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vate)[4] law of obligations, known in the Anglo-American system as tort and contract. Trespass and negligence were legal concepts known to most cultures and applied when a party polluted the air, land or water of a neighbor. More subtle cases included the legal theory of nuisance, where one had interfered with a neighbor's "quiet enjoyment" of his own land.

Social unrest worldwide in the 1960s included a rejection by many industrialized cultures of the exuberance of industry and its pollution and waste. Law addressed this unrest with constitutional reform, statutory law, and the establishment of legal agencies dedicated specifically and exclusively to the environment. Within twenty years, it became clear however that this scheme failed to account for two problems—the fact that legal regimes were limited to national applicability and the emergence of the so-called "developing" world into industrialism.

In 1987, a World Commission on Environment and Development was convened. The work product of the Commission was a report. The report ignited a new and invigorated approach to protecting the future by shaping the international agenda towards economic, social, and environmental development.[5] To do so, the report named the environmental goal of "sustainable development" and defined sustainability as "development which meets the needs of current generations without compromising the ability of future generations to meet their own needs."[6] This phrase became the first part of the legal definition that we now have in place. Additionally, the report also highlighted two key concepts of sustainability by further defining the concept of "needs" as being particular to the world's poor, "to whom prevailing priority should be given," and stated that the "idea of limitations" should be "imposed by the state of technology and social organization on the environment's ability to meet present and future needs."[7] The latter concept emphasizes the principle that natural resources should not be consumed primarily by a small number of highly developed and industrialized societies, but rather that access to natural resources should be equal among people from all over the world. Each society should be given the chance to produce and consume to fit their specific needs.[8]

So beyond what the prior national tools of law had accomplished, the principle of sustainable development brought about three new things: first, legal protection for future generations; second, the notion that economics plays an integral role in environmental protection; and third, legal protection that goes beyond national boundaries becomes available to persons injured by pollution. To achieve such goals, the Commission laid out a seven point plan in the pursuit of sustainability. The points are as follows: a political system that secures effective citizen participation, an economic system capable of generating surpluses on a self-reliant basis, a social system that provides for solu-

[4] While in civil law cultures, lawyers are comfortable with dividing the law between "public" and "private" law, common law lawyers do not. Thus common law lawyers, for example, would not find it odd to plead a constitutional claim (public law) alongside a tort relief claim (private law) in the same litigation's pleading. See Keith Wilder, "The 'Public Business Law' Conundrum," *Kölner Schrift zum Wirtschaftsrecht*, Vol. 2, 2012 (forthcoming).

[5] K. Bärlund, *Sustainable development - concept and action*, www.unece.org/oes/nutshell/2004-2005/focus_sustainable_development.html, last accessed January 10, 2012.

[6] Report of the World Commission on Environment and Development, *Our Common Future*, Chapter 2: Towards Sustainable Development, A/42/427 June 1987, Geneva, Switzerland. The Report is commonly known as the "Brundtland Report."

[7] Id.

[8] M. van Harmelen, M. van Leeuwen, T. de Vette, *International Law of Sustainable Development: Legal Aspects of Environmental Securityon the Indonesian Island of Kalimantan*, http://www.envirosecurity.org/espa/PDF/IES_ESA_CS_Kalimantan_Legal_Analysis.pdf, last accessed January 10, 2012.

tions arising from disharmonious development, a production system that respects preservation, a technological system that strives for new solutions, an international system that fosters sustainable patterns of trade and finance, and an administrative system that is flexible and can self-correct.[9] Given this charge, the Commission challenged governmental and non-governmental leaders alike to come together to solve problems as efficiently as possible given the technology at hand while protecting the environment, supporting the poor, and keeping an eye to the future. From the left and from the right, entities of every sort saw opportunities in the concept of sustainability—but it soon became apparent that the notion was broad and vague enough that the various interpretations resulted in no concrete set of traits as to what we could or could not call "sustainable development."[10]

Making It Legally Useful

The most immediate culmination of the national and international debate over sustainability following the Brundtland Report occurred in June 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro. At the Conference, one hundred seventy-eight states signed[11] five documents: Agenda 21, the Rio Declaration on Environment and Development, the Statement of Forest Principles, the United Nations Framework Convention on Climate Change, and the United Nations Convention on Biological Diversity. Only Agenda 21 and the UN conventions on Climate Change and Biodiversity are binding legal documents.

