AMEDEO POSTIGLIONE

JUSTICE
AND
GLOBAL ENVIRONMENT

NEED FOR AN INTERNATIONAL COURT

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FOREWORD

This volume is part of the constant and demanding work of ICEF (International Court of the Environment Foundation) for the establishment of an international jurisdiction for environmental protection at global level.

Ten years ago the UN Conference on "Environment and Development", held in Rio de Janeiro, dealt with such a topic for the first time, raised not only by ICEF but also by the European Parliament with a Special Resolution first signed by Alex Langer. The Resolution failed to produce real effects as it was deemed to be premature.

Today, the question relates to need and urgency in consideration of several issues that have been looked into in the volume.

Firstly, there is the ecological need because the global environmental situation has become further degraded and threatens the sustainability of life on earth regarding some fundamental elements of balance (climate, biodiversity, desertification, etc.).

Secondly, society's call for innovative actions by governments has considerably grown in relation to the protection of the Planet's common heritage, also in the interest of future generations.

This social demand has become more qualified and global since it regards not only the more sensitive social groups (NGOs) but also the international scientific and religious community.

Thirdly, for institutional legal aspects too, there is a positive trend both for the further development of the international substantive law in the environmental field and for the commitment of several international Forums (UN and related organisms, like UNEP, ECOSOC, CSD, FAO, UNESCO, etc.; OECD; Council of Europe; EU; G8) and the Governments themselves.

Therefore, we can hope for further improvement aimed at implementing the principle of the "effectiveness " of environmental protection at international level.

To such a purpose, it is necessary to co-operate with Governments and international organisations so that the environmental damage, in its global dimension as well, finds a solution according to the principles of the rule of law and justice in the name of the human right to the environment which belongs both to present and future generations.

At the national, regional (Council of Europe) and Community level improvement has been already achieved by integrating the legal systems and also through the action of existing courts (the courts in the various countries; the European Court of Justice in Luxembourg; the Court of Human Rights in Strasbourg).

At the international level the International Criminal Court was established after the Rome Conference in 1998.

This institution shall also deal with the international environmental crimes committed by individuals if the procedures in the Statute are amended in due time.

Although appropriate actions are or will be undertaken by the European Union and the Council of Europe, we believe that this publication is very topical for the UN Summit on the Environment that will be held in South Africa in July 2002: in such a venue Governments that have already proved to be interested, will be able to determine the actual political path they want to follow for the idea of environmental justice at global level that cannot be delayed any longer. The list of the Governments supporting the Project can be found in the Appendix to this Volume: it is a real attention which is important because it is paid by Governments of various continents.

So I want to thank Amedeo Postiglione, ICEF Director, for this latest contribution to the promotion of the idea in which he has always believed from its very origin.

H. E. Prof. Giovanni Conso
Former President of the Italian Constitutional Court
Former Italian Minister of Justice
Honorary President ICEF

INTRODUCTION

ICEF ACTION IN A 10 YEAR OLD DEBATE

For more than 10 years ICEF (International Court of the Environment Foundation) has promoted the creation of a universal jurisdiction for more effective protection of the environment at the legal level by improving the instruments already existing for the dispute solution. (1)

The fundamental idea underlying the Project, as also proposed by the UNCED Conference of Rio de Janeiro in June 1992, was and still is the "global village" meeting a global challenge which needs a global reply: it is deemed that the proper method for determining the advantage of creating a new international jurisdiction for the environment is its global nature and that, from this point of view, it is decisive to ensure that individuals also have access to environmental justice at the international level. (2)

On the one hand, it is necessary to objectively keep in mind all the grounds, not only the legal ones, but also the economic, political, scientific and cultural reasons in favour or against the Project; on the other hand, it is necessary to take the following into consideration:

a) the starting point (the present model for the environmental protection at the international level); (3)

b) the final pint (a new model, not only a judicial but also an administrative model); (4)

c) the most appropriate political institutional path according to rules which can be accepted from the social and economic point of view not only by Governments but by the International Community as a whole. (5)

Interesting views have been expressed, in favour or against the ICEF proposal. They all are worth consideration but sometimes the evaluation has been affected by cultural attitudes lacking in realism. (6)

In our opinion, it is not realistic to underestimate the seriousness of the ecological crisis of the Planet which involves global problems such as the transboundary pollution (from one State into another or over wide areas outside the State jurisdiction), the transfer of hazardous processes or products into underdeveloped countries, the destruction of biodiversity, vegetable and animal species dying out, deforestation, climate change with the relevant imbalances in the whole ecosystem.

Above all, it is not realistic to underestimate the different dynamics of the environmental crisis (which is accelerating) whereas the response given by the present institutional model seems to be late and fully inappropriate. That model refers to 180 States that do not seem to be able to find common reliable solutions.

Even more troublesome is the other side of the problem represented by the highly unbalanced utilisation of the common resources which leads many peoples to clash with each other or to migrate slowly (environmental refugees moving towards the richer countries).

With regard to these real problems, the economic political objections are legitimate (because, undoubtedly, there are strong opposing interests) as far as the Project for an International Court of the Environment is concerned, whereas the technical and legal objections do not always seem to be convincing. They are based on the present system of norms and institutions and are supported by some instances in jurisprudence. The

new institution requires a legal basis which is still not in existence today and, therefore, must be created (an International Conference that will discuss and adopt the Statute of the Court) and is part of a wider model for the environmental protection at a global level:

- the establishment of a High Authority or International Agency for the Environment (Mitterand proposal and Icef Proposal of 1989);
- the creation of a Task Force for technical and scientific emergencies in case of serious accidents (Ripa di Meana Proposal at the 1991 Icef Conference in Florence);
- the establishment of an International Fund for the Environment which will collect all the sums due as compensation for global ecological damage and reserve them for restoration project (Icef proposal);
- the convening of a General Assembly of NGOs with advisory powers, at least once a year;
- the establishment of an International Academy for the Sciences for the Environment;
- the creation of a Permanent Inter-religious Forum for the Environment;
- the amendment of the rules and model of present economic international institutions (such as the IMF, the World Bank, the World Trade Organisation, etc.), as proposed in several venues.

ICEF's opinion is that, at a political level, it is possible today to deal with the issue concerning an *ad hoc* international environmental jurisdiction although in a more general context of reforms and progress within the international system of environmental protection.

It is not a matter of preferring the legal path to other instruments which are equally necessary, but rather of ensuring balanced and indispensable help through a real jurisdiction to which not only States but also individuals and NGOs may have access. This jurisdiction shall solve environmental disputes according to mandatory legal norms where voluntary agreement between the parties concerned fails and where there are serious infringements of mandatory norms regarding the common heritage (*erga omnes* validity).

The effectiveness of the international law of the environment cannot ignore the positive and necessary role of the case law.

So it is hoped that the question concerning the creation of an International Court of the Environment - already suggested at the UNCED Conference in Rio de Janeiro in 1992 and not taken into consideration at that time - be put in the agenda of the next UNCEF International Conference on the Environment which will be held in South Africa in the year 2002.

With respect to the serious environmental situation of the Planet and the threats of violence by groups acting against globalisation it seems wise to look for earnest and useful solutions and not for mere palliatives (for example, an ombudsman or a commission) (7).

NOTES TO THE INTRODUCTION

1. The chronology of the meetings organised by ICEF on various continents is contained in Chapter X. ICEF's publications are contained in the Appendix to this volume together with the general bibliography on the topic concerning the instruments for environmental disputes resolution at global level.
2. The title of the volume presented by ICEF at the UNCED Conference held in Rio de Janeiro in June 1992 was: *The Global Village Without Regulations* and contained all the arguments supporting the Project of an International Court of the Environment (*Ethical, Economic, Social and Legal Grounds for an International Court of the Environment*).

   The establishment of a global environmental jurisdiction was justified not only by technical and legal arguments but also by social, economic cultural and political considerations.

   See: AMEDEO POSTIGLIONE, *The Global Village without Regulations*, Giunti Editore, Florence, 1994, p. 95.

   It is worth considering that ICEF has supported the Project by upholding its basic principles, without confusing the scientific aspects and the political choices by Governments. It was deemed more useful to co-operate with the Governments by encouraging real initiatives and not merely the opinions of individuals or small groups, thus remaining consistent with the initial orientation.
3. The present model for environmental protection at international level had been already examined and considered as insufficient by the World Commission for the Environment and the Development, chaired by GRO h. BRUNDTLAND, *Notre Avenir à Tous*, Editions du Fleuve, Montreal, May 1988, ISBN 2.89372-011-5. More recently, similar criticism can be found in LESTER R. BROWN, CHRISTOPHER FLAVIN and HILlARY FRENCH: *State of the World*, 1999, Millennium Edition, World Watch Institute.

   The following volume is also very interesting: DAVID HUNTER, JAMES SALZMAN, DARDWOOD ZAELKE, *International Environmental Law and Policy*, University Casebook Series, New York Foundation Press, 1998 (especially Chapter IX on the topic "Making International Environmental Law Work: Improving Compliance and Resolving Disputes, p. 443-502).

   In this last publication ICEF's proposal is welcomed (p. 502) since it is "one of the most complete and structural proposal". Very interesting is also the EEC Study on the existing international bodies with respect to the ICEF Project, drafted by the General Directorate for Studies - Directorate A - Social Issues and Protection of the Environment, European Community, Luxembourg, 14 June 1993, IV/WIP/93/03/152/HHK/ MA/hk. In consideration of its importance this document is joint as an Appendix to this volume.
4. ICEF proposal dates back to 1989 and is reported in the volume *Per un Tribunale Internazionale dell'Ambiente* (For an International Court of the Environment) by Amedeo Postiglione, Edizioni Giuffrè, Milan, 1999, p. 34.

   This proposal was not limited to suggesting a new international jurisdiction for the environment, but added the necessity of also establishing a High Authority (an International Agency for the Environment). The Foundation adopted the very important proposal contained in the Declaration of The Hague "Notre Pays c'est la Planète" signed by 24 States (promoted by the French President, Mr F. Mitterand), aiming at the establishment not of a simple Commission but of an International High Authority for

the Environment having actual management and supervisory powers. The Declaration of The Hague is published in the volume *Per un Tribunale Internazionale dell'Ambiente* by Amedeo Postiglione, 1989, Giuffrè Editore, Milan, pp. 840-843.

See also CLAUDE IMPERIALI, *L'effectivité du droit international de l'Environment*, 1998, Centre d'Etudes et de Recherches Internationales et Communautaires - Université d'Aix - Marseille III Economica - Paris (p. 52, preface by A. Kiss and p. 22 of the General Introduction by C. Imperiali).

5. With regard to the most appropriate political institutional path for establishing the International Court of the Environment, see Chapter X.

Similarly to what happened for the International Criminal Court, the suggestion is to establish an *ad hoc* Committee of Governments in favour of the Project in order to discuss its Statute in an International Conference of Governments.

6. Among the opinions contrary to the establishment of an international Court of the Environment: ELLEN HEY, , *Reflections on an International Environmental Court,* Kluiwer Law International, The Hague, October 2000; Sir ROBERT JENNINGS, President of the International Court of Justice of The Hague, *Need for an Environmental Court ?*, 20 *Environmental Policy and Law*, 1992, pp. 312-314.
7. The opinions in favour of the Project - following the time-based criterion of the ICEF initiatives - can be taken into account with reference to their evolution in quantity and quality. Further opinions of the jurisprudence supporting the establishment of the environmental court will be mentioned separately.

a) At the First ICEF Conference in Rome, 21 - 24 April 1989, the stress was laid on the topic: "For an Efficient International Law of the Environment and for the Creation of an UN International Court of the Environment".

As shown in the Proceedings published under the title: *Per un tribunale internazionale dell'ambiente*, by Amedeo Postiglione, Giuffrè Editore, Milan, 1990, most of the experts dealt with the aspects of the substantive environmental law at the national, international and Community level, without taking an express stand about the establishment of a supranational environmental jurisdiction which seemed to be still premature to many.

In particular, some rapporteurs supported the proposal made in the basic Report of the Congress by Amedeo Postiglione in the name of ICEF and the Italian Supreme Court to create an *ad hoc* International Court of the Environment to which individuals and NGOs could also have access. It is aimed at the legal solution of the environmental disputes of international significance and is to be carried out together with an International High Authority (or Agency) playing a management and supervisory role, as proposed by 24 Governments in the Declaration of The Hague, following the guideline given by the French Government, on the legal basis of a special International Convention between the States.

Among these speeches the following are worth remembering:

- EDORADO AMALDI, Italy, Nobel Prize for Physics, and President of the old and prestigious *Accademia Nazionale dei Lincei*, according to whom: "The initiative for the creation of an International Court of the Environment seems now to be more necessary and urgent than ever before, also within the Scientific Community"
(p. 6, above-mentioned volume);
- EDUARDO PIGRETTI, Argentina, Buenos Aires University: *L'Antartide: un antecedente del Tribunale Internazionale dell'Ambiente,* (pp. 51-58, the above-mentioned volume);
- GRACIELA BERRA ESTRADA PIGRETTI, Argentina: *Una proposta di Statuto per il Tribunale Internazionale dell'Ambiente,* (pp. 59-67, the above-mentioned volume);

- FRANÇOIS AUBURN, Australia, University of Western Australia: *The International Court of the Environment and Antarctica*, (p. 69-80: "It would be preferable to establish such a Court under a general multilateral treaty, open to all States and giving jurisdiction over all environmental issues");
- ALAIN H. PIPERS, Belgium, Ministry of Justice: *Reflexions, du point de vue de la responsabilité civile extra-contractuelle, sur l'opportunité de créer une jurisdiction sovranationale competente en matière d'environment,* (pp. 99-115);
- AMADO S. TOLENTINO, Philippines, International Environmental Adjudication: *Strengthen Existing Institutions and Processes or Create a World Tribunal for Environmental Protection ?*, (pp. 203-209);
-VASSILI TH. COSTOPOULOS, Greece, Lawyer in Athens: *La protection de l'environnement marin en Medirranée*, (pp. 331-335). On the creation of an International Court of the Environment, Mr Costopoulos astutely observed (p. 334) that it was a political and not just a technical-legal issue;
- RAMON OJEIDA MESTRE, Mexico, Mexico University and Mexican Academic Director of Ecological Law, *Verso una Corte Internazionale dell'Ambiente*, (pp. 637-643): "The Mexican Academy of Ecological Law supports with enthusiasm and optimism the creation of an International Court of the Environment with the mixed participation of representatives of Governments and civil societies";
- JEORGE CAILLEAUX, Peru: *Human Rights and International Environmental Disputes: Closing the Circle of Multinational Co-operation*, (pp. 651-661);
- VICTOR V. MAVI, Hungary: *International Environmental Law: Challenges and Unresolved Problems*, (pp. 751-763);
- MATEO MAGARINOS DE MELLO, Uruguay: *International Law and Environment*, (pp. 777-803);

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The final Resolution of the Rome Conference, 21-24 April 1989, adopted three points: the necessity for a Universal Convention of the Environment as a human right; the necessity for the establishment of a High Authority or International Agency of the Environment; the necessity for a Permanent Judicial Body to which individuals and NGOs also have access in relation to environmental disputes having international relevance (see pp. 162-163 of this Volume).

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b) At the Second ICEF International Conference held in Florence (10 - 12 May 1991) there was an increasing number of experts in favour of the Project for an International Court of the Environment and several representatives of the political institutional milieu also expressed their support (representatives of the Italian Government and Parliament; the EEC Commissioner for the Environment, Mr Carlo Ripa Di Meana and the European MP, Mr Alex Langer, the local authorities which promoted the Conference - the Municipality of Florence, the Province of Florence, the Tuscany Region -, the Chief Justice of the Italian Constitutional Court, H.E. Mr Ettore Gallo, and of the Italian Supreme Court, H.E. Mr Antonio Brancaccio).

Others joined the above-mentioned experts in supporting the Project (see the Volume: *Tribunale Internazionale dell'Ambiente*, by Amedeo Postiglione, Rome, 1992, Istituto Poligrafico e Zecca dello Stato, Libreria di Stato);
- ZDENEK MADAR, Czechoslovakia, Science Academy: *Improvement of National System of Environmental Law*, (p. 183);
- PATINO POSSE, Colombia, Colombian School of Environmental Lawyers: *Civil Responsibility and Relative Sanctions in International Law*, (pp. 185-190);

-ALFRED REST, Germany, Cologne University: *A New International Court of Justice for the Environment to Implement Environmental Responsibility/Liability Law*, (pp. 247-260);
-PAUL CLARK, Great Britain, Mandate for Life on Earth: *Popular Action in Support of Establishing an International Court of Justice for the Environment*, (p. 261);
- RUDOLF M. RIZMAN, Slovenia, Ljubljana University: *From Ecological Consciousness to Ecological Responsibilities*, (pp. 258-291);
- ROBERT MUNRO, Kenya, IUCN: *Statement for the Scientific World Seminar on an International Court for the Environment*, (p. 299-302): "I have seen the impressive list of participants for the Seminar. You certainly have my best wishes for a successful and pioneering Seminar".
- INCHNOMICS STANISLAW, Poland, Cracow University: Contribution to the Idea of Creating an International Court of the Environment, (pp. 321-322);
- JULIO DE PINA MARTIN, Portugal, Portuguese Association of Environmental Law: *Un modèle possible pour un Tribunal International de l'enviornment chez l'ONU*, (pp. 323-324);
- JOSE JUSTE RUIZ, Spain, Valencia University: *L'évolution du droit international de l'environnement; aspects normatives et institutionnels*, (pp. 363-378);
- KOLBASOV O.S., Russia, Science Academy: *To the Issue of International Court for the Environment*, (pp. 459-460);
- JAMES C. NICHOLAS, USA, Gainesville University of Florida: *The Need for an International Forum to Consider Compensation for Environmental Preservation*, (pp. 453-458);
- PATRICK DEL DUCA, USA, Lawyer: *The Compensation for Damage to Natural Resources: the Development of the United States' Experience and its Potential Implementation at International Level*, (pp. 447-452).

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c) At the International Conference held in Venice (2 - 5 June 1994), at the CINI Foundation, ICEF proposal was boosted and widely approved as shown in the two volumes "Towards the World Governing the Environment" by Giovanni Cordini and Amedeo Postiglione, Gianni Jaculano Editore, Pavia, May, 1997.

Great support was given by the Holy See through Jorge Maria Mejia of the Papal Council for Justice and Peace, the European Parliament (Alex Langer), the Italian Government, the local authorities (Veneto Region, Province and Municipality of Venice).

There was also the important scientific co-operation of several Italian Universities and CNR (Italian National Research Council) and of experts and delegates from all continents.

These include (for full information see the volumes):
- RAYMOND VAN ERMEN, Secretary General of the European Environmental Bureaum Belgium;
- HARTLEY BOOTH, House of ommons, London;
- ROGER D. CONGLETON, George Mason University;
- PAOLO COSTA, Italy, University of Venice;
- PIETR J.H. JONKMAN - The Netherlands - Secretary General International Bureau of the Permanent Court of Arbitration at The Hague: *Resolution of International Environmental Disputes: a Potential Role for the Permanent Court of Arbitration*, (pp. 435-445):

"Finally, the importance of the role of international law in governing the environment is highlighted by the emphasis placed on it in the program of the present

Conference. Proposal aimed at establishing an independent International Court of the Environment underline the need for an effective international forum";
- ANTONIO BRANCACCIO - Chief Justice of the Italian Supreme Court, Italy, (p. 21);
- MARIA JULIA ALSOGARAY - Minister for the Environment – Argentina, (p. 26);
- MASSIMO CACCIARI - Mayor of Venice, (p. 27);
- ALEX LANGER: Greens Italy, *The European Parliament Supporting an International Court of the Environment*, (pp. 100-102);
- FEIKE BOERSMA, Van de Geiju Partners, The Netherlands: *Attack is the Best Form of Defence*, (pp. 56-63);
- BRUNO TREZZA - Italy - Rome University "La Sapienza*": Economie et environnement*, (p. 133-141);
- SIMONE COURTEIX - France - CNRS et Institute of Comparative Law, Paris: *Towards the Legal Recognition of a New Method for the Defence of the Environment: Satellite Images*, (pp. 166-176);
- CNR contribution (Italian National Research Council), Italy, (pp. 249-250);
- MARIA GRACIELA CARO - Argentina, Buenos Aires University: *Hacia el ordenamento mundial del medio ambiente*, (pp. 69-78);
- PIERRE SPITZ, Research Director IFAD: *From Economics to a Holistic Understanding of the Environment, from Local Initiatives to a Global Authority*, (pp. 188-135);
- LUIGI ZANDA, Italy, Consorzio Venezia Nuova: *The International Environmental Court Foundation*, (pp. 143-145);
- FRANCESCO LUCARELLI - Italy - Naples University: *Environmental Protection and the Remote Sensing Satellite Sureveillance Rights*, (pp. 195-241);
- ROBERTO SOMMA - Italy - Alenia Spazio: *Remote Sensing from Space, a Tool for Environmental Monitoring*, (pp. 220-224);
- PHILIPPE ABRAVANEL - Switzerland - President of the International Bar Association: *L'environment et les droits de l'homme*, (pp. 253-256);
- GIAMPIERO AZZALI - Italy - Pavia University: *Il problema del diritto penale internazionale ambientale*, (pp. 270-272);
- GIOVANNI BATTAGLINI - Italy - Ferrara University: *IlTribunale Internazionale dell'Ambiente: una proposta conclusiva*, (pp. 284-290);
- ROY BREIVIK, Norway, On World: *A General UN System for the Protection of the Environment*, (pp. 318-321);
- PAUL W. CLARK - USA - The mandate for Life on Earth: *Why need a world Court of Justice for the environment*, (pp. 334-346);
- GIOVANNI CORDINI - Italy - Pavia University: *Environmental Resources, Cultural Values and the International Dimension of Environmental Protection*, (pp. 347-353);
- VASSILI TH. COSTOPOULOS - Greece, Attorney General at Law: *La contribution de la loi nationale et de la jurisprudence à la création d'un droit uniforme de l'environnement*, (pp. 354-360);
- PATRICK DEL DUCA, USA, Environmental Law Institute, Washington: *An International Court for the Environment*, (pp. 366-373);
- MANUEL DIEZ VELASCO, Spain, Judge of the European Court of Justice: *La jurisprudencia del Tribunal de Justicia en materia de medio ambiente*, (pp. 396-407);
- NOBUO KOJIMA, Japan, Japan Federation of Bar Association, (p. 431):

"We have addressed many problems in this way, in the process of which we came to believe that surely the establishment of an international environmental court, as proposed by judge Amedeo Postiglione, in late 199, (*omissis*) is necessary to deal with the global environmental court, gave it serious consideration and decided to enforce it.

The decision we announced as JFBA's opinion at the June 1992 Earth Summit held in Brazil.

On that occasion we also argued that, to create the desirable kind of international environmental NGOs and environmental experts so that the court's composition would broadly reflect the intentions of the people".

- JOSÉ JUSTE, Spain, Velencia University: *Desarrollo y medio ambiente hacia la armonizacion de la economia y la ecologia,* (pp. 446-463);
- DEMETRIO LOPERENA ROTA, Spain, University of The Netherlands: *The International Court of Environmental Arbitration and Conciliation*, (pp. 464-468);
- PAOLO MADDALENA, Italy, Public Prosecutor at the Italian State Audit Court – Rome: *Efficacia ed inefficacia delle norme sul risarcimento del danno ambientale*, (pp. 483-490);
- SERGIO MARCHISIO - Italy - Perugia University, Director of the Institute for Legal Studies of the International Community - CNR – Rome: *Avoidance and Settlement of Environmental Disputes in International Law, (*pp. 491-503):

"In my opinion, the proposal concerning an International Environmental Court, linked with the environmental community, is to be seriously taken into account by the competent bodies, included the Security Council of the United Nations".

- KENNETH F. MCCALLION - USA - Environmental Lawyer, ICEF North American Committee: *Establishing an International Standard for an Environmental Preliminary Model*, (pp. 504-506);
- VERONIQUE MAGNANY - France - University of Avignon: *For an International Ecological Order*, (pp. 507-514):

"Another proposition which does not conflict with the previous concerns the setting of a Tribunal for the Environment. This idea started debated a couple of years ago in Florence. The Supreme Court organised a Conference on the subjects of law to administer and persons to run it. It is an essential means to implement law. But it should not, in my opinion, constitute a primary source of law. I mean that before a Court of the Environment is created, we need to define its competencies, the law it shall apply, and the nature of parties, and conflicts to be treated there";

- ARTHUR C. NELSON, USA, Georgia, Institute of Technology: *The role of the International Court of the Environment in Implementation Domestic Crimes Laws*, (pp. 515-528);
- JAMES NICHOLAS - USA - Gainesville University of Florida: *Toward Judicial Solutions of international environmental conflicts*, (pp. 529-534);
- MIGUEL PATINO POSSE, Colombia Corporation Gaia XXI, Centro de Estudios Juridico Ambientales: *Projecto de Tribunal International del Ambiente adescrito a N. U.*, (pp. 541-547);
- EDUARDO A. PIGRETTI and GRACIELA BERRA ESTRADA PIGRETTI, Argentina - Buenos Aires University, ICEF South American Committee: *Diseno definitivo de un Tribunal International del Ambiente*, (pp. 548-551):

"Un camino largo ha sido cumpildo desde que el Magistrado Amedeo Postiglione resolviera hace ya muchos años atrás constituirse en el lider de un movimiento internacional mediante el cual se persigue instituir un tribunal internacional para la cuestions ambientales.

Su propósito fue al poco tiempo receptado por la Corte de Casación de Italia y la iniciativa ha sido motivo de reuniones especiales en múltiples lugares, debiendo destacarse - entre otros - los encuentros de Roma, Castel Gandolfo, Tokyo, Florencia, Rio de Janeiro u Nueva York en el corriente año".

- EDMUND G. PRIMOSH, Austria, University of Graz: *The spirit of «Sustainable Development» within Authoritative Decision-making Processes*, (pp. 552-558):

"The main approaches to international accountability can be identified in order to implement sustainable development policies:

- First, inter-state claims based on the principle of state responsibility;
- Secondly, instruments of national law using particularly the principle of equal access, due process and equal treatment in national administrative and judicial proceedings, transboundary civil liability schemes, and extraterritorial criminal jurisdiction;
- Thirdly, an international (including review procedures) as well as supervisory techniques (reporting, fact-finding and research, inspection) and human rights protection mechanisms.

To this end, both mandatory dispute settlement and enforcement mechanisms are of essential importance make states accountable in law. Furthermore, there is an evident need for far-reaching institutional restructuring of the current state-based international order by introducing «non territorial central guidance systems» (Richard Falk) performing truly planetary functions. In cases of deficient governance by the lower level, sustainable development functions should devolve upon the higher level of decision-making to ensure their proper performance. This international jurisdiction might well substitute for national jurisdiction. This concept appears not only as a necessity but it is also in line with the principle of subsidiarity calling upon the higher level to perform those functions which cannot be fulfilled properly by the lower levels of decision-making".

- ERNEST J., REY CARO - Argentina, Cordoba University: *Reflexiones sobre los indios y procedimentos para la solution de controversias en el derecho internacional del medio ambiente*, (pp. 562-563):

"Quisáz, en un plano ideal, podria aspirarse a la constitución de un Tribunal Internacional del Medio Ambiente, a semejanza del instituído en la Convención de Naciones Unidas sobre el Derecho del Mar para las differencias en esta rama del Derecho de Gentes.

Sin embargo, el hecho de que aún no se conoce con certeza cuál puede ser el futuro de esta instancia internacional, habida cuenta de que la Convención aun no ha entrado en vigor y que debera pasar un tiempo considerable para que se constituya y se pueda apreciar el grado de efectividad del mismo, aquella iniciativa carecería de viabilidad por el momento.

Dificilmente las prevenciones existentes en relación a la aceptatión de una jurisdicción obligatoria en general, pudieran ceder en presencia de un tribunal especializado, en razón de las consideraciones de carácter politico que predominan en los conflictos.

Vencidas las prevenciones, pareciera que la via abierta con el recurso a las salas de la Corte Internacional de Justicia puede su una opción valida y mas factible, por trasarse de un tribunal ya constituido y con un alto grado de especialización en derecho internacional y por haberse previsto un procedimiento más simple. Este Tribunal ha creado una Sala "ad hoc", para las cuestiones del medio ambiente, que se constituyo en agosto de 1993.

