THE PARALLEL EVOLUTIONS OF INTERNATIONAL HUMAN RIGHTS PROTECTION AND OF ENVIRONMENTAL PROTECTION AND THE ABSENCE OF RESTRICTIONS UPON THE EXERCISE OF RECOGNIZED HUMAN RIGHTS

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No Restrictions Ensuing from the Co-existence of International Instruments on Environmental Protection. **3.** No Restrictions Ensuing from the Expansion of Systems of Protection (As Evidenced by the Recognition of the Right to a Healthy Environment) in Their Effects upon Each Other. **4.** The Recognition of the Right to a Healthy Environment and the Consequent Enhancement, Rather than Restriction, of Pre-Existing Rights.

I. INTRODUCTION

The general theme chosen for consideration in the 1990 Banff Conference is a particularly suitable and most timely one: *Human Rights in the XXI Century: A Global Challenge*. Not only does it render possible to encompass the examination of a wide variety of aspects and concerns pertaining to the present state of the international protection of human rights, but it also paves the way for a projection into the future of insights and ideas which may point the ways towards the enhancement of the international protection of human rights in the years that bring us into the new century. Within this general outlook, the topic which has been entrusted to us for presentation in the present Conference in Banff is a specific and so far virtually unexplored one: the parallelisms in the evolutions of two domains of protection —human rights protection and environmental protection— and the impact of their expansion upon the exercise of previously recognized human rights.

For the purpose of examination of this novel topic, we shall develop four lines of considerations: first, the identification of affinities in the parallel evolutions of human rights protection and of environmental protection; second, the identification of the wide dimension of the fundamental right to life, added to the right to health, at the basis of the *ratio legis* of international human rights law and of environmental law; third, the question of the implementation (*mise en oeuvre*) of the right to a healthy environment; and fourth, the expansion of human rights protection and of environmental protection in their effects upon each other and a critical appraisal of the so-called *restrictions* upon the exercise of previously recognized human rights. It is our hope that the reflections developed herein may stimulate or pave the way for further attention to, and research on, the subject, conducive to a better understanding of the proper sense of the expansion of the two domains of protection and to the enrichment and strengthening of the international protection of human rights.

II. THE GROWTH OF HUMAN RIGHTS PROTECTION AND OF ENVIRONMENTAL PROTECTION FROM INTERNATIONALIZATION TO GLOBALIZATION.

1. *The Internationalization of Human Rights Protection and of Environmental Protection*

The parallel evolutions of human rights protection and environmental protection disclose some affinities which should not pass unnoticed. They both witness, and precipitate, the gradual erosion of so-called domestic jurisdiction. The treatment by the State of its own nationals becomes a matter of international concern. Conservation of the environment and control of pollution become likewise a matter of international concern. There occurs a process of *internationalization* of both human rights protection and environmental protection, the former as from the 1948 Universal Declaration on Human Rights, the latter —years later— as from the 1972 Stockholm Declaration on the Human Environment.

With regard to human rights protection, eighteen years after the adoption of the 1948 Universal Declaration the International Bill of Human Rights was completed with the adoption of the two U.N. Covenants, on Civil and Political (and Optional Protocol), and on Economic, Social and Cultural Rights (1966), respectively. The normative corpus of international human rights law is today a vast one, comprising a multiplicity of treaties and instruments, at both global and regional levels, with varying ambits of application and covering the protection of human rights of various kinds and in distinct domains of human activity.

As for environmental protection, the years following the Stockholm Declaration likewise witnessed a multiplicity of international instruments on the matter, equally at both global and regional levels. It is estimated that nowadays there are more than 300 multilateral treaties and around 900 bilateral treaties providing for the protection and conservation of the biosphere, to which over texts from international organizations can be added[1]. This considerable growth of international regulation in the present domain has, by and large, followed a *sectorial* approach, leading to the celebration of conventions turned to certain sectors or areas, or concrete situations (*e.g.*, oceans, continental waters, atmosphere, wild life). In sum, international

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1 Reference can further be made to domestic legislation on the matter in virtually all States: it is estimated that domestic legislative instruments reach today a total of 30,000. A.C. Kiss, *Droit international de l'environment*, Paris, Pédone, 1989. p. 46.

regulation in the domain of environmental protection has taken place in the form of *responses* to specific challenges.

The same appears to have taken place in the field of human rights protection, where we witness a multiplicity of international instruments: parallel to general human rights treaties (such as the two U.N. Covenants on Human Rights and the three regional —European, American and African— Conventions), there are Conventions turned to concrete situations (*e.g.*, prevention of discrimination, prevention and punishment of torture and ill-treatment), to specific human conditions (*e.g.*, refugee status, nationality and statelessness), and to certain groups in special need of protection (*e.g.*, workers' rights, women's rights, protection of the child, protection of the elderly, protection of the disadvantaged). In sum, human rights instruments have grown, at normative and procedural levels, likewise as *responses* to violations of human rights of various kinds.

This being so, it is not surprising that certain gaps may appear, as awareness grows as to the increasing needs of protection. An example of such gap, in the field of human rights protection, can be found in our days, *e.g.*, in the protection to be extended to certain vulnerable groups, in particular indigenous populations. Another example of such gap, in the area of environmental protection, can nowadays be found, *e.g.*, in the needed enhancement of international regulation on climate change and protection of the atmosphere.

A significant task for the near future —if not for the present— will precisely consist in ensuring the proper *co-ordination* of multiple instruments which have grown in the last decades, at global and regional levels, pursuant to the "sectorial" approach (*supra*), in the domains of human rights protection[2] as well as environmental protection. Beyond the internationalization of human rights protection and of environmental protection in the pattern above referred to, it was soon realized that, in each of the two domains of protection, there existed an inter-relatedness among the distinct sectors object of regulation.

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2 *Cf.* A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 21-435.

2. *The Globalization of Human Rights Protection and of Environmental Protection*

The awareness of this inter-relatedness has decisively contributed to the evolution, in recent years, from the internationalization to the globalization of human rights protections as well as of environmental protection. As far as human rights protection is concerned, two decades after the adoption of the 1948 Universal Declaration of Human Rights the 1968 Teheran Conference on Human Rights, in a global reassessment of the matter, proclaimed the *indivisibility* of all human rights (civil and political, as well as economic, social and cultural rights). This was followed by the landmark resolution 32/130, adopted by the U.N. General Assembly in 1977, where it stated that human rights questions were to be examined globally.

That resolution endorsed the assertion of the 1968 Teheran Proclamation of the indivisibility and interdependence of all human rights, from a globalist perspective, and drew attention to the priority to be accorded to the search for solutions to massive and flagrant violations of human rights[3]. Three decades after the adoption of the 1948 Universal Declaration, the U.N. General Assembly, bearing in mind the fundamental changes undergone by so-called international society —decolonization, capacity of massive destruction, population growth, environmental conditions, energy consumption, amongst others— by its resolution 32/130 endeavoured to overcome the old categorizations of rights and to proceed to a needed global analysis of existing problems in the field of human rights.

Such new global outlook and conception of the indivisibility of human rights, rendered possible by the U.N. Charter itself, and externalized in G.A. resolution 32/130 of 1977, contributed to drawing closer attention in particular to the rights pertaining to human collectivities and the measure of their implementation. The matter was re-taken by G.A. resolutions 39/145, of 1984, and 41/117, of 1986, which reiterated the inter-relatedness of all human rights, whereby the protection of one category of rights should not exempt States from safeguarding the other rights. Thus, human rights instruments turned to the protection of certain categories of rights, or of certain rights in given situations, or of rights of certain groups in special need of protection, are to be properly approached on the understanding

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3 Th. C. Van Boven, "United Nations Policies and Strategies: Global Perspectives?", *Human Rights: Thirty Years after the Universal Declaration* (ed. B.G. Ramcharan), The Hague, M. Nijhoff, 1979, pp. 88-89 and *cf.* pp. 89-91.

that they are complementary to general human rights treaties. Multiple human rights instruments re-inforce each other, enhance the degree of the protection due, and disclose an overwhelming identity of purpose.

In the domain of environmental protection, the presence —despite the "sector by sector" regulation— of "transversal" issues and rules contributed to the globalist approach. It was reckoned, *e.g.*, that more and more often certain activities and products may cause harmful effects in any environment (*e.g.*, toxic or dangerous substances, toxic or dangerous wastes, ionizing radiations, and radioactive wastes); in fact, the problem of dangerous substances is present in the whole of *sectorial* regulation, thus pointing to globalization and generating a "réglementation se superposant aux différents secteurs"[4].

Already in 1974, two years after the adoption of the Stockholm Declaration, the U.N. Charter on Economic Rights and Duties of States warned that the protection and preservation of the environment for present and future generations were the responsibility of all States (Article 30). And in 1980 the U.N. General Assembly proclaimed the historical responsibility of States for the preservation of nature on behalf of present and future generations[5]. While in the past States tended to regard the regulation of pollution by sectors as a national or local issue, more recently they have realized that some environmental problems and concerns are essentially global in scope[6]. In its resolution 44/228, of 22 December 1989, whereby it decided to convene a U.N. Conference on Environment and Development in 1992, the U.N. General Assembly recognized that the global character of environmental problems required action at all levels (global, regional and national), involving the commitment and participation of all countries; the resolution further affirmed that the protection and enhancement of the environment were major issues that affected the well-being of peoples, and singled out, as one of the environmental issues of major concern, the "protection of human health conditions and improvement of the quality of life" (§ 12 (i)).

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4 A.Ch. Kiss, *op. cit. supra* n. (1), pp. 275-276 and 46, and *cf.* pp. 93, 106 and 204.

5 *Cit. in ibid.*, pp. 38-39.

6 "Formal and informal linkages" across nations and States have contributed to this new perception; R.W. Hahn and K.R. Richards, "The Internationalization of Environmental Regulation", 30 *Harvard International Law Journal* (1989) pp. 421, 423 and 444-445.

The global character of environmental issues is reflected in the question, *e.g.*, of conservation of biological diversity; it is further illustrated, in particular, by the problems linked to atmospheric pollution (such as depletion of the ozone layer and global climate change). Those problems, initially thought of as being essentially local or even transboundary, were to disclose *"une portée pratiquement illimitée dans l'espace"*[7]. The threat of damage to many nations resulting from global warming, for example, is a major problem the cause of which would hardly be traceable to a single State or group of States, thus calling for a new approach on the basis of strategies of prevention and adaptation and considerable international cooperation[8]. Thus, the U.N. General Assembly, by resolution 43/53, of 6 December 1988, recognized that climate change is a common concern of mankind, and determined that action should be promptly taken to deal with it within a global framework.

Likewise, the Intergovernmental Panel on Climate Change (IPCC), set up by the WMO and UNEP, has indicated, as one of the possible elements for inclusion in a future framework Convention on climate changee[9], the recognition that climate change is a common concern of mankind, affecting humanity as a whole, and to be thus approached within a global framework[10]. The 1989 Hague Declaration on the Atmosphere insists on the search for urgent and global solutions to the problems of the warming of the atmosphere and the deterioration of the ozone layer. In the same line, the 1989 International Meeting of Legal and Policy Experts, held in Ottawa, in its report stated *inter alia* that the atmosphere constitutes a "common resource of vital interest to mankind"[11].

