



“Would legal personhood help to ensure a better protection for the environment?”

By Judith Creppy

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« Our biggest challenge in this new century is to take an idea that seems abstract – sustainable development – and turn it too, into a reality for all the world's people ».

Kofi Annan, March 14th, 2001 - **“Sustainable Development: Humanity’s Biggest Challenge in the New Century”**.

I. Executive summary

When entering the 21st century, humankind has been facing many challenges related to sustainability. Accounting the many crisis, whether environmental, economic, political and social that have plagued the world and resulted in disastrous consequences, it has become abundantly clear that in order to thrive and preserve the environment, societies worldwide should actively try to change their habits in order to prevent irretrievably damaging further the planet. From a political standpoint, the United Nations (UN) played a significant role and to this day continues to do so as international environmental treaties permitted various countries to come together with the objective to reduce pollution, preserve the world natural resources but mostly to control issues related to global warming¹.

Although evidence of environmental legislation can be traced back as early as the Iron Age², international environment law is commonly admitted as a 20th century invention that developed into the 21st century. Nowadays, it is a component of most countries' legal arsenal, especially with the newer concept of sustainable development.

Sustainable development is often defined as the “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”³.

¹ For example, the United Nations Framework Convention on Climate Change (UNFCCC) May 9th, 1992

² The Mauryan Empire Ashoka Edicts for instance prevented deforestation and protected wildlife in the 3rd century BCE

³ « Our common future », 1983 Chapter 2: Towards Sustainable Development, IV, Conclusion

When talking about sustainable development, the development aspect of the proceedings is often left out to put the emphasis only on sustainability. However, it would be a mistake to merely focus on the outcome, rather than centering the conversation on the whole process. The building of such changes, which would significantly alter our daily of lives and those of future generations, even modify our governance requires careful planning, which one could argue is the most important part of the process.

The Sustainable Development Goals (SDGs), which replaced the previous Millennium Development Goals (MDGs), are a set of 17 goals set in 2016 by the United Nations General Assembly as a part of the 2030 Agenda which too, aims to achieve a more sustainable world. To work towards their achievement, the SDG Fund was created to act as a bridge from the MDGs which expired in 2015 with what is considered lackluster success. While funding is an essential aspect in trying to complete the SDGs, legal systems, international like internal, can be the gatekeepers of the SDGs and generate profits for lawyers as well as contribute to protect vulnerable people and objects.

Since public international law is consent-based, meaning that it is contractual by nature, effectively implementing legally binding and enforceable laws is an intricate matter. As it is to the discretion of each country to ratify international conventions, there is most often little to no consequences in case of a failure to enforce the terms of a treaty. Thus, it raises the issue of an adequate protection for the environment. Most components of the environment do not have any legal personhood as they are most of the time protected in relation to humans. Professor Christopher D. Stone, in his 1972 book “Should trees have standing?” pioneered the idea of attributing legal personhood to some elements of the environment. Protecting a legal entity or person is by far easier and more effective than to do so for a body which does not have any legal capacity.

This research paper seeks to highlight the extent of the applicability and ultimately the limitations of international laws in matters of sustainable development in the hypothesis of the environment being a legal entity. First, I will briefly explain the principles of international environmental law, then I will focus on the current legal status of the environment, which will bring me to explore the hypothesis of the environment being a legal entity and some issues that it would either raise or solve. Finally, I will take into account the current international jurisdictions to try and answer if international law is the sole answer and realistic solution to achieve sustainable development. Ultimately, this essay will try to explain succinctly if granting a legal status to the environment could be a mean to effectively protect it.

II. The Questions presented

1. Could the environment legal personhood affect states sovereignty?
2. How to effectively protect natural resources to ensure equity?
3. How to secure peace and sustainable development in relation to armed conflicts?

III. Statement of the Facts

Drawing even a brief overview of international law relating to the environment and sustainable development would be an arduous task and it might take away from the focal point of this essay. In this section, I will concentrate on some of the most important elements in relation to the topic that is discussed in this paper.

International environmental law principles

International environmental law is defined by general principles which fundamentally characterize the way laws come into force and how they are made. This essay will focus on

the three principles which stand out the most and in which a subset of narrower principles and concepts may apply.

The prevention principle anticipates an infringement, which implies that measures are established to effectively prevent any harm whether irreversible or not to happen to the environment. This principle is omnipresent in international bilateral or multilateral conventions whenever the matter involves nature's protection. For instance, the International Court of Justice stated that a state is "obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State"⁴. Although it would be impossible and extremely difficult to eliminate all sources of potential harm, creating a threshold quantifying nuisances, beyond which any crossing would be reprehensible, is much more doable and is actually used to legislate⁵. The principle mainly prevents against known risks which are most likely to happen sooner or later.