Por otra parte, mientras subsista la segmentación tipica del Derecho Internacional del Medio Ambiente el recurso a las comisiones de conciliación u otros mecanismos con participátion de especialistas y técnicos en cuestiones ambientales, semejantes al regulado en el anexo VIII de la Convencion de las Naciones Unidas sobre el Derecho del Mar, pareceria ser el que mejor se ajusta a las particularidades de los conflictos en materia ambiental, que difieren en cada area, procedimiento a que puede recurrirse aun en caso de ausencia de mecanismos convencionales.

En quella linea se ubica la propuesta del Comité Juridico Interamericano para crear una Comisión mixta para solucionar las controversias entre los Estados del continente, relativas a la contaminacion transfronteriza".

- ECKARD REHBINDER, Germany, Frankfurt University: *Precaution and Sustainability: Two Sides of the Same Coin*, (pp. 581-589);

- ALFRED REST - Germany - Cologne University: *The Need for an International Court of the Environment: Underdeveloped Legal Protection for the Individual in Transnational Litigation,* (pp. 511-612):

"The analysis of litigation in trasnational environmental affairs has demonstrated that the rights of the injured individual are not sufficiently protected by National, Civil and Administrative Courts. No legal action was successfully brought before the courts of the polluting State. State in most cases even refused to protect their own nationals by diplomatic channels for reasons of political expediency. Therefore, to strengthen the legal position of the injured individual, becoming increasingly the victim of environmental destruction, the need for an International Environmental Court is evident. This court, granting legal access even to non state actors, could strengthen the individual's rights and would indirectly enhance the control of activities of public organs having destructive transnational effects. Although new political instruments of dispute avoidance increasingly are being developed (i.e., non-compliance procedures) they never can replace mechanism of jurisdiction. These remain indispensable for the guarantee of law and necessary for the further development of international environmental law.

The question, do we need a completely new International Environmental Court, or should an existing judicial mechanism within the UN meet the challenges of the today's environmental dimension?, has to be deliberated such, serious consideration should be given to the potential role of the Permanent Court of Arbitration".

- PHILIPPE SANDS - UK - London Universities, Legal Director for International Environmental Law and Development: *Existing Arrangements for the Settlement of International Environmental Disputes: a Background Paper*, (pp. 628-647):

"From an international legal perspective, compliance raises at least three separate, but closely related, questions which relate to implementation, enforcement and conflict resolution (traditionally referred to by international lawyers as 'dispute settlement'). There are:

a) what formal or informal steps must a state or an international organisation take to implement its international legal obligations?

b) what legal or natural person may seek or has the right to enforce the international environmental obligations of a state or international organisation? And

c) what techniques, procedures and institution exist under international law to resolve conflicts or settle disputes over alleged non-compliance with international environmental obligations?"

- TULLIO SCOVAZZI, Italy, Milan University: *Le aree marine specialmente protette e il diritto internazionale*, (pp. 648-661);

- ANDRÀS TAMÀS – Hungary: *Global Environmental Law Institutions: Purposes and Reality*, (pp. 678-681):

"The scientific background is given for an international court of the environment. There exists an International Court of the Environment Foundation (ICEF) which was constituted in May 1992 in Rome. This foundation is non-profit organisation set up for the purpose of promoting continuous action regarding the International Court of the Environment and public awareness. It is an international movement open to the contribution of institutions in all countries and of all non-governmental organisations.

It is evident that the realisation of an efficient environmental protection will only be successful if internal (national) character is converted into an international one as well.

Principally, this is not merely a legal question, but the execution must inevitably assume a legal forum. An international court of the environment is a rational and brilliant idea. But the new international environmental order calls for existential and normative legal bases. The main problems are money, direction and laws. The first step may be international convention for such purposes. The main questions for an international convention may be the settlement of economic problems and a different settlement of the general laws.

For the broader perspective of a common environmental administrative law in Europe, encompassing not only laws of the European Community but also the national laws, it seems, despite all national peculiarities and result of environmental law in the states of Europe, that to a great extent the different national legal rules in practice find similar solutions to similar problems. The similarity of problems and real solutions may turn out to be a basis for a further unification of environmental law in Europe. The laws of European Community may even prove to stimulate the development towards a common environmental law in Europe.

This process is very important to an international court. As a first step it is better if we have an international court for environmental protection of European administrative cases, here in Italy, as we remain a legal theoretical basis. I think we must have a real environmental international court. All this is not an illusion any longer".

- PIET GILHUIS, The Netherlands - University of Tilburg: *Principles of Environmental Law Emerging from Rio: Implementation by States*, (p. 687);
- ANDREW WAITE, United Kingdom, Berwin Leighon Solicitor: *State Responsibility and International Environmental Law*, (pp. 701-702):

"It may be argued that the notion that the standards of due diligence must take account of the resources and capability of the state in question is implicit in the concept of due diligence.

The liability of states for environmental damage has been notoriously difficult to establish. This is due to several reasons.

- Firstly, the adversarial nature of claims in the international Court of Justice has meant that states have been reluctant to damage diplomatic relations with other states by bringing claims against them.

- Secondly, such proceedings are extremely lengthy and expensive.

- Thirdly, the technical nature of environmental law has meant that the outcome of litigation in the international Court of Justice has been very hard to predict. This problem has been exacerbated by the problems of establishing such things as foreseability of the harm, the link of causalty, the author of the damage and the assessment of damages which will be necessary in order to hold states responsible for environmental harm.

- Fourthly, states have been reluctant to bring claims in the International Court of Justice for fear of creating precedents which might affect their own behaviour in the future.

- Fifth, proceedings in the ICJ depend on the consent of both parties since they are arbitral in nature.

It can be argued the ICJ in its present form is not an ideal tribunal to deal with environmental cases. A tribunal is needed to deal with such matter irrespective of the formal acknowledgement of jurisdiction by the defendant state.

The politically sensitive and adversarial nature of state claims suggest that the environment would be far better protected by the existence of internationally recognised obligations backed up by sanctions enforced by an international supervisory body".
- YONGMING XIE, Silong Liu, Jiazi Wang, Shiniin Liu, Zhen-hua Shui, Jieyi Wang, Chinese Delegation: *China Contributes to Global Economic Growth and Sustainable Environmental Development*, (p. 703).

* * *

d) At the ICEF International Conference held in Paestum, 6 - 10 June 1997, dealing with "Environment and Culture", there was a rise in the scientific and political consensus to the Project of an *ad hoc* International Permanent Court for the Environment to which also individuals and NGOs could have access.

The Conference was attended and supported by the Italian Government and the local authorities concerned by that topic (the Campania Region, the Province of Salerno, the Municipality of Carpaccio-Paestum, the Cilento National Park), and by several scientific organisms (Italian National Research Council, Accademia Nazionale dei Lincei, Latin American Institute, European Lawyers Association, International Associations of Judges, International Bar Association).

The interdisciplinary nature of the Conference and the attendance of large delegations from various Continents stimulated the interest for the initiative with a view to justifying the necessity for an International Court, due also to the global dimension of the cultural heritage (heritage common to all mankind).

In the volume "Ambiente e Cultura" by Giovanni Cordine and Amedeo Postiglione, Edizioni Scientifiche Italiane, 1999, Naples, a large number of reports on the topic of the conference were published. Only few of them deal with the question of the international jurisdiction for the environment, among which:
- AMEDEO POSTIGLIONE, Italy - ICEF Director: *Instruments for the Resolution of Environmental Disputes at the Global Level*, (pp. 29-38);
- ALFRED REST, Germany, University of Cologne: *The Indispensability of an International Court of the Environment*, (pp. 39-54);
- LUIGI LABRUNA and ALFREDO LIBERATORI - Italy, CNR: CNR Judicial Research in Environment Field, (pp. 55-56 and pp. 61-81);
- GREGORY LAZAREV and UGO FRADDOSIO: *Forum Permanent pour la Science et la Technologie ICEF*, (pp. 57-59);
- GIOVANNI BATTAGLINI - Italy - University of Ferrara: *Organizzazione delle garanzie del diritto dell'ambiente come diritto dell'uomo attraverso la International Court of the Environment Foundation,* (pp. 121-127);
- NILIMA CHANDIRAMANI, India, University of Bombay: *Effectiveness of Environmental Legislation in India: Role of Judiciary*, (pp. 163-177);
- GIOVANNI CORDINI, Italy, University of Pavia: *La protezione dei beni culturali e ambientali: dimensione sopranazionale e profili di diritto costituzionale comparato,* (pp. 193-213).
Dealing with the supranational dimension he regrets that: “The biggest limit which seems to emerge from this wide and impressive action is the lack of a national forum for the global examination of the problems caused by the maintenance of the cultural and natural heritage from the point of view of its "universal legal value" and its nature of "fundamental heritage of the peoples"
(p. 247);
- GUIDO GERIN, Italy, University of Trieste: *Brevi note sul diritto ambientale*, (pp. 297-301);

CHAPTER I

ECOLOGICAL NEED: TO ENSURE SUSTAINABILITY OF LIFE ON EARTH

1. Ambiguity of the so-called "sustainable development"

The Rio Declaration on "environment and development", containing 27 principles, joins the two terms in a unitary concept of "sustainable development", in a political vision trying to overcome the environmental problems together with those, not less serious, of the development characterising many African, Asian and South American countries.

This approach, though understandable from the political point of view, seems to be ambiguous. First of all, the "development", as understood up until now, has not proved to be compatible with the environment in all countries of the world[1].

2. The ecological notion of sustainability

Secondly, the ecological concept of sustainability is inherent in nature and cannot turn into an "adjective of quality" - though hoped for - of the «development», a term used for economic and social reality, which complies with other rules and seems now to be "unlimited" from the point of view of quality and quantity.

To theorise a «right to the development» (Principle 3 of the Rio Declaration) with reference to the present social economic model means to lead the Planet to self-destruction since sustainability of life on earth might not bear the pressure exerted by billions of human beings consuming energy and producing pollution at an astounding pace[2].

3. To avoid confusion between environment and need for justice in the Developing Countries

Thirdly, it is necessary to avoid confusion between the environment and justice because the environmental protection is already an action of justice.

Of course, it can not be denied that there is a very serious need for justice for the Developing Countries, but such a need must be dealt with in a strong way and without ambiguity, by resorting to a different cultural, economic and political approach, without confusing with the environment that represents an element common to any development, the fundament of development or, better, the fundament of life.

The matter is not «to equitably satisfy the needs concerning the environment and the development» (in general terms, because they can not be objectively compared), nor «to reach sustainable development» (Principle 4 of the Rio Declaration), hoping that the environmental protection constitutes «an integral part of the development process» and is not «considered separately from the latter» since such statements do not have a single, certain, serious and reliable point of reference[3].

4. Absolute priority for sustainability of life on earth

From our point of view the Rio Declaration was not able to translate the appropriate considerations in the Preamble (to protect the integrity of the global environmental and developmental system; to recognise the integral and independent nature of the Earth, our home) into a universal legal principle expressed as follows: «The absolute and priority responsibility of the human being, of peoples, of the States and of the International Organisations and the International Community is to ensure sustainability of life on the earth considered as living unitary ecosystem, the fundament of all free, peaceful and rightful development».

5. The error in the culture of the Developing Countries

It is an economic, social and political error made by Developing Countries in Rio de Janeiro, negatively influenced by the so-called culture of the Developing Countries: the environment is already "economy", owned as capital by such Countries and must be protected in their own interest, without confusing it with the so-called «development» which, although mitigated, may harm resources in the South of the Planet.

6. The Rio compromise benefited the Developed Countries

Due to the lack of really innovative economic-ecological rules, the Rio Declaration missed the chance to define the principle of sustainability of life on earth as a priority and sole criterion of common responsibility in order to ensure serious development itself, thus benefiting the Developed Countries.

Since the Environment in a mature vision is already "economy", is already «development» it was in the interest of the Developing Countries to avoid confusion and to claim the ecological integrity of the earth's ecosystem and the equitable exploitation of common resources with the well-established rules of an equitable social, economic, democratic and peaceful system.

7. It was and still is a priority to establish the actual rules for sustainable development

In a political document, it is clear that the signatory States have found common points for a compromise but, beyond the words, what counts is to stress that «sustainability of life on earth» is a major priority which must impose new rules on development in all Countries and, first of all, in the strongest ones. So it is necessary to avoid confusion between environment and development, giving absolute logical and political priority to the environment because any economy working against the environment will destroy itself.

Of course, the progressive development of the international environmental law requires the determination of new economic, political and social instruments, but starting from a sole main aim, namely the sustainability not of the development but of the life of the earth's ecosystem.

8. The aim of the International Court of the Environment

The main aim of the Project of an International Court of the Environment is maintaining sustainability of life on earth.

A Court of the Earth, in legal terms, implies the actual possibility of laying down a practical fundament to the implementation of economic, ecological rules by starting from the serious global situation and emphasising the universal responsibility of private economic parties and of the States against any relevant infringement of the legal system in order to protect the environment.

The first justification for the International Court of the Environment lies, therefore, in the very serious risks for the sustainability of life on earth.

If the environmental Conferences organised by the United Nations want to play a positive innovative role - and not merely represent an occasion to project an image - it seems wise not to divide the environment into many sectors, but to debate new integrated models for environmental protection by ensuring the effort, already underway, of multilateral framework conventions in order to ensure their implementation, even in the States that do not comply with them.

In the meantime concern about climate change on earth is growing, as shown in the Report submitted in Shanghai at the UN Summit on 22 January 2001of 99 countries.

A similar concern had been expressed by one of the most outstanding personalities of the planet (Pope John Paul II), on 13 January 2001, before the diplomatic representatives of 175 countries:

"This world which is programmed only according to our plans, could become unfit of breathing.

A century has just finished where life was ignored in the most brutal way.

Man cannot believe he can control nature and history. At the beginning of this new millennium we must save man, let's save him altogether"[4].

[1] The «compromise» between the two conflicting fronts (the North gives priority to the environment and the South to the development) at the UNCED Conference in Rio de Janeiro in June 1992 has also been

stressed by GIULIO C. GARAGUSO and SERGIO MARCHISIO in *Rio 1992: Vertice per la Terra*, Franco Angeli, Milan, 1993.
"The Rio preparation and Rio itself have experienced a continuous clash between these two different approaches and positions which have eventually decided to continue together while waiting for a solution that has never taken place. Therefore, it was postponed to a date still to be fixed and that will result from the development of the period of time following the Rio Conference (p. 23)".

[2] Of course nobody can deny the economic, social and political importance of development and the duty to ensure effective democratic participation in the process of development. Nevertheless, perplexity is shown in considering a legally independent subjective position as an «individual human right to development» whereas the main human right to life and the environment is being debated.
See SERGIO MARCHISIO, *Sviluppo (cooperazione internazionale per lo)* in *Enciclopedia del diritto*, XLIII, Milan, 1990, pp. 1551-1559; CAGGIANO, *Il diritto umano allo sviluppo*, Quaderni dell'Istituto Universitario Aziendale, Naples, 1991, pp. 17-22; POLLET, *Notes sur quelques aspects juridiques de la notion du droit au development*, in *La formation des normes en droit international de développement*, Colloque d'Aix-en-Provence, 7-8 Octobre 1982, Paris, 1984, p. 7 and ff.

[3] The notion of «sustainable development» has been adopted by the 1987 Brundtland Commission (see the Brundtland Report, Our Common Future, 43-46, 1987) and later by the UNCED Conference in Rio de Janeiro of 12 June 1992 (Declaration and Agenda 21); so now it represents a point of reference – though controversial – of the international environmental law.

In order to prove the controversial nature of the notion of sustainable development the dissenting opinion (separate opinion) by Judge Weeramantry of the International Court of Justice in The Hague can be mentioned with reference to the Gabcilovo case, decided on in September 1997 (see: *International Environmental Law and Policy*, by D. Hunter, J. Salzman and D. Zaelke, University Casebook Series, New York, 1998, pp. 237-247).

The definitions of sustainable development are numerous, too (25, according to David Pearce et Al., *Blueprint for a Green Economy*, 1, 1989).

The term «sustainable» is used in relation to different words: «development», «economy», «society», «world», «environment» (Environmental Sustainability), but reference to some issues is constant:

a) the need to fix «limits» to present development;
b) the need to assign a «economic» value to nature;
c) the need to solve the problem of «unequalness» of development between rich countries and countries in the South of the planet;
d) the need to protect the «common resources» outside the state's jurisdiction;
e) the need to guarantee a decent «quality of life» for future generations;
f) the need to ensure «life for future generations».

The effort to unify «economy and environment» derives from the acknowledgement that today economy establishes the external environmental costs, always increasing, both in the individual countries and in the areas outside the states' jurisdiction.
Economy does not pay for the marginal social cost since it is not able to internalise the so-called external effects: these are costs charged on the health and the quality of the life of people, on the inherent quality of natural resources, on the living ecosystem as a whole, on future generations.
The mechanisms able to oppose these consequences which have been used until now are:

a) the legal rules of «command and control»;
b) the assignment of a social role to private «property»;
c) a system of «tradable permits» applied to polluting emissions (Usa);
d) «taxation» for environmental purposes;
e) the granting of «subsidies» in order to improve the power efficiency and the use of the best technologies;
f) systems for «insurance»;
g) systems for «civil responsibility» for environmental damage.

The problem of the «economic» assessment of the environmental damage is still unsolved (what indicators?; What approaches?; What is the definition of natural capital? Of agricultural, forest, etc. capital? Of human and social capital?; What is biodiversity in practice and how can it be evaluated form the economic point of view in space and time?; Has the ability of an ecosystem to resist form the environmental point of view a differentiated economic value and what is it?; Is it possible to work out an opposite formulation of this issue: what is the natural economy?; Is it possible to give a dynamic formulation: from sustainability to sustainable development?; What is the economic influence exerted by the «dynamic» and «integrated» character of the environmental damage, the «shortage of resources», the «non renewable character» of some resources?; What is the economic cost of the unequal exploitation of the resources?; etc..

These problems are broadly dealt with by scholars. See, among the others:

- ROBERT GOODLAND and Herman Daly, *Environmental Sustainability: Universal and Non Negotiable, Ecological Application*, 6(4) 1003-13 (1996);
- DANA CLARK and DAVID DOWNES, *What Price Biodiversity?: Economic Incentives and Biodiversity Conservation in the United States*, 8 (CIEL), 1995, Washington;
- THEODORE PANAYTON, *Economic Instruments for Environmental Management and Sustainable Development*, 17-23, UNEP, 1994;
- S.L. HART, *Strategies for a Sustainable World*, in *Harvard Business Rev*., Jan. – Feb. 1997, 67-76;
- ROBERT COSTANZA et Al., *An Introduction to Ecological Economics*, 132-38 (1997).

[4] The option – represented by wild and absolute globalisation – denies the role of politics and democracy because the global economy is considered as the extreme outcome of a logic featuring enterprises «as the only party able to solve the problems of society, of the environment, also of information, schools and health», P. BARCELLONA, *Lo spazio della politica – Tecnica e democrazia*, Rome, Editori Riuniti, 1993, p. 11.

On globalisation, see also:

- ROBERT COSTANZA et Al., *An Introduction to Ecological Economics*, 132-138 (1997);
- STUART L. HART, *Strategies for a Sustainable World*, in *Harvard Business Rev.,* Jan. – Feb. 1997, 67-76;
- ZAELKE et Al., *Trade and the Environment: Law, Economics and Policy*, Island Press, 1993;
- LESTER BROWN et Al., *State of World*, 1997, Worldwatch Institute;
- EKINS PAUL, *The Sustainable Consumer Society: A Contradiction in terms?*, University Press of New England, Fall 1991;
- HOUSMAN ROBERT, *The North American Free Trade Agreement's Lesson for Reconciling Trade ant the Environment*, 30 Stanford J. Int.'l (1994);
- International Chamber of Commerce, *Business Charter for Sustainable Development Principles for Environmental Management*, 1996;
- JOHNSON and BEAUBIEN, *The Environment and NAFTA*, 1996, Island Press, Washington;
- Jaque Maritain Institute, *Globalizzazione: solidarietà o esclusione*, by R. Papini, ESI, Naples, 2001.

CHAPTER II

ECONOMIC NEED: LIMITS AND OPPORTUNITIES FOR THE GLOBAL ECONOMY

1. The globalisation of the economy intended as an opportunity

The globalisation of the economy cannot be contested as *a fact* as it is characterised by similar phenomena in other fields (science, technology, etc.) which are equally spreading over the whole Planet.

Economic globalisation cannot be contested *in principle* as *economic freedom* must be recognised as *a right* for individuals and societies, both nationally and transnationally.

Indeed, it is typical for the economic logic to take advantages of any opportunity, thus anticipating the legal institutional development.

2. Compatibility with the environment as a necessity.

The question relating to economy concerns compatibility with the natural balance and, finally, with the sustainability of life in our own and only terrestrial ecosystem.

Economy is already universal, but appropriate rules for the ecological compatibility are still missing.

The international market, international finance, currency, the stock-exchange, the role played by strong multinationals, the Internet, the electronic revolution, the change mass production and consumption, the movement of the investments from a sector to another, affect the choices and lives of millions of human beings, thus determining new social behaviours, without meeting any serious obstacles, even not at the level of the States' sovereignty.

In such a dynamic, complex and deep framework *there are rules*, *but these rules* are meant for gradual adjustment and are inherent in the process of economic globalisation that is currently underway.

As far as energy and the exploitation of raw materials are concerned, the weaker countries are subjected to two conditions: they sell resources at a price which is lower than their intrinsic value and they import products from stronger countries, expanding the mass consumption market.

The lack of the rule of law and of justice is inherent in the system from an objective point of view so that the existing international bodies can only play a *mitigating role* (World Bank, International Monetary Fund, World Trade Organisation, OECD, various UN organisms).

The global economy is not combined with a global right and a group of global institutions yet[1].

Nevertheless, it seems inevitable that States must help in the effort to develop the legal and institutional system since the global economy has spread throughout the entire Planet (including resources outside the States' jurisdiction).

A major boost is given by *new parties* that are already operating internationally: individuals, in the name of common human rights, which are universal by their very nature; the social groups as the NGOs, which are already playing stimulating important roles, are giving advice and sometimes strongly protest against globalisation (the people of Seattle)[2].

As to globalisation the environment first focuses on the question of the *limits set to the development*, but it also represents an opportunity[3]. Some fundamental and common rules, if implemented and imposed - where necessary - can ensure the equal opportunities amongst private, economic entities and help to find a more balanced relation between States having different levels of development.

The International Court of the Environment represents, therefore, *an opportunity* for the global economy since it considers the economic freedom as positive legal value.

3. Limits to development and the States' technical and political incapability

States are undoubtedly proving to be unable to technically and politically cope with the problems of the environment within their territory. Such incapability seems even more evident with respect to the global issues concerning the Planet such as the protection of the large area lying outside the jurisdiction of the States, the protection of biodiversity, the climate change, transborder pollution, the equitable exploitation of resources, the exportation of hazardous activities and products, the exportation of obsolete and polluting technologies into poorer countries, etc.

4. The intrinsic economic social value of the Environment

The environment considered as a «limit», an «external legal limitation» to the economic activity (although necessary during the first phase) requires a different culture which is now developing: natural and human resources already have economic and social value in themselves so that the economy must take this into account in advance or, in any case, in terms of compensation for damages.

Nevertheless, it is necessary to reconsider the theoretical basis of the economy with regard to the present state of the environment.

5. The advantages of negotiation

The tendency to solve new, economic environmental problems through negotiation following the model worked out by the Anglo-Saxon tradition (in spite of using authoritative and mandatory manners) undoubtedly offers the advantage of empirical, gradual and joint adjustments, but the special nature and feature of the environment must be taken into account from a realistic point of view: it is a living ecosystem whose fundamental equilibrium deteriorates quickly.

6. Necessity for erga omnes *mandatory norms*

Accordingly, in addition to negotiation (by individuals, multinationals, public institutions) it is necessary to determine some *erga omnes* behaviours to be adopted by everyone.

In this way, the global law and the global institutions must find a framework to work in without coming up against the limitation of the sovereignty of the States.

7. The International Court of the Environment as a body ensuring equitable development

Pursuant to these requirements, an International Court of the Environment is a body ensuring universal, albeit equitable, economic development (in the exploitation of resources, in compliance with the legal standards and the obligations laid down by international law).

The obstacles in the path of the idea of a jurisdiction for the environment at international level are not «technical», but «political»[4].

Yet, it is in this very field that a jurisdiction can play a positive role by granting access to justice and gradual growth in case law on actual cases having international relevance.

It is better for political entities and States to transfer a part of their institutional responsibility onto society through new social mechanisms (information, participation and access) and, by letting the society (individuals and NGOs) undertake such activity, it will play an essential role in real co-operation and not a marginal one merely aiming at projecting an image.

The International Court of the Environemnt gives a legal role to society and, therefore, it helps existing institutions and fosters the economy[5].

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[1] See: *Globalizzazione: solidarietà o esclusione*, by Roberto Papini, ESI, Naples, 2001 (International Institute J. Maritain). By the same Institute: *Abitare la società globale: per una globalizzazione sostenibile*, ESI, Naples, 1995. In the conclusions of the Milan Congress, 29-31 October 1998, on: "Globalizzazione: una sfida per la pace – solidarietà o esclusione", organsied by the International Institute J. Maritain, *SEBASTIANO MOSSO* underlined that globalisation represents the new social issue of the 21st century because "the present governmental system lacks of four fundamental elements:

1. *A lack of safety* due to the growing violence in countries undergoing some difficulties: Rwanda, Congo, Yugoslavia, Ethiopia, Somalia, Sri-Lanka, Albania, etc.;
2. *An environmental lack*: the growing economic globalisation is accompanied by the risk of an increase in the degradation of the territory;
3. *A social lack*: the question of inequality, poverty, unemployment, unacceptable living conditions, working children, etc.;
4. *A democratic lack*: the sovereignty of the elected national parliaments is considerably limited by the global economic reality and the legal and political supranational context which establishes economic and political rules and guidelines. And at this supranational level there is no representation elected by the people.

[2] See MARIA ROSARIA FERRARESE, *Le istituzioni della globalizzazione*, Il Mulino, Bologna, 2000.

[3] MEEDOWS et Al., *I limiti dello sviluppo. Rapporto del System Dynamics Group Massachusetts Institute for Technology per il progetto il Club di Roma sui dilemmi dell'umanità*, Mondadori, Milan, 1972.

[4] AMAN, *A Global Perspective in Current Regulatory Reforms: Rejection, Relocation or Reinvention?*, in *Indiana Journal of Global Legal Studies*, Vol. 2, 1992, Note No. 96, p. 463: "Notably the discussion on the membership signature for GATT in the United States had little to do with the issues relating to free trade, but had much to do with the question whether there was the intention to consider an International Tribunal for Dispute Resolution as a binding judge that we could not control".

[5] PIERRE SPITZ, *La globalizzazione e l'ambiente* in *Globalizzazione: solidarietà o esclusione*, by Roberto Papini, ESI, Naples, 2001, p. 166-171; see especially page 170 where the Author links the shared idea of an International Court of the Environment to local participation and an increasing global network of social observers. Further, on the most recent contributions on the relationship economy – environment:

PNUE (2000), *Avenir de l'enovironnement*, 2000, Programme des Nations Unies pour l'evironnement, Nairobi.

BANQUE MONDIALE (2000), *World Development Indicators*, Banque Mondiale, Washington DC.

OMS (Organisation Mondiale de la Santé) (1999), *Rapport sur la santé dans le monde: pour un réel changement*, OMS.

FAO (Organisation des Nations Unies pour l'alimentation et l'agricolture) (1999), *Examen de l'état des ressources ichtyologiques marines mondiales*, FAO, Rome.

FMI (Fonds monétaire international) (1999), *Indices of Primary Commodity Prices*, FMI, Washington, DC.

AEE (Agence européenne pour l'environnement) (2000), *Environmental Signals 2000*, Agence européenne pour l'environnement, Copenhagen.

AEE (Agence européenne de l'environnement (1999), *L'environnement dans l'Union européenne à l'aube du XX^{e} siècle*, AEE, Copenhagen.

AIE (Agence européenne de l'énergie) (1997), *Indicators of Energy Use and Efficiency*, AIE/ACDE; Paris.

FRENCH, H (2000), *Coping with Ecological Globalisation, State of the World 2000*, Worldwatch Institute, Washington, DC.

JAEGER, C (1997), *Promouvoir l'éco-efficience: les rôles des pouvoirs publiques*, Paris, 3 et 4 septembre.

JOHNSTONE, N. (2001), *Resource Efficiency and the Environment*, document de référence établi pour *les Perspectives de l'environnement* de l'OCDE, OCDE, Paris.

BURKE, T. (1998), *Globalisation, The State and the Environment*, in OECD, *Globalisation and the Environment: Perspectives from OECD and Dynamic Non-member Countries*, OECD, Paris.