And still in 1989 (November), the Ministerial Conference on Atmospheric Pollution and Climatic Change, held in Noordwijk, The Netherlands, with the participation of 67 countries, considered the elements of a future framework climate change Convention (to be further elaborated by the IPCC) and reasserted the principle of shared responsibility of all States.

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7 A.C. Kiss, *op. cit. supra* n. (1), p. 212.

8 V.P. Nanda, "Global Warming and International Environmental Law - A Preliminary Inquiry", 30 *Harvard International Law Journal* (1989) pp. 380-385.

9 *Cf.* UNEP Governing Council decision 15/36, of 25 May 1989.

10 WMO/UNEP, *IPCC Working Group III (Response Strategies) —Legal Measures: Report of Topic Co-ordinators*, Geneva/Nairobi, 1989 , p. III (mimeographed, internal circulation).

11 *Cf. Statement of the International Meeting of Legal and Policy Experts*, Ottawa, 1989, p.2.

The 1989 Noordwijk Declaration on Climate Change pursued a globalist approach (Cf.§§ 8-9) and expressly stated that "climate change is a common concern of mankind" (§ 7)[12]. In sum, recent trends in environmental protection as well as in human rights protection (*supra*) disclose a clear and progressive tendency from internationalization towards globalization.

3. *The Globalization of Protection and Erga Omnes Obligations*

The globalization of human rights protection and of environmental protection can also be attested from a distinct approach, namely, that of the emergence of *erga omnes* obligations and the consequent decline and end of reciprocity. In the field of human rights protection, reciprocity is overcome and overwhelmed by the notion of collective guarantee and considerations of *ordre public*. This operates a revolution in the postulates of traditional international law. Human rights treaties incorporate obligations of an objective character, turned to the safeguard of the rights of human beings and not of States, on the basis of a superior general public interest (or *ordre public*). Hence the specificity of human rights treaties.

Traces of this new philosophy are found in international humanitarian law: pursuant to common Article 1 of the 1949 Geneva Conventions, Contracting Parties are bound "to respect and to ensure respect" to the four Conventions "in all circunstances", *i.e.*, irrespective of considerations of reciprocity. Provisions with analogous effects can be found in human rights treaties (*e.g.*, U.N. Covenant on Civil and Political Rights, Article 2; European Convention on Human Rights, Article 1; American Convention on Human Rights, Article 1). Those humanitarian instruments have transcended the purely inter-state level in search of a higher degree of protection of the human person, so as to ensure the safeguard of common superior interests protected by them. Hence the universal character of the system of protection of international humanitarian law, which creates for States obligations *erga omnes*.

The evolution of environmental protection likewise bears witness of the emergence of obligations of an objective character without reciprocal advantages for States. The 1972 Stockholm Declaration on the Human Environment refers expressly to the "common good of mankind" (Principle 18). Rules on the protection of the environment are adopted, and obligations to that effect are undertaken, in the common superior interest of man-

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12 *Cf.* Ministerial Conference on Pollution and Climatic Change, *The Noordwijk Declaration on Climate Change*, Noordwijk, Nov. 1989, p.4, and *cf.* pp. 1-13 (mimeographed, restricted circulation).

kind. This has been expressly acknowledged in some treaties in the field of the environment (*e.g.*, preambles of the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof; the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources; the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft; the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage); it is further implicit in references to "human health" in some environmental law treaties (*e.g.*, the 1985 Vienna Convention for the Protection of the Ozone Layer, preamble and Article 2; the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, preamble; Article 1 of the three marine pollution Conventions above quoted).

The evolution, from internationalization to globalization, of environmental protection, can also be detected in its spatial dimension. In the beginnings of international environmental regulation, attention was turned to environmental protection in zones under the competence of States of the territorial type. One thus spoke of control of *transboundary* or *transfrontier* pollution (a terminology reminiscent of that employed in the OECD), with an underlying emphasis on the relations between neighbouring countries or on contacts of conflicts between State sovereignties. Soon it became evident that, to face wider threats to the environment —as in, *e.g.*, marine pollution, and atmospheric pollution (acid rain, depletion of the ozone layer, global warming),— it was necessary to consider also principles applicable *"urbi et orbi"*, on a global scale, not only in zones where State interests were immediately affected (transboundary pollution), but also in other areas where State interests appeared not so visibly affected (*e.g.*, protection of the atmosphere and of the marine environment). In this common international law of the environment, principles of a global character are to apply on the territory of States irrespective of any transboundary or transfrontier effect, and are to govern zones which are not under any national territorial competence[13].

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13 A.Ch. Kiss, *Droit international de l'environnement*, Paris, Pédone, 1989, pp. 93, 67-68, 70-72 and 8; L.A. Teclaff, "The Impact of Environmental Concern on the Development of International Law", *International Environmental Law* (ed. L.A. Teclaff and A.E. Utton), N.Y., Praeger, 1974, p. 251; and *cf.* Ian Brownlie, "A Survey of International Customary Rules of Environmental Protection", in *ibid.*, p.5.

In this connection, the Brundtland Commission, reporting to the U.N. General Assembly in 1987, dedicated a whole chapter to the management, in the "common interest", of the so-called "global commons", *i.e.*, those zones falling outside or beyond national jurisdictions[14]. Likewise, the Centre for Studies and Research in International Law and Relations of the Hague Academy of International Law, dwelling upon the issue of transfrontier pollution and international law in its 1985 session, singled out the gradual evolution from a transboundary or "transterritorial" to a global perspective of the preservation of the environment (and action in favour of resources of the common heritage of mankind)[15].

That international law is no longer exclusively State-oriented can be seen from reiterated references to "mankind", not only in doctrinal writings[16], but also and significantly in various international instruments, possibly pointing towards an international law of mankind, pursuing preservation of the environment and sustainable development on behalf of present and future generations. Thus, the notion of cultural heritage of mankind can be found, *e.g.*, in the UNESCO Conventions for the Protection of Cultural Property in the Event of Armed Conflict (1954) and for the Protection of the World Cultural and Natural Heritage (1974). The legal principle of the common heritage of mankind has found expression in the realms of the law of the sea (1982 U.N. Convention on the Law of the Sea, Part XI, especially Articles 136-145 and 311(6); 1970 U.N. Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction) and of the law of outer space (1979 Treaty Governing the Activities of States on the Moon and Other Celestial Bodies, Article 11; and *cf.* 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies; Article I[17]. The

14 World Commission on Environment and Development, *Our Common Future*, Oxford, University Press, 1987, chapter 10 ("Managing the Commons"), pp. 261-289.

15 P.M. Dupuy, "Bilan de recherches de la section de langue francaise du Centre d'Etude et de Recherche de l'Académie", *La pollution transfrontière et le droit international* - 1985. La Haye, Sijthoff/Académie de Droit International, 1986, pp. 68-70, 65-66 and 81.

16 *Cf.*, e.g., C.W. Jenks, *The Common Law of Mankind*, London, Stevens, 1958, pp. 1-442; R.J. Dupuy, *La communauté internationale entre le mythe et l'histoire*, Paris, Economica/ UNESCO, 1986, pp. 11-182; among others.

17 N.J. Schrijver, "Permanent Sovereignty over Natural Resources versus the Common Heritage of Mankind: Complementary or Contradictory Principles of International Economic Law?", *International Law and Development* (ed. P. De Waart, P. Peters and E. Denters), Dordrecht, Nijhoff/Kluwer, 1988, pp. 95-96, 98 and 101.

reconsideration of the basic postulates of international law bearing in mind the superior common interest of mankind has been the object of attention of general works on the subject at doctrinal level (*e.g.*, Jenks, Dupuy)[18].

Despite semantic variations in international instruments on environmental protection when referring to mankind, a common denominator underlying them all appears to be the common interest of mankind. There seems to be occurring lately an evolution from the notion of common heritage of mankind (as emerged in the contexts of the law of the sea and space law) to that of common concern of mankind. The latter has been the object of consideration by the UNEP Group of Legal Experts, which convened in Malta on 13-15 December 1990, in order to examine the implications of the concept of "common concern of mankind" on global environmental issues. In fact, it is not at all casual that the U.N. General Assembly resolution 43/53, of December 6, 1988, introduced the recognition that climate change was a "common concern" of mankind, since, in the wording of its first operative paragraph, climate was "an essential condition which sustains life on earth".

Such essential or fundamental condition is inextricably linked to the new idea of "commonness". The newly-proposed notion is inspired in considerations of international *ordre public*. It appears as a derivative of the earlier "common heritage" approach, meant to shift emphasis from the sharing of benefits from exploitation of environmental wealths to fair or equitable sharing of burdens in environmental protection, and the needed concerted actions to that effect with a social and a temporal dimensions[19]. It could hardly be doubted, as UNEP itself has acknowledged, that environmental protection is "decisively linked" to the "human rights issue"[20], to the very fulfilment of the fundamental right to life in its wide dimension (right to live — *cf.* section III, *infra*).

Resort to the very notion of mankind, human kind, immediately brings into the fore, or places the whole discussion within, the human rights framework, —and this should be properly emphasized, it should not

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18 *Cf.* references *in* n. (16), *supra*.

19 On this last point, *cf.* UNEP/Executive Director and Secretariat, *Note to the Group of Legal Experts to Examine the Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues*, Malta Meeting, 13-15 December 1990, document UNEP/ELIU/WG. 1/1/2, PP. 1-2, §4, AND CF. PP. 4-5, §§ 8-9 (mimeographed, internal circulation).

20 *Ibid.*, p. 14 § 22.

be left implicit or neglected as allegedly redundant. Just as law, or the rule of law itself, does not operate in a vacuum, mankind, the human kind, is neither a social nor a legal abstraction: it is composed of human collectivities, of all human beings of flesh and bone, living in human societies.

If it is conceded that, if and once the concept of common concern of mankind becomes widely and unequivocally accepted, rights and obligations are bound to flow from it, then one is led to consider as its manifestation or even materialization the right to a healthy environment: within the ambit of the *droit de l'humanité*, the common concern of the human kind finds expression in the exercise of the recognized right to a healthy environment, in all its dimensions (individual, groupal, social or collective, and inter-generational— *cf.* section V- *infra*), precisely as mankind is not a social or legal abstraction and is formed by a multitude of human beings living in societies and extended in time. The human rights framework is ineluctably present in the consideration of the regime of protection of the human environment in all its aspects; we are here ultimately confronted with the crucial question of **survival** of the human kind, with the assertion —in face of the threats to the human environment— of the fundamental human right to live.