Among these, we find sustainability embedded in Agenda 21. Adopted by one hundred seventy-eight governments in Rio, Agenda 21 is a comprehensive plan of action which is to be undertaken by all forms of governmental and non-governmental entities on a global, national, regional, and local scale to ensure sustainable development throughout the world.[12]

Agenda 21 is divided into four sections, each of which addresses separate yet intertwined topics for a total of forty chapters. Section One, entitled Social and Economic Dimensions, focuses on international cooperation to accelerate sustainability, combating poverty, protecting and promoting health, sustainable settlement, and integrating environment and development into decision making.[13] Section Two, Conservation and Management of Resources for Development addresses, *inter alia*, protecting the atmosphere, combating deforestation, managing fragile ecosystems, protecting waterways, conserving biodiversity, and promoting sustainable agriculture and rural development.[14] Section Three, Strengthening the Role of Major Groups, aims at increasing the awareness of sustainability among women and children, indigenous people, non-governmental organizations, and local authorities.[15] Finally, Section Four, entitled Means of Im-

[9] Report of the World Commission on Environment and Development, *Our Common Future.*

[10] K. Bärlund, *Sustainable development - concept and action*, www.unece.org/oes/nutshell/2004-2005/focus_sustainable_development.html, last accessed January 10, 2012.

[11] To make international agreements legally-binding, they must be both signed by a representative of the state, which is often accomplished at the convention itself, but then also be agreed by the domestic government of each state to make the agreement binding upon the state and its citizens through that state's domestic law. That second process is known as "ratification." States differ as to whether the international law is then a separate parallel path of domestic law (the dualist approach) or is fully integrated into the state's own domestic law (the monist approach). This is not an issue for this discussion of sustainability.

[12] UN Department of Economic and Social Affairs, Division for Sustainable Development, *Agenda 21*, http://www.un.org/esa/dsd/agenda21/, last accessed January 10, 2012.

[13] UN Department of Economic and Social Affairs, Division for Sustainable Development, *Agenda 21*, http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml, last accessed January 10, 2012.

[14] Id.

[15] Id.

plementation, discusses mechanisms which can be used to promote sustainable development, including: science, education, international institutions, and financial mechanisms.[16]

Defining "Sustainable Development"

Of most interest to readers of this journal would likely be Section One, Chapter Six, of Agenda 21, entitled "Protecting and Promoting Human Health." As recognized by the drafters of Agenda 21, "health and [sustainable] development are intimately interconnected."[17] That is, without a healthy population, sound sustainable development is nearly impossible to achieve. The authors opined that insufficient development leading to poverty and resulting in wasteful overconsumption, when exacerbated by an ever-growing world population, can lead to severe environmental health problems in all the nations of the world.[18] To address such issues, program areas were developed to tackle the primary health needs currently afflicting the world population. The program areas are as follows: meeting primary health care needs, particularly in rural areas; the control of communicable diseases; protecting vulnerable groups; meeting the urban health challenge; and reducing health risks from environmental pollution and hazards.[19]

To ensure success in protecting and promoting human health through sustainability, intersectoral efforts are required—health, environmental, and socio-economic improvements must be had.[20] To make certain such aims can be achieved, communities must focus on educating and housing those in need, especially the poor. A concerted effort via public works and community groups, businesses, and schools, as well as religious, civic, and cultural organizations can enable success in ensuring sustainable development.[21] In the public health sector, sustainability should not only be about the treatment of disease but rather about the prevention of disease. To do so, the drafters of Agenda 21 require governments and various international organizations to develop plans for priority actions via cooperative planning among all appropriate institutions. As noted by the authors, "health ultimately depends on the ability to manage successfully the interaction between the physical, spiritual, biological and [socio-economic environment."

Both to implement Agenda 21 and to monitor the implementation of Agenda 21 by states and local governments, the United Nations General Assembly established the Commission on Sustainable Development in December 1992, charging it with the mission of monitoring and reporting on the execution of the agreements reached during the Earth Summit.[22] The General Assembly also charged the Commission on Sustainable Development with the task of providing policy guidance for future conferences, including the World Summit on Sustainable Development.[23]

The World Summit on Sustainable Development (Johannesburg, 2002)

The World Summit on Sustainable Development, also known as Earth Summit 2002, marked the ten-year anniversary of the summit in Rio. The World Summit, held in Johannesburg, South Africa, during the months of August and September 2002, reaffirmed the full implementation of the Rio Summit and with it, Agenda 21.[24] In addition to the reaffirmation of

[16] Id.
[17] UN Department of Economic and Social Affairs, Division for Sustainable Development, *Agenda 21*, http://www.un-documents.net/a21-06.htm, last accessed January 10, 2012.
[18] Id.
[19] Id.
[20] Id.
[21] Id.
[22] http://www.un.org/esa/dsd/csd/csd_aboucsd.shtml, last accessed January 10, 2012.
[23] Id.
[24] Johannesburg Declaration on Sustainable Development, http://www.un-documents.net/jburgpln.htm, last accessed January 10, 2012.