BUZAN, B., J. DE WILDE et O. WAEVER (1998), *Security: A new* Framework *for Analysis*, Lynne Rienner, Boulder et Londres.

WALLER-HUNTER, J. (1999), *Appropriate Institutions for the 21st Century*, in IUCN, *Imagine Tomorrow's World: 50th Anniversary Symposium Proceedings*, Gland, Suisse.

CHAPTER III

LEGAL NEED: TO GUARANTEE THE HUMAN RIGHT TO THE ENVIRONMENT AND TO UPHOLD THE EFFECTIVENESS OF THE INTERNATIONAL ENVIRONMENTAL LAW

I. The effectiveness of the international environmental law

1. The issue of the effectiveness of the international environmental law is carefully taken into consideration by Governments, International Organisations, NGOs and jurisprudence[1].

Some progress has been achieved:

a) the creation of new norms has been developing very rapidly in the last thirty years and has increased enormously in quantity (about 1,000 international agreements); see: L. BOISSON DE CHAZOURNES, R. DESGAGNÉ and C. ROMANO, *Protection international de l'environnment*, in *Recueil d'Instruments Juridiques*, Paris, Pedone, 1998 and the note by T. SCOVAZZI in *Rivista Giuridica dell'Ambiente*, 1998, 4, Giuffrè, Milan;

b) that very development seems highly meaningful from the point of view of quality since it has led to the definition of some unifying principles in the environmental field:
   the principle of the environment as fundamental human right;
   the principle of the right to the environment of future generations (intergenerational equity);
   the principle of the common heritage of humankind (referred to oceans, climate, biodiversity, etc.);
   the principle of sustainability (referred to life on earth);
   the principle of prevention;
   the principle of precaution;
   the principle of equity in the exploitation of resources;
   the principle "who pollutes pays";
   the principle of responsibility for transboundary damages;
   the principle of loyal co-operation;
   the principle of preventive assessment of the environmental impact;
   the principle of information as individual right;
   the principle of participation as individual right;
   the principle of the equal individual right of access to justice, (see D. HUNTER, J. SALZMAN and D. ZAELKE in *International Environmental Law* – University Casebook Series, N.Y. Foundation Press, 1998, Cap. 30, pp. 98-142.

c) the political and administrative mechanism of the control in the single conventions between the States shows a trend toward institutionalisation and strengthening according to new, rather uniform criteria (see: S. MALJEAN-BUBOIS, in C. IMPERIALI, *L'effectivité du droit international de l'environnement*, in Economica, 1998, Paris, pp. 26-56.

2. Despite all this progress, it must be noted that there are no supranational authorities responsible for establishing the violation of the States' international obligations and for applying possible sanctions. This fact considerably affects the system's efficiency.

The States have not shown, at least until now, much interest in the organic evolution of the institutional model as actual "governance".

3. Yet, the efforts to solve the environmental problems, made by the national legal systems, cannot be ignored (through the indirect application of the international law).

According to the principle of the integration of legal systems, the strengthening of legal instruments at national level leads to the progress – albeit indirect – of the international dimension (and vice versa).

The principle of integration of the national, Community and international legal systems in the view of the World Governing of the Environment and of an International Court of the Environment represents the subject-matter of the ICEF International Seminar to be held in Rome, 16-17 November 2001.

See, among the others, LEANZA UMBERTO, CARACCIOLO IDA, *Le incidenze della Convenzione di Montego Bay del 1982 sulla legislazione italiana in materia di spazi comuni*, in *La comunità internazionale*, 1995, no. 3-4 (December), pp. 469-509 and LEANZA U., *Il giudice interno e il diritto internazionale*, Report at the SIOI Congress of Rome, 26 January 1998, on the topic: *The Italian case law on international public law*, in *La Comunità Internationale*, 1998, 1, pp. 12-18.

4. The lack of supranational authorities (both administrative and judicial) entails some disadvantages:

a) the environmental crisis increases its pace without effective remedies;
b) the responses of the single States (according to a highly fragmentated model of 180 Countries) are often given late and in a dishomogeneous way;
c) the African and South American States, and some Asian too, do not have appropriate economic and technological resources and adequate administrative structures and this situation feeds inequality in the field of environmental protection.

5. The lack of effectiveness, therefore, has a structural and institutional character, since the parties signing the international obligations are those that decide if, when and how they must be observed, without any control by superior independent authorities (nor is the UN horizontal model useful to such a purpose).

While individuals, the International Community and the Future Generations are still waiting to be given recognised independent legal status at international level, States are fostered to start the process of effectiveness by implementing the international obligations signed by the existing international organisations and by the large world of NGOs, namely the voluntary social groups.

6. About the relationship between "compliance" and "effectiveness", see: RONALD MITCHELL, *Compliance Theory: an Overview*, in *Improving Compliance with International Environmental Law*, 3, 24-26, James Cameron et Al., EDS, 1996.

About the dynamic nature of the institutional (political and administrative) process of effectiveness and the criteria which may guarantee this outcome, see: PETER M. HAAS, ROBERT O. KEOENE and MARC A. LAVY, *Institutions for the Earth: Sources of Effective International Environmental Protection*, 3-24, Eds, 1993.

About the role of states' sovereignty and their interest to avoid compulsory remedies, see: ABRAME CHAYES, ANTONIA CHAYES, The New Sovereignty*, Harvard University Press, 3, 28, 1995.*

A criticism to the states' traditional stance can be found in A. WAITE, *State Responsibility and International Environmental Law*, ICEF, Towards the Governing of the Environment, *see above*, pp. 701-702.

For a description of the "positive compliance measures" adopted in favour of the developing countries in order to let them implement the obligations set forth by the International Conventions on the environment, see: *International Environmental Law Policy*, by A. HUNTER, J. SALZMAN, D. ZAELKE, University Casebook Series, N.Y. Foundation Press, pp. 171-478.

The measures include: *the financial co-operation* (World Bank, Global Environment Facility - Gef, UNRP); *the technology transfer* imposed by Agenda 21, Chapter 34 and by some Conventions (for example, the 1992 Climate Convention, Art. 4 and UNCLOS, Art. 144); *a differentiated responsibility for the developing Countries* (Rio Declaration, Principle No. 7; Climate Change Convention, Art. 3; Montreal Protocol on Substances Depleting the Ozone Layer, Art. 5); *a complex compliance information system* which includes: the obligation of periodical reports by Governments (for instance, Basel Convention, Art. 13; Cites Convention, Art. 18; Climate Change Convention, Art. 12; Montreal Protocol, Art. 7; Biodiversity Convention, Art. 26; Berne Convention, etc.); *the verification of the compliance or non compliance with obligations* (Verifiaction; Fact Finding; Inspection Panel).

7. About the response for the failed fulfilment of the obligations undertaken by States with respect to environmental protection, see:

GUNTHER HANDL, *Compliance Control Mechanisms and International Environmental Obligations*, 5, Tvl, J, Int'l and Comp., L. 29 (1997).

Governments tend to adopt collective mechanisms for consultation and political control in case of established violation of some parties' obligations (Non Compliance Procedure, NCP), in order to manage the dispute within the conventional system.

It is an important phenomenon, inherent to the multilateral environmental Treaties (Multilateral Environmental Agreements, MEAs), characterised by a common target, by a not merely bilateral, but mutual interest for the exact and full compliance which is essential for achieving the goals.

The flexibility of this mechanism can properly reduce the need of resorting to mandatory judicial mechanisms without excluding them for the present and future time, especially when obligations are specific as to their contents and time for compliance (for example, Montreal Protocol). Despite all this, they are never complied with, although the lack of fulfilment has been formalised.

8. The non compliance procedure, which was successfully tested for the Montreal Protocol, tends to be adopted also for other Multilateral Treaties in the environmental field.

Since this procedure is accompanied by technical and financial assistance, a kind of sanction is also represented by the suspension of financing or other advantages (technology and information transfer).

9. Yet, It is not possible to ignore the role of the States' legal responsibility for the violation of conventional obligations (pacta sunt servanda) and of the infringement of customary norms (among which there is the general principle of *neminem laedere*).

On this point see: PHILIPPE SANDS, *Compliance with International Environmental Obligations, Existing International Legal Arrangements, in Improving Compliance with International Law*, in JAMES CAMERON, *Improving Compliance with International Environmental Law*, (Kogan Page Publishers, 1997); MARY ELLEN O. CONNELL, *Symposium: Enforcement and the Success of International Environmental Law*, 3 Ind. J. Global Stud., 47, 1995.

II. *The International Responsibility in the Environmental Field*

10. *The question of international responsibility in the environmental field* is complex and requires a thorough, objective and careful analysis of the international environmental law as to its trend, in an integrated view of its elements and with respect to the similar evolution of the national and regional legal systems[2].

Concisely speaking, the matter can be examined from various points of view:

a) the legal basis of the international responsibility;
b) the existence of a general principle of responsibility for the environmental damage;
c) the spatial extension of such principle;
d) the time extension (future generations);
e) the extension of the contents of responsibility with respect to all natural resources and in the future to the sustainability of life on earth (living unitary ecosystem): the notion of common heritage of humankind;
f) the parties responsible (States, multinational corporations, individuals);
g) the forms of responsibility;
h) the parties entitled to take action (states; International Organisations; NGOs; individuals);
i) supranational authorities for solving the disputes and possible mandatory penalties.

11. *The Legal Basis*. – The legal basis of the principle of responsibility must be sought for in the existing international law of the environment (customary and conventional).

These two sectors of the international law are not separated, but linked to each other.

Although it is true that there is actual opposition to the general acceptation of customary norms and to the implementation of the conventional ones, it cannot be denied that relevant steps have recently been made and that, chiefly, there is a trend toward the effectiveness of the international law of the environment, because the ecological crisis worsens and accelerates its pace, and the social conscience is not only uneasy, but also willing to react.

12. *The Existence of the General Principle of International Responsibility for the Environmental Damage*. – The massive and quick production of new international norms in almost all sectors of the environment (the principle of responsibility is often expressively provided for) and the development by the international practice are evidence of a different attitude of the *States*. Therefore, it can be asserted that a principle of responsibility for the environmental damage is now accepted in international law: in principle the States accept the duty to be held responsible from the legal point of view for the environmental damage produced by their bodies or by other parties subjected to their jurisdiction. This happens not only because norms have increased, but thanks to their different quality.

13. *The Spatial Extension of the Principle of Responsibility*. – First of all, the international law of the environment is no longer limited by the relationship between the neighbouring Countries. This limit was founded on the principle of neighbourhood or geographic nearness. Indeed, while the preceding international practice simply referred to transfrontier pollution between neighbouring states (see the cases of the Trail Foundries, of the Lanoux Lake, of the Gut Dam), today the environmental norms do also refer to the relationships between far Countries and consider that the environmental risk is caused more often by those activities whose harmful effects can be noticed far away from them (radioactive fall-out, the fall of satellites, acid rains, etc.). Some progress has been made at diplomatic level (see, for example, the Cosmos 954 case) and in the conventional law. See for example the Convention on wide-range transfrontier pollution of the air and the IAEA Conventions on notice and aid in case of nuclear accident.

14. *The Extension to All Resources of the Principle of Responsibility*. – Secondly, the international law of the environment has progressively extended its own scope to new sectors and resources. Indeed, while the prohibition to pollute and the corresponding responsibility were limited to the protection of the territory and the resources of other states, later they have been extended to the protection of the marine environment (included the high sea) and, more recently, to the protection of space and common resources and the environment as such.

The notion of common heritage of humankind has been stated with reference to both cultural and environmental patrimony (UNESCO Universal Convention of Paris, 23 November 1972, on the cultural and natural heritage; Camberra Convention, 20 May 1982, on the marine resources in the Antarctica: Bonn Convention, 23 June 1979, on the migrating species; Bern Convention, 19 September 1979, on wildlife in Europe; Barcelona Convention, 16 February 1976, on the Mediterranean Sea and the relevant Protocols; Conventions on climate and biodiversity signed in Rio in 1992).

The «spatial» extension was already set forth in Principle 21 of the Stockholm Declaration which stated the States' additional obligation to prevent the «damage to the environment.. in areas outside the limitations of the national jurisdictions ». The interest of the International Community as a whole for the protection of the common environment is underlined also in Article 19 of the CDI Draft Articles on States' responsibility where it is maintained that a serious infringement of the prohibition to massively pollute the air or the sea can lead to an international crime.

The most important development concerns the adoption of a series of international instruments establishing a principle of responsibility relating to the protection of the common environment. Among such instruments the most significant are: the UNCLOS (Articles 139, 194, 235, 263 and 304), the Convention on the prohibition to use, for military or somehow aggressive purposes, techniques for changing the environment (Articles I and IV), the Convention for the protection of the ozone layer (Article 2) with the Montreal Protocol, the measures agreed upon for the preservation of flora and fauna in the Antarctica, the Convention on the discipline of the activities concerning the mine resources of the Antarctica (Articles 7 and 9), the Convention on climate (Articles 1, 2 and 3), the Convention on biological diversity (Article 3), the Cartagena Protocol of 26 February 2000 on biodiversity (Articles 6, 16, 17, 18 and 27).

15. *The "Time" Extension of the Principle of International Responsibility in Favour of Future Generations*. – This is a still incomplete development of the international law of the environment.

If there has been a «spatial» extension of the notion of common heritage of humankind, able to include all resources, the earth too, which hosts the life in the only common wealth, the cultural phenomenon refers, from the subjective point of view, two new parties to the international law: the International Community separately considered from the States and the Future Generations.

A common wealth requires a unitary subject that is altogether beneficiary and manager, now (the International Community) and in the future (the Community itself in its genetic and cultural continuity, i.e. the future generations).

There is awareness of the fact that this cultural and moral achievement now only has a partial legal aspect, but undoubtedly the reference to future generations made in several international documents cannot but have some legal consequence.

Actually, if today there is a principle of responsibility for the environmental damage, it is not possible to deny the dynamic character of such damage and its practical affectation on resources and individuals who will follow us.

The Convention on climate refers to the «common concern for the whole humankind» and the provisions already passed at the UN Conference «for the present and future generations» (see Preamble).

Similarly, the Convention on biodiversity (see Preamble and the definition of sustainable exploitation in Article 2, last part).

16. **Parties Responsible**. – The environmental damage having international relevance can be caused directly by the States through their bodies or by private entities or individuals.

In the present international law the range of the States' obligations has been increased: this happens because the States have duties and correspondent responsibilities not only for the supervision of their territory, but also for the supervision of the activities carried out outside their territory.

The words used in Principle 21 of the Stockholm Declaration do not refer only to «jurisdiction», but also to the States' «supervision». Such words («jurisdiction and control») have been used later in several international instruments (resolutions of the UN General Assembly; the Final Act of the Conference on security and co-operation in Europe, etc.). In particular, UNCLOS has adopted these words (Article 194) which create many specific norms providing for the States to prevent and reduce sea pollution not only when the latter is produced on their territory or in marine areas on which they exercise exclusive jurisdiction, but also when it is due to their ships, anywhere on the sea (Articles 216 (1) (b) and 217) or when it is caused by activities carried out under their supervision in the area of the international sea ground (Article 139). See now also the Convention on Biodiversity (Article 5), as well.

For this reason it can be asserted that within the progressive development of the international law of the environment, the States' duties to control the activities carried out by their bodies and especially by private legal entities outside the national territory, become more and more relevant. See the Basil Conventions on the transfer of dangerous wastes and the Cartagena Protocol on Biodiversity.

In this view it is necessary to consider the new phenomenon of the transfer abroad of dangerous materials or technologies. The Convention on the supervision of transfrontier circulation of dangerous waste and their destruction takes such phenomenon into consideration and envisages a system based on notice and prior consent by the receiving State. But at present it does not contain norms about responsibility. Actually the adoption, by means of a treaty, of norms on international responsibility could provide a more efficient instrument to tackle the transfer abroad of dangerous materials.

In a phase of globalisation of the economy the legal responsibility for the environmental damage caused by multinational private companies conferred upon the States of origin, represents a strong deterrent for the rule of law and justice (localisation; environmental impact; security measures for the environment and the population; information and participation of the public, etc.).

17. *The Forms of Responsibility*. – a) *The criminal responsibility* is possible only for single individuals as it is the case of the national systems.

Some extension of the principle of criminal responsibility at international level already occurred with the Statute of the International Criminal Court passed in Rome in 1998, with reference to some crimes against mankind.

A possible amendment to such a Statute passed with the majority of two thirds could allow the punishment of some categories of environmental crimes committed by individuals, which affect the fundamental interest of the International Community.

b) *The civil responsibility* for the environmental damage having international relevance, according to the prevailing jurisprudence, takes two forms: responsibility due to negligence (violation of the duty of diligence, care and expertise) or objective responsibility (due to the fact itself of polluting or causing transnational environmental damage).

The responsibility for massive transfrontier pollution can be included in the notion of «negligence», i.e. in the failed diligence by the States when carrying out their supervisory activity.

The responsibility founded on conventional norms depends on the kind of legal discipline of the field (for example, the Convention on the absolute prohibition to cause environmental damage in case of war (unjustified damage) provides for a case of objective liability; similarly the Convention on the fall of spatial objects or the failed fulfilment of duties necessary for serving notice and consulting).

But responsibility is usually due to negligence according to the international agreements.

It must be stressed that the missing norms on responsibility (for example the Geneva Convention on transfrontier pollution) do not imply the exemption for the States from any legal responsibility since the customary rules have independent validity (the principle of responsibility for trasnfrontier massive damage is a fundamental one).

18. *Relationship between Damage and Responsibility*. – The questions so far concern:

a) the «unjust» damage (a violation of an international norm is always required);
b) the material damage or also the moral damage (or the actual and present danger of damage);
c) the ecological damage (intended as damage to be economically assessed and also as risk; the serious or assessable damage or any other damage).
d) the international practice in the field is not uniform. For example, Principle 21 of the Stockholm Declaration only deals with the environmental damage, without any further explanation about the seriousness of such damage. The same can be maintained for the norms concerning UNCLOS (for example, Articles 194 and from 207 to 212). On the contrary, other elements of the international practice seem to require more serious damages. For example, the judgment in the case of the Trail Foundries deals with «serious consequences»; the judgment in the case of the Lanoux Lake with «final pollution» and the recent Convention on the discipline on the activities concerning the mine resources of the Antarctica refers to damage as any «considerable impact» on the territory, waters and air. Actually at least in the

international customary law according to the prevailing notion that the States must exclusively prevent serious damage.

Such statement is also confirmed in the works of the Commission on the international law on responsibility for acts which are not forbidden by the international law that refer to responsibility exclusively in case of an «assessable damage».

19. *Parties Entitled to Act*. - The recognition of the duty to ensure that the activities carried out on the territory controlled by a State do not produce damage to the natural environment in areas outside the national jurisdiction implies, as a consequence, the necessity to identify the parties entitled to initiate legal proceedings at international level. Actually, when the damage does not directly affect the territory of a State or the resources it manages, but it occurs in common areas like the high sea, the outer space or the Antarctica, no State directly and individually undergoes some damage. Nevertheless, this kind of damage potentially affects all the States *uti universi*, as members of the International Community, which are collectively and individually interested in enjoying and preserving such common areas and resources. Yet, if they are all interested, who can act in a specific case to claim for halting a harmful conduct and for the restoration of the integrity of the environment which was violated? Eventually, who can claim the punishment of the offender and apply the relevant penalties?

Recently, under the pressure of strong innovative trends, the international law has recognised the public interest of the global Community, whose protection transcends the mere mutual relationship between States and represents a real public international policy which binds the single States to the International Community as such. In the well-known Barcelona Traction, Light and Power Co. Case, the International Court of Justice underlined, in an *obiter dictum* considered today as a classic decision, that the existence of "duties on the part of a State with respect to the International Community as such" must be recognised along with the regular international obligations which bind the States according to reciprocity (in the case mentioned above the treatment of foreigners and the diplomatic protection). Such duties, added the Court, "regard" all the States. Considered the importance of the rights concerned, it can be maintained that all the States have a legal interest in their protection: such duties are *erga omnes*.

According to the Court, the violation of this kind of duties confers upon the States not directly damaged the right to react by resorting to the legal remedies provided for by the international law in the judicial, arbitral or diplomatic decisions.

A further case where the International Court of Justice recognised the notion of *erga omnes* obligations refers to the decision taken on 25 September 1997 (Gabcikovo – Nagymaros Project, between Hungary and Slovakia, ICJ Report no. 92).

According to a solidaric principle in the Multilateral Treaties, the obligations of the States must be fulfilled in order to guarantee the unitary goal of the agreement: the obligations undertaken are not bilateral, but collective so that each State can react for the infringement of the duties by another State even without proving to have been directly damaged.

The most important multilateral treaties (Vienna Convention, UNCLOS; Convention on Climate; Convention on Biodiversity) confirm such statement and the practice too is following this trend.

The problem, still unsolved, concerns the access to justice by individuals and NGOs, although some progress of the substantive international law has been already achieved (the Aarhus Convention on the right to environmental information and the corresponding access to justice; the Expoo Convention on the procedure of environmental impact and on the rights of participation of individuals; the XI Protocol to the Rome Convention on human rights; the Statute of the International Criminal

Court and the power to initiate legal proceedings on the part of an individual entity other than the States, i.e. by the prosecutor).

The theory of the *actio popularis,* according to which the legitimacy would be "supplementary", has been abandoned due to its theoretical inconsistency in the national systems and does not seem to be necessary at international level.

The States, when acting for the lack of fulfilment of an obligation by another state with respect to a multilateral treaty, affirm their own legal interest which coincides with that one of the International Community.

The individuals, when they are entitled to do so, affirm a fundamental human right (the human right to the environment) and do not replace public institutions which can be even summoned for the violation of the international rules.

The question relating to the social access to environmental justice does not have a legal basis in the international law, yet.

Without a specific convention on this matter it seems misleading to start protecting anything outside the jurisdiction, nor the interests of future generations, because the chance of a possible innovative practice still lays outside the legal system.

It is necessary to recognise that the problem of those people having the right to restoration and compensation and how the latter could be used in order to reach the target of eliminating the effects of the environment damage, is likely to be hardly solved in this international situation.

Without being too optimistic the following must be recognised:

a) the principle of the common haritage of mankind is now acknowledged in several international treaties (on the outer space, on the law of the sea, on climate, biodiversity, cultural patrimony, etc.) and can be considered as institutionalised, so that its application is now real;
b) the principle of responsibility for the environmental damage has now started to be part of special international instruments;
c) the increase of accidents in the common areas with their corresponding environmental damages urgently demands a more effective institutionalisation;
d) the climate shows to be profoundly changed so that it seems unrealistic to advance even justified difficulties in order to postpone the solution of the problem which now concerns legal liability and possible effective penalties;
e) similar deep concerns are raised by important cases of destruction of biodiversity, forests, seas and large rivers.

III. *Resolution of Disputes*.

20. *Supranational Authorities for the Solution of Disputes*. – The principle of liability for the environmental damage is properly regulated in the national systems both in the substantive legislation and in the administrative mechanisms for management and supervision, and in the legal proceedings (criminal, civil and administrative).

In the international system the situation is rapidly developing, with some major progress in the substantive norms and in some procedural provisions (information, notification, participation of citizens and NGOs in some preventive procedures – for example, the assessment of the environmental impact) and occasionally in the mechanism of implementation and compliance of the treaties[3].

The progress achieved in the field of institutionalisation has been more limited and is substantially carried out through a model of horizontal (political administrative) co-operation set up by about 180 States and several International Forums (UN and its major bodies: General Assembly, Security Council and General Secretariat; agencies

linked to the UN, such as FAO, UNESCO, UNEP, ECOSOC; OECD which represents 29 industrialised countries; Council of Europe which represents 49 States; European Union consisting of 15 States and 27 in the future; G8 including the most industrialised Countries of the world).

Most of the progress achieved concerns the regional level: at the Council of Europe there is an effective Court for the Human Rights in Strasbourg to which also individuals have access; at the European Union, besides the Parliament and the Commission, there is the Court of Justice of Luxembourg which effectively implements an independent and priority Community Law with respect to the Law of the Member States. This also regards the legal liability of the Member States when they do not comply with the Directives .

As to the judicial aspects of the International Law of the Environment there are two institutions (the International Court of Justice and the Permanent Court of Arbitration) set up before the working-out of the collection of international norms on the environment, within a state-like horizontal logic. These two institutions have failed until now – on the basis of the statistics – to solve the environmental conflicts from the legal point of view, due to the practical reason that just a few cases were submitted to them.

The practical consequence is the non exploitation of these two institutions for the benefit of the environment which substantially work only for arbitration, on the basis of a consensus by the States concerned, without any *erga omnes* mandatory power and social access.

The lack of real mandatory jurisdiction *de facto* damages the Permanent Court of Arbitration, too, since the jurisdictional and arbitral roles in the mature legal systems are complementary: the States are reluctant to use the arbitration if there is no threat of a jurisdictional mandatory proceeding which is more exacting to them.

This picture can be modified mainly through a political institutional evaluation: it seems unbearable and contrary to the principles of sound economy to miss an institutional framework, which is legally effective, in the globalisation of economy, which today relies too much on the Planet's common resources (chiefly in the space outside the States' jurisdiction, i.e. on three quarters of the earth and on the atmosphere).

Let us mention just a few examples: the repeated accidents of the oil tanks on the sea extensively damage the common resources, and the damages are only partially insured; the transfrontier pollution through big rivers or in the atmosphere is transferred onto the common heritage with very dangerous cumulative and synergic effects in the long term, since the mechanism substantially remains uncontrolled and without any applied and credible regime of legal liability.

Everybody agrees on these political considerations, but they seem to be important also for a different legal, economic and social approach to problems.

The progress already achieved at national, community and regional (Council of Europe) level and the improvement introduced in the "non-compliance" mechanisms of the multilateral Treaties and their Protocols make us realise that without adequate institutions it is not possible to ensure the proper operation of the international legal system in the environmental field.

The progress achieved in the domain of the human rights (Court of Justice of Strasbourg and the International Criminal Court) and the continuous worsening of the ecological crisis of the Planet, despite the incredible augmentation of partial conventional instruments, lead – in our opinion – to critically reconsider the existing horizontal model which seems unable to ensure a possible future to the global economy itself.

It is necessary to start a simplification on the basis of a few common rules to be applied in the name of the International Community and in the interest of future generations requiring the society to co-operate in a real way.

To such a purpose it is not possible to overlook the need for reducing the existing fragmentation (of provisions and institutions) through two supranational means: an International Agency of the Environment and an International Court of the Environment (as it has been proposed by ICEF since 1989).

IV. Prevention of Conflicts.

21. As to the prevention of disputes (or conflicts and struggles), the present system envisages some procedural mechanisms which are very useful, of course, although they are deemed insufficient.

Such mechanisms tend to be strengthened and supplemented with economic and technical instruments of assistance:

a) Exchange of Information in General.

This duty between the States represents a primary obligation in some extreme situations of threat of environmental damage, but it is certainly a legal obligation under the treaties (with respect to their object and their specific goals).

The duty to inform concerns the States' international responsibility, also according to the new Conventions on procedure (Aarhus and Expoo).

b) Notification

This is a States' international legal duty which regards situations able to bring about major transfrontier environmental effects.

Such obligation becomes stricter in case of emergency (for example, in the sector of nuclear energy and of dangerous activities).

c) Consultation

Since there is an ecological interdependence between the States, the mechanism of mutual consultation is necessary in order to discuss and prevent possible disputes.

The consultation tends to institutionalise in the single Conventions as to their implementation and on a more general level it is already institutionalised in special systems (Nordic Council; The European Council; The UN System).

d) Prior Informed Consent

In some sectors the International Law imposes an obligation other than information, notification and consultation, i.e. the prior informed consent by those States which may be damaged.

These sectors are highly critical, like the exportation of wastes and dangerous materials; their transportation; the nuclear emergency; the localisation of chemical factories; the genetic research.

The Basil Convention of 1989 (in force on 05.05.1992) has disciplined this sector and the Bomako Convention of 1991, worked out by FAO in 1985, has dealt with the delicate situation of wastes and the use of pesticides.

The UNEP London Guidelines are very important as far as the chemical industry is concerned.

The Chernobyl accident (27 April 1986) caught the international system that reacted with two subsequent conventions on immediate notification and assistance (26 September 1986).

It is clear that the problem cannot be taken into account *ex post*, but it also concerns the technology used for producing nuclear power and the military sector (conflict between Australia and new Zealand against France for the tests in the Pacific Ocean

which was brought before the International Court of Justice, case no. 1974, ICJ.253 and case no. 1974, ICJ.457).