Just as a couple of decades ago there were questions which were "withdrawn" from the domestic jurisdiction of States to become matters of **international** concern (essentially, in cases pertaining to human rights protection and self-determination of peoples)[21] , there are nowadays global issues such as climate change which are being erected as **common** concern of mankind. Here, again, the contribution of human rights protection in piercing the so-called reserved domain of States can be perceived in historical perspective. The globalization of the regimes of human rights protection and environmental protection heralds the end of reciprocity and the emergence of *erga omnes* obligations.

The prohibition of the invocation of reciprocity as an excuse for noncompliance of *erga omnes* obligations is confirmed in unequivocal terms by the 1969 Vienna Convention on the Law of Treaties: in providing for the conditions in which a breach of a treaty may bring about its suspension or termination, the Vienna Convention (Article 60 (5)) expressly excepts "provisions relating to the protection of the human person contained in treaties

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21 A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 International and Comparative Law Quarterly (1976) pp. 723, 731, 737, 742, 761-762 and 765.

of a humanitarian character". This provision pierces a domain of international law —the law of treaties— traditionally so markedly infiltrated by the voluntarism of States, and constitutes a clause of safeguard or defense of the human beings. Thus, the contemporary law of treaties itself, as attested by Article 60 (5) of the Vienna Convention, discards the principle of reciprocity in the implementation of treaties of a humanitarian character. The obligations enshrined therein generate effects *erga omnes*. The overcoming of reciprocity in human rights protection and in environmental protection has taken place in the constant search for an expansion of the ambit of protection (for the safeguard of an increasingly wider circle of beneficiaires, human beings and ultimately mankind), for a higher degree of the protection due, and for the gradual strengthening of the mechanisms of supervision, in the defense of common superior interests. Yet another affinity, in the recent developments of human rights protection and environmental protection, which has not been sufficiently examined so far and to which we shall now turn, lies in the incidence of the temporal dimension in both domains of protection.

III. FURTHER AFFINITIES IN THE EVOLUTIONS OF HUMAN RIGHTS PROTECTION AND OF ENVIRONMENTAL PROTECTION

1. *Protection of the Human Person and Environmental Protection: Mutual Concerns.*

Just as concern for human rights protection can be found in the realm of international environmental law (Preamble and Principle 1 of the 1972 Stockholm Declaration on the Human Environment, Preamble and Principles 6 and 23 of the 1982 World Charter for Nature, Principles 1 and 20 proposed by the World Commission in its 1987 report[22], concern for environmental protection can also be found in the express recognition of the right to a healthy environment in two recent human rights instruments, namely: the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Article 11), and the 1981 African Charter on Human and Peoples' Rights (Article 24); in the former, it is recognized as a right of "everyone" (§ 1), to be protected by

22 *Cf.* A.A. Cançado Trindade, "The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change", in *International Law and Global Environmental Change: New Dimensions* (ed. E. Brown Weiss), United Nations University (UNU) Project, 1991-1992, 93pp. (in print).

the States Parties (§ 2), whereas in the latter it is acknowledged as a peoples right[23].

Concern for the protection of the environment can nowadays be likewise found in the realm of international humanitarian law, namely: Articles 35(3) and 55 of the 1977 Additional Protocol I to the 1949 Geneva Conventions (prohibition of methods or means of warfare severely damaging the environment), added to the 1977 U.N. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, and to the 1982 World Charter for Nature (paragraphs 5 and 20), among other provisions[24] . Likewise, recent developments in international refugee law are worthy of attention, such as the possible assimilation of victims of environmental disasters to protected *[displaced]* persons under refugee law (*e.g.*, the 1984 Cartagena Declaration on Refugees, recommending for use in Central America an expanded concept of refugee)[25].

Furthermore, the protection of vulnerable groups (*e.g.*, indigenous populations, ethnic and religious and linguistic minorities, mentally and physically handicapped persons) appears today at the confluence of international human rights law and international environmental law: as we have indicated in another study, concern for the protection of vulnerable groups can nowadays be found in international instruments and initiatives pertaining to both human rights protection and environmental protection, where the issue has been approached on the basis of both human and environmental considerations[26].

2. *Incidence of the Temporal Dimension in Environmental Protection and in Human Rights Protection*

The temporal dimension, so noticeable in the field of environmental protection, is likewise present in other domains of international law (*e.g.*, law of treaties, peaceful settlement of international disputes, international economic law, law of the sea, law of outer space, State succession, etc.). The notion of time, the element of foreseeability, inhere in legal science as such. The predominantly **preventive** character of the normative corpus on envi-

23 *Cf. ibid.* (in print).

24 *Cf. ibid.*

25 *Cf. ibid.*

26 *Cf.* references and sources in A.A. Cançado Trindade, "The Contribution...", *op. cit. supra* n. (22), 93pp. (in print).

ronmental protection, stressed time and time again[27] , and reiterated in clear and emphatic terms in the reference to the temporal dimension in the 1990 Ministerial Declaration of the II World Climate Conference (paragraph 7), is also present in the field of human rights protection.

Its incidence can be detected at distinct stages or levels, starting with the *travaux préparatoires*, the underlying conceptions and the adopted texts of human rights instruments (*e.g.*, the three recent Conventions —the Inter-American, the U.N. and the European— against Torture, of an esssentially preventive character; the 1948 Convention against Genocide, the 1973 Convention against *Apartheid*, besides other international instruments turned to the prevention of discrimination of distinct kinds)[28]. The temporal dimension is further present in international refugee law (*e.g.*, the elements for the very definition of "refugee" under the 1951 Convention and the 1967 Protocol on the Status of Refugees, namely, the well-founded fear of persecution, the threats or risks of persecutions, —besides the recent U.N. "early warning" efforts of prevention or forecasting of refugee flows)[29]. Secondly, the incidence of the temporal dimension can also be detected in the "evolutionary" **interpretation** of human rights treaties, which has ensured that they remain living instruments: there has been occurring a dynamic process of evolution of international human rights law through interpretation[30].

And thirdly, also in respect of the **application** of human rights treaties, the practice of international supervisory organs (*e.g.*, at global level, that of the Human Rights Committee under the Covenant on Civil and Political Rights and its Optional Protocol), affords illustrations of the temporal dimension in human rights protection. Thus, the *jurisprudence constante* of the European Commission and Court of Human Rights under the European Convention on Human Rights has in recent years upheld, in numerous cases, the notion of **potential** or **prospective** victims, *i.e.*, victims claiming a valid potential personal interest under the Convention, thus enhancing the condition of individual applicants[31]. Likewise, the Inter-American Court of Human Rights, in its judgments of 1988 in two of the three

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27 *Cf. ibid.* (in print).

28 *Ibid.*

29 *Ibid.*

30 A.A. Cançado Trindade, "Co-existence and Co-ordination...", *op. cit. supra* n. (2), pp. 91-112.

31 *Ibid.*, Pp. 243-299.

Honduran cases where it found a breach of the American Convention (*Velasquez Rodriguez* and *Godinez Cruz* cases), stressed the States' duty of due diligence to prevent violations of protected human rights[32].

In fact, the incidence of the temporal dimension can be detected not only in the interpretation and application of norms pertaining to guaranteed rights but also in the conditions of their exercise (as in, *e.g.*, public emergencies); it can further be detected in the protection not only of civil and political rights, but also —and perhaps even more pronounced— of economic, social and cultural rights (*e.g.*, right to education, right to cultural integrity), or else of the right to development and the right to a healthy environment, —extending in time[33]. Manifestations of the temporal dimension become quite concrete in particular precisely in the field of human rights protection, where they do not appear as soft law. Here, more clearly than in other chapters or fields of international law, the evolving jurisprudence (e.g., on the notion of potential victims, on the duty of prevention of violations of human rights) may serve of inspiration also for environmental protection.

IV. THE RIGHTS TO LIFE AND TO HEALTH AT THE BASIS OF THE RATIO LEGIS OF INTERNATIONAL HUMAN RIGHTS LAW AND OF ENVIRONMENTAL LAW

1. *The Fundamental Right to Life in Its Wide Dimension.*

The right to life is nowadays universally aknowledged as a basic or fundamental human right. It is basic or fundamental because "the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights"[34]. As indicated by the Inter-American Court of Human Rights in its Advisory Opinion on *Restrictions to the Death Penalty* (1983), the human right to life encompasses a "substantive principle" whereby every human being has an inalienable right to have his life respected, and a "procedural principle" whereby no human being shall be arbitrarily deprived of his life[35].

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32 *Cf.* A.A. Cancado Trindade, "The Contribution...", *op. cit. supra* n. (22) (in print).

33 *Ibid.* (in print).

34 F. Przetacznik, "The Right to Life as a Basic Human Right", 9 *Revue des droits de l'homme/Human Rights Journal* (1976) pp. 589 and 603.

35 I.A. Court H.R., Advisory Opinion OC-3/83, of 08 September 1983, Series A, nº3, p.59, 53.

The Human Rights Committee, operating under the U.N. Covenant on Civil and Political Rights (and Optional Protocol), qualifying the human right to life as the "supreme right of the human being", has warned that fundamental human right *ne peut pas être entendu de façon restrictive* and its protection *exige que les Etats adoptent des mesures positives*[36]. The Inter-American Commission on Human Rights, likewise, has drawn attention to the binding character of the right to life[37]. In its recent resolution nº 3/87, on case nº 9647, concerning the United States, the Inter-American Commission, after identifying a norm of *jus cogens* which "prohibits the State execution of children", warned against "the arbitrary deprivation of life" on the basis of a patchwork scheme of legislation which subjects the severity of the punishment (of the offender) to the "fortuitous element of where the crime took place"[38].

Under international human rights instruments, the assertion of the inherent right to life of every human being is accompanied by an assertion of the legal protection of that basic human right and of the **negative** obligation not to deprive arbitrarily of one's life (*e.g.*, U.N. Covenant on Civil and Political Rights, Article 6(1); European Convention on Human Rights, Article 2; American Convention on Human Rights, Article 4(1); African Charter on Human and Peoples' Rights, Article 4)[39]. But this negative obligation is accompanied by the **positive** obligation to take all appropriate measures to protect and preserve human life. This has been acknowledged by the European Commission of Human Rights, whose case-law has evolved to the point of holding (Association X versus United Kingdom case, 1978) that Article 2 of the European Convention on Human Rights imposed on States also a wider and positive obligation *de prendre des mesures adéquates pour protéger la vie*[40].

Taken in its wide and proper dimension, the fundamental right to life comprises the right of every human being not to be deprived of his life

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36 *Cit.* in J.G.C. Van Aggelen, *Le rôle des organisations internationales dans la protection du droit à la vie*, Bruxelles Story-Scientia, 1986, p.23.

37 *Cit.* in *ibid.*, p. 38.

38 OAS, *Annual Report of the Inter-American Commission on Human Rights - 1986-1987*, pp. 170 and 172-173.

39 Th. Desch, "The Concept and Dimensions of the Right to Life (As Defined in International Standards and in International and Comparative Jurisprudence)", 36 *Osterreichische Zeitschrift für Offentliches Recht und Völkerrecht* (1985) pp. 86 and 99.