Agenda 21, the leaders who convened in Johannesburg adopted the Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development.[25]

The Johannesburg Declaration on Sustainable Development emphasized that the overarching objectives and fundamental requirements for sustainability were poverty eradication, changing unsustainable patterns of production and consumption, and protecting and managing the natural resource base of economic and social development.[26] The drafters of the Declaration attributed the divide between rich and poor as well as the "ever-increasing gap between the developed and developing worlds" as the underlying issue facing human society, threatening global prosperity, security, and stability.[27] Cognizant of the losses already sustained and the future threat of diminished biodiversity and food stores, in addition to the increased risk of more frequent and devastating natural disasters, the Declaration and its authors urged solidarity irrespective of race, creed, language, culture, or tradition.[28]

To achieve their goals of fostering solidarity and promoting sustainable development, the drafters issued a call for multilateralism. Such multilateralism is often believed to be most easily achieved via the United Nations, which acts as the most universal and representative international legal organization of states.[29] Unfortunately, this belief too often leads governments and other organizations to believe that someone else is taking care of their problem. In an effort to curb this belief, the drafters insisted that the process of sustainable development must be an inclusive process, requiring the aid and support of each major group and government with participated at the Summit.

The Plan of Implementation of the World Summit on Sustainable Development, the second effort to arise from the Summit, contains an eleven-part Annex which provides the framework for achieving sustainability. The eleven-part Annex, including the introduction, addresses: poverty eradication; changing unsustainable patterns of consumption and production; protecting and managing the natural resource base of economic and social development; sustainable development in a globalizing world; health and sustainable development; sustainable development of small island developing States; sustainable development for Africa; regional initiatives in Latin America and Caribbean, Asia and the Pacific, West Asia, and the Economic Commission for Europe; means of implementation; and institutional framework for sustainable development.[30]

Much of the plan reiterates the goals of Agenda 21 while more narrowly focusing the efforts of those involved. Until the Johannesburg Summit, a cloud of ambiguity surrounded the concept of sustainable development, despite high-level political support.[31] To substantiate interest in sustainable development, the drafters of the Plan committed to concrete actions—as opposed to issuing various unilateral political declarations—on global, regional, and local levels, while at the same time enhancing legal cooperation among states to expedite the realization of sustainable development.[32] In doing so, the authors shifted the focus of sustained development from one of an all-encompassing venture aimed at a great number of areas to a more practical approach, stressing emphasis on only a limited number of substantive areas at one time.[33] By using this

[25] Id.
[26] Johannesburg Declaration on Sustainable Development, http://www.un-documents.net/jburgdec.htm, last accessed January 10, 2012.
[27] Id.
[28] Id.
[29] Id.
[30] Annex of the Plan of Implementation of the World Summit on Sustainable Development, http://www.un-documents.net/jburgpln.htm#IV, last accessed January 10, 2012.
[31] Id.
[32] Id.
[33] K. Bärlund, *Sustainable develop-*

approach, the authors hoped to neutralize external factors, particularly the negative factors associated with globalization—such as the ever-increasing gap between the developed and developing countries.[34]

The World Summit on Sustainable Development (New York, 2005)

Three years after the Johannesburg Summit, in September 2005, New York City hosted a World Summit.[35] At the New York Summit, the legal definition of "sustainability" was further refined. The delegations in New York reaffirmed their commitment to achieve the goal of sustainable development via Agenda 21 and the Johannesburg Plan of Implementation, but also integrated addition components into the legal concept of sustainable development. The additional components—the "Three Pillars" as they came to be known—are economic development, social development, and environmental protection.[36] The Pillars are interdependent yet mutually reinforcing and are a testament not only to the intertwined planning of a sustainable society,[37] but also an indicator of the types of problems to which societies turn for international norms when domestic norms are insufficient to solve problems. With the New York Summit, we then have arrived at the legally-operative definition of "sustainable development" at the international level that carries forward to the present. With the current concrete definition, the issue for practicing lawyers, and perhaps more importantly, for their clients, becomes whether one can use the principle of sustainable development as an independent cause of legal action through which one can obtain recovery.