It must be stressed that the mechanism of prior informed consent takes place between the States, but it does not cover the broad areas laying outside their jurisdiction (represented by the International Community).

e) Environmental Impact Assessment (EIA).

It is set forth for projects having transfrontier effects (Expoo Convention).

f) Common Institutionalised Management.

This more evolved mechanism of prevention is implemented through the North Convention Model and with the International Joint Commission Between Canada and the United States.

Major application has occurred with respect to the Antarctica and the models of Conventions on the atmosphere (Montreal Protocol Regime and Kyoto Protocol Regime).

As to the solution of disputes the fundamental legal model is represented by Art. 33 of the UN Chart.

This model progressively provides for a set of legal obligations aiming at peacefully settling the conflicts between States:

a) preliminary obligations: co-operation; notification; information exchange;
b) measures between parties: consultation and negotiation;
c) non-binding third-party measures: good offices, fact-finding, conciliation and mediation;
d) binding third-party measures: arbitral tribunals and judicial bodies.

The system is based on the consensual acceptation by Governments of soft mechanisms for the solution of conflicts and the use of arbitration and jurisdiction is considered as possible, rarely applied solution.

Hence a fragmentation of the legal systems which serve the strong interests of the economic globalisation protected by the States despite the serious lack of the rule of law and justice for the common environmental heritage.

The States are reluctant to resort to serious forms of arbitration and, *a fortiori*, to be subjected to a real international mandatory jurisdiction in order to avoid establishing negative precedents.

This shows why the social parties (non-state actors) are kept outside the system for fear of having to accept a transparent and democratic social supervision according to the rule of law and justice.

In order to change it is necessary to reveal the role of the law considered as strong set of common values which are democratically shared, for a legal civilisation able to give well-substantiated answers to the global and accelerated challenges of globalisation (challenges that are not only economic, but concern the technological innovations deeply transforming everybody's life).

The ecological "truth", especially in the field of damages, is presented as a primary and absolute necessity which cannot be negotiated by the States.

An international judicial institution able to verify the ecological "truth" in every single case, according to legal rules, does not represent a "permission" by the States, but their "responsibility" for the present and future generations.

Therefore the problem is not "whether" to establish an International Court of the Environment, but "when" and "how".

V. *New judicial parties to the global right*

Among the new legal parties to the global right, today the role played by some supranational judicial bodies must be taken into account: the Court of Justice of the European Communities in Luxembourg; the European Court of Human Rights in Strasbourg; the Interamerican Court of Human Rights; the International Criminal Court established in 1998 in Rome.

22. *The Court of Justice of the European Communities in Luxembourg.* - This institution works for *15 Countries* (destined to become 27 through the extension of the EU's borders) and has turned out to be very useful for the protection of the environment since it has developed a case law in several fields. It was characterised by the supremacy of the Community Environmental Law over the national law of the single States, often condemned for their non-compliance (political and economic sanctions).

Therefore, it is possible to maintain that environmental problems having exclusively national relevance are ruled on by the judges of the single EU Member States whereas the environmental problems at Community level are dealt with by a special supranational judicial body and are granted two instances of adjudication. This results in the gradual integration of the single national systems and more efficient environmental protection as to both substance and procedure[4].

23. *The Court of the Human Rights in Strasbourg*

The Court of Human Rights of Strasbourg, as well, (on the basis of the 1950 Rome Convention and the additional Protocols, among which the XI Protocol that has opened the access to individuals, too) has created very important and innovative case law as far as the *42 Countries* of the European Council are concerned.

Some decisions - albeit indirectly - already regard the environment so that it is possible to consider the creation of a Special Section for the Environment to which individuals and NGOs may have access.

This perspective suggested by some experts must be examined and discussed even if it concerns only a limited area of the Planet and has some technical limitations[5].

24. *Towards a Universal Court of the Human Rights.* - Since the list of the human rights in the Convention is not strictly limited, on several occasions, the Court of Strasbourg has, examined the human right to the environment - although indirectly - in its decisions so that there are now new interesting prospects for this issue.

The Regional Courts on the Human Rights are expected to create a similar case law (in North and South America, Africa and Asia) while there are still expectations that *a single Universal Court of the Human Rights* be created. Such court is actually possible and is in the interest of the International Community. It could also help to protect the human right to the environment (a brand-new right that is not formally included in the Rome Convention, but could be added by means of a protocol).

25. *The International Criminal Court.* - As far as it is concerned the International Criminal Court, established in 1998 in Rome, must await the implementing procedure for the single international offences (committed by individuals) as defined in its Statute[6].

It is noteworthy that the limits to the States' sovereignty have been jointly overcome precisely in the most exclusive and typically traditional field of State sovereignty, namely, the criminal field and in the name of the new human rights.

This fact supports the hope that a permanent International Court of the Environment can be established at global level. It will protect the environment intended

both as human right (subjective aspect) and as implementation of the principles of the international environmental law as well as of the customary and conventional principles (objective aspect).

26. *International environmental crimes perpetrated by individuals.* – In case the concept of "international environmental crime" be adopted through an amendment to the Statute or by developing the relevant case law, the International Criminal Court could deal with it with regard to very serious actions by individuals against the common resources of the Planet[7].

Despite the existence of the International Court of Justice in The Hague these other international institutions were established as UN general legal institutions and are now working with the view of integrating other adjudicating bodies in the unity of the international legal system.

27. *The "reservations" of the Court of Justice in The Hague.* - The reservations of the Court of Justice of The Hague, already made at the time of the 1950 Rome Convention and also more recently with the International Criminal Court in 1998, have been overcome – correctly, according to our opinion - because the human rights concern individuals, intended as entities entitled to them, and not the States (which only have the duty of compliance, recognition and protection). Thus it is right that there exist supranational jurisdictional bodies providing legal guarantee other than the Court of Justice of The Hague which is a jurisdictional body only for the States (States meant as active and passive parties to the corresponding proceedings).

28. *The International Tribunal for the Law of the Sea.* - There is a similar issue for the human right to the environment: whether to establish a specific body other than the Court of Justice of The Hague.

In the environmental field such a question - despite the reservations of the Court of Justice - has been already solved by the signatory States of the 1982 Convention on the Law of the Sea of Montego Bay, through the creation of a special International Tribunal for the Law of the Sea in 1996. This supranational jurisdiction covers a very broad sector of the whole terrestrial environment (about 70%) and is open not only to the States, but also to other "entities" (which will be better defined by the case law)[8].

29. *Internationales Klima Tribunal* - A similar adjudicating body for the climate was proposed by several German and Austrian organisations in Berlin in 1995 (Internationales Klima Tribunal) as a consequence of the slow and incomplete implementation of the framework Convention on Climate Changes signed in 1992 in Rio (and its corresponding Protocols)[9].

30. *The Possibility of a Single International Court of the Environment*. - Since the environment cannot be divided into many separate sectors (why, then, not an International Court of Nature and Biodiversity, as well?), and the legal principles of the international environmental law represent a unity from many points of view, it is not surprising that a single International Court of the Environment has been considered. Its aim would be to have a general specialised jurisdiction (not a special one) and to supplement the role played by the Court of Justice of The Hague, both as far as specialisation and access to justice are concerned (access is a fundamental feature which the Court of Justice lacks and which is indispensable for the environment for practical reasons since the questions are raised by the society suffering environmental damage)[10].

As we will see in the last chapter concerning the progress of the ICEF Project in many areas of the world, the political attention of a large number of Governments is undoubtedly focused on a real international jurisdiction for the environment, thus showing the unsubstantiated scientific and technical nature of some criticism which has often been expressed without the appropriate knowledge of the Project.

31. *The Permanent Court of Arbitration in The Hague*. - It is certainly wrong to observe that the International Court of the Environment would uselessly multiply the already numerous existing tribunals.

No one is questioning the Permanent Court of Arbitration as to its role for the settlement of bilateral environmental disputes between States or States and individuals or between individuals.

In this case, it is sufficient to allow for a flexible adjustment of the procedural rules (already carried out) and for an agreed-upon voluntary role played by the parties concerned, as it occurs in any arbitration.

ICEF supports the role of the Permanent Court of Arbitration because it deems the arbitral function of this or other bodies on a joint basis to be very useful[11].

32. *The International Court of Justice and Its Inadequacy*. - As far as the Court of Justice of The Hague is concerned, it should be noted that the creation of a special Section for the Environment is not enough if this institution does not receive the cases having international relevance without giving access to individuals or NGOs.

In order to reach this aim a new legal basis is needed through an international Convention or Statute since the institutional mechanism is built on an exclusive horizontal conception of state sovereignty (of the States towards other States).

Some precedents had bilateral and arbitral nature.

It has never been possible to hear cases of actual jurisdiction dealing with global problems and having *erga omnes* mandatory validity.

Respect for this institution is indisputable but the problem of the jurisdiction for the environment is completely different[12].

33. The International Court of the Environment for the Protection of the Human Right to the Environment. - *Due to the very delicacy of the whole matter at global level, it is necessary that the new jurisdiction be widely acknowledged by Governments from the political point of view (since the acceptance of 40 Countries or more is not enough, as it happens for the International Court of Justice).*

Today this political acceptance can be achieved in order to stem the effects of economic globalisation which is growing at an impressive pace.

This new institution could simplify the system because it would absorb the International Tribunal for the Law of the Sea by simultaneously rationalising jurisdictional mechanisms for the dispute settlement, by concentrating on cases having actual international relevance.

But the final reason which, in our opinion, must lead to the creation of an *ad hoc* International Court of the Environment lies in the new kind of international conventions dealing with the human right to the environment.

34. *The Right to Environmental Information and the Access to Justice*. - The international dimension of the individual right to environmental information (including, of course, the information having international importance) is already recognised by the Aarhus Convention, so that it is clear that the first stone has been laid for a mechanism

to protect this right not only at national level (as it already happens) but also before an international court (although with the necessary graduality and adequate filters in order to avoid many unfounded claims).

35. The Right to Participation and the Corresponding Right to Access to Justice. - *The international dimension of the right to participation (social control) is provided for in the 1992 Rio Declaration and in special international instruments like the Expoo Convention on the Environmental Impact Assessment in a transboundary context.*

It is clear that it is not sufficient (though useful) to allow the external participation in some already existing international organisms through a "quasi-judicial" control:

the *Independent Evaluation Office* at the International Monetary Found;

the *Inspection Panel* at the World Bank;

the *Appellate Body* of the World Trade Organisation.

The human right to participation implies the possibility to take part – with some limitations - in the strategic choices of the global economy in order to fill the lack of democracy, transparency and rule of law. Therefore, in this perspective, the above-mentioned bodies do not seem to be sufficient.

The infringement of norms (at least those existing at present) which ensure participation in projects having transboundary effects, in the transportation and detection of dangerous activities, will find in the International Court of the Environment a proper legal assessment and, in particular, a remedy.

36. *The Access to Justice and the Need for an* ad hoc *Convention.* - The legal reference to access to justice - meant as final feature of the human right to the environment – at international level is still inappropriate (see the Rio Declaration, Principle no. 10).

Therefore, it seems appropriate that the Convention leading to the establishment of an International Court of the Environment provides a well-determined basis for this fundamental human right by allowing for its real exercise in practice (although with an adequate filter, perhaps through the intervention of a Committee made up of ombudsmen).

It is not something given with the "permission" of the States, but a fundamental right of the individuals and peoples, i.e., a way of co-operating with the States always having its own independent institutional dignity.

ICEF has been insisting on this point for over ten years because it is convinced it is affirming something necessary and useful to Governments and to the International Community.

37. The International Environmental Court of the Environment for the Effectiveness of the International Law. - *The monitoring of the implementation of the international conventions now takes place through a technical, scientific and economic* institutional pattern *having a* political and administrative *nature as provided for by the single agreements signed by the States.*

The fragmentation of the international environmental law in the various fields coincides with a similar, non-homogeneous situation in the organisation of the monitoring.

Actually, the signatory States themselves, parties to numerous conventions in the environmental field, are concerned about the implementation of the obligations they are

engaged in. This takes place ordinarily through the mechanisms that are adopted - more or less - in the Conventions.

The way to settle the disputes is still to be decided (as to the construction and implementation of the conventions) since reference is made to arbitration (or, more specifically, to the Permanent Court of Arbitration in The Hague) or to the International Court of Justice (always on voluntary basis) whereas, according to the 1982 Convention of Montego Bay, the International Tribunal for the Law of the Sea was meant to be established for that very purpose.

38. *The Political Deciding Body in the Conventions*. - This is the Conference or meeting of the State parties. It is held periodically and tends to take place annually.

The importance of this internal political control is growing increasingly with regard to the large framework Conventions on the environment and can be expressed in a plenary or limited meeting (Permanent Commission or Committee or Permanent Council), to show that the States are now aware that the Conventions have their own life and need gradual enhancement through continuing and institutionalised co-operation among all the signatories.

The very tendency to institutionalise the control represents an interesting phenomenon which was started at political administrative and technical level, to be then integrated by similar institutionalisation at the judicial level in order to solve the disputes for which no joint settlement was possible.

39. *The Executive Body of the Conventions*. - The Permanent Commission (usually with a limited number of participants) acts as Secretariat and can be integrated by Sectorial Commissions or Bureaux or *ad hoc* Working Groups.

This structure too - accessory to the decision-making at political level - represents an important aspect of the institutionalisation of the monitoring of the implementation of a Convention.

40. *Scientific and Technical Facilities*. - In such a wide and complex matter like that one of the environment, diplomats and jurists need to be advised by independent experts who have interdisciplinary competence.

The experts can be professionals or work in *ad hoc* scientific and technical facilities.

This technical and scientific contribution is very important in the administrative institutionalisation of the monitoring of conventions (especially the Framework Conventions on the Sea, Biodiversity, Climate and Desertification): it also represents an evident and actual signal of the need to provide for a similar mechanism in the International Court of the Environment which should have a mixed composition of jurists and experts.

41. *Non-Governmental Support*. - NGOs and several other social entities already act as "parties" to the environmental global law since they take part in drafting Treaties (for example, IUCN for the Ramsar Convention) and give advise in the case of meetings or International Conferences (for example, in Rio de Janeiro in 1992).

The role played by NGOs is not only for prevention, but especially for the implementation of the Conventions on the environment.

The traditional rigidity of the international community, which is focused on the exclusive legal role played by the States, tends to be overcome by these new social entities that claim for their own legal role.

We believe that the contribution by the NGOs when discovering violations of the Conventions cannot be limited to administrative monitoring because the access to justice has a broader scope and cannot ignore the adjudication level.

Hence, the consequence is that the International Court of the Environemnt must be “open” to the co-operation of the NGOs concerned.

42. *The Role of the United Nations and Other Institutions*. - The UN Programme for the Environment (PNUE), created in 1972 after the Stockholm Conference, acts as Secretariat for the implementation of several international conventions regarding the environment and as general co-ordinator.

The Commission on Sustainable Development, set up in 1992 after the Rio Conference, monitors the application of environmental Conventions and, notably, of Agenda 21.

A useful role is played by specialised institutions within the United Nations (FAO, UNESCO, WHO) and by regional institutions (Council of Europe, UN Economic Commission for Europe, OECD, OUA, ASEAN).

In conclusion, the monitoring of the application of the international conventions on the environment has only a political and not a judicial character.

International and regional bodies, recognised by the States, have horizontal competence which is not superior to that of Governments and cannot inflict "penalties" for possible violations of the Conventions.

Everything changes slowly (or does not change at all) and, in accordance with agreements, it changes step after step while the global environmental situation risks not being governed as required.

43. *The "non-compliance" procedure*. - Under international law, the State violating the obligations undertaken in a Treaty is legally liable and must redress the wrong.

This is true also for the environment as stated by the International Court of Justice in a recent decision (substantially arbitral and bilateral), (Hungary, Slovakia, Gabcikovo Project - Nagumaros, Judgment of 25 September 1997).

A classical case, where the same principle was upheld by the International Court of Justice, concerns the Trail Foundry Affair.

In this case too, the decision was arbitral and related to a bilateral dispute, so there was no real question of adjudication.

In the case of multilateral environmental Conventions, when they are infringed, there is no case law by the International Court of Justice because this institution only acted in the two aforesaid cases as an arbitration court and was not operating a real adjudicating body.

Like the Court itself explained (Avis relatif aux reserves à la convention pour la prévention et la répression du crime du jénocide, Ric. 1951 p. 23) in multilateral Conventions the obligations of the States are not "reciprocal", i.e. "bilateral", since they serve a superior interest (bien commun): "les Etats contractants n'ont pas d'intérêts propres; ils ont seulement tous et chacun un intérêt commun, celui de preserver les fins superieurs qui sont la raison d'être de la convention".

In this case, the problem concerns the creation of a collective mechanism for implementing the Convention, namely, every party can raise the issue of the violations through a special procedure of non-compliance fixed by the executive bodies of the Convention.

Indeed, there is an *erga omnes* interest in the compliance of the conventional rule so that the political body (the Assembly of the Parties) shall make the necessary decisions.

This proceedings - though not contentious – are already set forth for in some more recent Conventions (for example, the Vienna Convention on the Ozone Layer with its Protocols) and show that the effectiveness will need a court if the question cannot be solved at political level.

The International Court of the Environment is the appropriate body for rendering judgments having *erga omens* validity for multilateral Conventions providing for specific obligations (as to quantity, time, etc.).

It is the present evolution of the international legal system earmarked by the increasing rapidity of the move towards effectiveness which requires the development towards a real jurisdiction.

The political statement of "non-compliance" would be replaced by a statement by an independent and permanent supranational authority (not to be established for a single case only).

VI. *Grounds in Favour of an* ad hoc *International Court of the Environment*

ICEF leaves to Governments the responsibility to choose, but it expresses its preference for an *ad hoc* International Court of the Environment separated from the Court of Justice in The Hague on the basis of some considerations:

a) because a jurisdiction is needed which is not limited only to disputes between states (as it is set forth, on the contrary, in Art. 34, I of the ICJ Statute);
b) because in the environmental field it is important to grant people and NGOs the access to justice which is not provided for in the ICJ Statute;
c) because the legal principle of liability for tranfrontier environmental damage in the territory outside the jurisdiction and on the territory of other states is fundamental and compulsory and is also binding for the states. So it is not realistic to apply it against a state by means of the present ICJ model which is valid only for the states since it is difficult to figure out a legal action by a state against another state in this domain whereas an action by the society is possible (individuals and NGOs);
d) because the multilateral treaties can lead to disputes that cannot be solved by means of voluntary and arbitral decisions, but the *erga omnes* validity of the judgment is necessary to this purpose (which is missing today in the ICJ model);
e) because the political basis of consent by the states for the ICJs is limited (about 45 states out of 180 and without the Usa and France), while for an *ad hoc* tribunal the broadest political consensus is necessary, considered the impressive acceleration of the ecological global crisis (and the need also for preventive measures);
f) because after the second World War, for about 50 years, the Court of Justice in The Hague has not developed a case law in the environmental field (there have been only two cases which were fundamentally arbitral and never a case of real mandatory jurisdiction). So it is a nonsense to evoke the role of an existing tribunal that has not operated for the environment and cannot operate without a new legal basis, i.e. a Convention or a Treaty, since a mere adjustment through the decisions of the court is not sufficient;
g) because the International Court of the Environment, as proposed by ICEF, does not disturb the unity of the international legal system (which is a positive value): a new International Court of the Environment would have specialised and interdisciplinary character and would not be a special tribunal (i.e., with jurisdiction over the legal

environmental disputes having international relevance; applying the general principles of the international law and, within this framework, also the principles and the norms relating to the environment). In this way the ICJ remains the adjudicating body between the states for the application of the international common law whereas for the environment there would be a single specialised jurisdiction (including also the Tribunal for the Law of the Sea) to which the society has access in order to develop a case law and to foster the international law of the environment and its actual application;

h) because the obstacle to the states' sovereignty – already overcome for the International Criminal Court – can be afforded through a statute providing for a possible and gradual model of jurisdiction by showing the states that the International Court of the Environment can represent a positive chance for the international system and the peace and it does not exclude the fundamental responsibility of the states to protect the environment in their jurisdiction;

i) because in accordance with the development of the human rights it seems anachronistic that the legal interests of the individuals in the environmental field be taken into account only if mediated and embodied by the states of origin whereas the common necessary and universal contents is typical for the human rights – as for the environment – and must be respected also by the states that can be held responsible for the infringement of the existing international rules set forth in the interest of the international community as a whole. They do not affect the concern of a single state, but of all the states, not the interest of a people, but of all peoples, not matters of national relevance, but international common matters (climate, desertification, biodiversity, etc.) and in the future the sustainability itself of life on earth;

j) l) because the development of the international law of the environment has been very quick and the substantive legal framework embraces all sectors so that a single legal body at global level seems to be the right answer. It could allow the actual application of the international law of the environment and furthermore it could guarantee stronger consistency within that law among the different sectors;

m) because especially the new models of multilateral framework conventions (climate, biodiversity, desertification, sea, etc.) and of framework conventions on the role played by individuals and NGOs also at the international level (information, participation and access) anticipate the need for an actual global jurisdiction for the environment and scorn the proposals for alternative mechanisms like the ombudsman which some lobbies and their experts are still making again[13];

n) because the states are legally and internationally obliged to protect the common resources of the Planet and the future generations[14] and to assure a high degree of co-operation. Actually they must, first of all, comply with the international norms, in order not to leave space to violence which will never fulfil the lack of the rule of law and justice of the present phase of globalisation of the global economy: within this framework a well balanced jurisdiction for the environment is a political chance and therefore an interest of the states;

o) because today an international legal basis (Convention or Statute) is missing, which should aim both at reforming the ICJ as to its powers and access and at creating *ex novo* an *ad hoc* Court. So the political problem of Governments is really the same: to establish an actual jurisdiction for the environment which must be real and serious or to hope for longer periods of time and gradual empirical adjustment. For the International Court of the Environment this is an

urgent and necessary choice by Governments since the environmental interest is so prevailing.

Governments are required to recognise the positive value of economic freedom, development and globalisation, but not to decline their role for ensuring rights and justice also to economy, in the name of the health and sustainability of life on the Planet.

The lack of the rule of law and justice is an actual phenomenon, so that along with the scientific, technical, economic and administrative instruments the role that the case law plays in any legal system must be deemed as necessary. On the International Court of Justice in The Hague see:

TREVES TULLIO, S. ROSENNE, *The Law and Practice of the International Court*, 1920-1996, The Hague-Boston-London, M. Nijhoff Publishers, 1997, Vol. 4, pp. XXXVI-1960, in *Rivista di diritto internazionale privato e processuale*, 1999, No. 2 (June), pp. 412-413. The Author recalls that Shabtai Rosenne is the best world expert of the International Court of Justice; this work represents the final outcome of fifty years spent by Rosenne at the Court. The whole work is based upon a detailed analysis of the documents concerning the Court and its decisions. At the end the Author expresses to Rosenne the admiration raised by his work and the satisfaction felt by any scholar or lawyer of the international law since he or she can rely upon this renewed and up-dated edition of his work.

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[1] On the effectiveness of the international environmental law see:

PETER M. HAAS, ROBERT O. KEOHANE, MAC A. LEVY, MIT Press, *Institutions for the Earth: Sources of Effective International Protection,* 1993;

P.H. SAND, *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments*, Cambridge, Grotius Publications, 1992, p. 539;

L. BOISSON DE CHAZOURNES, *La mise en oeuvre du droit international dans le domaine de la protection de l'environnement: enjeux et defis*, in RGDIP, 1991, pp. 37–76;

K. SACHARIEW, *Promoting compliance with international environmental legal standards: reflections on monitoring and reporting mechanisms*, in *Yearbook of International Environmental Law*, 1991, pp. 31-52;

G. PEET, *The Marpol Convention: Implementation and Effectiveness*, in *International Journal of Estuarine and Coastal Law*, Vol. 7, No. 4, Graham and Trotman Ltd, 1992, pp. 277-293;

CLAUDE IMPERIALI, *Le contrôle de la mise en oeuvre des Conventions Internationales*, in *L'effectivité du droit international de l'environnement*, Université d'Aix, Marseille III, Economica, Paris, 1988;

In the same work by Claude Imperiali see also the other contributions:

- SANDRINE MALJEAN DUBOIS, Le fonctionnement des Institutions conventionnelles, (p. 25-26);
- STEPHANE DOUMBE-BILLE, *Les Secrétatiats des Conventions internationales*, (p. 57-58);
- CYRILLE DE KLEMME, *Les Ong et les Experts scientifique*, (p. 79-90);
- KARINE BANNELIER-CHRISTAKIS, *Techniques des rapports*, (p. 91-110);
- HENRY SMETZ, *L'examen périodique*, (p. 111-136);
- WINFRID LANG, *L'enquêt et l'inspection*, (p. 137-145);
- THEODORE CHRISTAKIS, *L'example du contrôle exercé par l'OMI (Organisation Maritime International) dans le domain de la pollution marine*, (p. 147-173);
- DANIEL NAVI*, L'assistance technique*, (p. 177-185);
- LAURENCE BOISSON DE CHAZOURNES, *Les mecanismes conventionelles d'assistance économique et financière et le fonds pour l'environnement mondial*, (p. 187-199);
- IWONA RUMMEL-BULSKA, *Les aspects juridiques et institutionnels de la mise en oeuvre de la Convention de Bâle*, (p. 201-224). See also:
- GUNTHER HANDL, *Compliance Control Mechanisms and International Environmental Obligations*, 5, Tul. J. Int'l and Comp. L.29 (1997);
- LORENZO SCHIANO DI PEPE, *La Convenzione internazionale del 1996 sulla responsabilità ed il risarcimento per i danni causati dal trasporto per mare di sostanze nocive e potenzialmente pericolose*, in *Rivista Giuridica dell'Ambiente*, Giuffrè, Milan, 6, 1998, p. 977 and 11.

As to wastes two special Conventions must be kept in mind: that of Basilea of 1989 on the control of transboundary transfer of dangerous waste on the basis of the UNEP Project (United Nations Environmental Programs) and that of Bamako of 1991 started by OUA (Organisation for the African

Unity) which is stricter because it absolutely prohibits the exportation of dangerous wastes to the developing countries.

The well-known events of the ships carrying poison have led some African States, like Nigeria, to introduce a Special Criminal Provision (Harmful Waste) by means of a Decrée in 1998 after the Koko accident.

- CESARE P. R. ROMANO, *La prima conferenza delle Parti della convenzione quadro delle Nazioni Unite sul cambiamento climatico – Da Rio a Kyoto via Berlino*, in *Rivista Giuridica dell'Ambiente*, Milan, Giuffré, 1996, 1 p. 163 and ff.

The procedure for peaceful resolution of conflicts which may arise among the contracting parties first provides for negotiation and then (in case the negotiation fails to settle the dispute within 12 months) for the voluntary submission to an Arbitral Court or to the International Court of Justice.

In Art. 13 the framework Convention sets forth the application of the Convention. It is a more flexible and less adversary mechanism, having non judicial character, which equally aims at verifying the non compliance (non-compliance procedure).

The same procedure is envisaged in the Montreal Protocol, in the Vienna Convention on the ozone layer, in the Convention on Desertification and in the Geneva Convention on transboundary pollution.

SERENA PASSINI, *Aspetti istituzionali e meccanismi di decisione nelle Conventioni ONU sulla protezione dell'ambiente*, in *Rivista Giuridica dell'Ambiente*, Giuffré Editore, Milan, 1998, 5, p. 781 and ff..

Therein it is maintained that: "A new tendency, arising at international level, concerns the establishment of mechanisms able to support the accomplishment of the commitments undertaken by the States that signed the Conventions.

The old systems chiefly based on the settlement of the disputes between the parties are no longer deemed to be sufficient and appropriate. Besides, they have never been used and have been provided for especially in order to complete the international documents".

See also:

- M. E. OTT, *Elements of Supervisory Procedure for the Climate Regime*, in *Zeitschrift für ausländisches öffentliches Recht*, *Völkerrecht*, 1996, Vol. 56, no. 3, pp. 732-749.