40 *Cit.* in J.G.C. Van Aggelen, *op. cit. supra* n. (36), p.32.

(*right to life*) and the right of every human being to have the appropriate means of subsistence and a decent standard of life (preservation of life, *right of living*). As well pointed out by Przetacznik, "the former belongs to the area of civil and political rights, the latter to that of economic, social and cultural rights"[41]. The fundamental right to life, thus properly understood, affords an eloquent illustration of the indivisibility and inter-relatedness of all human rights[42].

In fact, some members of the Human Rights Committee have expressed the view that Article 6 of the U.N. Covenant on Civil and Political Rights requires the State

> "to take **positive measures** to ensure the right to life, including steps to reduce the infant mortality rate, prevent industrial accidents, and protect the environment (...)"[43].

Taking the essential requirements of the right of living (*supra*) as a corollary of the right to life, Desch argued that inequitable distribution of food or medicaments by public authorities, or even the toleration of malnutrition or failure to reduce infant mortality would constitute violations of Article 6 of the Covenant if there results an arbitrary deprivation of life[44].

During the drafting of the 1948 Universal Declaration of Human Rights, attempts were made to make its Article 3, which proclaims the right to life, more precise[45]. A number of issues was the object of discussion in the drafting of corresponding provisions on the right to life of human rights treaties[46] , but it was the views and decisions more recently rendered by

41 F. Przetacznik, *op. cit. supra* n. (34), p. 603, e *cf.* p. 586.

42 On the right to life bearing witness of the indivisibility of all human rights, *cf.* W.P. Gormley, "The Right to a Safe and Decent Environment", 20 *Indian Journal of International Law* (1988) pp. 23-24.

43 *Cit.* in Th. Desch, *op. cit. supra* n.(39), p.101.

44 *Ibid.*, p.101.

45 *Cf.* H. Kanger, *Human Rights in the U.N. Declaration*, Uppsala/ Stockholm, Almqvist & Wiksell, 1984, pp. 81-82.

46 On the legislative history of Article 6 of the U.N. Covenant on Civil and Political Rights, *cf.* [B.G. Ramcharan] "The Drafting History of Article 6 of the International Covenant on Civil and Political Rights", in *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/ Kluwer, 1985, pp. 42-56; on the legislative history of Article 2 of the European Convention on Human Rights, *cf.* B.G. Ramcharan, "The Drafting History of Article 2 of the European Convention on Human Rights", in *ibid.*, pp. 57-61; and on the legislative history of Article 4 (and antecedents) of the American Convention on Human Rights, *cf.* J. Colon-Collazo, "A Legislative History of the Right to Life in the Inter-American Legal System", in *ibid.*, pp. 33-41.

international supervisory organs that have gradually given more precision to the right to life as enshrined in the respective human rights treaties (*cf. supra*). Even those who insist on regarding the right to life strictly as a civil right[47] cannot fail to admit that, ultimately, without an adequate standard of living (as recognized, *e.g.*, in Articles 11-12 of the U.N. Covenant on Economic, Social and Cultural Rights, following Article 25(1) of the 1948 Universal Declaration) the right to life could not possibly be realized in its full sense[48] (*e.g.*, in its close relationships with the right to health and medical care, the right to food, and the right to housing[49]. Thus, both the U.N. General Assembly (resolution 37/189A, of 1982) and the U.N. Commission on Human Rights (resolutions 1982/7, of 1982, and 1983/43, *cf.* 1983) have unequivocally taken the firm view that **all individuals and all peoples** have an **inherent** right to life, and that the safeguarding of this **foremost right** is an essential condition for the enjoyment of the entire range of civil and political, as well as economic, social and cultural rights[50].

Two points are deserving of particular emphasis here. First, it has not passed unnoticed that the provision of the U.N. Covenant on Civil and Political Rights on the fundamental and inherent right to life (Article 6(1)) is "the only Article of the Covenant where the inherency of a right is expressly referred to"[51]. Secondly, the United Nations has formed its conviction that not only all individuals but also all **peoples** have an inherent right to life (*supra*). This brings to the fore the safeguard of the right to life of all persons as well as of human collectivities, with special attention to the requirements of survival (as component of the right to life) of vulnerable groups (*e.g.*, the dispossessed and deprived, disabled or handicapped persons, children and the elderly, ethnic minorities, indigenous populations, migrant workers - *cf.* section III, *supra*)[52].

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47 *Cf.*, to this effect, the analysis by Y. Dinstein, "The Right to Life, Physical Integrity, and Liberty", *The International Bill of Rights* (ed. L. Henkin, N.Y., Columbia University Press, 1981, pp. 114-137.

48 Th. Van Boven, *People Matter - Views on International Human Rights Policy*, Amsterdam, Meulenhoff, 1982, p.77.

49 On this latter, *cf.* S. Leckie, "The U.N. Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach", 11 *Human Rights Quarterly* (1989) pp. 522-560.

50 *Cit.* in B.G. Ramcharan, "The Right to Life", 30 *Netherlands International Law Review* (1983) p. 301.

51 *Ibid.*, p. 316.

52 *Cf. ibid.*, p. 305, and *cf.* p. 306; and Th. Van Boven, *op. cit. supra* n. (48), pp. 179 and 181-183.

From this perspective, the right to a healthy environment and the right to peace appear as extensions or corrollaries of the right to life[53]. The fundamental character of the right to life renders inadequate narrow approaches to it in our days; under the right to life, in its modern and proper sense, not only is protection against any arbitrary deprivation of life upheld, but furthermore States are under the duty "to pursue policies which are designed to ensure access to the means of survival"[54] for all individuals and all peoples. To this effect, States are under the obligation to avoid serious environmental hazards or risks to life, and to set into motion "monitoring and early warning systems" to detect such serious environmental hazards or risks and "urgent action systems" to deal with such threats[55].

In the same line, in the I European Conference on the Environment and Human Rights (Strasbourg, 1979), the point was made that mankind needed to protect itself against its own threats to the environment, in particular when those threats had negative repercussions on the conditions of existence —life itself, physical and mental health, the well-being of present and future generations[56]. In a way, it was the right to life itself, in its wide dimension, which entailed the needed recognition of the right to a healthy environment; this latter appears as *le droit à des* ***conditions*** *de* ***vie*** *qui assurent la santé physique, morale, mentale et sociale, la vie elle-même, ainsi que le bien-être des générations présentes et futures*[57]. In other words, the right to a healthy environment safeguards human life itself under two aspects, namely, the physical existence and health of human beings, and the dignity of that existence, the quality of life which renders it worth living[58]. The right to a healthy environment thus encompasses and enlarges the right to health and the right to an adequate or sufficient standard of living, and has furthermore a wide **temporal** dimension: as, *en matière d'environnement,*

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53 B.G. Ramcharan, *op. cit. supra* n. (5), pp. 303 and 308-310.

54 *Ibid.*, p. 302.

55 *Ibid.*, pp. 304 and 329. Views reproduced in B.G. Ramcharan, "The Concept and Dimensions of the Right to Life", *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/Kluwer, 1985, pp. 1-32.

56 P. Kromarek, "Le droit à un *environnement* équilibré et sain, considéré comme un droit de l'homme: sa mise-en-oeuvre nationale, européenne et internationale", *I Conférence européenne sur l'environnement et les droits de l'homme,* Strasbourg, Institute for European Environmental Policy, 1979, pp. 2-3, 31 and 34 (mimeographed, restricted circulation).

57 *Ibid.*, pp. 13 and 5 (emphasis added).

58 *Ibid.*, p.12.

certaines atteintes à l'environnement ne produisent d'effets sur la vie et la santé de l'homme qu'á long terme, (...) la reconnaissance d'un droit à l'environnement (...) devrait donc admettre une notion large des atteintes[59].

Thus, the wide dimension of the right to life and the right to a healthy environment entails the consequent wider characterization of attempts or threats against those rights, which in turn calls for a higher degree of their protection. An example of those threats is provided by, *e.g.*, the effects of global warming on human health: skin cancer, retinal eye damage, cataracts and eventual blindness, neurological damage, lowered resistance to infections, alteration of the immunological system (through damaged immune cells); in sum, depletion of the ozone layer may result in substantial injury to human health as well as the environment (harm to terrestrial plants, destruction of the zooplankton, a key link in the food chain)[60], thus disclosing the needed convergence of human health protection and environmental protection.

In the realm of international environmental law, the 1989 Hague Declaration on the Atmosphere, for example, states that "the right **to live** is the right from which all other rights stem" (§ 1), and adds that "the right **to live** in dignity in a viable global environment" entails the duty of the "community of nations" *vis-à-vis* "present and future generations" to do "all that can be done to preserve the quality of the atmosphere" (§ 5). The use of the expression the right **to live** (rather than right **to life**) seems well in keeping with the understanding that the right to life entails negative as well as positive obligations as to preservation of human life (*cf. supra*). The *Institut de Droit International*, while drafting its Resolution on Transboundary Air Pollution (Session of Cairo, 1987), was attentive to include therein provisions referring to the protectiife and human health[61].

Together with the right to a healthy environment, the right to peace appears also as a necessary prolongation or corrollary of the right to life. In fact, both the Inter-American Commission on Human Rights[62] and the U.N.

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59 *Ibid.*, pp. 43 and 21.

60 J.T.B. Tripp, "The UNEP Montreal Protocol: Industrialized and Developing Countries Sharing the Responsibility for Protecting the Stratospheric Ozone Layer", 20 *New York University Journal of International Law and Politics* (1988) p. 734; Ch. B. Davidson, "The Montreal Protocol: The First Step Toward Protecting the Global Ozone Layer", in *ibid.*, pp. 807-809.

61 *Cf.* preamble and Articles 10(2) and 11; text in: 62 *Annuaire de l'Institut de Droit International* (1987) II, pp. 204-207-208 and 211.

62 *Cf.* Comisión Interamericana de Derechos Humanos, *Diez Años de Actividades - 1971-1981*, Washington, Secretaría General de la OEA, 1982, pp. 338-339, 321 and 329-330.

General Assembly[63] have been attentive to address the requirements of **survival** as component of the right to life. In this connection, in its general comment 14 (23), of 1985, in Article 6 (on the right to life) of the U.N. Covenant on Civil and Political Rights, the Human Rights Committee, after recalling its earlier general comment 6(16), of 1982, on Article 6(1) of the Covenant —to the effect that the right to life, as enunciated therein, is "the supreme right from which no derogation is permitted even in time of public emergency",— went on to relate the current proliferation of weapons of mass destruction to "the supreme duty of States to prevent wars". The Committee associated itself with the growing concern, expressed during successive sessions of the U.N. General Assembly by representatives from all geographical regions, at what represented one of the "greatest threats to the right to life which confronts mankind today". In the words of the Committee, "the very existence and gravity of this threat generate a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights" in accordance with the U.N. Charter and the U.N. Covenants on Human Rights[64]. The Committee, accordingly, "in the interest of mankind", called upon "all States, whether Parties , to take urgent steps, unilaterally and by agreement, to rid the world of this menace"[65].