Furthermore, despite all that has been written about sustainable development from the issuance of the Brundtland Report until the present in an effort to clearly and concretely define the term, there remains some debate as to the legal implications of the term in international law.[38] One argument presented by some environmentalists suggests that sustainability detracts from the debate on environmental protection because sustainable development emphasizes the role of mankind to a degree which is detrimental to the planet. The counterargument to this belief is that sustainable development is misunderstood due to a poor understanding of the mission of the multiple summits which is to integrate environmental protection, economic development, and human rights.[39] The clearest method through which to implement the concrete legal meaning of this term from international law is to trace cases that rely upon it. Within the records of these cases, we find the clear legal arguments of litigation parties and the explicit reasoning of judges to decide what the term means for the parties to the litigation. But before reviewing the cases that have thus far worked with the term, one should first have a clear understanding of the difference between international and domestic subjects of law, between domestic and international institutions of law and between international and domestic sources of law.

Differences between International Law and Domestic Law

Legal Subjects

As mentioned earlier, it was an Enlightenment concept to believe that legal rights spring from the indi-

ment - concept and action, www.unece.org/oes/nutshell/2004-2005/focus_sustainable_development.html, last accessed January 10, 2012.

[34] Plan of Implementation of the World Summit on Sustainable Development, http://www.un-documents.net/jburgpln.htm, last accessed January 10, 2012.

[35] Fact Sheet of the Outcome of the 2005 World Summit Outcome, http://www.un.org/summit2005/presskit/fact_sheet.pdf, last accessed January 10, 2012.

[36] Resolution adopted by the General Assembly, http://data.unaids.org/Topics/UniversalAccess/worldsummitoutcome_resolution_24oct2005_en.pdf, last accessed January 10, 2012.

[37] Id.

[38] Id.

[39] Id.

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vidual natural person. And indeed they still do, making each natural person a legal subject. Natural persons may also create artificial persons such as corporations or states that are also legal persons, however. All legal persons who are citizens of a state have a right of audience before the courts of that state to resolve legal conflicts.

In contrast, the only recognized international legal persons are states themselves. With rare exceptions like the European Commission, only states may enter into treaties, conventions and other internationally-binding agreements. For domestic citizens to have a voice in an international venue, they must use politics to persuade their state (or other states) to act, as they do for instance during the legal procedure before the World Trade Organization, before whom no private individuals may appear.

Legal Institutions

Since the Enlightenment, Montesquieu's notion of tripartite government has had tremendous influence over most secular states of the world. The benefit of the idea is to separate the various functions of government into independent branches and then use the constitution legally to empower each branch with a separate legal function through constitutionally-created institutions. Once constitutions create a separate and independent judicial system in any state, that judiciary may then constitutionally, and with binding effect, decide conflicts among legal subjects of that state.

These same domestic institutions do not have the power to speak with legal authority (literally, "jurisdiction") over foreign sovereign states, however. For that function, truly international institutions are necessary, and thus, states come together and by agreement create international judicial institutions such as the International Court of Justice, the European Court of Human Rights, or the World Trade Organization's Appellate bodies. However, of the three concepts—subjects of international and domestic law, institutions of international and domestic law, and sources of international and domestic law, perhaps the most different from domestic law, and thus, the least understood, are the sources of law.

Sources of Law

Through simply living in a culture—going to school or university, being a member of a family, a club, or a religion, reading the newspaper and watching television, film and social media, one is usually acculturated to one's own domestic legal system without having explicitly studied the legal system. Often, the formal education that is offered in a culture, even if it is called "law," is more often education about the political system. Nevertheless, citizens of states all over the world have a cultural sense of the law under which they live. Citizens have a sense for instance of their constitution and perhaps of some relevant statutory laws. They may know the contents of some regulations, even if they do not know that the authority of the regulation is executive rather than legislative, for example, and as a result conflicts arising out of the regulation go before administrative tribunals and not courts. And in common law jurisdictions, some citizens might even have some sense of the legal effect of court decisions known as precedent under the principle of "stare decisis."

But when it comes to international law, misunderstanding abounds, and it seems that people most often think of the international system as some super system, sitting atop the domestic systems in some way, and expect that same international system to rule over the domestic system using the same types of legal sources, but then to administer these types of sources through international institutions. This picture is not only wrong, but it may well also be an impediment to political and social support for the idea of international law. Thus, with emphasis upon this cautionary remark that international law is not a super system, it begins to become clear how extraordi-

nary it is that through international law, and not through domestic law, "sustainability" first became defined as a legal concept.