- C. KLEMM L. SCHINE, *Biological Diversity Convention and Law*, IUCN, Gland Cambridge, 1993, pp. 292 and 11;

- PETER H. SAND, *The effectiveness of International Environmental Agreements. The United Nations Conference on Environment and Development*, Grotius Publication, Cambridge, 1992;

- M. DEJANT-PONS, *European Biodiversity: the Berne Convention of 19 September 1979 on the Conservation of European Wildlife and Natural Habitats*, Essay in honour of Way Tieya, The Hague, 1993, p. 10;

SANDRINE MALJEAN-DUBOIS, *Un mécanisme original: La procedure de "non compliance" du protocol relatif aux substances appauvrissant la couche d'ozone*, in C. IMPERIALI, in *L'Effectivité du droit international de l'environnement*, Université d'Aix Marseille III, Economica, Paris, 1998, (p. 225-247);

CESARE P. R. ROMANO, *The Peaceful Settlement of International Environment Disputes – A Pragmatic Approach*, Kluiver Law International, The Hague, 2000, (pp. 120-129);

HELLEN HEY, *Reflection on an International Environmental Court*, Kluiver Law International, The Hague, October 2000;

A. KISS, *Introduction* to the volume by C. Imperiali *L'effectivité du droit international de l'environnement*, Université d'Aix, Marseille III, Economica, Paris, 1998:

"La moltiplication rapide des instruments du droit international de l'environnement au cours d'une periode relativement brève – une trentaine d'années à peine – a nécessairement posé la question de leur efficacité. On peut dire qu'une grande partie de la législation internationale qui s'imposait à été élaborée. Il est normal que la communauté internationale tente de franchir les étapes suivantes qui seront de plus en plus indispensables: *assurer les fonctions executives et judiciaires*" (p. 6);

E. C. IMPERIALI in the same volume asks himself:"Faut-il enfin aller plus loin dans cette voie et créer dans le cadre des Nations Unies une nouvelle Cour Mondiale pour l'Environnment? La question revêt un grand intérêt théorique pour l'avenir en relation avec la problematique des droits de l'homme et notamment le droit à un environnement sain dont la positivité reste à affirmer à l'aube du vingt et unième siècle" (p. 22).

RAIMOND RANJEVA, *Les potentialités des modes jurisdictionnelles internationaux et règlement des differences*, in C. IMPERIALI, vol. mentioned above, (p. 271-275);

This Author, who is a judge of the International Court of Justice of The Hague, acknowledges:

- that the submission of environmental conflicts to jurisdiction is also an international issue since it is "un trait caractéristique de la société";

- that there is an important precedent in the International Tribunal for the Law of the Sea in Hamburg, established according to the Montego Bay Convention of 1982, in order to solve the conflicts concerning the use of the international area of the sea ground;

- that the access to justice by individuals and NGOs is a necessary value which is not set forth in the Statute of the International Court of Justice of The Hague ("le problème doit être envisagé dans le cadre soit du Tribunal de Hambuourg, soit d'une éventuelle jurisdiction à créer de lege ferenda").

According to this Author "le lancement de l'idée d'un Tribunal du droit de la mer a été effectué à un periode de désaffection à l'égard de la Cour de Justice" and that it would be politically better to abolish this Institution, thus supporting the International Court of Justice, considering its "universal character".

The same thing is repeated by this Author for the International Tribunal for the punishment of war crimes in former Yugoslavia and Rwanda (to be eliminated in favour of a universal jurisdiction of the Court of Justice of The Hague).

We remark that there is no doubt about the positive role played by case law in the last 70 years which has been developed by the International Court of Justice of The Hague "favorisant tant une cohérence des decisions, qu'une prévisabilité assez grande de leurs décisions" and nor is there any doubt about the fact that the Court can deal with the environment if Governments so decide.

The universal character of this noble institution helps maintaining the unity of the international legal system also for the environment and the consistent scientific development of the international law.

But a calm and thorough analysis leads to envisage the problem in a dimension which is more realistic and equally consistent from the theoretical point of view:

a) has the creation, in 1993, after the Rio Conference of 1992, of a Chambre Speciale pour l'Environnement, by means of a mere internal decision of the CJG President, represented a move in favour of the public image of the conservative (besides, lawful) role of the Court or has it been a real evolution of the jurisdiction in order to solve the environmental conflicts at global level, thus allowing access to justice to individuals and NGOs?
b) Has the creation in 1993 of the Special Chamber for the Environment prevented Governments from establishing an independent International Tribunal for the Law of the Sea in 1996 which is also open to "entities" other than States?

Can this political orientation of Governments be due only to psychological factors or disaffection for the International Court of Justice?

The question must not be solved from a self-referring point of view, but realistically considering the missing response of the present institutional pattern of the International Court of Justice and the need for environmental justice in case of global environmental disputes.

c) the inclusion of the International Tribunal for war crimes in former Yugoslavia and Rwanda in the general jurisdiction of the International Court of Justice of The Hague did not take place; on the contrary, in Rome in 1998 the Governments' political willingness created the International Criminal Court, namely a universal jurisdiction in the name of human rights against some crime perpetrated by individuals (with a possible inclusion of crimes against the environment through amendments the Statute);
d) the issue concerning access to justice by individuals and NGOs must not be confused with the *actio popularis* (the so-called *quisque de populo* which exceptionally "replaces" the public parties in the legal proceedings).

Access to justice is a fundamental human right of every person and so it complies with a different consideration of the role of the right aiming at protecting the environment and with a different outlook of the environment (every person's independent legal value which is not exclusively assigned to States and kindly granted).

From the theoretical point of view a true international jurisdiction for the environment makes sense only if it meets the need for justice of the individual that is entitled to it (human right to the environment).

The political "need" to avoid judicial inflation cannot be overcome by means of an appropriate filter, but the real question still is to create a new legal basis with an *ad hoc* international instrument (Statute) for an International Court of the actual Environment (universal and accessible to individuals and NGOs in the name of a human right and not "to disturb" the States).

e) the mechanism (although mandatory) of conciliation and arbitration may operate for some disputes (having free, voluntary and bilateral character), but not for those being inherently multilateral, where jurisdiction is mandatory and the judgment is effective as *ius cogens*.
f) access to justice should not be confused with the concept of the ombudsman which seems to be obsolete from the theoretical point of view (what is the profound cultural and legal fundament of the notion of Ombudsman?) and inefficient at the operational level;
g) access to justice should neither be confused with the advisory approach (request of advice by the PNUE to the Court of Justice of The Hague or resort to some NGOs as experts upon request of the

Court itself according to Art. 50 of the Statute), like D. Schelton seems to propose, *The Participation of Non-Governmental Organisations in International Juridical Proceeding*, in AJIL, 1994, no. 4, p. 619-628.

For the aspects relating to the European Community, see:

GIOVANNI CORDINI, *Diritto ambientale. Elementi giuridici comparati della protezione ambientale*, Padua, Cedam, 1995 and by the same Author: *La protezione ambientale nel diritto dell'Unione Europea* in *Danno ambientale: Strumenti giuridici ed operativi*, by Amedo Postiglione, Edizioni Scientifiche Italiane, Naples, 1999, p. 67-90 and its large bibliography;

FRANCESCO FEDERICO, *La giurisprudenza della Corte di Giustizia in materia di ambiente*, Istituto per l'Ambiente, Milan, 1995, in Diritto Ambientale Comunitario, by G. Cassese, (pp. 123-167);

LUDVIG KRAMER, *Observation sur le droit communautaire de l'environnement*, in *L'Actualité Juridique – Droit Administratif*, AJDA, 20 September 1994, no. 9, p. 617;

A. ADINOLFI, *I principi generali della giurisprudenza comunitaria e la loro influenza sugli ordinamenti degli Stati membri*, Riv. It. Dir. Pubbl. Comunitario, 1994, (p. 521 ff.);

A. TIZZANO, *Corte di Giustizia delle Comunità Europee*, in *Foro It*., 1992, 1, IV, (pp. 358-398);

A. SAGGIO, *Le basi giuridiche della politica ambientale nell'ordinamento comunitario dopo l'entrata in vigore dell'Atto Unico Europeo*, Riv. Dir. Fur., 1990, 1, (p. 39-50);

POSTIGLIONE A., *La giurisprudenza ambientale europea e la banca dati ENLEX della CEE*, Milan, Giuffrè, 1988;

E. POCAR, *Diritto delle Comunità Europee*, Milan, Giuffrè, 1991;

C. CURTI GIALDINO, *Le politiche delle Comunità: ambiente*, in *Il trattato di Maastricht sull'Unione Europea*, in *Studi e documenti della Riv. Dir. Eur*., 1992, p. 166;

D. SIMON, *Recours en constatation de manquement*, Jurisclassuer Europe, No. 380, Jurisclassuer Droit International, Fasc. 161-28.

About the Court of Human Rights of Strasbourg see:

JEAN PIERRE MARGUENAUD, *Inventaire raisonné des arrêts de la Cour Européenne des droits des l'homme relatifs á l'environnement*, Limoges, 1998, 1 (p. 5-19).

For the application to the human right to the environment also of the model of the human rights being guaranteed in the Rome Convention of 1950 and at the Court of Strasbourg: see GIOVANNI BATTAGLINI, *Organizzazione delle garanzie del diritto all'ambiente come diritto dell'uomo attraverso la "International Court of the Environment Foundation"*, University of Ferrara, in *Ambiente e Cultura*, by G. Cordini and A. Postiglione, Edizioni Scientifiche Italiane, Naples, 1999, p. 121-127; GUIDO GERIN, *Brevi note sul diritto ambientale*, in the volume mentioned above, p. 297-301.

[2] On the international environmental responsibility the bibliography could be large. As to some aspects only:

a) **Legal fundament**.

As known, the main sources of the international law are four: conventions, customs, the general principles of the law; the decisions of the courts (see Art. 38, Statute of the International Court of Justice). Nevertheless there are other instruments which have legal basis, though relative: the legal jurisprudence (Writing of Publicist); for documents adopted by organisms of the UN system or regional systems (resolution declarations; code of conduct; guidelines; operational directives); documents and NGOs' declarations.

The international environmental responsibility, therefore, must be sought for in a complex framework of customs, conventional norms (treaty) which is rapidly progressing, according to an integrated interpreting criterion (of principles and practice). See TREVES TULLIO, L. BOISSON DE CHAZOURNES, R. DESGAGNE, C. ROMANO, *Protection internationale de l'environnement, Recueil d'instruments juridiques*, in *Rivista di diritto internazionale privato e processuale*, 1998, no. 1 (March), pp. 309-310.

There are already collections of volumes concerning the international environmental law, but this is the only one written in French and so it represents a new and very useful instrument. Besides, the collected volumes are very interesting.

See also TULLIO SCOVAZZI*, Aspetti internazionali della responsabilità civile per danni all'ambiente*, in *Rivista Giuridica dell'Ambiente*, 1994, Vol. 1, February, pp. 105-116; TULLIO SCOVAZZI, *Precedenti ed evoluzione della consuetudine internazionale: breve casistica, La Comunità Internazionale*, 1992, No. 3-4, December, pp. 373-385.

According to this Author a strict interpretation of the criterion of the precedents in the creation of new customs cannot efficiently follow the progress of international customs. Indeed, it may happen that in a certain historical period the States or most of them maintain that it is no longer appropriate for them to comply with or to keep a certain conduct which they used to adopt before. So, in order to assess the compliance of a State's conduct with the general international law it will no longer be sufficient to search

for precedents, but it will be necessary to assess and interpret it according to the present needs and the States' common belief.

FRANCESCO FRANCIONI, *La consuetudine locale nel diritto fondamentale*, in *Rivista di diritto internazionale*, 1971, No. 3, September, pp. 396-422.

The notion of special custom is compared to the conventional one and the nature of the customary phenomenon at general and particular level.

MAURO POLITI, *I danni da inquinamento nella normativa internazionale: realtà e prospettive*, Report at the Conference *Il danno ambientale: regolamentazione, prevenzione,* in *Diritto e pratica nell'assicurazione*, 1987, pp. 79-92. This Author deals with the following issues: environmental damages and international co-operation; the provision and limitation of the damages in the conventional law; international responsibility: civil responsibility for environmental damages; the conventions in the field of civil responsibility for damages caused by pollution due to hydrocarbons and peaceful nuclear activities; the mechanisms of the international solidarity for recovering the damage; the deficiencies of the solidarity systems now existing and the problems they have raised in the present developing phase of the law concerning the environmental damage.

DANIEL BODENSKY, *Customary (and Not So Customary)*, in *International Environmental Law*, 3 Ind. J., Global Legal Stud., pp. 105-108, 5, 1995.

According to the classical theory a customary norm is based upon an objective element (State practice), a subjective element (*opinio juris sine necessitatis*), a continuing behaviour (the persistent objector).

See also JAN BROWNLIE – *Principles of Public International Law*, 16 (4th ed., 1990); PATRICIA BIRNIE and ALAIN BOUYLE, *International Law and the Environment*, 24, 1992, Oxford University Press; SHABTAI ROSENNE – *Practice and Methods of International Law*, 69, 1984, Oceana Publications Inc..

b) **The existence of a general principle of international responsibility in the environmental field**.

Such a principle can derive from: Art. 21 of the Stockholm Declaration on the responsibility for damages caused by transboundary pollution and Art. 2 of the Rio Declaration; the international practice, namely the States' conduct; several treaties, mainly the multilateral ones (sea, climate, biodiversity, desertification), decisions and opinions of the existing Courts, the prevailing assessment of jurisprudence.

c) **spatial extension**.

See TULLIO SCOVAZZI, *Fondi marini e patrimonio comune dell'umanità*, in *Rivista di Diritto Internazionale*, 1994, No. 2, June, pp. 249-258. The notion of common heritage of humankind was born with respect to the sea space beyond the national jurisdiction (the so-called Area). The notion's foundations are the prohibition of national appropriation the destination for peaceful goals, the utilisation in the interest of humanity with special regard to developing countries, the management through an international organisation. In its original wording, as shown in the speech held by the Malta representatives at the UN headquarters in 1967, the principle was broadly applied. Yet, the Montego Bay Convention on the Law of the Sea of 1982, although accepting the principle, reduced it from the point of view of quantity since the sea space, where it is applied, is reduced and also the proceeds for the Authority responsible for the Area have been reduced. An analysis of today's international practice shows that some developed Sates have rejected one of the principle's foundations. These States have enacted national legislation for unilateral exploitation of the Area. No wonder if a strongly ideal principle barely manages to affirm itself. It is a principle subject to be applied also in other spaces (for example, the moon, as envisaged in an agreement in 1979) and probably to be the focus of further next international negotiations.

d) **Temporal extension**.

See TULLIO SCOVAZZI, *Le azioni delle generazioni future,* in *Rivista giuridica dell'ambiente*, 1995, No. 1, February, pp. 153-159. The Author underlines a decision of the Philippine Supreme Court of 30 July 1993 that confirmed the principle according to which future generations can institute proceedings in order to assert their own rights relating to environmental protection. The Author refers to the fact being dealt with in the decision which has examined only the preliminary question of the procedural capacity of the claimants. Considered the great importance of this precedent the Author thinks that, if the trend followed by the Philippine Court is followed by other courts, the instrument of future generations will represent a further weapon in the hands of people and, mainly, of non-governmental environmental groups in order to limit its possible misuse by public authorities which are more sensitive to immediate economic proceeds than to the rational management of nature.

F. LETTERA, *Stato ambientale e le generazioni future*, in *Rivista giuridica dell'ambiente*, no. 2, 1992.

EDITH BROWN WEISS, *Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, pp. 37-39, 1996, Transnational Publishers Inc., Ardsley, N.Y..

e) **Extension of the contents to all resources and damaging activities**

See TULLIO SCOVAZZI, *L'inquinamento da navi nel diritto internazionale* (Report held at the "*International Conference on Pollution of the Marine Environment*", Venice, 28-30 October 1987), in *Rivista giuridica dell'ambiente*, 1988, No. 1, April, pp. 75-92; and still: TULLIO SCOVAZZI, *Immersione di sostanze inquinanti in mare e risarcimento del danno*, (Note to the Bastia civil Tribunal (France), 4 July 1985, no. 422), in *Rivista giuridica dell'ambiente*, 1986, April, pp. 105-108.

LEANZA UMBERTO and SICO LUIGI, *Uso e minaccia di uso di armi nulceari in due recenti pareri della Corte Internazionale di Giustizia*, in *La Comunità Internazionale*, 1997, No. 4, December, pp. 653-672. The International Court of Justice has rendered two opinions in July 1996, having different scope and importance, thus answering two questions dealing with the assessment of the lawfulness of the use or threat to use nuclear weapons according to the existing international law. The first opinion was asked by the WHO which wanted to know if the use of these weapons by a State during an armed fight is a violation of international obligations, considering the effects of nuclear weapons on the health and the environment.

TULLIO SCOVAZZI, *L'Iraq è tenuto a risarcire il danno ambientale*, in *Rivista giuridica dell'ambiente*, 1991, No. 3, September, pp. 543-544.

FRANCESCO FRANCIONI, *Il protocollo di Madrid sulla protezione dell'ambiente antartico*, in *Rivista di diritto internazionale*, 1991, No. 4, December, pp. 797-820. What kind of document for the protection of the Antarctic environment: protocol or convention? The relationship between the Madrid Protocol and the other components of the Antarctic system. The system of the annexes. The material principles of the environmental protection. The Antarctic as natural reservation. The assessment of the environmental impact. The mine question.

TULLIO TREVES, N.J. SEEBERG-ELVERFELDT, *The Settlement of disputes in deep seabed mining*, Baden-Baden, Nomos Verlaggesellschaft, 1998, p. 166, in *Rivista di diritto internazionale privato e processuale*, 1999, No. 2, June, pp. 413-414. The Author remarks that the volume in question is the first monograph dedicated to the solution of disputes concerning the activity in the international area of the marine ground which was published after the creation of the International Tribunal for the Law of the Sea where the Chamber for the disputes on marine ground or Chamber of the Marine Ground works. The study is divided in four parts: the establishment of the Chamber for the Marine Ground, the access to the Chamber, the jurisdiction of the Chamber, the procedure before the Chamber.

TULLIO SCOVAZZI, *Il diritto dell'individuo di agire per la tutela dell'ambiente: descrizioni ed impressioni*, in *Jus*, 1999, No. 1, April, pp. 495-508. The Bhopal Gas Disaster (Processing of Claims) Bill, 1985.

FRANCESCO FRANCIONI, *International Codes of Conduct for Multinational Enterprises: an Alternative Approach*, in *Codici di condotta internazionali per imprese multinazionali: una prospettiva alternativa*, The Italian Yearbook of International Law, 1977. There are no short-term prospects for the creation of new international norms which may govern the physiological and pathological aspects of the activity of multinational enterprises. As to some of these activities, attention must be paid to the States' obligation imposed by the international customary law to prevent those ones implemented on their own territory which may damage foreigners. Consequently, each state must exert some monitoring on the decision-making centres located on its territory. The extent of such monitoring must be fixed according to the state's organisational ability.

TULLIO TREVES, *Il codice di condotta sul trasferimento della tecnologia* (Report at the Conference by the Italian Group of the *Association Auditeurs et Anciens Auditeurs de l'academie de la nave*, Siena, 21-22 May 1977, in *Rivista di diritto internazionale privato e processuale*, 1977, No. 4, December, pp. 705-732.

MAURO POLITI, *Miniere d'uranio nelle Alpi Marittime, inquinamento transfrontaliero e tutela internazionale dell'ambiente*, in *Rivista di Diritto internazionale privato e processuale*, 1981, No. 3. From the situation of the international practice it can be maintained that there exists a custom obliging the States not to cause damage, beyond their borders, due to activities implemented on their territory. The same practice can lead to the assumption that generally the responsibility for the violation of such an obligation does not have an objective character since it requires the evidence of negligence. Yet, in special hypotheses like those of the spatial activity and the exploitation of nuclear energy , the responsibility for the violation of the obligation in question is featured as objective responsibility. So if compared to France, that could permit the search for uranium in the Maritime Alpes, the Italian State can require the compliance with the prohibition of transfrontier nuclear pollution which is punished as objective international responsibility on the part of the French State.

TULLIO SCOVAZZI, *La transazione del caso Bhopal*, in *Rivista giuridica dell'ambiente*, 1990, No. 3, September, pp. 597-598. There is a description of the elements of the transaction which took place on February 14-15, 1989, between the Indian Government and the Companies Union Carbide Corporation and Union India Limited for the compensation for the damages caused by gas emissions which in Bhopal

(India) led to the death of about 2,600 people and seriously damaged the health of further 40,000 people. The transaction, as indicated in the explanation given by the Indian Supreme Court, chiefly took place because of the urgent necessity, 5 years after the disaster and in the view of a never-ending proceeding, in order to provide compensation to the victims.

TULLIO SCOVAZZI, *Il riscaldamento atmosferico e gli altri rischi ambientali globali*, in *Rivista giuridica dell'ambiente*, 1988, No. 3, December, pp. 707-712. The Author underlines how the degradation of the global environmental commons can produce serious risks for the equilibrium on our planet. In this connection the Report of the World Commission on Environment and Development can be kept in mind. It has underlined the dangers deriving from excessive and illogical exploitation of natural patrimony and has highlighted the relationship of mutuality between environment and development and environment and political security. It also stresses how international negotiations in the environmental field must necessarily take into account global phenomena. So it deals with the Geneva Convention on transfrontier atmospheric long-distance pollution (aiming at facing the so-called acid rains), the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on the substances depleting such layer.

TULLIO SCOVAZZI, *Il protocollo sui movimenti transfrontalieri di rifiuti nel Mediterraneo*, in *Rivista giuridica dell'ambiente*, 1997, No. 3-4, August, pp. 599-605. The Protocol on the prevention of pollution in the Mediterranean Sea from transfrontier circulation of radioactive waste and its elimination, signed in Smirne on October 1, 1996, shows some new aspects with respect to the 1989 Basil Convention which can be applied worldwide. The Protocol can also be applied to the circulation of radioactive waste and dangerous material forbidden in the exporting state. The Protocol sets forth a procedure of "notification without permission" for the crossing of the territorial sea by foreign ships carrying dangerous wastes.

TULLIO SCOVAZZI, *Nuovi sviluppi del "sistema di Barcellona" per la protezione del Mediterraneo dall'inquinamento*, in *Rivista giuridica dell'ambiente*, 1995, No. 5, October, pp. 735-740. On June 10, 1995, in Barcellona a special intergovernmental conference adopted three new texts which improve the conventional system for the protection of the Mediterranean from pollution and harmonise it with the recent evolution of the international law. The Author stresses the major characteristics of these new texts.

TULLIO TREVES, *Seabed Mining and the United Nations Law of the Sea Convention*, (Report at the Symposium on the new law of the sea and Italy, Naples, 12-14 November 1981), The Italian Yearbook of International Law, 1983, September, pp. 22-51.

f) **The subjects responsible**.

The responsibility of the States is certain (State responsibility, State liability) with respect to activities included in a broad notion (Jurisdiction and Control) for damages to other States or to areas outside any jurisdiction (significant injury). The State is also responsible for having failed to monitor damaging activities carried out by individuals or companies. See Art. 21 of the Stockholm Declaration; Principle 2 of the Rio Declaration; Lac Lanoux Arbitration (Spain v. F2), XII, R.I.H.A. 281 (1957); UNEP Principles (Shared Natural Resources, Principle 4); IUCN Draft Covenant on Environment and Development, Art.11.

g) **Forms of responsibility**.

According to customs and the prevailing conventional practice the States' responsibility is based on negligence (i.e. failing diligence). In some cases the Conventions provide for cases of objective responsibility (obligation to provide a determined good or service) or of responsibility for acts which are not forbidden under the international law. See P. BIRNIE and A. BOYLE, *International Law of the Environment*, 139-60, 1992, Oxford University Press; FRANCIONI, SCOVAZZI (by), *International Responsibility for Environment Harm*, London, Dortrecht, Boston, 1991.

h) **Parties entitled to act**.

See the notes to Chapter IV of this Volume concerning the access of NGOs and individuals. See also the Principle no. 10 of the Rio de Janeiro Declaration and the Aarhus Convention of 23-25 June 1998 on the right to environmental information and the Expoo Convention of 25 February 1991 on the procedure of environmental impact for transfrontier projects. See also the Protocol XI of the Rome Convention of 1950 on human rights which gives access to individuals to the European Court of Human Rights of Strasbourg. The access to ecological justice has been properly included in the global consideration on the human right to the environment: see *Beitrage zur Umweltgestaltung – Individualrecht oder Verpflichtung des States?,* Erich Schmidt Verlag, Berlin, 1976, A-41 that publishes the proceedings of an "International Symposium on the right to a sound environment", organised in Bonn form 23 to 25 June 1975, on the initiative of the European Council for the law to the Environment in Strasbourg, and directed by Alexander Kiss and Wolfang Burhenne, IUCN, Environmental Law Centre of Bonn. This volume was edited in Italy, in Rome, in 1983, by Amedeo Postiglione, with some further contributions, for the Working Group "Ecologia e Territorio" of the Italian Supreme Court.

The first edition in Italy on *Diritto all'ambiente come diritto umano* was made by AMEDEO POSTIGLIONE, Jovene Editore, Naples, 1982 (see Chapter II, Il diritto all'ambiente a livello internazionale).

In 1989 the question was specifically posed with respect to the need for an International Court of the Environment by ICEF during the International Conference of Rome, 21-24 April 1989 (see A. POSTIGLIONE, *Per un Tribunale Internazionale dell'Ambiente*, Giuffrè Editore, Milan, 1990).

In 1990 the question of the access to justice was raised and dealt with also during the World Meeting of the Associations of the Law of the Environment organised by Michel prieur, University of Limoges and by Crideau, 13-15 November 1990 (see Recommendations no. 4 and 11 and the ICEF Report "Le droit de l'homme à l'environnement: reconnaissance nationale et internationale").

In 1991 the matter was proposed again during the ICEF International Conference of Florence (10-12 May), see the volume: *Tribunale Internazionale dell'Ambiente* by Amedeo Postiglione, Istituto Poligrafico e Zecca dello Stato, Rome, 1992.

In 1992 the problem of the access to justice at the international level in the view of protection a fundamental human right was envisaged by ICEF with an *ad hoc* project (see *The Global Village Without Regulations*, by A. Postiglione, Giunti, Florence, 1992).

The question – highly interesting – was raised in several international venues, after Rio, at the Council of Europe and the European Union and at many ICEF International Conferences (Argentina, Buenos Aires, 1993; Switzerland, Lucerne, 1993; USA, N.Y., at the works for the Commission on Sustainable Development from 1993 on; Japan, Kobe, 1994; Belgium, Brussels, 1994; Mexico, 1994; Berlin, 1995 – Conference on climate; Spain, Seville, 1995; Italy, Venice, 1995, 5-6 May: Simulation of an international trial by some famous ladies on the most serious cases of environmental damage "The women's judgment"; Argentina, Buenos Aires, 1995; Greece, Epidauro, 1995; Belgium, Brussels, 21-23 Sept., "Green Access to Justice"; Costa Rica, 1995; Italy, Paestum, 1997; Africa, Addis Abeba, 1997; Rome, 1998, ICEF Meeting at FAO Headquarters on "International Ecological Crimes", Crete (Greece), 1998; Turkey (Marmais), 1999, 25-27 February; USA, Washington George Washington University, EPA, CIEL, Final Resolution in Support of the ICEF Project; Paris, 20 May 1999, State Responsibility and Access to International Courts by the Council of Europe with the participation of ICEF; ICEF Environment Days in 1998, 1999, 2000, 2001).

At theoretical level is seems appropriate to link the procedural aspects of the human right to the environment (information, participation and access) to the objective implementation of the right to the environment (what standards for a "sound" environment? Against what "residual" damages can the individual react? In what context: before a regular Court for the human rights or before the International Court of the Environment?).

[3] On the possible "organic" development of the international law of the environment see: F. FRANCIONI, *Per un governo mondiale dell'ambiente: quali norme? Quali istruzioni?,* in S. SCAMUZZI (by), *Costituzioni, razionalità, ambiente*, Bollati, Boringhieri, 1994; YOUNG O.R., *Per un governo internazionale dell'ambiente*, in Queste Istituzioni, no. 97, 1994; G. CORDINI and A. POSTIGLIONE, *Towards the World Governing of the Environment*, ICEF Venice Conference, 1994, Iaculano Editore, Pavia, 1996; PAVEZ HASSAN, *Towards an International Covenant on Environment and Development*, Proceding American Society of International Law, 1993; MARTIN R. ALBUS, *Zur Notwendigkeit eines internationalen Umweltgerichtshofs*, Frankfurt am Main, 2000.

[4] See note no. 1 of this Chapter.

[5] JEAN PIERRE MARGUENAUD, *Inventaire raissonné des arrêts de la Cour Européenne des droits de l'homme relatifs à l'environnement*, in *Revue Européenne de droit de l'environnement*, Limoges, 1998, 1 (pp. 5-19). For the application also for the human right to the environment of the model of the human rights being ensured by the Rome Convention of 1950 and in the Court of Strasbourg: see GIOVANNI BATTAGLINI, University of Ferrara, *Organizzazione delle garanzie del diritto all'ambiente come diritto dell'uomo attraverso la "International Court of the Environment Foundation"*, in *Ambiente e cultura*, by G. CORDINI and A. POSTIGLIONE, Edizioni Scientifiche Italiane, Naples, 1999, pp. 121-127; GUIDO GERIN, *Brevi note sul diritto ambientale*, in the volume mentioned, p. 297-310.