As for the precautionary principle, with constant scientific progress and a general consciousness about safekeeping the environment is arising, it consists of keeping unknown threats which would happen in a distant future at bay. Nicolas de Sadeleer considered that the precautionary principle takes into account potential, uncertain, hypothetical threats about which there are no tangible proof to affirm that they will materialize⁶. The UN Conference in Environment and Development (UNCED) 15th principle proclaimed that "in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities [...] lack of full scientific certainty shall not be used as a reason to postponing cost-effective measures to prevent environmental degradation." Yet, contrary to the prevention

⁴ International Court Justice, 20th April 2010 Argentina v. Uruguay

⁵ For instance, the European Union (EU) regulation 880/92 establishes an eco-label scheme destined to reduce impacts on the environment

⁶ Translated from : « Droit de l'environnement » 4th edition, Agathe Van Laang, Thémis droit Puf 2016

principle, its legal status is quite uncertain as international jurisdictions aren't inclined to recognize a general principle status to the precautionary principle.

Finally, the polluter pays principle is a remedy to an existing nuisance as the polluting party is held responsible for paying the damages done to the environment. It encompasses voluntary damages as well as involuntary ones since the Organization for Economic Cooperation and Development (OECD) directive which extended this principle to chronic pollution and accidental pollution related to dangerous substances. It acquired the status of a general law principle with its integration in the 1992 Rio Declaration on Environment and Development⁷, as “national authorities should endeavor to promote the internalization of environmental costs and the use of economic instrument, taking into account the approach the polluter should, in principle, bear the cost of pollution”. The polluter pays principle goes beyond solely compensating for causing harm. It's not only a curative principle, it also encompasses prevention and incentive as the intent is not to punish polluters but rather to make one conscious of the costs of the damages associated with one conduct and to establish some sort of responsibility.

Besides these general principles, other important principles such as equity and transparency are often discussed. The first one describes fairness and refers to the rights of the future generations to enjoy the natural resources of the Earth to which they are entitled. The second one refers to accountability for states in the process of lawmaking when the results could affect the environment or the people.

United Nations Framework Convention on Climate Change (UNFCCC)

Adopted on May 1992 by 197 states at the Rio Earth Summit, convention was the first of its time to acknowledge climate change and its effects, binding signatory states to act in the

⁷ Declaration of Rio on Environment and Development, Principle 16, 1992

interest of human safety. It sought to stabilize greenhouse gas concentrations to prevent any further interference with the climate system⁸.

The 2030 Agenda

The 2030 Agenda was adopted by the UN General Assembly on September 2015 and implemented des SDGs as sustainable development was the main goal pursued by the agenda. It also heavily promotes and tries to ensure peace, freedom and to reduce inequality, goals which are detailed in the 17 SDG's which ae the main focus of this convention. It reaffirmed the previous agendas and conventions, especially the Rio Declaration on Environment and Development which helped to create the Agenda 2030 and committed to achieving the objectives at a national, regional and global level.

The environment current legal status

Since the term environment is ambiguous, as it encompasses numerous concepts such as the fauna and flora, natural habitats, climate, resources and many others. As a result, it would be improper to talk about the environment legal status, we should rather talk about the way humanity appropriated the environment and its components. We could define the environment as “the natural world, as a whole or in a particular geographical area, especially as affected by human activity”⁹. This definition leads to believe that the very concept of the environment can only be thought of by the intermediary of humans. International conventions do recognize the environment as an entity that must be protected from damages. However the environment as a whole does not possess a clear legal definition, much less a personhood. It should be noted that some components of the environments in some countries do possess *locus standi* as a way to appear in court trough a representative. For example the Law of the Rights of Mother

⁸ United Nation Framework Convention on Climate Change (UNFCCC) Article 2, June 4th 1992

⁹ Oxford Dictionary in English, (<https://en.oxforddictionaries.com/definition/environment>)

Earth, passed by Bolivia's Plurinational Legislative Assembly in December 2010 granted in its Article 10 some aspects of legal personhood to the environment.

IV. The Argument

Could the environment legal personhood affect states sovereignty?

As it has been said in the executive summary, protecting something which is the subject of rights or someone who has rights is more effective than do to so for an entity that does not possess legal capacity¹⁰.

Granting some of the environment elements a legal status could help to reduce any potential infringement and harm to the environment. Currently, it would be ludicrous to imagine making the environment as a whole or some of its elements as a sovereign state. Indeed, it could not protect itself without human action and as the environment is present in every states of the world, it could be an issue with states sovereignty.

There are two choices presented for granting the environment a legal personhood; making the environment a subject of law or making it an object of law.

The first scenario would grant the environment *locus standi*, meaning the ability to appear in court, assert its rights and obtain reparation.

The second one is similar to the current state of the environment, meaning that it would be considered as an object that could be subjected to appropriation and should be preserved and respected in regards to the owner rights.

¹⁰ For instance, in New Zealand, the Whanganui Iwi Deed of Settlement of 2014 granted the Whanganui River legal personhood in regards to Maori claims

The first solution seems to be the most protective of the environment and its components whereas the second one could be more appealing to sovereign states¹¹.