International Source of Law 1: Treaties. Above, in the section reviewing the history and development of the term "sustainable development" from Agenda 21 to the New York Convention of 2005, I traced the meaning of the words through the texts of treaties. And by now, at least twenty-three different multilateral treaties exist in which "sustainable development" is stated to be the object or purpose. Indeed treaties are the easiest of the international sources of law to use. Article 38 of the United Nations' International Court of Justice Jurisdiction statute provides however that in addition to treaties, the International Court of Justice is to apply two other sources of international law in resolving international conflicts—custom and principle.

International Source of Law 2: Custom. Specifically, Article 38 of the International Court of Justice's Jurisdiction Statute says, inter alia, the court shall apply "international custom, as evidence of a general practice accepted as law." So in addition to sustainable development being binding upon states in their relations with other states with whom they have entered into treaties, might it also be a binding norm as a function of custom? To make that so, those same states would need to demonstrate both an objective component of custom and a subjective component of custom in order for it to be recognized as such. The objective component means that one would need to offer evidence that a number of states have in fact followed this practice. There is no exact number of states necessary, but there should be a representative number of similar states in the world. The subjective part of the requirement, known as the *opinio juris*, requires that the states in question practice the custom because they believe it to be legally required, and not out of moral obligation alone or due to a threat of force from another power. Within the realm of international environmental law, sustainable development has indeed been recognized as custom by the International Court of Justice in the case of Hungary versus Slovakia, also known as the Gabcikovo—Nagymaros Dam case. There, the court stated that "The need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[40] In making this statement, the court recognized that even without a treaty, sustainable development was being practiced as a custom by the states involved and a sufficient number of other states such that it should be considered as part of the internationally-recognized body of customary law.

International Source of Law 3: Principle. The third example of international sources of law is principle. Whereas the evidence of custom is the observed practices of states, after they have committed themselves to those practices, principles can be unilaterally and intentionally announced as principles, precisely for the idea of bringing an international legal norm into existence. For this study in sustainable development, we find in the non-binding legal instrument of the 1992 Earth Summit in Rio known as the "Rio Declaration," mention of the principle of sustainable development through the goal of "the further development of international law in the field of sustainable development."

Some argue that the concept has graduated from the status of a legal principle to that of customary law.

> *There can be little doubt that the concept of 'sustainable development' has entered the corpus of international customary law, requiring different streams of international law to be treated in an integrated manner. (…) By invoking the concept of sustainable development, the ICJ indicates that the term has a legal function and both a pro-*

[40] *Hungary v. Slovakia*, International Court of Justice Reports, 37 *International Legal Materials* (1998) 162.

cedural/temporal aspect (obliging the parties to 'look afresh' at the environmental consequences of the operation of the plant) and a substantive aspect (the obligation of result to ensure that a 'satisfactory volume of water' be released from the by-pass canal into the main river and its original side arms). [However] the ICJ does not provide further detail as to the practical consequences, although some assistance may be obtained from the Separate Opinion of Judge Weeramantry.[41]

As in the *Case Concerning the Gabcikovo-Nagymaros Project* between Hungary and Slovakia, which came before the International Court of Justice, sustainable development has begun to be recognized as an independent cause of action not just through its mention in treaties, but through conflict resolution before international courts and tribunals.[42] Even detractors admit the normative effectiveness of sustainable development:

It is suggested in the Gabcikovo judgment that the references to the concept of sustainable development in multilateral treaties and so on are evidence of the concept's translation into customary international law. But what is the value of that evidence? One of the most noticeable characteristics of the examples cited in Gabcikovo is that they do not include any instances of the actual application of the principle of sustainable development in order to reach a binding determination that states have acted unlawfully. There is no instance of reliance upon the concept itself as a rule of law binding upon states and constraining their conduct.[43]

However, despite Vaughn Lowe's belief that sustainable development cannot be a primary rule of law, he does propose that it may serve as an interstitial norm, that is, as a gap filler or modifier between primary norms.[44] For example, it has been suggested that where two primary rules of law are in conflict, an interstitial norm can serve to elucidate how the two primary rules should be balanced.[45]

For lawyers, the task is not to define sustainability, since that has already been accomplished, but to take the definition and use it to resolve conflicts. To do so, the question that arises is whether the legal concept of sustainability is a sufficiently concrete and definable legal norm, the violation of which alone gives individuals the right to recover damages. In legal parlance, this is known as a "cause of action." Although the legal concept comes from international law, international law is the law practiced between and among states, not individuals. For an individual to have the ability to use an international norm like sustainability to support his or her private legal action, the state must have implemented the international norm into its own domestic law. Thus, the impact of the legal concept of sustainability can best be seen in domestic cases. The following is a brief review of the domestic legal use of sustainability on four different continents.