[6] Rome Statute of the International Criminal Court, 37 ILM 999 (1998), For further information see *Symposium The International Criminal Court*, in *European Journal of International Law*, 1998, with contributions by Ruth Wedgewood, Gerhard Hafner, Kristen Boon, Anne Rubesame and Janathan Huston, Marten Zwaneburg. Antonio Cassese and Paola Gaeta, pp. 93-191. In the ICC and disputes involving international environmental law see JEAN MARIE HENCKAERTS, *Armed Confllict and the Environment*, in *Yearbook of International Environmental Law*, 1999, pp. 188-193, pp. 189-192.

[7] During the Rome Conference at FAO Headquarters in 1998, ICEF organised a Meeting dealing with the international ecological crimes in the view of including them in the Statute.

This prospect is shared by the President of the Assembly, Prof. *Giovanni Conso*, who suggests to use amendments to be approved by the majority of two thirds within seven years from ratification. The

problem of a well-determined definition of the notion of "individual personal ecological crime" still remains unsolved.

[8] ITLOS, on 27 August 1999, delivered the Order for Provisional Measures in the Southern Bluefin Tune cases (New Zealand v. Japan (case no. 3); Australia v. Japan (case no. 4)), hereinafter Southern Bluefin cases PM.

See also: R. WOLFRUM, *Das internationale Seegerichtshof in Hamburg*, in *Vereinte Nationen*, 1996, pp. 205; TULLIO TREVES, *The Law of the Sea Tribunal: Its Status and the Scope of Jurisdiction after November* , 1996, in (SS) ZaoRv, 1995, p. 421.

T. TREVES, *Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 New York University Journal of International Law and Politics, 1999, p. 809-821.

ALAN BOYLE, *Dispute Settlement and Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 International and Comparative Law Quarterly, 1997, pp. 37-54; JONATHAN CHARNEY, *Is International Law Threatened by Multiple International Law and Politics*, 1999, pp. 697-708.

[9] At the Berlin Conference of 1995 on the climate ICEF took part together with several German and Austrian organisations, proposing once again the need for a general Court for the environment which is not limited to the climate only.

[10] AMEDEO POSTIGLIONE, *Strumenti di risoluzione dei conflitti ambientali in sede mondiale*, in *Rivista Giuridica dell'Ambiente*, Giuffrè, Milan, no. 5 of 1997, pp. 623-631.

By the same Author:

a) The first proposal of an International Court of the Environment published in the Volume: *Per un Tribunale Internazionale dell'Ambiente*, Giuffrè Editore, Milan, 1990, pp. 15-36;
b) The volume *Tribunale Internazionale dell'Ambiente*, Istituto Poligrafico e Zecca dello Stato, Rome, 1992, (containing the proceedings of the Florence Conference of 1991);
c) The volume presented at the Rio de Janeiro Conference in 1992, entitled: *The Global Village Without Regulations*, Giunti Editore, Florence, 1992, 1st edition and 1994, 2nd edition;
d) The two volumes by G. CORDINI and A. POSTIGLIONE, *Ambiente e Cultura*, Pavia, 1996 and 1997 (containing the proceedings of the International Conference of Venice of 1997);
e) The volume by G. CORDINI and A. POSTIGLIONE, *Ambiente e Cultura*, Edizioni Scientifiche Italiane, 1999, (containing the proceedings of the International Conference held in Paestum of 1997);
f) The access to justice for the human right to the environment, in *Diritto e Giurisprudenza Agraria e dell'Ambiente*, 2, 2000, pp. 77-81.

About the need for an International Court of the Environment many authors have expressed their advice as already shown in the notes to the Introduction.

Among the others, A. REST, *The Need for an International Court of the Environment*, in *Towards the World Governing of the Environment*, IV International Conference, 2-5 June 1994, Venice, Italy, by G. CORDINI and A. POSTIGLIONE, Pavia, 1996, p. 178.

[11] On the Permanent Court of Arbitration see P.H. JONKMAN, *Resolution of International Environmental Disputes: a Potential Role for the Permanent Court of Arbitration*, in *Towards the World Governing of the Environment*, Pavia, 1996, by G. Cordini and A. Postiglione.

PH. SANDS, *Environmental Disputes and the Permanent Court of Arbitration*: *Issues for Consideration*, Background Paper for the Secretary General of the PCA (Field March, 1996).

Protocol of P.J.H. JONKMAN, *Secretary General of PCA of 19 May 1999 Procedural Rules for the Settlement of Environmental Disputes Before the Permanent Court of Arbitration*, Summary of views expressed during a discussion held at the Peace Palace on February, 24, 1998.

A. REST, *The Indispensability of an International Court of the Environment*, in *Danno Ambientale, Strumenti Giuridici ed Operativi*, First Environment Day, December 11, 1998, Corte Suprema di Cassazione (Italy), by A. Postiglione, ESI, Naples, 1999, pp. 49-63.

By the same Author: *Peaceful Settlement of Transnational Environmental Conflicts – Why not by an International Court for the Environment*, Athens, January 22, 2001, at a Meeting organised by Biopolitics International Organisation, with the support of PCA and ICEF; and still: *International Alternative Dispute Resolution: past, present and future*, edited by the International Bureau of PCA, Kluiver Law International (The Hague Appeal for peace Conference, May 13, 1999).

[12] For example, the Dutch Minister of Housing, Spatial Planning and the Environment, J.P. PRONK, *Expressed support for the Establishment of an International Environmental Court at the 2nd International Lawyers Seminar entitled International Investments and Protection of the Environment: The Role of Disputes Resolution Mechanisms*, organised by the PCA, May 17, 2000, The Hague.

[13] The legal basis of the right to environmental information of any individual, at international level, is represented by Principle 10 of the Rio de Janeiro Declaration on Environment and Development of June

1992 and of the Aarhus Convention, 23-25 June 1998, "Convention on access to information, public participation in decision-making and access to justice in environmental matters".

The legal basis of the right to participation in the procedures concerning the environment, at international level, can be found in the already mentioned Rio Declaration (Principle No. 10), in the Aarhus Convention, 23-25 June 1998 and in the Expoo Convention – Finland, of 25 February 1991, on the procedure of environmental impact of projects having transfrontier effects.

At European level the fundamental provision is represented by Directive 85/337/CEE.

[14] On the notion of future generations see:

TULLIO SCOVAZZI, *Le azioni delle generazioni future, in Rivista Giuridica dell'Ambiente*, 1995, no. 1, p. 153 and ff., who mentions an interesting judgment of July 30, 1993, of the Supreme Court of the Philippines, that recognises the right of the future generations with respect to the serious damaging of the rainforests by companies entitled to exploit wood (Case Minor Oposa v. Secretary of the Department of Environment and Natural Resources DENR, in International Legal Materials, 1994, p. 173).

EDITH BROWN WEISS, in *Fairness to Future Generations: International Law Common Patrimony and Intergenerational Equity*, 23.38, Transnational Publishers Inc., Ardsley, New York.

CHAPTER IV

SOCIAL NEED: TO GUARANTEE INFORMATION, PARTICIPATION AND ACCESS TO JUSTICE TO INDIVIDUALS AND NGOS

1. The creation of an *ad hoc* Court of the environment at global level meets a real social need.

The concern raised by environmental disasters, pollution under various forms, the emerging global phenomenon of unbalanced ecosystem (climate, oceans, desertification, the biodiversity collapse), persistent serious conditions of poverty in Africa, South America and in some Asian areas, is well known by the public[1].

2. The environmental crisis (and its acceleration) has caused practical negative effects in relation to damage to heath and living conditions of large numbers of people all over the world, both in the developed and developing countries.

So the social demand for action by public institutions has become stronger and since their answer has not been given yet and seems to be inappropriate, a new social phenomenon is taking place: an active role played by various social groups[2].

3. Individuals and NGOs are now playing an active role in the single national systems, and they claim three rights (information, participation and access), which can be gathered into the single human right to the environment of every human being.

This role has already been recognised in legal terms by several national systems, also thanks to the progress of case law.

In the individual systems the environment has undergone an interesting cultural and legal development: from widespread interest to collective interest and then to public interest and later to a subjective right fundamental to every person (and that is all the more reason why there are social groups where human personality can develop).

4. A similar (and inevitable) development is already taking place in the international legal system from various points of view: the right of every human being to environmental information is recognised in Principle No. 10 of the 1992 Rio Declaration and more recently in the Aarhus Convention (23-25 June 1998).

5. It is a highly innovative phase of the international environmental law because it confers a legal role in environmental protection on a new party, other than the states, namely, the individual.

Besides, the right to information is linked to the access to justice: environmental information is considered as dynamic social value since it represents the fundament of participation and access to justice.

The notion of environmental information is broadly defined as to its shape and object without being affected by the State's territorial sovereignty so that the international environmental information should be included, as well.

6. The provision in the Aarhus Convention on instruments used to solve disputes (relating to the interpretation and application of the Convention) is worth considering

since it is a "voluntary" provision for the States to submit to several instruments (negotiation, International Court of Justice or the Permanent Court of Arbitration, according to a special procedure).

7. The Aarhus Convention provides for the signatory States to recognise, in their own legal systems, the right to environmental information, participation and access to justice in national bodies.

In the Convention a more advanced concept is not included: the recognition in favour of every individual of the right of access to information, participation and access directly to supranational bodies.

Thus the matter of further steps seems to be necessary for the "environmental information having international relevance": to directly recognise this legal possibility in a new international legal instrument in favour of individuals and NGOs before the International Court of the Environment.

Indeed, several national legal systems are already fitted with appropriate rules: what is lacking is the international legal framework.

8. The right to participation in the decision-making process is equally provided for in Principle No. 10 of the Rio Declaration and in the Aarhus Convention.

Now it must be stressed that "participation" transforms information from the point of view of quality and quantity and mainly directs it towards the national competent institutions.

9. The problem of international legitimacy for the participation of individuals and NGOs is still partly unresolved, save what has been provided for in the Expoo Convention on the assessment of environmental impact of some projects having transboundary effect (Finland, 25.2.1991).

In this field, as well, there has been great progress which can straighten up the domestic legal systems.

This represents clear evidence that there is a tendency toward broader recognition of the social supervisory role at the international level, too.

10. The right of access to “green” justice refers to some international legal instruments, but there is not any *ad hoc* convention which recognises to any individual (as an international legal party, separate from the states) the right to appeal to a supranational jurisdictional organ for an environmental matter.

Only with such an innovative legal instrument will it be possible to move cases of environmental damage having international relevance outside the national jurisdiction because it is the society that experiences the environmental damage and therefore it must have the possibility to play an independent role for its own protection, also in the case of States' inaction or even of conflict[3].

[1] For an overview, certainly not exhaustive, some significant cases can be recalled:

- Trail Smelter Case (United States v. Canada), Arbitral Tribunal, 1941, 3 UN Rep. International Arb. Awards (1941); J. READ, *The Trail Smelter Dispute*, The Canadian Yearbook of Int’l Law, 213-17 (1963);
- Indonesia Fires, 1997;
- ICOLP Case Study (Center for International Environmental Law (1994);
- Impacts on the Small Islands States (OASIS – Association of Small Island States) Climate Change, Sea Level;
- Use of Drift net KAZUO SUMI, *The International Legal Issues Concerning the Use of Drift Nets, with Special Emphasis on Japanese Practices and Responses*, in Jon van Dyke et Al., ISLAND Press, 1993;

- The Seizure of the Estai Spanish Trawler [9-3-1995], by Canadian Authorities in International Waters, Grand Banks;
- Greenpeace*, Illegal Italian Driftnet Seized Near Spain*, Europe Environment (Nov. 9, 1993);
- International Oil Pollution – Environment, May, 1995, by R.B. Mitchell;
- Shetland Oil spill: EC Law Makers Hesitant in the Face of Environmental Disasters, in *Europe Environment*, Jan. 19, 1993;
- The Brent Spar, Shell Oil Platform in the North Sea, occupied by Greenpeace in spring 1995;
- Decommissioning Nuclear Submarines *Jon van Dyke*, *Ocean Disposal of Nuclear Wastes*, 12 Marine Policy, 82 (1988). W. JACKSON DAVID and VAN DYKE, *Dumping of decommissioned nuclear submarines at sea: a technical and legal analysis*, 14 Marine Policy 467 (1990);
- Lac Lanoux Arbitration (Spain v. France) 12 R. International Arbitration Awards 281 (1956), November 16, 1957, reprinted in 24 I.L.R. 101 (1957). It is an international dispute between Spain and France about the use of the water of Lac Lanoux on the Pyrenees.
- Gabcikovo – Nagymoros Project (Hungary Slovakia) 24 Sept. 1997; V. PAUL R. WILLIAMS, *International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary concerning Construction of the Gabcikovo and Nagymaros Dams*, Colum J. ENTL L. (1994); GABRIEL ECKSTEIN, *Application of International Water Law to Transboundary Groundwater Resources and the Slovak-Hungarian Dispute over Gabcikovo-Nagymaros*, 19, Suffolk Transation L. Rev. 67 (1995);
- Exploitation of the Rio Grande River by the United States and Mexico (Harmon Doctrine linked to the Principle of territorial integrity, territorial sovereignty and its gradual overcoming in the view of the "equitable utilisation"); STEPHEN McCAFFREY, *The Harmon Doctrine One Hundred Years Later: Buried*, Not Praised, 36 National Resources, J. 549, (1996); See: *Convention between the United States of America and Mexico concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes*, 34 Stat. 295 3 (1906);
- The Great Lakes and the International Joint Commission (Boundary Waters Treaty, Canada, USA, 1909: (Environmental Atlas and Resource Book 39-42 3 Ed. 1995);
- The Gut Dam Arbitration (St. Lawrence River) USA – Canada, 25 March 1965;
- Zambezi River Management Plan, J. TEED and Al., *The Zambezi River of the Goods*, at 11 (1990);
- Mahakali River and Sorada Barrage (Nepal-India);
- Ganga/Ganges at Farakka, 1996, (India, Bangladesh);
- Middle East (Sea of Galilee; Dead Sea; East Ghor Canaal; Yarmuk River; Euphrates-Tigris Basin and conflicts with Turkey, Syria, Jordan, Iraq; Ataturk Dam);
- Nile basin and conflicts with Egypt, Sudan, Tanzania, Kenya, Ethiopia;
- Mekong basin and conflicts with Laos, Thailand, Cambodia, Vietnam;
- Pazana basin and conflicts with Brazil, Argentina;
- Lanca basin and conflicts with Bolivia, Chile;
- Aral Seashore Rehabilitation;
- Tropical Forest Action Plan;
- Texaco Drilling in Ecuador's Amazon;
- Shell Oil's Development in Nigeria;
- Irian Iaya Freeport's copper and gold mine;
- Azun Valley in Nepal;
- Black Market in CFCs;
- Oil Pollution Damage (International Fund for Compensation);
- Nuclear Test Cases;
- Iraqui Invasion of Kwait (UN Security Council Resolution 687);
- Air pollution and impacts;
- UV-B Radiation on the Earth's Surface;
- Brazil and Amazon Basin;
- Using Gentic Resources;
- Indian Biodiversity; The World Heritage List; Convention to Combat Desertification; Legal Protection of Indigenous Peoples; Environment Terrorism; Environmental Damage During Armed Conflict; Acid Rain; Food Security; Pesticides; Exotic Species (Danger of Introduction); Deforestation; Nuclear Weapon; Polar Regions As Habitats; Radioactive Materials; Motor Vehicles; Hazardous Wastes; Bhopal cases; Extinctions of Waves; Intellectual Property; Rights Access to Genetic Resources; Air Pollution Caused by Biomass Fuels; Bio-Technology; DDT and Cancer; Chernobyl Disaster; Danube River Deep; Seabed Mining; Fisheries Disputes; Human Genome Project; Dalphin Protection Drugs and Medicines; Global Warning; Hazardous Waste Dumping; Marine Mammal Protection; Offshhore Pollution; Migration famine caused.

[2] About the role played by the social groups in defence of the environment, see D. HUNTER, J. SALZMAN and D. ZAELKE, *International Environmental Law and Policy*, Chapter VIII, Section IV, "The Role of Non-States Actors", pp. 422-442, University Casebook Series, New York, Foundation Press, 1998.

The 1992 Rio Declaration provides for the States to encourage the access to justice for every individual and to make the right (Principle 10) become "effective".

With reference to the damages due to transfrontier pollution an OECD document called for the recognition of the right of access in favour of the persons damaged: "Implementation of a Regime of Equal Right of Access and Non Discrimination in Relation to Tranfrontier Pollution", Recommendation adopted on 17 May, 1977. C. 77.28.

A similar right, both substantive and procedural, can be found in the Nordic Environmental Protection Convention of 1974 and in the Boundary Waters Treaty between the United States and Canada.

The European Court of Justice of Luxembourg already recognises the right of access to justice of the Country from which pollution comes for the person damaged who is staying in another Country of the Community (Bier v. Minies de Potasse d'Alsace, 1976, Eur. Comm. Ct. T. Rep. 1735).

With refernce to the social needs of future generations:

EDITH BROWN WEISS, in *Fairness to Future Generations: International Law*, Common Patrimony and Intergenerational Equity, 23.39, 1996, Transnational Publishers, Inc. Ardsley, New York.

See also the case OPOSA (Minor Oposa v. Secretary of the Department of Environment and Natural Resources, 33, I.L.M., 168, 185 no. 18 (1994).

In the jurisprudence: TULLIO SCOVAZZI, *Le azioni delle funzioni future*, in *Rivista Giuridica dell'Ambiente*, 1995, I, p. 153.

[3] The question has been raised whether in the international law there is a general principle of environmental information of the States among themselves and of the States toward their citizens and people in general and the International Community, considering the communicating and integrated character of information (stressed by the new technologies) and the socially inseparable nature of information itself. It seems that the answer can be positive on some conditions.

To such a purpose it is interesting to verify the Aarhus Convention of 23/25 June 1998 which recognises a right to information of every individual: does this Convention recognise such a right only indirectly or does it have direct impact at international level?

It must be underlined that the question of transparency, of actual knowledge, of exchange and access to information is transversal and can be found in several Conventions of every environmental sector, so that for this reason, too, it can be maintained that there is a consistent attitude by Governments. See for details:

a) **In the sector of transfrontier air pollution** (Geneva Convention of 13 November 1979, see Artt. 3 and 4, and also a system for continuing monitoring, EMEP; Vienna Convention of 22 March 1985, Art. 2, para. 2, point a); Montreal Protocol of 16 September 1987, points 2 and 3 concerning technical information and timely and complusory data communication);

b) **In the climate sector** the Rio Convention of June 1992 provides for the States to prepare "Domestic Lists on Emissions" with comparable methodologies (Art. 4, lett. b)) and "the thorough free timing exchange of information of scientific, technological, technical, social and economic and legal nature about the climate system" (Art. 4, point h)). The Convention provides for the States to promote the "systematic observation" and the "access to data" (Art. 5 b)) also for the areas outside the jurisdiction in a structural, institutional and permanent way.

c) **Similarly in the naturalistic sector**, the Convention on biodiversity signed in Rio in 1992 makes the States exchange all information (Art. 14, point c) and Art. 17).
The same legal principle of co-operation in the field of the exchange of information is set forth in all the conventions relating to this sector (Ramsar 2 February 1971 about the humid areas, Art. 2, point 5 and Art. 3, point 2; Washington Convention of 3 March 1973 on the international trade of dying-out animal and vegetable species, which establishes a permanent reciprocal mechanism of checks (concessions, permits, certifications) for import and export and provides for the States to send annual reports and any further information; the Paris Convention of 18 October 1950 for the protection of wild birds; the Bonn Convention of 23 June 1979 about the migrating species of wild fauna, Art. IV, points d) and l); the Bern Convention of 19 September 1979, Art. 3, points 3 and 11.

d) **In the sector of oceans and seas** the framework convention on the law of the sea, signed in Montego Bay, can be taken into account. It needed 10 years of hard work, was named UNCLOS and came into force in 1994 (320 articles and two annexes).
The Sates have accepted a general legal obligation to protect and preserve the environment from any "polluting factor deriving from the ground, ships, activities on the marine soil, etc.".

In the legal system so created, the role of environmental information is extraordinarily important, also because of the establishment of a special permanent judicial body (International Tribunal for the Law of the Sea), with access for the States and other "entities".

The system is completed by other general Conventions (London Convention of 1972, London Dumping Convention) and by Conventions at regional level (Barcelona Convention of 16 February 1976, See Artt. 9, 10 and 11 on the Mediterranean Sea and the 4 following Protocols; Camberra Convention of 20 May 1980 about the preservation of the marine resources in Antarctica).

e) **In the field of the management of the waters of the large rivers** on the various Continents there are agreements between the States aiming at ensuring some common interests (the vital continuity of waters; the sustainable exploitation; the quality of the resource; the regime of irrigation; possible dams; multiplicity of uses etc,.).

The cases examined and resolved through arbitration (Lac Lanoux, Spain v. France, 12 R. Int.l Arb. Awards 281 (1956), 16 November 1957, reprinted in 24 I.L.R. 101 (1957) concerning the exploitation of the lake's waters for hydroelectric purposes in the areas of the Pyrenees and the other case regarding the plans for dams on the Danube, Gabcikovo-Nagymaros Project, Hungary Slovakia, 25 September 1997), do not properly show the actual and potential conflicts which concern governments and peoples at global level.

What is the legal role of transfrontier information in this sector and where can it act?

f) **In the field of wastes and dangerous substances**, apart from the nuclear sector, information plays an essential role also in the international system.

The Basil Convention of 1989, come into force on 5 May 1992, provides for a crossed system of preventive agreements between the Parties and an authorised path for wastes from the place of origin to the final one, with some mandatory information about the nature of such wastes and the way of disposing them.

After some serious cases of transportation of dangerous wastes in Africa, the right reaction was to prevent the importation of such wastes onto the continent (apart from expressed and accepted exceptions): Bamako Convention signed in Mali, January 1991 and Lomé Convention IV d) of 22 March 1990.

About the distribution and use of pesticides in farming, FAO has adopted a Code of Conduct in 1985 which requires the prior consent of the importing State and a general principle of information for the citizens.

Similarly for chemical industries an information system has been developed (The London Guidelines for the Exchange of Information on Chemicals in International Trade, UN Doc. UNEP/GC, 14/17, Annex IV, 1987), which derives from the awful experience of Seveso (1976) and Bophal (1984) and has not prevented the Sandoz accident (1988).

For the nuclear sector, after the Chernobyl disaster of 27 April 1986, the international system has produced two mechanism for notification and aid, (Vienna Convention about the timely notification of a nuclear accident of 1986 and the Vienna Convention on aid in case of nuclear accident of 1986) which represent a useful model for further steps in order to obtain information and guarantees on localisation, technology, types and ways of management, etc., and on the possible serious transfrontier effects.

The project of the "UN Troops", proposed again by the EC Commissioner for the Environment, Mr Ripa di Meana, at the Florence Conference in 1991, suggests a permanent model for monitoring and aid for any critical environmental situation, i.e. a special World Centre at the International Agency for the Environment, which may function also for the International Court of the Environment (in order to collect the data concerning the legal responsibility for the environmental damage and even before for possible precautionary measures).

Always in the nuclear sector the question was raised as to accidents occurred in submarines under the North Sea and the Barents Sea and for the tests in the Pacific Ocean by France on the isle of Mururoa in Polynesia (proceeding regarding Australia v. France, 1974 I.C.J., 253 and that one concerning New Zealand v. France, 1974, I.C.J. 457, which were not examined by the International Court of Justice on the merits and were rejected for procedural grounds).

A similar examination can be made for the participation of individuals and NGOs which affects several questions: the NGOs' role in the preparation of some Treaties; the NGOs' role in the implementation of the Expoo Convention on environmental impact; the role of the social participation in several other Conventions: Climate Convention, Art. 4 (1) (f); Law of the Sea Convention, Art. 206; World Charter for Nature, Principle 11 (e); Wellington Convention on the Regulation of Antarctic Mineral Resources Activities, Artt. 37 (7) (d)-(e), 39 (z), 54 (3) (b), etc..

To our opinion a general principle of international law must be recognised according to which the social participation represents an obligation for the States when peoples' significant interests are in danger.

The application of such a principle could be possible also in the Amazon in favour of the indigenous population as to big works (dams; deforestation for the exportation of wood; large roads in the forest), but it is necessary to create an international judicial body, that may start a doctrine on the single real cases with prudence and balance.

It seems that the two general legal principles on the right to information and on the right to participation of individuals in the international law of the environment bring about the logic and legal consequence of the right of access: the two phenomena of information and participation affect the individual as "social" party so that an institutional solution can not be denied before the competent institutional bodies (administrative and judicial).

To insist on NGOs (although welcomed in the environmental field) without dealing with the legal point of the single individual (as new legal party in international law) means to carry on with a situation of State exclusive model, which "uses" the NGOs as image and does not cope with individuals and peoples.

CHAPTER V

POLITICAL NEED: TO PREVENT AND SOLVE THE ENVIRONMENTAL CONFLICTS BY ENABLING A PACIFIC AND BALANCED DEVELOPMENT

1. The problem of the environmental conflicts cannot be underestimated as to their number, their inherent danger, their strong expanding dynamic in space and time, the negative impact on economy and society.
Politics must give an appropriate answer, also because a great deal of this problem is still unexplored although the situation is real and serious[1].

2. Environmental conflicts having "international relevance" are those which complete their direct or indirect effect in the short-, medium- and long-term period, on a territory under the jurisdiction of a single state[2].

3. The environmental "conflict" is conceptually inherent in human action and is not compatible with nature (relationship man-nature): the national legal systems receive legal and administrative instruments for prevention and supervision (acceptability standards; permits; civil, criminal and administrative penalties) and also economic and tax instruments.

4. The environmental conflicts having "national relevance" are also embracing entire areas (with high risk of environmental crisis; areas to be drained), i.e. they affect all the resources (water, air and soil) and damage or threaten the health of local communities or groups of people. In this case, the conflict can arise between non-governmental organisations or local institutions and the state or even between social groups having opposing interests. These environmental conflicts (just "natural" or also "social") fall within the jurisdiction of national States and their corresponding system.

5. The "political" responses to national environmental conflicts has been given until now through legal instruments, but there is a tendency now to also use economic and fiscal means in order to prevent the environmental damage by fostering the economic dealers to include the costs in the producing cycles through the use of better technologies and to redress the damage according to the principles "who pollutes pays".

6. A "political" reply by the various systems is also that of transparency or non transparency about how to detect and assess environmental damage spread over the territory which rises like an iceberg with all its potential poisonous power.

7. The increased possibility for people to benefit from information, participation and access also represents a viable possibility and a trend bound to be rapidly developed.

8. In conclusion, it can be maintained that the "political" response in the various national systems has produced a lot of laws, a few effective administrative and decisional procedures and even less use of decisive economic and fiscal means.

Therefore, the "political" response has taken place in the single states, but *the matter of the environmental damage as a whole remains unsolved* because the grounds for this phenomenon have not been eliminated and the institutions themselves protect the strong interests which have damaged the environment.

It is hard to say something real about the alleged social acceptability (or acceptation) of this situation which is generally concealed from public opinion by the strong economic powers, by the strong press and the institutions themselves.

9. The "international" environmental conflicts, on the contrary, cause important transboundary effects or affect the common resources not falling within the jurisdiction[3].

If general categories were worked out relating to the source of international environmental conflicts two topics would be taken into account: pollution and the unfair exploitation of common resources[4].

At the 1992 Rio Conference, the political and legal world stressed the link between environment and development in order to suggest the concept of "sustainable development" not only as far as pollution is concerned, but also in relation to the equitable exploitation of the resources among the different areas of the Planet (for the human need for justice and peace), in addition to the consideration over time of future generations.

But we are only at the very beginning, especially with regard to the equitable exploitation of resources (in space and time) and to the corresponding international economic environmental rules[5].

10. At present there is no organised consideration of international environmental "conflicts" already existing.

No wonder if the term "conflict" is used in this context because the important environmental damage having international relevance always leads to violence and poisonous relationships which are dynamic and bound to appear after some time and also far from the originating place[6].