The maintenance of peace is an imperative for the preservation of human life; the Final Act of the 1968 Teheran Conference on Human Rights contains several references to the relationship of observance of human rights and maintenance of peace[66]. In this connection, reference can further be made to the preambles of the two 1966 U.N. Covenants on Human Rights. More recently the "right to peace" has formed the object of a number of U.N. resolutions, which relate it to disarmament and détente, thus disclosing the temporal dimension of the underlying duty of **prevention** of conflicts[67] (*e.g., inter alia,* G.A. resolutions 33/73, of 1978, and 34/88 of 1979). The States' duty to co-exist in peace and to achieve disarmament is acknowledged in the 1974 Charter on Economic Rights and Duties of States (Articles 26 and 15, respectively).

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63 B.G. Ramcharan, *op. cit. supra* n. (50), p.303.

64 U.N. *Report of the Human Rights Committee, G.A.O.R.* 40th Session (1985), suppl. n°40-(A/40/40), p.162.

65 *Ibid.*, p.162.

66 *Cf.* U.N., Final Act of the International Conference on Human Rights (1968), U.N. doc. A/CONF. 32/41, N.Y., U.N., 1968, pp. 4, 6, 9, 14 and 36.

67 *Cf.* J.M. Becet and D. Colard, *Les droits de l'homme*, Paris, Economica 1982, pp. 128-131.

The right to peace entails as a corollary the "right to disarmament"[68]; attention has in this regard been drawn to the fact that limitations or violations of human rights are often associated with the outbreak of conflicts, the process of militarization and the expenditure on arms[69], especially nuclear weapons and other weapons of mass-destruction[70], which have led and may unfortunately still lead to arbitrary deprivation of human life. The conception of "sustainable development", as propounded by the Brundtland Commission, points to the ineluctable relationship between the rights to a healthy environment, to peace and to development[71].

The relationship between the right to life and the right to development as a human right becomes clearer as one moves from the traditional, narrow approach to the right to life (as strictly a civil right) into the wider and modern approach to it, as encompassing also the minimun conditions for an adequate and dignified standard of living (*cf. supra*). Then the interrelatedness of the right to life and the right to development as a human rights becomes self-evident, as this latter purports to demand all possible endeavours to overcome obstacles (of destitution and underdevelopment) preventing the fulfilment of basic human needs[72]. Not surprisingly, the U.N. Working Group of Governmental Experts on the Right to Development recommended in 1984 *inter alia* that particular attention be paid to the basic needs and aspirations of vulnerable or disadvantaged and discriminated groups[73].

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68 To this effect, *cf. ibid.*, pp. 129-131; Ph. Alston, *op. cit. infra* n. (69), pp. 324-325 and 329-330.

69 Ph. Alston, "Peace, Disarmament and Human Rights", *Armement, Développement, Droits de l'homme, Désarmement* (Colloque à l'UNESCO, 1982) (ed. G. Fischer), Paris/Bruxelles, Bruylant, 1984, pp. 325-330.

70 *Cf.* discussion in, e.g., A.A. Tikhonov, "The Inter-relationship between the Right to Life and the Right to Peace; Nuclear Weapons and Other Weapons of Mass-Destruction and the Right to Life", *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/Kluwer, 1985, pp. 97-113.

71 *Cf.* World Commission on Environment and Development, *Our Common Future*, Oxford, University Press, 1987, pp. 19 and 290-3,and *cf.* in particular pp. 294-300 on conflicts as a "cause of unsustainable development".

72 P.J.I.M. De Waart, "The Inter-Relationship between the Right to Life and the Right to Development", *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/Kluwer, 1985, pp. 89 and 91-92.

73 *Cit.* in *ibid.*, p.91.

In sum, the basic right to life, encompassing the right of living, entails negative as well as positive obligations in favour of preservation of human life. Its enjoyment is a precondition of the enjoyment of other human rights. It belongs at a time to the realm of civil and political right and to that of economic, social and cultural rights, thus illustrating the indivisibility of all human rights. It establishes a "link" between the domains of international human rights law and environmental law. It inheres in all individuals and all peoples, with special attention to the requirements of survival. It has as existensions or corollaries the right to a healthy environment and the right to peace (and disarmament). It is closely related, in its wide dimension, to the right to development as a human right (right to live with fulfilment of basic human needs). And it lies at the basis of the ultimate ratio *legis* of the domains of international human rights law and environmental law, turned to the protection and survival of the human person and mankind.

2. *The Right to Health as the Starting-Point Towards the Right to a Healthy Environment*

Like the right to life (right of living, *supra*), the right to health entails **negative** as well as **positive** obligations. In fact, the right to health is inextricably interwoven with the right to life itself, and exercise of freedom. The right to life implies the **negative** obligation not to practice any act which can endanger one's health, thus linking this basic right to the right to physical and mental integrity and to the prohibition of torture and of cruel, inhuman or degrading treatment (as recognized and provided for in the U.N. Covenant on Civil and Political Rights, Article 7; the European Convention on Human Rights, Article 3; the American Convention on Human Rigts, Articles 4 and 5). But this duty of abstention (so crucial, *e.g.*, in the treatment of detainees and prisoners) is accopanied by the **positive** obligation to take all appropriate measures to protect and preserve human health (including measures of prevention of diseases).

Such positive obligation (as recognized and provided for in, *e.g.*, the U.N. Covenant on Economic, Social and Cultural Rights, Article 12, and the European Social Charter, Article 11, besides WHO and ILO resolutions on specific aspects), linking the right to life to the right to an adequate standard of life[74], discloses the fact that the right to health, in its proper and

74 As proclaimed by the 1948 Universal Declaration of Human Rights, Article 25(1). On the "negative" and "positive" aspects of the right to health, *cf.* M. Bothe, "Les concepts fondamentaux du droit à la santé: le point de vue juridique", *Le droit à la santé en tanomme - Colloque 1978* (Académie de Droit International de la Haye), The Hague, Sijthoff, 1979, pp. 14-29; Scalabrino-Spadea, "Le droit à la santé. Inventaire de normes et principes de droit international", in *Le médecin face aux droits de l'homme*, Padova, Cedam, 1990, pp. 97-98.

wide dimension, partakes the nature of at a time an individual and social right. Belonging, like the right to life, to the realm of basic or fundamental rights, the right to health is an individual right in that it requires the protection of the physical and mental integrity of the individual and his dignity; and it is also a social right in that it imposes on the State and society the collective responsibility for the protection of the health of the citizenry and the prevention and treatment of diseases[75]. The right to health, thus properly understood, affords, like the right to life, a vivid illustration of the indivisibility and inter-relatedness of all human rights.

3. *The Right to a Healthy Environment as an Extension of the Right to Health*

The right to life in its "positive" aspect (*supra*) found expression, at global level, in Article 12 of the U.N. Covenant on Economic, Social and Cultural Rights; that provision, in laying down the guidelines for the implementation of the right to health, singled out, *inter alia* ("b"), "the improvement of all aspects of environmental and industrial hygiene". The way seemed thereby paved for the future recognition of the right to a healthy environment (*infra*).

This point was object of attention at the 1978 Colloquy of the Hague Academy of International Law on "The Right to Health as a Human Right", where the issue of the human right to environmental salubrity was raised. On the occasion, after warning that the degradation of the environment constituted nowadays a *menace collective à la santé des hommes*[76], P.M. Dupuy pertinently advocated the needed assertion or proclamation of the human right to environmental salubrity as the "supreme guarantee of the right to health"[77]. Pondering that the environment ought to be protected *en fonction de l'ensemble des intérêts de la collectivité*, he justified:

> —*"Il nous paraît que la chance fournie par l'affirmation d'un droit à la salubrité du milieu est justement de donner l'occasion à l' "environnement" de cesser d'être d'abord perçu en termes économiques, ainsi qu'un bien susceptible d'exploitation, afin d'apparaître au moins autant comme un patrimoine de l'individu, necessaire à l'épanouissement de son droit fondamental a la vie, et donc à la santé"*[78].

75 R. Roemer, "El Derecho a la Atención de la Salud", in OMS, *El Derecho a la Salud en las Américas* (ed. H.L. Fuenzalida-Puelma and S.S. Connor), Washington, OPAS, publ. nº509, p.16.

76 P.M. Dupuy, *op. cit.* infra n. (78), p. 406 and *cf.* p. 351.

77 *Ibid.*, p. 412, and *cf.* p. 409.

78 P.M. Dupuy, "Le droit à la santé et la protection de l'environnement", *Le droit à la santé... Colloque...*, cit. *supra* n. (74), p.410.

The protection of the whole of the biosphere as such entails "indirectly but necessarily" the protection of human beings, in so far as the object of environmental law and hence of the right to a healthy environment is "protèger les humains en leur assurant un milieu de vie adéquate"[79] . The right to a healthy environment, in the perspicatious observation by Kiss, "completes" other recognized human rights also from another point of view, namely,

> *"il contribue à établir une égalité entre citoyens ou, du moins, à atténuer les inégalités dans leurs conditions matérielles. On sait que les inégalités entre humains de conditions sociales différentes sont accentuées par la dégradation de l'environnement: les moyens matériels dont disposent les mieux nantis leur permettent d'échapper à l'air pollué, aux milieux dégradés et de se créer un cadre de vie sain et équilibré, alors que les plus démunis n'ont guère de telles possibilités et doivent accepter de vivre dans des agglomérations devenues inhumaines, voire des bidonvilles, et de supporter les pollutions.*
>
> *L'exigence d'un environnement sain et équlibré devient ainsi en même temps un moyen de mettre en oeuvre d'autres droits reconnus à la personne humaine.*
>
> *Mais, par ses objectifs miemes, le droit à l'environnement apporte aussi une dimension supplémentaire aux droits de l'homme dans leur ensemblc"*[80].

The interrelatedness between environmental protection and the safeguard of the right to health is clearly evidenced in the implementation of Article 11 (on the right to protection of health) of the 1961 European Social Charter. The Committee of Independent Experts, operating under the Charter, has in recent years been attentive, in the consideration of national reports, to measures taken at domestic level, pursuant to Article 11 the Charter, to prevent, limit or control pollution[81]. With regard to the removal of causes of ill-health (Article 11(1)), the Committee has concentrated on measures taken to prevent or reduce pollution of the atmosphere[82]. Thus, in the consideration of a French report, the Committee took note of "the inten-

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79 A.Ch. Kiss, "Le droit à la qualité de l'environnement: un droit de l'homme?", in *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N. Duplé), Vieux-Montréal (Quebec), Ed. Québec/Amérique, 1988, pp. 69-70.

80 *Ibid.*, p.71.

81 *Cf.* , e.g., Council of Europe/European Social Charter, *Committee of Independent Experts - Conclusions IX-2*, Strasbourg, C.E., 1986, p. 71 (Austrian and Cypriot reports); *Ibid.*, Conclusions XI-1, Strasbourg, C.E., 1989, p. 119 (Swedish and British reports).