Sustainability as a Legal Tool in Practice (a.k.a. "cause of action"): Some Case Examples from Four Continents

Since the publication of the report of the World Commission on Environment and Development in 1987, various countries have begun to include basic principles of environmental protection or sustainable development, or both, into their national constitutions. In 1994, there were already about sixty

[41] Phillipe Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge: Cambridge University Press (2003) pp. 254-55.
[42] Id.
[43] Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone, eds., *International Law and Sustainable Development: Past Achievements and Future Challenges*, Oxford: Oxford University Press (1999) pp. 19-37.
[44] Id.
[45] Id.

countries that had adopted constitutional provisions relating to sustainable development.[46] However, the degree of protection awarded to sustainable development varies immensely among the different countries. Some countries even grant an enforceable constitutional right to an individual to a clean and healthy environment, whereas other countries have only incorporated declaratory provisions of their intention to protect the environment and further sustainable development. An overview of the exemplary constitutional practices of some countries will be given.

Sustainable Development as an Independent Cause of Action in Germany

On the constitutional level, environmental protection takes responsibility for the future in Art. 20a GG[47] of the German *Grundgesetz*, which functions as a Constitution. It is generally accepted that this Article entails precaution in regard to the environment, an element of sustainable development, on part of the state. Art. 20a GG, however, only codifies a state objective (*Staatszielbestimmung*) and neither creates a binding and enforceable obligation to protect the environment nor something like an environmental human right. Germany thus belongs to the countries with a weaker level of constitutional protection for sustainable development.

On the level of legislation in Germany, however, under the influence of developments in International and European law, sustainable development became a principle of its own, the so-called *Nachhaltigkeitsprinzip* or "principle of sustainability." This principle is not always so visible in German law because many of its aspects are already incorporated in the precautionary principle (*Vorsorgeprinzip*), which is one of the main principles of German Environmental Law and has been so for quite some time. The precautionary principle in Germany is not only understood to contain the element of precaution in relation to risk-taking and scientific uncertainty, but also an element of precaution in relation to the use of resources. This principle guides administrative bodies and courts in the interpretation of environmental statutes. Yet, like constitutional Article 20, neither the *Nachhaltigkeitsprinzip* nor the *Vorsorgeprinzip* grant a subjective right to current or future generations that would be enforceable in a court. Only specific provisions in environmental statutes grant on rare occasions rights to third parties. The individual will have to show however that the particular section in question was intended not only to protect communal interests but also individual interests (i.e., a so-called *Schutznorm*) and even then a person's standing to bring a claim will only be based on property of a neighbouring piece of land.

For Germany, one should note in conclusion that sustainable development, like much of environmental law in Germany, is mostly protected and enforced through the administrative process and not conflict resolution. The possibility of judicial enforcement through individuals bringing cases is rather weak, mainly due to the fundamental principle of German administrative law that one can only enforce one's own subjective rights and not objective rights belonging to other people or mankind in general (*Prinzip des subjektiven Rechtsschutzes*).

Sustainable Development as an Independent Cause of Action in the United Kingdom

[46] See Final Report by Mrs. Fatma Ksentini (E/CN.4/Sub.2/1994/9), Annex III.

[47] Art.20a GG:
Protection of the natural foundations of life and animals
Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.
(Der Staat schützt auch in Verantwortung für die künftigen Generationen die natürlichen Lebensgrundlagen und die Tiere im Rahmen der verfassungsgemäßen Ordnung durch die Gesetzgebung und nach Maßgabe von Gesetz und Recht durch die vollziehende Gewalt und die Rechtsprechung.)

In the United Kingdom of Great Britain and Northern Ireland, the situation is similar to Germany. Sustainable development, in and of itself does not grant subjective rights that can be enforced in courts. However the term is increasingly used in the formulation of statutes and sometimes, as in Scotland's Land Reform Act of 2003, even in the form of a legal rule, which requires that before they give their consent to a proposal by a community to buy land, Scottish Ministers must be satisfied that what the community body proposed to do with the land is compatible with furthering the achievement of sustainable development.[48] This provision is even legally enforceable in court, where community bodies can appeal certain decisions by Ministers[49] that in fact often relate to questions of sustainable development. The Court then examines whether the community bodies land use plans actually satisfy the legal mandate for sustainable development.[50]

[48] S.51(3) of the Land Reform (Scotland) Act 2003

[49] S.61 of the Land Reform (Scotland) Act 2003

[50] This section was so far invoked once in the case of *Holmehill Limited v the Scottish Minister* 2006 SLT (Sh Ct) 79 (available at http://www.scotcourts.gov.uk/opinions/b255_05.html) In this case the community right to buy was denied because of a late application, yet the Court in this case agreed with the Ministers in doubting the sustainable development of the land, as the community group wanted to keep it as wild land and prevent the future building of houses on it.