11. Some international environmental "conflicts" are linked to incidental but almost "regular" events which have affected the seas (Torrey Canyon, 1967; Amoco Cadiz, 1978; Bahia Paraiso, 1989; Exxon Valdez, 1989; Haven, 1991; Erica 1999; Galapagos 2001, etc.): these events have surely caused damage to common resources - at least partially - beyond the territorial sea of the single Countries; but no legal instrument for restoration has been found at the international level[7].

This is a clear lack of rules and justice - which in itself already justifies an International Court of the Environment - because also serious events considered as "incidental" can derive from fault lying in failing to supervise, to take care and pay attention, to carry out due performance and diligence as well as especially from the use of inappropriate technologies.

12. Further frequent events have affected the territory (chemical accidents like Seveso in 1976 or Bhopal in 1984 or nuclear accidents like Chernobyl in 1986, or destruction due to military actions like what happened during the Gulf War in 1991 or the Balkan War in 1998)[8].

These events have caused a "reaction" in the single national legal systems and in the European Community (for example, the Seveso Directives), but the impact at the international level has been very little (obligation to notify the nuclear accidents and to give assistance).

It is mainly at the international level that the problem has not been solved through new and more appropriate Conventions on the legal liability of the States and the private entities concerned.

Some international improvement was achieved through the Convention on the transport of dangerous waste (Basil Convention).

The detection of dangerous activities in developing countries represents a very serious problem which can be solved only by means of a new international convention and a different approach.

13. Another type of international environmental conflict concerns the emission in the air having transboundary effects[9].

In this field, the Geneva Convention on long-distance air pollution across boundaries of 13 November 1979 seems milder because the problem cannot be solved with mere exchange of information, meetings, research and surveillance (including the EMEP data bank and the relevant units for permanent surveillance).

It is sufficient to consider that the settlement of disputes (that is, of the international environmental conflicts in the sector) is still assigned only to "negotiation", or in other words, to the traditional instrument which is merely voluntary, with no reference to a legal principle of liability of States or private entities, from which the ascertained and continuing flow of poisons is coming (almost like an air river borne by the currents of air, with terrible effects of acidification of lakes and forests and alteration of the quality of life of all people concerned).

14. The other type of "transfer" of the environmental damage concerns the big rivers and is ruled, though still insufficiently and inappropriately, by the Helsinki Conventions of 17 March 1997 on the protection and exploitation of transfrontier watercourses and international lakes and on the transboundary effects of industrial incidents.

It is sufficient to take into consideration the big European rivers (Rhine, Danube,) or those in Asia (Don, Dnieper, Dniester, Volga, Ural, Ob, Jenissei, Lena, Amur, Huang He, Hang Liang, Mekong, Ganges, Indo, Tigris, Euphrates) or in Africa or America (Nile, Congo, Rio de la Plata, MacKenzie, Yukon, San Lorenzo, Mississippi, Rio Grande, Colorado), in order to imagine the flows of poison coming from settlements, industrial activities and animal farms, that are brought down to the valley, often all across the territory of other countries, towards lakes or into the sea.
The Caspian Sea is poisoned, like the big Aral Lake.

The Black Sea is now experiencing a dramatic situation because pollution is moving toward the Mediterranean Sea, thus seriously threatening its sustainability not only from the environmental point of view, but also at the economic, social and cultural level.

For these problems, the partial agreements already regulating some cases (for the San Lorenzo River in the USA and Canada; for the Rhine between the States concerned) are useful, but they do not solve the matter (like it has recently emerged from the pollution of Danube due to mining in Romania in 1999).

15. An international environmental "conflict" that until now has been very difficult to solve is that one relating to climate change, which is not linked to the concept of transfrontier pollution (via air or through rivers), but to all the emissions coming from the territory of the single countries: a global common problem affecting sustainability of life on earth (at least in the present social situation of humanity). The ratification of the Kyoto Protocol on the supervision of emissions is still expected to

take place and some serious climate irregularity is already occurring (see the 2000 Report of the World Weather Organisation).

16. The 1992 framework convention of Rio de Janeiro on the climate only represents the first step toward a comprehensive strategy at the global level to solve the problem, as demonstrated by the difficulties that arose at the Conference of the Parties (Berlin 1995, Kyoto 1997) when the attempt was made to specify and implement the obligations adopted by the States.

17. Some improvement was achieved in the specific field of the protection of the ozone layer which only concerns some particular pollutants (chlorofluorocarbons).

The Vienna Convention of 22 March 1985 was followed by more specific Protocols (Montreal, 16 September 1987) and the obligations of the States have been more seriously supervised as to time and their actual implementation.

18. The sector of environmental conflicts concerning nature broadly include deforestation (namely, unjustified destruction of wide parts of tropical forests in the Amazon, Central Africa and South-East Asia and the Pacific); desertification; destruction of biodiversity in the sea due to prohibited fishing or destruction and unfair trade of vegetable or animal species which are running the risk of dying out.

The Convention on Biodiversity of Rio of 1992, though limited, represents an important reference point while awaiting a universal framework Convention on sustainability of life on the earth intended as unitary living ecosystem.

The Convention itself must be included in a context made up of several other conventions concerning nature (Ramsar, 2 February 1971, on wet lands; Washington, 3 March 1973, on the international trade in endangered species of fauna and flora; Bern, 19 Septemeber 1979, on preservation of wild life and natural environment in Europe; Bonn, 23 June 1979, on the preservation of migrating wild fauna; and others).

19. Further environmental (real or potential) conflicts concern the sector of genetic manipulation, use of biotechnologies, altered food threatening health and the environment and deriving from initiatives based on the market's needs without an appropriate and well-considered scientific evaluation.

The case of mad-cow disease in Europe has shown the health risks deriving from the use of non vegetable food for cattle.

Not inferior are the risks deriving from the animal cloning and the tendency to carry out tests also on human beings.

The freedom to carry out scientific research cannot be questioned. However, its application must comply with universal rules which are lacking at international level.

20. Further environmental conflicts concern the exploitation of the resources in the ocean, of Antarctica, of outer space and more in general, of the unbalanced exploitation of the energy sources of the planet.

21. Some international Conventions rule some aspects (Montego Bay Convention of 1982 on the law of the sea and the Camberra Convention of 20 May 1980 on living marine resources in Antarctica), *whereas the problem of "equity" in the exploitation of the common resources and of the duty deriving from it to respect the rights of future generations remains unsolved.*

22. The rules of the global market do not include the principle of moderation in the exploitation of watercourses, rivers and lakes when more than one State is concerned (except for specific bilateral agreements), nor does it concern a similar principle of moderation for the use of other precious resources (occupation of sensitive spaces; upsetting of systems of traditional farming; excessive tourist exploitation of the coast and mountains; excessive exploitation of mines; large works with transboundary impact; etc.).

Of course, it is difficult to fix rules "outside" the economic rule, but a catalogue on the "limits" should now be urgently applied to big multinational companies.

Anyhow, it is necessary to determine mechanisms of supervision and guarantee regarding the great fields of international trade and to have the courage to adopt a real international jurisdiction for the application of the new (ecological-economic) rules, concerning the equitable exploitation of resources (in order to give practical meaning to the far too general concept of equity).

23. New-brand "environmental conflicts" are those concerning persons and populations who, due to climate changes, desertification, poverty or little water or food, are forced to become "ecological refugees" in the richer Countries.

The "environmental" component of these conflicts - though real - finds other justifications (ethnical, racial, linguistic, cultural, etc.), but cannot be underestimated.
The exploitation of waters in some big rivers has already caused dangerous conflicts between the various States concerned (Jordan, Nile, Euphrates, Tigris, Zambesi, etc.).
However, migration toward more developed countries risks turning into a slow invasion of peoples, which will become inevitable like a flood in the long-term period.

The problem falls within the more general protection of human rights in the era of globalisation: indeed, the international community has improved in principle (European Convention on Human Rights, Rome, 1950; Court of Human Rights of Strasbourg; International Criminal Court, Rome, 1998), but it does not seem to be ready to tackle the implications of the actual implementation of the universal human rights.

24. In conclusion, in the evaluation of the matter concerning the possible environmental disputes having international relevance to be included in the jurisdiction of an International Court of the Environment, there is the legal question regarding the definition of the precise legal elements of such conflicts or disputes.

25. At present international environmental law is divided into a lot of differentiated legal regimes for several sectors (international law of the sea, international law on fishing, international law on watercourses and lakes, international law on air pollution, international law on waste, international law on hazardous activities, international law on nature - which, in its turn, is subdivided into branches -, international law on trade, international law on human right, etc.).

Since a real international jurisdiction on the environment does not exist, there is no implementing procedure which could have established some common features.

26. Considering that some International Conventions refer to the International Court of Justice (though as a voluntary option with negotiation and arbitration), the jurisdiction of this institution - in case it is appealed - would be limited to the legal regime introduced by the Conventions.

This mechanism does not substantially affect the differentiated legal system in the environmental field provided for in the various international conventions, thus just taking limited and only hypothetical steps forward through construction (considering

that there is no access for individuals or NGOs to the Court in The Hague; that the states are unwilling to let this institution work; and that only a few States recognise the legal role of this Court; and that there are not true precedents for the multilateral conventions, but just two arbitration decisions for strictly bilateral cases).

27. The concern about the fact that an International Court of the Environment might represent a break in the international legal system is groundless, since the International Court of Justice can not fill the present lack of unity of the existing legal system.

On the contrary, an *ad hoc* international jurisdiction for the environment could develop evolutionary and unifying case law on the principles and common features of environmental law by dealing with a remarkable number of cases.

Moreover, the new institution could implement the customary principle that is common within the international law, on a state's liability for damages (toward the other States and the International Community as a whole) with a link between the international environmental law of the environment and general international law.

A really prudent and serious field for developing international case law is in those cases involving environmental damage having international relevance.

28. The new jurisdiction, being specialised and having general competence on the environment, could establish unitary principles of international environmental law by means of interpreting International Conventions and customary law for some aspects in an integrated and systemic way (for example):

- notion of the environment;
- environmental impact;
- environmental information;
- environmental participation;
- access to justice on the part of individuals and NGOs (with appropriate filters through criteria to be defined);
- notion of best available technology;
- notion of negligence;
- notion of precaution;
- notion of equity;
- notion of co-operation;
- notion of biodiversity;
- notion of genetic manipulation;
- notion of "international environmental dispute";
- scope of the principle of subsidiarity.

29. A very important issue concerns the link between the environment and human rights so that it seems important to make a distinction between the legal *procedural* role of the human right to the environment (information, participation and access to justice in the common interest) and the *substantive* role of the human right to the environment (for the protection of one's health, wealth, etc.).

An International Court of the Environment could offer both the procedural aspect (access to justice for matters having international relevance) and the objective implementation of the international environmental law (which anyone can benefit from). In this way the problem of the indirect protection of merely subjective legal positions would find an implicit solution (these positions could later be dealt with also by national judges).

30. The *principle of the integration of the legal systems* cannot escape serious political evaluation: all systems (national, community, international) try to give a similar answer for the fundamental principles when the subject-matter is the same.

So *those who deem the national procedure and the national jurisdiction on the environment to be sufficient are not realistic and are theoretically wrong*.

31. As to the factual point, the national judges do not often know the international environmental law because there is no little or specific training in this field.

However, except for other practical difficulties (like the language), the national judge is an organ of a State legal system which might not have absorbed the conventions or might have done late in doing it or done it improperly.

32. Legal systems are based on an integrated and organised notion, namely, every system has its own specific bodies and also its own judges.

The national judge can never condemn its State for having infringed international obligations, but this is possible for an International Court.

Integration among different legal systems must be fostered in relation to a new and complex matter like the environment which calls for proper international case law.

The prospect is not negative when considering that the jurisprudence and the practice have already highlighted some common principles of the international law of the environment which are similar to those of the domestic legal system and of the Community legal system.

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[1] For the *environmental conflicts at international level* there are not data to submit to the public opinion in a serious and reliable way. The International Community is heavily responsible for this lack of information.

For the jurisprudence see:

- MARTIN TAMPIER, *The UN and Environmental Conflict: the Possible Future Role of the United Nations in Transnational Environmental Conflict Management*, Master's Thesis, Vrije Universitet Bruxelles, 1995;
- ARTHUR H. WESTING, *An expanded concept of international security*, Global Resources and International Conflict, Stockholm International Peace Research Institute, Oxford University Press, Oxford, 1986, p. 192;
- PETER H. SANDS, *The effectiveness of International Agreements*, Grotius Publications, Cambridge, 1992, p. 436;
- NORMAN U. MYERS, *Environment Security*, in *International Environmental Affairs*, 2/1989, University Press of New England, Hanover, 1989;
- LARS BOJÖKBON, *Resolution of Environmental Problems – The Use of Diplomacy*, in E. JOHN CARROL ed., International Environmental Diplomacy, Cambridge University Press, Cambridge, 1988;
- J.E.S. FAWSETT and A. PARREY, *Law and International Resource Conflict*, Royal Institute of International Affairs, Oxford, 1981, p. 2;
- ROBERT E. STEIN, *The Settlement of Environmental Disputes: Towards a System of Flexible Dispute Settelement*, Syracuse Journal of International Law and Commerce, 12, 1985, p. 285-298;
- ROBERT E. STEIN and GERARD CORNICH, *Elements of a United Nations Environment and Development Dispute Settlement Service* (Preparatory Committee at UNCED Conference), Italy, 1991, p. 5;
- RICHARD B. BILDER, *The Settlement of Disputes in the International Law of the Environment*, Collected courses of The Hague Academy of International Law, 144 (1975-1), pp. 139-239;
- L. TIMBERLAKE and J. TINKER, *Environment and Conflict*, Earth Briefing Document no. 4, International Institute for Environment and Development, London, 1985;

- JON MARTIN TROLLDALEN, *International Environmental Conflict, Resolution – The Role of the United Nations,* World Foundation for Environment and Development, Oslo, 1992, pp. 8-11 and p. 35;
- STEPHAN LIBISZEWSKI, *What is an Environmental Conflict?* Center for Security Studies and Conflict Research – Swiss Federal Institute of Technology, Zürich, 1992, p. 6;
- MARTTI KOSKIENNIERNI, *Peaceful Settlement of Environmental Disputes*, in Nordic Journal of International Law, 60, 1991, pp. 731, 85;
- A. POSTIGLIONE, *An International Court of the Environment?*, in *Environmental Policy and Law*, 1993, no. 2, pp. 73-78 and *The Global Environmental Crisis: The Need for an International Court of the Environment*, in *International Report ICEF*, 1996, Giunti Editore, Florence, 1996.

[2] In the *single national systems* the environmental conflicts (and so the disputes, the debates, the struggles, the legal proceedings) are already finding some solution:

- preventive instruments (authorisations, procedure for assessing the environmental impact; planning, programming, agreements on programmes; supervision; collecting activities; analyses, Ecolabel; Ecoaudit, etc.);
- subsequent instruments (the principle "who pollutes pays"; environmental damage as legal economic and social damage; criminal, civil and administrative penalty; economic and tax instruments; etc.).

In *the EU Countries* the legal instruments (Directives and Regulations) go together with the Action Plans which bind the States and fix the objectives. Besides, there is a double check (through the Commission and through the Court of Justice of Luxembourg).

The European Union also stresses the importance of the educational, training, technical and economic instruments and has already started to play a significant role with regard to the environmental conflicts at Community level (with a special doctrine of the Court of Justice).

[3] The *category of the "international environmental conflicts"* can be considered form a general point of view (with reference to the political, economic, social, cultural, religious etc. aspects), by taking into account all the critical situations relating to the environment, in a dimension which is not only local or national (i.e. a damage or danger that is altogether environmental, social, economic, etc.).

It is clear that such a notion – though useful - seems to be too broad and general and depends on the point of conceptual and priority reference assigned to it.

In the general category of the *"international environmental conflicts"* there are three terms:

a) a conflict (a situation of opposition, comparison, challenge, tension), actual or potential;
b) the environment (a situation of damage or danger which brings about or can bring about immediate direct or indirect, long- or medium-term effects concerning one or more resources which constitute the environment, including man);
c) international (a situation that in any case affects the environmental balance on a broader scale than on the local and national one);

The notion of "international environmental legal conflict" is more limited because in such a case only the situations affecting the international, customary or conventional law are taken into account.

In principle any violation of the obligations set forth by the international law entails responsibility (which varies according to the matter and the parties involved) and a possible penalty.

The legal fundament of the international obligations in the environmental field is represented first of all by the customary law (violation of the principle of "neminem laedere"; serious infringement of the obligations to inform, co-operate and aid in some special cases; etc.) and especially by the conventional instruments (about 1,000 according to UNEP) having bilateral or multilateral, regional or general nature.

Considering the present structure of the international law, which essentially concerns the relationship between the States, - and the *soft law* character of several norms – almost all international environmental legal conflicts, though in existence, do not lead to "disputes" or "litigation" or "controversy" before supranational administrative or judicial bodies since the present horizontal international system does not have and does not seem to be ready to have supervising bodies over the States which are reluctant to use legal proceedings and prefer the political instruments.

Therefore, there is a *logic-legal contradiction* (which can be explained only through the prevailing contrary economic and political powers at global level) between the existing international legal obligations in the environmental field and the lack of the system's structural and organic effectiveness.

The root of the contradiction lies in the fact that the States seem to have become a sort of "cage" for some – even primary - interests of the peoples and individuals, an insurmountable "wall", except for a certain kind of economy.

Despite this political limit – or rather because of this very reason – the legal jurisprudence has analysed the topic of the international environmental legal conflicts:

a) with regard to the various sectors (water, atmosphere, deforestation, space, genetic manipulation, etc.);

b) with regard to the international reference norms (customary and conventional);
c) with regard to the parties involved (producing or suffering the damage);
d) with regard to the causes (general or special) of the events;
e) with regard to the moment when the conflict has occurred (initial, latent phase, open phase);
f) with regard to the time dynamics (present and future generations);
g) with regard to space dynamics (synergical and cumulative effects; local or transfrontier effects);
h) with regard to the procedural aspects (assessment, means, costs, etc.);
i) with regard to the possible *legal remedies* (prevention, inhibition measures; quantification of the damage; compensation, allotment of the sums, etc.);
j) with regard to the new political institutional models deemed to be more appropriate: only national; instruments for gradually adjusting to the mitigation mechanisms worked out by the economic globalisation; binding instruments of institutional integration, within some limits; creation of specific supranational bodies of environmental protection and their integration and consistency with the present system of the international relations, etc..

So it must be underlined that the examples in the text are relative and rather show a necessary path to follow at the theoretical level (a path that could be assisted by the existence of an International Jurisdiction for the Environment, to be accessed by the society).

[4] The Global Conflicts certainly embrace: ozone depletion; green-house gasses; deforestation; desertification; climate change; loss of biodiversity; sea rise; soil degradation; deprivation of agricultural land; soil erosion; salinization; overuse of fish, pasture and other resources; overuse or misuse of shared resources as lakes, rivers, aquifers, forests; shared water resources; migrations conflicts; conflicts with indigenous peoples.

The following belong to the category of the conflicts linked to "transboundary pollution": acid rain; radioactivity; river pollution; sea pollution and dumping; oil spills.

The conflicts concerning the conservation of nature embrace: biodiversity; rare species; natural area preservation; allowable fish catch; whaling; etc..

Among the conflicts linked to the activities carried out by multinationals there are: oil exploration; running prospects; toxic waste traffic; big industrial exploitation of sea; copper exploitation.

International environmental conflicts, which are not dealt with in any way, are still occurring: the "ecological catastrophes" (Chernobyl; Galapagos; Vasche Folle; etc.).

The environment is seriously affected by the military, ethnical, cultural conflicts, by the religious controversy linked to fundamentalism and by the conflicts on the global commons, i.e. on their impossibility to be renewed and on their effects on future generations.

The international conflicts relating to the "environmental criminality" too are enormously important.

[5] See Art. 3 IUCN Draft Covenant on Environment and Development, 1995, as to the principle of common concern of human kind and the VII International ICEF Conference of Paestum (Italy), 6-10 June 1997, in G. CORDINI, A. POSTIGLIONE, *Environment and Culture: Common Heritage of Human Kind*, Esi, Naples, 1999. Resolution of the UN Assembly, no. 35/8, Coct. 30, 1980; The Hague Declaration, March 11, 1989, 28 I.L.M. 1308, 1989; E. BROWN WEISS, *Fairness to Future*: *International Law*, *Common Patrimony and Intergenerational Equity*, in *Transnational Publishers*, Inc. Ardsely, N.Y., 1996.

[6] The facts and events having global impact have been confused with the opinions and have been often taken into account in several sectorial sources.

The websites on the international environmental conflicts must be looked for in:

a) the literature and bibliography of the sectors which deal with environmental problems;
b) the documents and acts of the major UN bodies: **UNESCO** (**United Nations Educational, Scientific and Cultural Organisation**), established in 1945 and covering the field of the international cultural heritage, i.e. on the patrimony common to humankind. It is able to provide information on damage or threat to such patrimony:

FAO (**Food and Agricultural Organisation**) established in 1945. It is concerned with famine and poverty, the protection of soil and water, the problems relating to the application of the Conventions on climate, desertification, biodiversity. This institution is aware of the several actual conflicts between economy and environment.

WHO (**World Health Organisation**), created in 1946 and dealing with the relationship between health and environment (1992 Report on "Our Planet, Our Health");

IMO (**International Maritime Organisation**), set up in 1959. It plays a role of supervision on sea pollution, as provided for in several Conventions (Marpol-Maritime pollution, 1973, concerning hydrocarbons: Salas (Safety of Life at Sea), 1972, on the protection of human life at sea; 1969

Convention on the intervention on the high sea in case of incidents and pollution due to hydrocarbons; Montego Bay Convention of 1982 on the Law of the Sea).

WMO (**World Meteorological Organisation**) displaying data on the climate;

IACA (**International Atomic Energy Agency**), collecting data on the nuclear accidents on land or at sea;

ILO (**International Labor Organisation**), with data on the labour conditions in the various Countries, with special reference to minors and women and the risks for the health and the environment;

ICAO (**International Civil Aviation Organisation**), collecting data on the international traffic in the space and the corresponding risks (pollution, noise, obsolete technologies, jammed airports, etc.);

UNEP (**United Nations Environmental Programme**), ancillary body of the UN Assembly, established after the First UN Conference of Stockholm, 5-16 June 1972;

CSD (**Commission on Sustainable Development**), created at the UNCED Conference in Rio de Janeiro, 3-14 June 1992, expected to supervise the implementation of the Agenda 21, a document divided in four sections (social and economic dimensions; conservation and management of the resources; participation and responsibility of individuals; means for the implementation).

This Commission – despite the sensitivity shown by its Chairman, Mr Nitin Desai – does not seem to be able to suggest to Governments the means to solve the international environmental disputes (which he knows of through the reports sent to the Commission each year), that are fitting to reality and to the nature of the environmental conflicts;

c) the documents of regional organisations (**Council of Europe**; **European Union**).

[7] The "Ecological Catastrophes" in the oceans and seas exert great impact on the public opinion that is aware of the inadequacy of the instruments - or better their emptiness - provided for with regard to the international responsibility for the environmental damage,.

For this reason in the ICEF Volume presented in Rio in 1992 there was a list of some of these catastrophes for which there has not been any penalty (*The Global Village Without Regulations*, Amedeo Postiglione, Giunti Editore, Florence, 1992 – and 1994, Second Edition).

Although the international rules (Marpol 73/78 and UNCLOS 1982) have become stricter (routes, hulls, insurance), the problem of responsibility and compensation for damages to common resources is still unsolved.

The single cases have often been submitted to the Countries' jurisdiction according to the principle of territoriality (although mitigated in some cases), which has worked out some interesting case law (for example, about the equitable assessment of the ecological damage, the burden of proof, of legal capacity). Yet there still is the need for a judicial solution at global level.

[8] About the role of technology, see HEATON, REPETTO and SOBIN, *Transforming Technology*: *an Agenda for Environmentally Sustainable Growth in the 21st Century* (World Resources Institute, 1994).

PAUL EKINS, *The Sustainable Consumer Society: A Contradiction in Terms?* International Affairs Vol. 3, no. 4, Unviersity Press of New England, Fall 1991;

CLAUDE FUSSLER and PETER JAMES, *Driving Eco-Innovation: A Breakthrough Discipline for Innovation and Sustainability* (1996);

MICHEL PORTER, *Comparative Advantage of Nations*, Harvard Business, Rev. Mar. Apr., 1990, 73;

STUART HART, *Strategy for a Sustainable World, in Harvard Business*, Rev. Jan./Feb. 1997, 67;

DAN FAPIN et Al., *Toxic Deception: How the Chemical Industry Manipulates Science*, *Bends the Law and Endangers Your Health*, 14-15 (Bisch Lane Press, 1997).

The matter relating to new technology highlights the clear independence between economy and law: according to the rule of economic freedom the operator chooses whether to use new expensive technology, what technology, when and how, on the basis of the calculation for his or her own benefit. According to the legal rule it is necessary to verify what norms provide for new technology and on what conditions (time-related, inherent; on the basis of the comparison to other existing technology; according to the local conditions; following the primary needs – environmental exigencies in a certain sector).

The role of the law in the national systems and in the Community system is limited by the "excessive costs", so that economy prevails on the law once again.

At international level the legal principle on the adoption of the best technology seems to gain ground; there are hints in the Rio Declaration (Principle No. 10) and in the Agenda 21 (Chapter IV) and in some highly delicate conventional sectors (of energy, chemistry, transportation of dangerous wastes, etc.).

See also: DON GOLDBERG, *ICOLP Case Study* (Center for International Environmental Law, 1994).

[9] Some phenomena raise special concern:

a) The impact of the climate change on the small island States: an association of several small island states has been established (AOSIS – Association for Small Island States) in order to stress the topic. Some of these Governments have joined the ICEF Project for an International Court of the Environment since they are threatened in their very existence.
b) The pollution of the Black Sea (and of the Mediterranean Sea) for the poisonous water coming from big rivers such as the Danube, Don, Dnieper, Dniester. With regard to this great problem the Council of Europe has shown its political sensitiveness (see the Marmaris Conference in Turkey, 25-27 Feb. 2000, Report by Prof. Mario Pavan, Pavia University, former Ministry for the Environment).
c) The situation of the great patrimony of biodiversity (Amazonian Basin; Congo Basin; Indonesia; etc.) where there are clear signals of alteration due to three reasons: climate changes, pollution, human activity).
d) The overall situation of the oceans.

CHAPTER VI

RELIGIOUS NEED: TO RESPECT AND PRESERVE THE GIFT OF CREATION

1. The three big monotheist religions (Judaism, Christianity and Islam) explicitly refer to a *sole God*, the Creator of the universe.
The *creation* is conceived of as a "gift by God".

God, almighty and merciful (in the vision of the three religions), is still acting in the universe *so that it can* be maintained that the creation renews itself continuously and the "gift" is represented as a *permanently new act of love*.
Despite the language used in the Book of Genesis which reflects the culture of that period, man is undoubtedly charged with the precise responsibility of respecting and preserving the gift of creation: in addition to *the "material" control over the non human environment*, man is expected *to "spiritually" control himself* (thus avoiding the temptation to feel self-sufficient, represented by the tree of knowledge in Eden or by the violence dramatically exerted in the conflict between Cain and Abel).

2. The moral ambivalence of human nature has a religious fundament because man was created free by God.

Breaking the communication with the spiritual presence of God, the Creator, entails imbalance also in the relationship man-nature because man is himself part of nature. In the Christian tradition (the Gospel according to St. John, Prologue 1-18) the mystery of evil is represented by the contrast light-darkness, life and death.

The Word, Creator for eternity ("all things were made through Him"), the beginning of life in the universe ("in Him was life") does not abandon the world, but comes into it as if He wanted *to bear witness to the Holy Ghost* and becomes a man, thus re-determining the balance of the true God's children ("who were born not of blood, nor of the will of the flesh nor of the will of man but of God").

If this is the religious fundament it is hard to think that *offences against nature* are not conceived as *contempt for a gift of God*.

3. According to the principles common to the three monotheist Religions, the "*new rights*" cannot only concern the relationship between men, but also that of creation.

The "*sacredness" of nature* must therefore be saved and guaranteed especially through justice (not only from the moral and religious point of view, but also at the political institutional level in relation to life on earth).

The threats against Mother Earth are so strong that a *deep change in man's heart* is needed and this is possible only by linking the necessary environmental and economic choices to each other and by discovering again the roots, also the religious ones, of all peoples.

4. A similar important contribution can be made by other cultural and religious experiences in the world (for example Buddhism) which are of extraordinary interest.

5. It is pertinent to ask for co-operation of all Religions and individual believers: to transform the commitment to "inner" renewal into a "power" serving the common good of our Home.