82 E.g., German and Italian reports, in *ibid.*, Conclusions IX-2, cit. *supra* n. (81), pp. 71-72.

tion of the public authorities to achieve a 50% reduction in sulphur dioxide emissions into the atmosphere during the period 1980-90"[83]; and in the consideration of the latest Danish report, the Committee noted the measures taken to reduce air pollution, in particular that "emissions of nitrogen oxide into the atmosphere was to be reduced by 50% before 2005 and of sulphur dioxide by 40% before 1995"[84].

The collection *Case Law on the European Social Charter* contains other pertinent indications. The Committee of Independent Experts has manifested its wish to find in forthcoming national reports information, under Article 11 of the Charter, on "the measures taken to reduce the release of sulphur dioxide and other acid pollutants in the atmosphere"[85]. The Committee has called for amplified measures for control of environmental pollution[86]. The Committee has further expressed the opinion that States bound by Article 11 of the Charter should be considered as fulfilling their obligations in that respect if they provide evidence of the existence of a medical and health system comprising *inter alia* "general measures aimed in particular at the prevention of air and water pollution, protection from radio-active substances, noise abatement, the food control environmental hygiene, and the control of alcoholism and drugs"[87].

An attempt has in fact been made, in the European continent, to extend the protection of the rights to life and health so as to include well-being, under the realm of the European Convention of Human Rights itself: prior to the convening of the 1973 European Ministerial Conference on the Environment, a Draft Protocol to the European Convention on Human Rights to that effect was prepared by H. Stelger. The Draft Protocol, con-

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83 In *ibid.*, p. 71-72.

84 In *ibid.*, *Conclusions XI-1*, cit. *supra* n.(81), p.118.

85 Council of Europe/European Social Charter, *Case Law on the European Social Charter-Supplement*, Strasbourg, C.E., 1986, p.37.

86 Council of Europe/European Social Charter, *Case Law on the European Social Charter*, Strasbourg, C.E., 1982, p.105.

87 *Ibid.*, p.104 - On the protection of health vis-à-vis the environment under Article 11 of the European Social Charter, *cf.* further: Council of Europe doc. 6030, of 22.03.1989, p.9; C.E.; *Comité Gouvernemental de la Charte Sociale Européenne 10 rapport* (1989), p. 28 (control of atmospheric pollution); Conseil de l'Europe/Charte Sociale Européenne, *Comité d'Experts Indépendants-Conclusions X-2*, Strasbourg, C.E., 1988, pp. 111-112 (reduction of atmospheric pollution); Council of Europe/European Social Charter, *Committee of Independent Experts-Conclusion X-1*, Strasbourg, C.E., 1987, 108 (reduction of atmospheric pollution, air and water pollution control).

taining two articles, provides for the protection of life and health as encompassing well-being (Article 1(1)) and admits limitations on the right to a healthy environment (Article 1 (2)); it further provides for the protection of individuals against the acts of other private persons (Article 2 (1) and (2)). This point (*Drittwirkung*), though giving rise to much debate and controversy, has been touched upon by the European Commission of Human Rights, which, in its 1979 report in the *Young, James and Webster cases*, admitted that the European Convention contained provisions that *non seulement protègent l'individu contre l'Etat, mais aussi obligent l'Etat à protéger l'individu contre les agissements d'autrui*[88]. Although Steiger's proposed Draft Protocol, purporting to place under the machinery of implementation of the European Convention the provisions above referred to (Article 1 and 2), was not at the time accepted by member States, it remains the sole existing proposal on the matter (in so far as the European Convention system is concerned) and its underlying ideas deserve today further and deeper consideration[89] (*cf. infra*). Though the question remains an open one, there has however been express recognition of the right to a healthy environment in more recent human rights instruments, as we have already seen (*cf.* section III, *supra*).

V. THE QUESTION OF THE IMPLEMENTATION (*MISE EN OEUVRE*) OF THE RIGHT TO A HEALTHY ENVIRONMENT

1. *The Issue of Justiciability*

It can hardly be doubted that the appropriate formulation of a right may facilitate its implementation. But given that certain concepts escape any scientific definition, it becomes necessary to relate them to a given context for the sake of normative precision and effective implementation (*mise-*

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88 *Cit.* in J.P. Jacqué, "La protection du droit à l'environnement au niveau européen ou régional", *Environnement et droits de l'homme* (ed. P. Kromarek), Paris, UNESCO, 1987, pp. 74-75, and *cf.* pp. 72-73. And, on Steiger's proposed Draft Protocol, *cf.* W.P. Gormley, *Human Rights and Environment: The Need for International Co-operation*, Leyden, Sijthoff, 1976, pp. 90-95; P.M. Dupuy, *op. cit. supra* n. (78), pp. 408-413.

89 W.P. Gormley, *op. cit. supra* n. (88), pp. 112-113; J.P. Jacqué, *op. cit. supra* n. (88), pp. 73 and 75-76; P.M. Dupuy, op. cit *supra* n. (78), pp. 412-413. For the complete text of Steiger's 1973 proposed Draft Protocol, *cf.* Working Group for Environmental Law (Bonn - *rapporteur*, H. Steiger), "The Right to a Humane Environment/Das Recht auf eine menschenwürdige Umwelt", in *Beiträge zur Umweltgestaltung* (Heft A 13), Berlin, Erich Schmidt Verlag, 1973, pp. 27-54.

en-oeuvre); thus, *e.g.*, the term "environment" may be taken to cover from the immediate physical *milieu* surrounding the individual concerned to the whole of the biosphere, and it may thus be necessary to add qualifications to the term[90]. In the implementation of any right one can hardly make abstraction of the context in which it is invoked and applies: relating it to the context becomes necessary for its vindication in the *cas d'espèce*[91].

This applies not only to the right to a healthy environment, but also to any other "category" of rights. But such "new" rights as the right to a healthy environment and the right to development present admittedly a greater challenge when one comes to implementation: while many of the previously crystallized civil and political, and economic, social and cultural rights had at a much earlier stage found expression also in domestic law and had been formally recognized in national constitutions and other legislation, the above-mentioned "new" rights, on their turn, were still "maturing" in their process of transformation into law, were "conceived directly in international forums" (such as the United Nations system), and had "not had the benefit of careful prior scrutiny at the national level"[92]. Many rights, whether classified as civil and political, or else as economic, social and cultural rights, "can only be defined with specificity when located in a given context"[93].

While the element of *formal justiciability* is taken as an "indispensable attribute" of a right in positivist thinking[94], international human rights law has distinctly considered that "an international system for the 'supervision' of States' compliance with international human rights obligations is sufficient to satisfy the requirement of 'enforceability'"[95]. In short, international

90 A.Ch. Kiss, "La mise-en oeuvre du droit à l'environnement: problematique et moyens", *II Conférence européenne sur l'environnement et les droits de l'homme*, Salzburg, Institute for European Environmental Policy, 1980, p.4 (mimeographed, restricted circulation).

91 *Ibid.*, p.5.

92 Ph. Alston, "Conjuring up New Human Rights: A Proposal for Quality Control", 78 *American Journal of International Law* (1984) p.614.

93 For example, "it would not seem inherently more difficult for a particular society to define a 'right to primary education' (an economic right) than a 'right to take part in the conduct of public affairs' (a political right)". Ph. Alston, "Making Space for New Human Rights: The Case of the Right to Development", 1 *Harvard Human Rights Yearbook* (1988) p.35.

94 *Ibid.*, p.33.

95 *Ibid.*, p.38.

human rights law has "clearly adopted the notions of 'implementation' and 'supervision' as its touchstones, rather than those of justiciability or enforceability"[96]. International human rights law counts largely on means of implementation other than the purely judicial one[97]; besides recourse to such judicial organs as the European and the Inter-American Courts of Human Rights, there occurs most often resort to various other means —non-judicial means— of implementation of guaranteed human rights (*e.g.*, friendly settlement, conciliation, factfinding)[98].

Formal justiciability or enforceability is by no means a definitive criterion to ascertain the existence of a right under international human rights law. The fact that many recognized human rights have not yet achieved a level of elaboration so as to render them justiciable does not mean that those rights simply do not exist: enforceability is not to be confounded with the existence itself of a right[99]. Attention is to be focused on the *nature* of obligations; it is certain that, for example, obligations under the U.N. Covenant on Economic, Social and Cultural Rights were elaborated in such a way (*e.g.*, the basic provisions of Articles 2 and 11) that they "cannot easily be made justiciable (manageable by third-party judicial settlement). Nevertheless, the obligations exist and can in no way be neglected"[100].

One is to reckon, in sum, as far as the issue of justiciability is concerned, that there are rights which simply cannot be properly vindicated before a tribunal by their active subjects (*titulaires*). In the case specifically of the right to a healthy environment, however, if, as pertinently pointed out by Kiss, this latter is interpreted not as the —virtually impossible— right to an ideal environment but rather as the right to the conservation— *i.e.*, protection and improvement— of the environment, it can then be implemented like any other **individual** right. It is then taken as a "procedural" right, the right to a due process before a competent organ, and thus

96 *Ibid.*, p.35.

97 K. Vasak, "Pour les droits de l'homme de la troisième génération: les droits de solidarité", *Résumés des Cours de l'Institut International des Droits de l'Homme* (X Session d'Enseignement, 1979), Strasbourg, IIDH, 1979, p.6 (mimeographed).

98 For a recent study of the operation of international mechanisms of human rights protection, *cf.* A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 21-435.

99 A. Eide, "Realization of Social and Economic Rights and the Minimun Threshold Approach", 10 *Human Rights Law Journal* (1989) pp. 36 and 38.

100 *Ibid.*, p.41.

assimilated to any other right guaranteed to individuals and groups of individuals. This right entails, as corollaries, the right of the individual concerned **to be informed** of projects and decisions which could threaten the environment (the protection of which counting on preventive measures), and the right of the individual concerned **to participate** in the taking of decisions which may affect the environment (active sharing of responsibilities in the management of the interests of the whole collectivity)[101]. To such rights to information and to participation one can add the **right to available and effective domestic remedies**. And it should not in this connection be overlooked that some economic and social rights were made enforceable in domestic law once their component parts were "formulated in a sufficiently precise and detailed manner"[102].