Sustainable Development as an Independent Cause of Action in India

References to the environment can be found in the Indian Constitution in Art. 48a[51] and Art 51a[52] – the former codifying a state objective to protect the environment, the latter creating a citizens' duty in that regard. In addition, the Indian Supreme Court – considered to be by far the most activist court in the developing world (if not the entire world) when it comes to environmental protection[53] – has interpreted the right to a clean environment to be part of the right to life protected in Art.21 of the Indian Constitution: "No person shall be deprived of his life or personal liberty except according to procedure established by law."[54] Hence the Indian judiciary created a human right to a healthy environment,[55] and thus offers much stronger protection through sustainable development than Germany or the U.K.

There are also strong and wide-ranging enforcement mechanisms for the actual implementation of sustainable development, as environmental cases can be brought before the Indian courts by way of public interest legislation under either Article 32 or Article 226 of the Indian Constitution,[56] that is, unlike in

[51] 48A. Protection and improvement of environment and safeguarding of forests and wild life.—The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

[52] 51A. Fundamental duties.—It shall be the duty of every citizen of India—
(*g*) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

[53] Ebeku, Kaniye SA, "Judicial contributions to sustainable development in developing countries: an overview" *Environmental Law and Management* 15(3) [2003] 168 at 169. See especially volume I of M. C. Mehta, *In the Public Interest, Landmark Judgments and Orders of the Supreme Court of India on Environment & Human Rights* (3 vols.) New Delhi: Prakriti Publications, 2009.

[54] See *Charan Lal Sahu v. Union of India* (AIR 1990 SC 1480), *Subhash Kumar v. State of Bihar* (AIR 1991 SC 420), para 7:"Right to live is a fundamental right under Art. 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Art. 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life."

[55] Razzaque, Jona, "Human Rights and the Environment: the national experience in South Asia and Africa", Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva: Background Paper No. 4, para 5.

[56] 32. Remedies for enforcement of rights conferred by this Part
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights

conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

226. Power of High Courts to issue certain writs. —
(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.
(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—
(*a*) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
(*b*) giving such party an opportunity of being heard,
makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.
(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

Germany, a person does not have to show that he or she is hurt personally by the pollution, merely that he or she has a "sufficient interest"[57] in bringing the matter before a court. In the case of *Law Society of India v. Fertilizers and Chemicals*,[58] the Kerala High Court referred explicitly to sustainable development:

> *It is significant to note that there is now a broad cognizance that pious good wishes for humanitarian welfare will not simply be adequate to assure human well being, social justice and sustainable development for all. The world is looking increasingly for a sound judicial basis to ground national action to assure that necessary steps are taken to achieve the various objectives scheduled as priority for the survival of a peaceful and equitable world society. Life on earth can never be peaceful if it is shrouded in perpetual anxiety and fear of extinction on account of human activities, which may be based perhaps on highly advanced technology.*[59]

In the case called *Vellore Citizen Welfare Forum v. Union of India*,[60] the facts of which concerned tanneries discharging effluents into a river that was the main source of drinking water in the area, the Supreme Court noted that "though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology, degrade the environment and pose as a health hazard."[61] In that

[57] Razzaque, Jona, "Human Rights and the Environment: the national experience in South Asia and Africa", Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva: Background Paper No. 4, para 3.2.2.
[58] AIR 1994 Ker 308 at para 161.
[59] Which appears to be the first explicit reference to this principle by an Indian court.
[60] AIR 1996 SC 2715.
[61] AIR 1996 SC 2715 at para 9.

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http://www.electronic-health-journal.com/

same case, the Court went on to state that "The traditional concept that development and ecology are opposed to each other, is no longer acceptable. *'Sustainable development' is the answer."* [62]

And finally, in the case of *Narmada Bachao Andolan v Union of India*, the Indian Supreme Court held that:

> *It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution.*[63]

Sustainable Development as an Independent Cause of Action in South Africa

The South African Constitution, by many considered to be one of the most progressive Constitutions in the world, provides for a human right to a clean environment expressly taking the rights of future generations into account. Under the simple title of "Environment," Section 24 of the South African Constitution provides that: [E]veryone has the right:

> *to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*

This right is often quoted by the South African Constitutional Court when interpreting other statutes and its importance is emphasized by the Court. As such the Constitutional Court has said:

> *What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable 'economic and social development'. Economic and social development is essential to the well-being of human beings. This Court has recognised that socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.*[64]

Whereas there has yet to be a case testing whether sustainable development is an independent cause of action included in this right, or is otherwise actionable, most analysts agree that the constitution, as written, will include that right when tested.