For a creature just born in the universe, it might be very dangerous to no longer recognise the sign of God in nature. This can happen without giving up the maximum freedom in research.

ICEF hopes to continue the dialogue with all Religions for common actions for the green justice at global level.

The International Court of the Environment is a civil institution which faces a lot of obstacles (almost impossible to overcome) in Governments and strong powers so that in order to be established, it must count on wide cultural and social consensus and be perceived not as further bureaucracy, but as an independent international body serving man and nature.

The prevention and resolution of environmental conflicts having international relevance (today left unsolved in vast common areas) fulfil that great hope that Isaiah calls "the justice of peace"[1].

[1] Care for God's Earth Requires Justice for the Poor, Statement by senior Religious Leaders, Feb. 5, 1997, Washington, D.C..

CHAPTER VII

ETHICAL NEED: TO REACT TO THE DEGRADATION OF THE PLANET THROUGH NEW RULES ON INDIVIDUAL AND SOCIAL RESPONSIBILITY

1. In the Ten Commandments given to Moses by God on the Sinai Mountain, there is no direct mention to the protection of the environment.
Nevertheless, the language of the Prophets in the Old Testament (especially Isaiah) is often full of praise to God for the beauty of Universe and for all creatures He gave to humanity.

2. At present, there is no decalogue of the environment, as something to be protected by religion, but this can be drawn from the principles common to all existing religions.

3. It is possible to derive a "lay" decalogue of the environment from the common conscience of humankind, considering scientific knowledge and the bitter experience of fratricidal wars.
Some achievements have now become part of the present-day culture, although they have not become part of consistent individual and social behaviour yet.

4. We all saw the Earth like a bigger moon when man managed to quit its surface: a small celestial body of the solar system, a small grain of sand in the infinite universe.

5. We all know and experience that the Earth, though limited as to its size and resources (not all renewable), hosts life, that is, all the living species that we know, humankind included.

6. The biosphere is actually just a film of soil, water and air which covers the world: these components are interdependent among themselves (interaction between living bodies and inorganic material; deep and continuous interaction between soil, water and air; interaction man-material and material-man).

7. The closest potential biosphere could be millions of light-years far from Earth.

8. If humankind radically changes the habitat to which it also belongs, it will need to offset the way of living on the Earth with new scientific and technological discoveries that are unimaginable today or it will have to leave this biosphere in huge spaceships, fitted with air for breathing, drinking water, edible food, appropriate atmospheric pressure, etc. toward new worlds that will be reached after a long time during a "wandering overcrowded life".

9. If this is the situation today, a moral principle seems to be a priority: *not to affect sustainability of life on Earth*.
It is an individual and social moral principle so important that it must also be complied with through appropriate legal instruments.

10. So *environmental justice at global level* has a well-defined ethical fundament because the challenge is a real one.
Although not easy to do, it is urgent to determine some kinds of morally, socially and legally reprehensible behaviour that is to be prevented and punished in a sure way.

11. With the help of independent science, it will be necessary to assess ecological damage (which is real economic social harm) all over the planet; to simultaneously list the limited available resources and define their quality; to examine the current dynamics of the big ecosystems; to stabilise the climate change and the level of the oceans; to match resources to social needs, by establishing priorities, etc.

12. In order to avoid the excessive generality of the term "future generations", it is necessary to properly define the prospects for the future generations and to create now a World Authority which is able to ensure the right to life for future generations (water, air, soil, food, space, etc.).

13. In order to avoid the excessive generality of the term "equity", it is necessary to establish whether only the economy is expected to deal with this topic or other institutions are to do so, too: equity in the exploitation of limited resources - energy included - is a problem that is even more important than pollution itself in the future.

14. Some behaviour (now little controlled by law) requires moral evaluation in the appropriate venue (energy saving, recycling of materials and waste, of used waters, non-occupation of further space in the countryside, etc.).

15. The use of better technologies, under some conditions, must become a moral and legal obligation.

16. The transparency and quality of true information on production and products must represent a fundamental moral obligation, not just a legal one.

17. Social participation and control are not only a right, but mainly a duty: those who do not care for the quality of the common habitat are morally selfish.

18. Access to justice is not only a right, but also a duty: justice reflects balance and respect for social life.
Regarding global problems of the environment at global level every man must be able to co-operate, at least by indicating the relevant cases of danger or damage to common heritage.

19. The environmental protection model existing today, which is horizontal and subdivided into 180 sovereign States, with different systems and instruments, seems to be inappropriate.
The first responsibility of the States is to recognise their own inadequacy, by starting a great cultural and political debate with society and with the International Community.

20. So the national States - whose positive role in not being questioned - will establish appropriate co-operation mechanism reflecting the challenge, by finding strong scientific, technical, economic and social solutions and by seriously working on the

supranational management models necessary for objectively dealing with global problems.

21. The adoption of graduality, of empirical adjustments, of the search for acceptance in various fields, of limited achievement, is clearly understandable, if it has a proportioned timetable, ways and results for the problem.
However - without imaging bureaucratic State control and antidemocratic bodies - it already seems urgent and necessary today to establish an International High Authority for the Environment (a real Agency with powers and means) and an International Court of the Environment (a real jurisdiction, open - with the appropriate filter - to individuals and NGOs which will be able to deal with the extreme cases of international responsibility caused by private or public entities or by States: not a jurisdiction of the States, already existing in The Hague, but of individuals who are really concerned with life and must also be able to bring claims against States, if the latter do not comply with their international obligations)[1].

[1] *Towards the World Governing of the Environment*, IV International Conference, ICEF, Venice, 2-5 June 1994, by G. CORDINi and A. POSTIGLIONE, Gianni Iaculano Editore, Pavia, 1997, Vol. II, Forum 5, The Contribution of Religion and Science:

- MAURICE AUBERT, *L'homme, le gerant de la Terre*, Cerbom, Nice, p. 275;
- FERRUCCIO BRESOLIN, *Ethics, Environment and Development*, University of Venice, p. 289;
- ROGER M. CHARLIER, *Of Genocide, Ecocide and Related Matters*, p. 303, where it is also stated: *It is thus conceivable that International Court of the Environment be created as a guarantee of mankind's nature heritage for future generations*;
- ROBERTO DELLA ROCCA, *Ecology in Jewish Law: the Roots of Report*, Chief Rabbi of Venice, p. 305;
- UGO FRADDOSIO*, Necessité d'un éveil des consciences en defence de la vie – Alarm sur la mort du Regne Végétal*, Coordinateur Forum Scientific ICEF, p. 318;
- GUILLERMO GARBANINI ISLAS – Rector Universidad Museo Social Argentino, *La Preservation de la vida sobre la Tierra*, p. 333;
- GUIDO GERIN – President of the Istituto Internazionale Diritti dell'Uomo of Trieste, *Diritti dell'uomo e ambiente*, p. 343, This Author strongly supports the project for an International Court of the Environment as projection of a fundamental human right (see p. 349).
- S.M.A. BAYES and M. HEATER, *The Islamic view of legal protection of the environment*, Law Department, University of Northumbria at Newcastle, UK, p. 360;
- VIGGO MORTENSEN, *Towards a viable Theology of Creation for Today: the Socio-Ethical Issues*, The Luteran World Federation, p. 380;
- SHAIKH ABDAL WAHID PALLAVICINI, *Environing the Environment: Ecology or Ecumenism?*, Italian Association for Information on Islam;
- ANGELO PANSA, Catholic Missionary in the Amazon, *La responsabilità della tradizione giudaico-cristiana circa l'ambiente*, p. 405.
  This man has supported the ICEF Project from the Rio Conference in 1992, also for the defence of the Xipaya Indios of Brazil.
- SANDRO PIGNATTI, *Allarme botanico*, Rome Unviersity, p. 419: "Yet all these documents (Rio Conference in 1992) have had few effects because Governments are mainly focused on defending their own interests, nor can typically global problems be coped with at regional level: therefore now it seems necessary to establish a legal-normative institution (as the UN Tribunal for the Environment, recently proposed) able to guarantee the supervision and the governing of a dying planet".
- -BERNARD J. PRZEWOZNY – Franciscan Centre of Environmental Studies – and Member of ICEF, *The Catholic Church and Ecological Concern*, p. 431;
- OLAF G. TANDBERG, *New Environmental Ethic: The Earth Charter*, The Royal Swedish Academy of Science, p. 444;
- MARIO PAVAN – Former Ministry for the Environment – Professor at the Pavia University, Conlcusions: *Giustizia ecologica – Pace con l'Ambiente*, p. 475 and ff..

See also:

- ROBERTO PAPINI, *Abitare la società globale. Per una globalizzazione sostenibile*, Institute Jaques Maritain, ESI, Naples, 1997;
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CHAPTER VIII

CULTURAL NEED: TO PROVIDE THE COMMON HERITAGE OF MANKIND WITH A COMMON DEFENCE IN THE INTEREST OF FUTURE GENERATIONS

1. If we intend "environmental culture" as the conscience that the humankind has about the terrestrial ecosystem as a whole, a widespread, deep and common perception is still lacking as far as the meaning of "life" on our Planet is concerned[1].

2. As the human animal is likely to be conditioned by its relatively recent cultural background, it still considers the direct and incumbent danger to it and its family or to a limited living space, separating it from others that menace his fellow-men.

3. What prevails is the feeling or need to develop living conditions more than those resources deemed unlimited (air, space, water, soil), with a logic not far from that of our ancestors, although the means able to affect the habitat are totally different (no more herd or plough or wagon, but an impressively developing technology which extends the city outside its walls and creates a real and virtual network of information exchange and relationships between millions of people).

4. It is not clear to our conscience yet what is the real motivation for all this and it is urgent to become aware of this knowledge, through a fully revolutionary method which has been agreed upon: to compare a common challenge in everybody's conscience, described as it really is and with its "actual" and not merely hypothetical reflection on each social "monad" and on the society as a whole.

5. To achieve such knowledge and conscience maybe it will be necessary to find a way to communicate with animals and plants not only in the abstract, by grasping the *whole breath* of seas and climate and the *feeling of life* of living creatures other than humankind: how much biodiversity needs to be maintained? Where? How? How much space or how many ecological spots must exclude humankind? Is it possible that a human being, a living creature, listens to what the Earth suggests it should or should not do?

6. The "testimonies of civilisation" made up of *cultural heritage*, namely, of all those things spread all over the world having archaeological, artistic, demo-ethnic-anthropological etc. interest are also deemed to be worth legal protection by culture for two essential reasons: because such heritage has a more direct communication value for a creature that reflects itself in it in relation to the "construction" made by the human spirit; because humankind sees a "generation" as moral continuity, not simply as physical continuity[2].

7. Culture reflects itself in those parts of nature (the *landscape*) characterised by some special spiritual evocation calling up beauty so that, according to an "insular" notion, protection concerns areas having special value if compared to the remaining natural heritage.

8. Then culture extended its interest to other areas in consideration of the *particular natural values inherent in them*, through the creation of parks, natural reserves and humid areas.

9. Culture itself has become aware of the "*intrinsic value of biological diversity*, and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic value of biological diversity and of its components", of its importance "for developing and maintaining the systems necessary for the life of the biosphere", thus affirming the need for maintenance as "interest common to mankind" (Convention on Biological Diversity, Rio, 1992).

10. Culture itself correctly defines the climate as a "*system*": *atmosphere, hydrosphere*, *biosphere and geosphere with their interactions*", thus determining the need and urgency for present and future generations for specific precautionary measures (Convention on Climate, Rio, 1992).

11. Culture itself has worked out the notion of *common heritage of mankind*, initially for cultural heritage, then for natural heritage within the jurisdiction of the States, later also for the natural heritage outside the jurisdiction of the States[3].

12. Considering now how the current cultural trend will develop in the environmental field, it could be possible to determine the final points:

a) the consideration of *the Earth itself as common heritage of mankind*, through a direct and specific international protection which is stronger than that one offered by the States;

b) *to found the development on the principle of sustainability of life on Earth*, thus avoiding the ambiguity of the 1992 Rio Declaration on the so-called "sustainable development".

13. The "sustainable development", in our opinion, is an ambiguous term for very logical reasons:
a) because development we all know has not been sustainable *until now* so that we are concerned about global problems (like the climate) that are likely to escape any control;
b) because current development is not yet sustainable;
c) because there are no precise economic ecological rules in the international legal system, nor are such rules likely or likely to be applied;
d) because the notion of "sustainability", typical for the environment, cannot refer to an economic term such as the "development": *nature's economy has been built for millions of years whereas the human economy is too young to be as reliable as the former is*;
e) because the term "*sustainable development*" *de facto* puts aside the environment (meant as hoped-for adjective of quality of the environment), thus creating also social and political confusion.
There are good economic and political reasons to change the relations between the peoples in the world according to the principles of democracy, freedom and justice.
The environment represents the common "limits" for all peoples, but it is also a great "chance" for unity.

14. The International Court of the Environment, as an expression of global justice, meets a cultural need according to the above-mentioned grounds which take the future generations into account.
Indeed, *today* it is necessary to establish a body for the international protection of the right to life for future generations or else this right will remain an abstract one[4].

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[1] The term "culture" is used as "idea of the world" and "system of values" not of a single people, but of humankind as a whole.

As to man the biological evolution is a slow development, as it happens for animals, but the cultural evolution is very quick: it seems that, if compared to the environment (and to its changes due to pollution and the unbalanced exploitation of resources), our species is still similar to our ancestors. This hypothesis has also been formulated by Giuseppe O. Longo, Trieste University, *Homo Technologicus*, Molteni, Rome, 2001.

With some concern ARNOLD TOJNBEE, in his volume *Il racconto dell'uomo*, Garzanti, 1977 (original title: *Mankind and Mother Earth*, Oxford University Press, 1976) underlines that: "Mankind has overvalued the fully modern increase of its ability to affect the biosphere" (p. 26) and this is due to two innovations: the scientific research and the technological application; the industrial revolution and chiefly the energy progress (use of the nuclear energy).

Yet, it is possible to recover, at cultural level, a different relationship between man and nature, or better between the "human species" and the "sustainability of life on earth".

[2] TOMMASO ALIBRANDI, *L'evoluzione del concetto di bene culturale. Il testo Unico in materia di beni culturali e ambientali*, by Matteini Chiari et Al., Maggioli Editore, Rimini, 2001, p. 25.

AMEDEO POSTIGLIONE, *Protezione del patrimonio culturale ed ambientale in ambito internazionale e comunitario*, in the same volume, p. 75 and ff..

[3] For the notion of common heritage of humankind see: A. KISS, *La notion de patrimoine commune de l'humanité*, in *Récueil des cours de l'Académie du droit international*, 1982, p. 103.

See also: *Ambiente e Cultura – Atti della VII International Conference ICEF*, Paestum, Esi, Naples, 1999, by G. CORDINI and A. POSTIGLIONE, and especially the contribution by G. CORDINI, *La protezione dei beni culturali ed ambientali: Dimensione sopranazionale e profili di diritto costituzionale comparato*, pp. 193-214 and V. TH. COSTOPOULOS, *La protection internationale du patrimoine cultural*, pp. 215-220.

[4] The question of the existence of a real right to the environment for the present and future generations is complex and hard to be solved at theoretical level.
It is necessary to define some aspects:

a) the legal basis (national, Community and international);
b) the capacity to hold the right;
c) the capacity to hold the duty to protect;
d) the procedure;
e) the substantive contents;
f) the space-related dimension;
g) the time-related dimension;
h) the foundations of the right; human dignity; protection of human species' continuity; the safeguard of life on earth according to the principles of sustainability and interdependence; the unitary consideration of the human community; the unitary consideration of the world natural heritage;
i) the protecting bodies.

* Briefly it can be recalled that whereas the *traditional human rights* have been asserted for over 50 years (Universal Declaration of the Human Rights of December 10, 1948, adopted by the General Assembly of the United Nations; European Convention of the Human Rights adopted in Rome, November 4, 1950), the *human right to the environment* has only recently started to find some legal foundation (1972 UN Conference on the Environment adopeted in Stockholm, Principle no. 1; World Charter of the Nature, adopted by the UN General Assembly on October 28, 1982, Resolution 37/7; point 23, 1992 UN Conference held in Rio de Janeiro on Environment and Development, Principle 10).

* About the *capacity to hold the right*, it is undoubtedly conferred on the single human being, in his or her reality and dignity: it is not an abstract right having ideal contents.

* The *capacity to hold the duty* to respect and protect is not only conferred upon public entities, like the State (although this has been the historical development of the human rights in the name of freedom), but on the individuals, too: the human right to the environment is always also a human duty to protect the common environment.

* There is a *procedure* for the right to the environment which now finds wide consensus: the right to information; the right to participation; the right to access.

* Of course, there is a *minimum substantive contents*: the compliance with the legal limits or standards provided for by the law.

Anyhow, it would be contradictory and restrictive with regard to the nature of human rights to deny the existence of some *further necessary contents*: the right to enjoy a "quality of the resources" (clean air, clean water, edible food, etc.) meeting the human needs of life and this may also be opposite to the plans and programmes of the public authorities.

On the contrary, the substantive contents of the right to the environment does not include the right to have preferential differentiated conditions which are purely individual.

The philosophy of the human rights – at least in this historical period – is based on the objective universality of the human nature and can not accept a virtual projection of the environmental exploitation which is merely objective.

Considered the very universality of the human rights, the fact of maintaining the existence of a human right to the environment implies the contextual recognition of a double space- and time-related dimension: like men experience different places and situations from the point of view of space and nevertheless they have the same right to the environment considered as a notion and due to equitable reasons, also form the point of view of time there is a right to the environment for the future generations.

It does not seem to be necessary to resort to the notion of representation, also because there is not a mandate. The truth is that man is integrated in the genetic continuity of a living ecosystem: today the right to the environment is an individual and social right since it belongs to all men (the world community) and to everybody and it must already be considered as a right of the future generations as a legal obligation which now represents its guarantee.

We believe that the legal and scientific notions of "global natural heritage" and "global cultural heritage" must be supplemented by a new common legal value: the sustainability of life on earth, or better of the Earth as living ecosystem.

The protected legal patrimony is the "human person" as such in his or her dignity, whereas the patrimony of nature and culture and the life itself remain values that can not be separated from the holder of the right-duty: man.

Since the ecological "truth" on the real situation of the Planet is part of the contents of the right to life, it forces the States to open the access to justice to the real holders of the right, the persons, also before an International Court of the Environment. These human rights are not "granted" by the States, but only "recognised" so that in principle the obstacle of sovereignty disappears.

The lack of consistency and courage of some authors is surprising (they belong to exclusive lobbies of experts which are financed by economic and political entities and even by some famous NGOs that at horizontal level recognise the human life to the environment form different points of view – national, regional and international -, but at vertical level seem to be reluctant to urge a model of World Governing of the Environment different form the present one which is only focused on the relationship between the States).

So this conservative stand has been continued. It was already contained in the Report of the Brundtland Commission ("Notre Avis à Tous", edition du Fleuve, Les Publications du Quebec, 1988, p. 401), where the authors hoped for the creation of a Special Section for the Environment, according to Art. 26 of the Statute, in the International Court of Justice (a desire then realised in 1993), although it must be said that this did not lead to any practical consequence since there was no access to the ecological justice at international level, too.

* About human rights see:

"Les droits de l'homme à l'environnement en droit international au niveau mondial et européen", Colloque International de Trieste, 16-18 March 2000, *Maguelonne Dejant-Pons* of the European Council. During the same meeting in Trieste important contributions were the Reports by Prof. *A. Kiss* of the European Centre of the Law of the Environment of Strasbourg and of Prof. *Guido Gerin* – President of the International Institute for Studies on the Environment of Strasbourg, the wide contribution by Prof. *Gherzali*, University du Littoral, France and the Report: *Ambiente e Diritti dell'Uomo: il diritto di accesso alla giustizia ecologica* by Amedeo Postiglione.

The topic was broadly dealt with during the Meeting held in Siena, 10-11 April 2000, organised by the Universities of Siena and Milan-Bocconi on: *Ambiente, Diritti umani e liberalizzazione del commercio internazionale*, (for comments see R. JARABELLO and M. MONTIN, in *Rivista Giuridica dell'Ambiente*, Giuffrè, Milan, 2000, no. 3/4, p. 597 and ff.).

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CULLET (PHILIPPE*), Definition of an environmental right in a human right context*, Netherlands Quarterly of Human rights, Vol. 13, 1995, no. 1, pp. 25-40;

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CHAPTER IX

SCIENTIFIC NEED: AN INDEPENDENT GLOBAL FORUM FOSTERS FREEDOM AND TRUTH ABOUT THE DESTINY OF THE PLANET

1. Science has progressed considerably both as to infinitely big issues (knowledge of the universe) and infinitely small ones (the atom and its components, the fundamental forces).

2. Scientific freedom is an absolute value because the search of truth is an unrestrainable need of the human soul and a way to open oneself to the infinite mystery of God (for those who believe).

3. The freedom and truth of the search, when applied to the environment, become necessary values. Scientific research is often confused with its exploitation which might be dangerous.

4. In the international system, the principle of "precaution" is clear and it works for the environment although there is no absolute scientific certainty about some events[1].

5. The circulation and the exchange of information and scientific achievement represent an absolute need of the global environment since much information remains concealed to most of people who are deprived of the possibility to make a complete and objective evaluation.

6. Therefore, it seems wise to foster the establishment of a specific scientific and global forum, charged at least with responsibility for co-ordination and research.

7. The establishment of an International Court of the Environment is similarly important. It could entrust independent and authoritative experts with answering practical questions (for example, genetic manipulations; amount and nature of the international environmental damage in single cases of environmental conflicts, etc.).

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[1] The Principle of precaution is expressively stated in Principle No. 15 of the Rio Declaration of 1992 and in the framework Convention on biological diversity signed in Rio: “still observing that in case of threat of considerably reducing or loosing biological diversity, the lack of absolute scientific certainty can not be used as an excuse in order to postpone the measures aiming at eliminating or mitigating such a threat” (Preamble).

The same principle is quoted in the framework Convention of Rio on the climate (Art. 3, point 3) and in the recent Cartagena Protocol of February 26, 2000, on the Conservation of Biological Diversity.

See: DANIEL BODANSKY, Scientific Uncertainty and the Precautionary Principle, 33 Env.t 4 (Sept. 1991), Heldref Publications, Washington.

See also for further indications: D. HUNTER, J. SALZMAN and D. ZAELKE, *International Environment Law Policy*, University Casebook Press, N.Y., pp. 360-361.

CHAPTER X

THE DEVELOPMENT OF THE PROJECT FOR AN INTERNATIONAL COURT OF THE ENVIRONMENT

General considerations.

1. The Project for an International Court for the Environment is essentially known by NGOs, Governments and Parliaments as shown in the ICEF 1996, 1998 and 2000 Reports and in the bibliography published.

2. After the 1998 Rome Conference on the International Criminal Court the Project underwent some acceleration.

3. The following Governments have replied to the action undertaken by ICEF :

Argentina, Armenia, Australia, Austria, Bangladesh, Belarus, Belgium, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Czech Republic, Denmark, England, Estonia, Finland, France, Gabon, Gambia, Germany, Haiti, Hungary, India, Israel, Italy, Jamaica, Japan, Kenya, Korea, Kyrgyz Republic, Kuwait, Latvijas, Lituania, Luxemburg, Macedonia, Madagascar, Maldive Islands, Malaysia, Malta, Mauritius, Mexico, Mozambique, Nepal, New Zealand, Pakistan, Poland, Rwanda, Russia, Saint Lucy, San Salvador, Seychelles, Slovenia, Slovakia, Spain, South Africa, Surinam, Tanzania, Thailand, Tagikistan, Trinidad & Tobago, Uachtarain, Ukraine, Uruguay, Uzbekistan.

4. The replies made by those Governments have been entirely published in the ICEF 1986, 1988 and 2000 Reports. For some information see also in the Appendix to this Volume.

The approach proposed implies:

a) The establishment of a Working Group at the Ministries of Foreign Affairs of the single Countries;
b) The definition of the essential guidelines of the Project;
c) The verification of the political willingness of the Governments which declared to be either in favour of the Project or somehow interested in it.
d) The definition of a political path for the Project
e) An International Conference to pass the Statute;
f) To include the Project in the Agenda of the UN Rio+10 Conference to be held in South-Africa in 2002.

5. *The Fundamental Characteristics of the New Institution*. – A real jurisdiction: for the legal solution of the conflicts concerning the global problems of the environment having international relevance; a kind of "specialised" jurisdiction with specific and interdisciplinary competence; elimination of the characteristic of "speciality" of the jurisdiction in order to maintain unity within the international legal system and not to clash with the acknowledged role of the Court of Justice in The Hague; a mandatory and

not merely voluntary jurisdiction (at least in cases to be defined in the future) and the deriving *erga omnes* validity of the decisions.

6. *The advantages of the New Institution*.

Realism. – It is acknowledged that there exist environmental conflicts deriving from transfrontier pollution, disasters and serious accidents, the misuse of resources when infringing specific rules and that an alternative to violence is to bring those conflicts originated in the country and in the society before a legal international forum ensuring protection.

Effectiveness. - The existing mechanisms of guarantee are useful but inappropriate since they are voluntary and not mandatory and simply bilateral: mediation, conciliation, arbitration, etc..

Unity. - The environment is considered as unitary terrestrial ecosystem and therefore integrated so that the jurisdiction can not deal only with one field: Tribunal of the Sea, Tribunal for the Climate, etc..

Social Access. - This is the new qualifying point at the cultural and political level: it has been acknowledged that the environment is not simply a problem of the States or between the States but it is mainly a social matter so that only the model for the protection of the human rights can bring the social cases before an institution ensuring protection.

The access must be given also to individuals and NGOs thus implementing the human right to the environment - with possible filtering mechanism so as to avoid the impasse of the system.

A Real Case Law. – The jurisdiction requires a body to apply the rules and establish continuity in the case law through the examination of the cases.

7. Further characteristics have been suggested by ICEF in its Project but the following must be dealt with more deeply:

- Independence and impartiality of the bench;
- Appointment and duration of the office;
- Preliminary investigation powers;
- Injunction powers;
- Guarantees in the proceedings (publicity, defence, etc.);
- "Boosting" powers exercised also by public entities (States, Commission on Sustainable Development, International Organisations; a kind of Public Prosecutor like the Ombudsman, etc.);
- Declaratory nature of the decisions;
- The decision "can" (and not must) be a sentencing judgment;
- Effectiveness of the decisions;
- Implementation of the decisions;

8. *The answer to the new conventions*. - The framework conventions on sea, biodiversity, climate, deforestation, etc. are objectively global and can not be implemented only through bilateral instruments between the States;

9. *The answer to some conventions underlining the human right to the environment.* - These are the Aarhus Convention on environmental information intended as the right of every human being all over the world; the Expoo Convention on information and participation of persons for transfrontier projects (Evaluation of the Environmental Impact) etc..

10. *Implementation of the principle of responsibility for transfrontier environmental damage.* - It is a primary principle of the acknowledged international law which has not been applied yet since there is not a Court able to examine the single cases and establish an appropriate case law;

11. *Balance.* - Since its very beginning the inspiring philosophy of the ICEF Project has envisaged a balanced and parallel progress of the international system, also with supra-national administrative organs, such as a High Authority or Agency besides a judicial Body so as to avert fundamentalist temptations and unfair legal actions;

12. *International environmental crimes*. - The philosophy of the new institution is not focused on the criminal aspect. For a matter of consistency the International Criminal Court, with regard to crimes perpetrated by individuals against humanity, will be also concerned with the ecological crimes as defined by law and committed by individuals, whereas the International Court of the Environment deals with the civil aspects of international environmental wrongs and usually with the implementation of the existing conventions as well, at least for the obligations having specific contents.

13. The proposal for an International Court of the Environment as independent body does not collide in principle with the institutions already in existence (Permanent Court of Arbitration of The Hague and International Court of Justice of The Hague) but provides some integration of their role: the new institution is not a "special" but a "specialised" tribunal and so it supplements and does not break the unity of the international legal system.

14. The acceleration of the global ecological crisis leads to a broad consensus of the States for the new institution and allows a response in terms of legality and balance to the globalisation of the world economy and the serious imbalances in the exploitation of the common resources of the Planet.

15. Besides, the importance given to a human right (with its dynamic contents about information, participation and access) allows a very innovative experience in the field of jurisdiction in the name of the environment through a new institution (the International Court of the Environment which becomes in the meantime the Court for a human right from the point of view of procedure and the Court for the protection of the environment from an objective point of view with regard to the implementation of the

norms as such, the prevention of damage and its reparation in the interest of all peoples).

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APPENDIX