Focussing on the **subjects** of the right to a healthy environment, we see first that it has an individual dimension, as it can be implemented, as just indicated, like other human rights. But the beneficiaries of the right to a healthy environment are not only individuals, but also groups, associations, human collectivities, and indeed, the whole of mankind. Hence its collective dimension as well. The right to a healthy environment, like the right to development, discloses an individual and a collective dimensions at a time. If the subject is an individual or a private group, the legal relationship is exhausted in the relation between the individual (or group of

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101 A. Ch. Kiss, "Le droit à la qualité de l'environnement: un droit de l'homme?", *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N.Duplé), Vieux-Montreal/Quebec, Ed. Québec/Amérique, 1988, pp. 69-87. As the environment is a common good ("le bien de tous"), "l'ensenble du corps social aussi bien que les groupes ou que les individus qui le composent sont appelés à participer à sa gestion et à sa protection"; P. Kromarek, "Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme: sa mise-en-oeuvre nationale, européenne et internationale", *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, p.15 (mimeographed, restricted circulation). On the remedies (in domestic comparative law) for the exercise of the right of information and the right of participation, *cf.* L.P. Suetens, "La protection du droit à l'information et du droit de participation: les recours", *II Conférence européenne sur l'environnement et les droits de l'homme*, Salzburg, Institute for European Environmental Policy, 1980, pp. 1-13 (mimeographed, restricted circulation); and, on private recourses for environmental harm (in domestic comparative law), *cf.* S.C. McCaffrey and R.E. Lutz (eds.), *Environmental Pollution and Individual Rights: An International Symposium*, Deventer, Kluwer, 1978, pp. XVII-XXIII and 3-162. On the "procedural" conception of the right to the conservation of the environment, *cf.* A.Ch. Kiss "Peut-on parler d'un droit à l'environnement?", *Le droit et l'environnement - Actes des Journées de l'Environnement du C.N.R.S.* (1988) pp. 309-317.

102 A. Eide, *op. cit. supra* n. (99), p.36.

individuals) and the State; but if we have in mind mankind as a whole, the legal relationship is not exhausted in that relation. This is probably why the distinction between individual and collective dimensions is often resorted to.

If we focus on **implementation**, it is conceded that all rights, whether "individual" or "collective", are exercised in a societal context, having all a "social" dimension in that sense, since their vindication requires the intervention —in varying degrees— of public authority for them to be exercised. There is, however, yet another approach which can shed some light on the problem at issue: to focus on the object of protection. Taking as such an **object** a common good, a *bien commun* such as the human environment, not only are we thereby provided with objective criteria to approach the subject, but also we can better grasp the proper meaning of "collective" rights.

Such rights pertain at a time to each member as well as to all members of a given human collectivity, the object of protection being the same, a common good (*bien commun*) such as the human environment, so that the observance of such rights benefits at a time each member and all members of the human collectivity, and the violation of such rights affects or harms at a time each member and all members of the human collectivity at issue. This reflects the essence of "collective" rights, such as the right to a healthy environment in so far as the **object** of protection is concerned.

The multi-faceted nature of the right to a healthy environment becomes thus clearer: the right to a healthy environment has individual and a collective dimensions —being at a time an "individual" and a "collective" right— in so far as its **subjects or beneficiaries** are concerned. Its "social" dimension becomes manifest in so far as its **implementation** is concerned (given the complexity of the legal relations involved). And it clearly appears in its "collective" dimension in so far as **object** of protection is concerned (a *bien commun*, **the human environment**).

This matter has not been sufficiently studied to date, and considerable in-depth reflection and research are required to clarify the issues surrounding the implementation of the right to a healthy environment and the very conceptual universe in which it rests. In so far as the subjects of the relationships involved are concerned, one has moved from the individuals and groups to the whole of mankind, and in this wide range of *titulaires* one has also spoken of **generational** rights (rights of future generations- *cf. supra*). In so far as the methods of protection are concerned, it still has to be carefully explored to what extent can the mechanisms of protection

evolved under international human rights law)essentially the petitioning, the reporting and the factfinding systems)[103] be utilized also in the realm of environmental protection.

It seems that the experience accumulated in this respect in the last decades in human rights protection can, if properly assessed, be of assistance to the development of methods of environmental protection. Some inspiration can indeed be derived from the experience of application of mechanisms of international implementation of human rights for the improvement of international implementation of instruments on environmental protection. It is, in this connection, reassuring to note that the conclusions of a recent Forum on International Law of the Environment, held in Siena, Italy, in April 1990, recognize *inter alia* that "certain procedures used for the protection of human rights could serve as models in the field of the protection of the environment"[104]. Likewise, expert writing on international environmental law has suggested that U.N. international environmental organs could be given "powers similar to those" of the U.N. Committee on Economic, Social and Cultural Rights "to study and comment on reports submitted by States since the right to a good environment is similar to and partakes of all the difficulties and drawbacks of social and economic rights"[105]. Such acknowledgements are quite understanding and beneficial to environmental protection, given the fact that human rights protection antedates it in time and the experience with the implementation of the latter can be of use and value to the implementation of the former.

2. *The Issue of Protection Erga Omnes: "Drittwirkung"*

In the fields of both human rights protection and environmental protection there occur variations in the obligations: some norms are susceptible of direct applicability, others are rather programatic in **nature.** Attention ought thus to be turned to the nature of the obligations. An important issue, in this connection, is that of the *erga omnes* protection of cer-

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103 On their functioning and co-ordination, *cf.* A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp. 13-435.

104 *Conclusions of the Siena Forum on International law of the Environment* (April 1990), p.8, § 23 in fine (mimeographed, restricted circulation)

105 L.A. Teclaff, "The Impact of Environmental Concern on the Development of International Law", in *International Environmental Law* (ed. L.A. Teclaf and A.E. Utton), N.Y., Praeger, 1975, p.252.

tain guaranteed rights, which raises the issue of third-party applicability of conventional provisions. This issue, called *Drittwirkung* in German legal literature, can be examined in the domains of both human rights protection and environmental protection.

In the former, *Drittwirkung* is still evolving in, *e.g.*, the case-law under the European Convention on Human Rights[106] (*infra*). Bearing in mind the considerable variety of rights guaranteed under human rights treaties, there are provisions in these latter which seem to indicate that at least some of the rights are susceptible of third-party applicability (*Drittwirkung*). Thus, Article 2(1) (d) of the U.N. Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination "by any persons, group or organization". By Article 2(1) of the U.N. Covenant on Civil and Political Rights States Parties undertake not only "to respect" but also "to ensure" to all individuals subject to their jurisdictions the rights guaranteed under the Covenant, —what may be interpreted as at least the States Parties' duty of due diligence to prevent deprivation or violation of the rights of one individual by others. And it has been argued that Article 17 of the Covenant (right to privacy) would cover protection of the individual against interference by public authorities as well as private organizations or individuals[107]. In addition, Article 29 of the Universal Declaration of Human Rights refers to "everyone's duties to the community".

The European Convention on Human Rights, in its turn, states in Article 17 that nothing in the Convention may be interpreted as implying "for any State, group or person", any right to engage in any activity or perform any act aimed at the destruction of the guaranteed rights. Articles 8-11 indicate that account is to be taken of the protection of other people's rights; and from Article 2, whereby "everyone's right to life is protected by law", it may be inferred the State's duty of due diligence of prevention and of making its violation a punishable offence[108]. It can in fact be forcefully added that the supreme values underlying fundamental human rights are such

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106 *Cf.* A.Z. Drzemczewski, *European Human Rights Convention in Domestic Law - A Comparative Study*, Oxford, University Press, 1983, ch.8, pp. 199-228; and *cf.* J.Rivero, "La protection des droits de l'homme dans les rapports entre personnes privées", *René Cassin Amicorum Discipulorumque Liber*, vol. III, Paris, Pédone, 1971, pp. 311ss.

107 Y. Dinstein, "The Right to Life, Physical Integrity, and Liberty", in *The International Bill of Rights* (ed. L. Henkin), N.Y., Columbia University Press, 1981, p.119; Jan De Meyer *op. cit.* infra n. (111), p.263.

108 E.A. Alkema, *op. cit. infra*. n.(109), pp.35-37.

that they deserve and require protection *erga omnes*, against any encroachment, by public or private bodies or by any individual[109].

Even though the issue of *Drittwirkung* was not considered when the European Convention was drafted, the subject-matter of the Convention lends itself to *Drittwirkung*, in the sense that some of the recognized rights deserve protection against public authorities as well as private individuals, and States have to secure everyone —in the relations between individuals— against violations of guaranteed rights by other individuals[110]. Thus, *e.g.*, with regard to the right to privacy (Article 8 of the Convention, on respect for private life), there is need to protect this right also in the relation between individuals (persons, groups, institutions, besides States). Situations have in fact occurred in practice where the State may be involve in the relations between individuals (*e.g.*, custody of a child, clandestine recording of a conversation by a private individual with the help of the police)[111]. Certain human rights have validity *erga omnes*, in that they are recognized in relation to the State but also and necessarily "in relation to other persons, groups or institutions which might prevent the exercise thereof"[112].

Thus, a human rights violation by individuals or private groups can be sanctioned indirectly, when the State fails, in "its duty to provide due protection", to take the necessary steps to prevent or punish the offence[113]. Article 8 of the European Convention pertinently illustrates the "absolute effect" of that right to privacy, the need for its protection *erga omnes*, against frequent interferences or violations not only by public authorities but also by private persons or the mass media[114].

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109 E.A. Alkema, "The Third-Party Applicability or 'Drittwirkung' of the European Convention on Human Rights", in *Protecting Human Rights: The European Dimension - Studies in Honour of G.J. Wiarda* (ed. F. Matscher and H. Petzold), Köln, C. Heymanns, 1988, pp. 33-34.

110 This has led one to speak of a sort of "indirect *Drittwirkung*", since "it is realized *via* an obligation of the State". P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Deventer, Kluwer, 1984, pp. 14-18.

111 Jan De Meyer, "The Right to Respect for Private and Family Life, Home and Communications in Relations between Individuals, and the Resulting Obligations for States Parties to the Convention", in A.H. Robertson (ed.), *Privacy and Human Rights*, Manchester, University Press, 1973, pp. 267-269.

112 *Ibid.*, p.271, and *cf.* p.272.

113 *Ibid.*, p.273.

114 *Ibid.*, pp. 274-275.

In the same line, it has been forcefully argued that the right to a healthy environment ought to be "opposable aux tiers, avoir un effet direct à leur égard", ought to be "opposatement aux particuliers de façon à assurer la protection des intérêts des individus et des groupes en matière d'environnement"[115]. *Drittwirkung* amounts to the situation whereby everyone is beneficiary of that right and everyone has duties *vis-à-vis* the other citizens and *vis-à-vis* the whole community; *"tout le monde est bénéficiaire de ce droit, mais en même temps tout le monde assume aussi des obligations de son fait: Etat, collectivités, individus"*[116].

VI. THE RIGHT TO A HEALTHY ENVIRONMENT AND THE ABSENCE OF RESTRICTIONS IN THE EXPANSION OF HUMAN RIGHTS PROTECTION AND OF ENVIRONMENTAL PROTECTION

1. *No Restrictions Ensuing from the Co-existence of International Instruments on Human Rights Protection*

In the field of the international protection of human rights, restrictions are not to be inferred from the possible effects of multiple co-existing instruments of human rights protection upon each other: on the contrary, in the present context, international law has been made use of in order to improve and strengthen the degree of protection of recognized rights. In fact, the interpretation and application of certain provisions of one human rights instrument have at times been resorted to as orientation for the inter-

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115 P. Kromarek, "Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme: sa mise-en-oeuvre nationale, européenne et internationale", in *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, p.38(mimeographed), restricted circulation).