Sustainable Development as an Independent Cause of Action in the United States of America

In the United States, parties have attempted to implement sustainable development through conflict resolution from the law of nations through the domestic Alien Tort Claims Act,[65]

[62] AIR 1996 SC 2715 at para 9 (emphasis added).
[63] AIR 2000 SC 3751
[64] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) at para 44.
[65] *Stanford Environmental Law*

which is a piece of federal legislation. For example, in *Flores v. Southern Peru Copper*, a 2002 case which was before the United States District Court for the Southern District of New York, the plaintiffs claimed violations of their "right to life," "right to health," and "*right to sustainable development*," in addition to various violations of international environmental law.[66] In demonstration of the reverse progression of sustainable development from international to domestic law, in their brief the plaintiffs cited the Rio Declaration, stating, "even within a country's borders, no state has the unfettered right to pursue economic development at whatever the cost to human beings." And so, when behavior as egregious as this results in a substantial, long-lived pattern of disease and death, the boundary has been crossed. The state's discretion has been abused."[67] The District Court concluded that the plaintiffs failed to establish a violation of the law of nations, holding that the alleged violations were "boundless and indeterminate" rights, insufficient to comprise customary international law.[68]

Despite such attempts as that of the plaintiffs in the *Flores* case, at the same time there have been observers of the American legal scene who have concluded that "No fair minded observer could conclude that U.S. environmental law and policy as they currently exist make sustainable development an organizing focus or central design goal."[69]

There is also uncertainty surrounding sustainable development among scholars, particularly the opinions of Sands and Lowe mentioned above. Nevertheless, the District Court in the *Flores* case should have considered the effect of the decision rendered by the International Court of Justice and the weight given to the concept in the advisory opinion. Although the two scholars disagree on the exact effect of sustainable development in deciding the outcome of a case, they do agree that it does play a role, however expansive or limited in international law, and should be therefore recognized.

In another case from 2002, *Sarei v. Rio Tinto, PLC*, a group of citizens alleged that the mining operations of Rio Tinto in Papua New Guinea resulted not only in a despoliation of the natural environment, but civil war. One of the most peculiar aspects of the case is that the plaintiffs were able to bring the action against Rio Tinto PLC in United States Federal Court under the Federal Alien Tort Claims Act, a statute designed to give US plaintiffs the ability to get jurisdiction over foreign defendants in US court, but one that has been on many occasions been used by foreign plaintiffs to get jurisdiction over foreign defendants in US court. Those citizens were ultimately not successful, but their theory of the case was accepted.

Conclusions

In conclusion, history demonstrates that unlike most legal norms that begin domestically and then become global, sustainable development began globally and is slowly being applied domestically, one state at a time, over at least four continents. Important for the legal practitioner is the fact that sustainable development is, at the same time, also becoming an independent legal cause of action. In international law, the use of sustainable development as one's legal theory of the case to support a cause of action must yet come from explicit agreements, such as treaties. Nevertheless, evidence of the other two sources of international law—custom and principle according to Article 38 of the jurisdictional statute of the International Court of Justice—is growing. When the international agreements are implemented in states, they historically have required statutory enactment,

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[66] 253 F.Supp.2d 510 (emphasis added).

[67] Id.

[68] Id.

[69] E. Donald Elliott & Mohamed Tarifi, "Integrating Sustainable Development into U.S. Law and Business," 33 ENVTL. L. REP. 10,170, 10,172 (2003).

such as in the states of Germany, the United Kingdom and India. Newer states, such as South Africa, make sustainable development a constitutional requirement. These newer constitutions signal what one might expect on the horizon—an independent cause of action for individuals when others have failed to follow the requirements of the legal principle of sustainable development.

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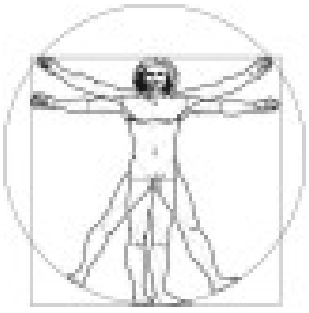

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