As for relations to states sovereignty, the environment legal personhood would not be a great infringement as is the legal personhood of humans. The fact that a forest could assert his rights in court against a sovereign state could be translated into the fact that there is an effective protection against the state's violations of rights.

How to effectively protect natural resources to ensure equity?

In this section, I will concentrate on the two most important resources for humankind, as they are essential to our livelihood, namely water and air, which need to be preserved from pollution to retrieve their quality.

Being the most important natural resources, water and air numerous conventions¹² targets them and in the case of water, it is subjected to its own law, as “the right to potable water and sewerage is a fundamental right essential to the full enjoyment of life and the exercise of all human rights”¹³. As for air, its quality is often measured to assess if pollution could result in a danger for humans.¹⁴

The 6th and 15th SDGs goals relate to these issues. Redistributing and sharing resources while minimizing air pollution as per instructed by the FNCCC would be an effective way to ensure equity for all people. For that, preserving ecosystems and water resources, reducing deforestation would help and moreover, instilling responsible behaviors towards natural resources.

¹¹ As per the French Civil Code article 544 “property is the right to enjoy and benefit from things in the most absolute manner as long as there no prohibited use by law or regulations”, (Translated from French, Code civil 2018, Dalloz)

¹² For example, the Vienna Convention for the Protection of the Ozone Layer, 1985 and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992

¹³ Translated from French, F. Duhautoy « L'accès à l'eau, droit de l'Homme ou loi du marché » Johannet 2015

¹⁴ As per the Air Quality Index, indices are measured according to national standards

In the event of the environment being granted a legal status, the fact that water and air are commons could raise an issue. As it was previously discussed, if the environment is granted the status of a legal subject, it would mean that it could appropriate some of its elements and gain ownership over them. In this particular case, I would assume that the environment legal personhood could be an intricate matter which would overcomplicate issues that are already delicate to deal with. However, it could be an asset to reduce pollutions levels and effectively sanction the culprits.

How to secure peace and sustainable development in relation to armed conflicts?

“Sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development”¹⁵.

Environmental protection should be considered in regards to armed conflicts as the environment could be weaponized in a conflict. With the prevalence of mass destructions weapons, it became a concern in the late 20th century¹⁶. Current laws of war do not prevent the harm that is being done the environment and often, there are no legal repercussions in case of damage.

The SDG's 16th goal promotes peace, stronger and inclusive institutions as well as accountability. It seeks to reduce violence related to internal dysfunction in countries such as domestic and sexual violence, also human trafficking. Taking this goal in a broader sense, we could apply it to threat of armed conflicts especially between countries.

¹⁵ Agenda 2030 Declaration, « The New Agenda », point 35, 2015

¹⁶ For instance, the Partial Test Ban Treaty (PTBT) or Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water August 5th 1963

In the event of an armed conflict, the environment being a legal person could help to minimize any attempt to use the environment as a weapon. Through a spokesperson, the damaged component of the environment could assert his rights in court and obtain reparation¹⁷. For instance, polluting a river to force an enemy to surrender could result in a fine and an order to cease the damages. Although sanctioning a sovereign state is not an easy task, it goes differently for other entities hailing from these states which are more easily subjected to the law and brought in court.

As per the polluter pays principle, which sanctions any damage related to pollution caused to the environment a similar principle could be applied in these cases. Jurisdictions such as the International Criminal Court could also have a role to play, depending on the nature of the sanctions, whether penal or administrative. However, since most of their rulings are not enforceable in any way, the effectiveness would be very limited.

More importantly, it would not only be beneficial to the environment and prevent destruction of historical or sacred sites for instance; it could also help to reduce the cost of human lives, whether they are civilian or military.

V. Conclusion

Legal systems alone cannot be the only bodies that ensure that sustainable development can be achieved.

¹⁷ Usefulness of class actions for ecological damages as they were introduced in the Justice modernization law of the 21st century in France, article L.142-3-1 Environmental Code

As of today, we can see that despite the threats of climate change, wars over resources and the disappearance of some components of the fauna and flora, habits of the Earth inhabitants are yet to change in a sufficient way to achieve sustainable development.

From an anthropocentric point of view, one can assume that law, meaning the legal systems that governments around the world provide, does not have a real purpose outside of humans as they are the only legal subjects, outside of them exists only legal objects. Still, if the environment and its various components were to be granted some sort of legal status, its rights would be exercised through humans and in their benefit. Granting legal personhood to the environment and its components could be a hassle but it would ensure a better protection for at least the fauna and flora and real enforceable repercussions if any harm were to happen to it.

However, ecological transition should not be considered a mere utopia. Education should be the main convector, transcending political and economic considerations while taking them into account. It doesn't mean that law is meaningless in the process; on the contrary.

Establishing a set of laws that lawyers and jurisdictions can effectively protect and enforce can be a decisive factor in helping to achieve a more sustainable world.

To quote once more the 1992 Rio Declaration on Environment and Development, as we recognize the interdependent nature of our Earth and work towards its betterment for future generations, “the creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all” as the principle 21 states.