116 A.Ch. Kiss, "le droit à la qualité de l'environnement: un droit de l'homme?", in *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir* (ed. N. Duplé), Vieux-Montréal/Québec, Ed. Québec/Amérique, 1988, p.80, and *cf.* p.83. - "En ce qui concerne le droit à l'environnement, tout le monde est 'créancier' et 'débiteur' en même temps: Etat, collectivités, individus". A.Ch. Kiss, "La mise en oeuvre du droit 'a l'environnement: problematique et moyens", in *II Conférence européenne sur "Environnement et droits de l'homme"*, Salzburg, Institut pour une Politique Européenne de l'Environnement, 1980, p.8, and *cf.* pp. 6-9 (mimeographed, restricted circulation).

pretation of corresponding provisions of other —usually newer— human rights instruments[117].

Normative advances in one human rights treaty may indeed have a direct impact upon the application of other human rights treaties, to the effect of enlarging or strengthening the States Parties' obligations of protection and restricting the possible invocation or application of restrictions to the exercise of recognized rights. Multiple human rights instruments appear complementary to each other; and their complementarity reflects the specificity of the international protection of human rights, a domain of international law characterized as being essentially a *droit de protection*. Where States have undertaken obligations under multiple co-existing instruments of human rights protection, it may be taken to have been the intention to accord individuals a more extended and effective protection. In sum, there is here a clear trend towards the expansion and enhancement of the degree and extent of protection of rights recognized under co-existing human rights instruments[118].

2. *No Restrictions Ensuing from the Co-Existence of International Instruments on Environmental Protection*

Likewise, in the field of international environmental law, restrictions are not to be implied from the possible effects upon each other of multiple co-existing instruments on environmental protection. To this effect, in its well-known 1987 report, the World Commission on Environment and Development, in propounding the elaboration of a Universal Declaration and a Convention on Environmental Protection and Sustainable Development, stressed the need "to consolidate and extend relevant legal principles" on the matter in order "to guide State behaviour in the transition to sustainable development", and warned that multiple co-existing as well as new international conventions and agreements in the area were to **strengthen and extend** environmental protection[119]. As in human rights protection (*supra*), there is no room for [implied] restrictions in the present domain of environmental protection either.

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117 A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International* (1987) pp.401 and 101, and *cf.* p.104.

118 *Ibid.*, pp. 110, 121-122 and 125.

119 World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987, pp. 332-333.

Having thus considered the point at issue from the perspective, on the one hand, of the effects of human rights instruments upon each other, and, on the other hand, of the effects of environmental protection instruments upon each other, we have found no room for the incidence of restrictions, as those instruments, in one and the other domain, were meant to re-inforce each other and strengthen the degree of protection due. It now remains to examine the point at issue from the perspective of the effects of norms or instruments of human rights protection and of environmental protection *inter se*, or, more precisely, of the effects of the recognition of the right to a healthy environment upon the *corpus* of human rights already recognized.

3. *No Restrictions Ensuing from the Expansion of Systems of Protection (As Evidenced by the Recognition of the Right to a Healthy Environment) in Their Effects upon Each Other*

A fairly recent trend of thought has visualized in the emergence of environmental policies of States the incidence of **restrictions** upon the exercise of certain recognized human rights. It has further justified these latter to the effect of protecting the environment. It has suggested that, while some of the more classical civil and political rights are not apparently affected, certain economic and social rights are susceptible of suffering restrictions. As examples, reference has been made to the rights of free circulation, of choice of residence, and to property, in face of protected areas or zones; the right to work, in face of anti-pollution measures; the right to equality, in face of disparities in administrative measures as to the environment; the freedom of association, in face of measures against noise pollution; the right fo family, in face of birth-control measures; the rights to development and to leisure, in face of measures for conservation of nature[120].

This approach, it is submitted, is inadequate and short-sighted, even though it cannot fail to admit that the right to a healthy environment comes ultimately to guarantee and re-inforce such basic rights as the right to life and the right to health[121]. In historical perspective, the emergence of new

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120 *Cf.* F. Doré, "Conséquences des exigences d'un environnement équilibré et sain sur la définition, la port'èe et les limitation des différents droits de l'homme - Rapport intructif", *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, pp. 3-5, 7-12 and 14 (mimeographed, restricted circulation); and *cf.* F. Doré [Interventions] in *ibid.*, pp.25-27 and 37-38 (mimeographed, retricted circulation).

121 *Cf.* F. Doré, "Conséquences des exigences...", *op. cit. supra* n.(120), pp. 16-19; F. Doré, [Intervention] in *op. cit. supra* n. (120), p.27.

rights has generated the need of their "adaptation" to the *corpus* of rights already recognized. Thus, *e.g.*, economic, social and cultural rights had an impact on classical civil and political rights, and what appeared to be restrictions to the exercise of these latter amounted rather to conditions of the effective exercise of the former, of the new rights[122]. And this helped to enlarge the scope of protection of human rights. In the same way, it became clear that the exercise of recognized rights was to take place bearing in mind the exigencies of *ordre public* or the general welfare[123]. The apparent restrictions amounted rather to adjustments to render effective new rights[124] and thus to strengthen the degree of the protection due. From this perspective, it becomes clearer that the right to a healthy environment, once asserted as a **human right**, rather then entailing restrictions to the exercise of other rights, comes to enrich the *corpus* of recognized human rights[125].

Hence the appropriateness of the anthropocentric outlook and the need to place the theme of the environment within a human rights framework. There is no antagonism between international human rights law and environmental law, and the latter helps to clarify the social framework within which all rights are inserted[126]. The recognition of the right to a healthy environment enriches and re-inforces existing human rights and discloses other rights in new dimensions, *e.g.*, the much-needed right of citizen participation, which, in turn, requires the effectiveness of the rights to information and to education (in environmental matters)[127] .

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122 *Cf.*, to this effect, A.Ch. Kiss [Interventions], in *I Conférence européenne sur l'environnement et les droits de l'homme*, Strasbourg, Institute for European Environmental Policy, 1979, pp. 43-45; and in *Résumé des débats, ibid.*, p.20 (mimeographed, restricted circulation).

123 P. Kromarek, "Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme: sa mise-en-oeuvre nationale, européenne et internationale", in *I Conférence européenne...*, cit *supra* n.(122), p.26 (mimeographed, restricted circulation).

124 M. Ali Mekouar, "Le droit à l'environnement dans ses rapports avec les autres droits de l'homme", *Environnement et droits de l'homme* (ed. P. Kromarek), Paris, UNESCO, 1987, pp. 95-96.

125 *Cf.*, to this effect, K. Vasak, [Interventions], in *I Conférence européenne..., op. cit. supra* n.(122), pp. 68-69; and in *Résumé des débats, ibid.*, p.22 (mimeographed, restricted circulation).

126 *I Conférence européenne...*, cit *supra* n.(122), *Conclusions*, pp. 72-73 (mimeographed, restricted circulation).

127 *Ibid.*, p.73; and *cf.* F. Doré, "Conséquences des exigences...", *op. cit. supra* n.(12), pp. 21-22 (mimeographed, restricted circulation).

4. *The Recognition of the Right to a Healthy Environment and the Consequent Enhancement, Rather than Restriction, of Pre-Existing Rights*

International human rights law, in short, is unequivocal in indicating that limitations or retrictions to the exercise of guaranteed rights are to be restrictively interpreted. This ensues, to begin with, from interpretative principles enshrined in human rights treaties themselves (*e.g.*, U.N. Covenant on Civil and Political Rights, Article 5(1), American Convention on Human Rights, Article 29), discarding a restrictive interpretation of human rights obligations. As we have upheld in our lectures at the Hague Academy of International Law in 1987, the *restrictive interpretation of restrictions* to the exercise of recognized rights is sanctioned by the application of the test of primacy of the most favourable norm to the alleged victims in respect of the same rights guaranteed by two or more human rights treaties to which the State concerned is a Party, thus discarding undue limitations or restrictions to the exercise of a given right (recognized in another treaty to a lesser extent)[128].

The international supervisory organs themselves have delivered pertinent warnings to that effect. To recall but a few significant ones: the European Court of Human Rights maintained in its Judgment in the *Golder versus United Kingdom* case (1975) that there was no room for implied limitations under the European Convention on Human Rights; the same was upheld by the Inter-American Court of Human Rights in its Advisory Opinions in the cases of *Compulsory Membership in an Association of Journalists* (1985) and of the *Word "Laws" in Article 30 of the American Convention on Human Rights* (1986); likewise, in its Report of 1987 on a recent case concerning the observance by the Federal Republic of Germany of the 1958 ILO Discrimination (Employment and Occupation) Convention (nº111), the Commission of Inquiry (appointed under Article 26 of the ILO Constitution) clarified that no implied exceptions were admissible under ILO Convention nº 111[129].

The gradual recognition of "new" human rights cannot possibly have the effect of lowering the degree of protection accorded to existing rights. The emergence of "new" human rights cannot possibly undermine the protection extended to pre-existing rights. That would simply go against the course of historical evolution of the process of expansion of international human rights law, which has consistently pointed towards the enlarge-

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128 A.A. Cançado Trindade, "Co-existence and Co-ordination...", *op. cit. supra* n.(117), p.104, and *cf.* pp. 104-108.

129 Cases *cit in ibid.*, pp. 106-107 and 116.

ment, improvement and strengthening of the degree and extent of protection of recognized rights. In sum, the only permissible limits to the exercise of recognized rights are those expressly provided for under human rights treaties themselves (in whichever form, namely, as limitations or restrictions, or as exceptions, or as derogations, or as reservations); such limits are to be restrictively interpreted, bearing always in mind the accomplishment of the object and purpose of those treaties.

It is to be regretted that the recognition of the right to a healthy environment has led some to the misunderstanding that it might clash with other rights, or the object of these latter. This can only result from an inadequately fragmented or atomized outlook of the *corpus* of international human rights law. Instead, human rights are indivisible and the mechanisms devoted to their protection complement each other, so as to expand and strengthen the degree of the protection due. Rights belonging to distinct "categories" have more in common than one may *prima facie* assume, let alone the fact of their being inter-related.

The emergence of "new" rights is followed by their "adaptation" to the *corpus* of existing rights and their means of implementation. No restrictions on existing rights can be justified by the recognition of "new" rights, as these cannot possibly have been articulated to lower the prevailing degree of protection. Rights belonging to such distinct domains as the civil and political, or the economic, social and cultural, have found their way to co-existence. Likewise, as regards newly-emerged rights, what may at first sight appear as restrictions on pre-existing rights, are in reality not more than needed adjustments entailed by the "new" rights[130].

Given the continuing expansion of international human rights law and the multiplicity of co-existing rights, it may well happen that in given circumstances "priorities may have to be set and limited resources devoted to fulfilling one right which is at more risk or more significant in the circumstances than another"[131]. And this does not mean that the other rights are restricted or contradicted or ignored; there is a balance between the various recognized rights, set by the human rights treaties and instruments themselves, which, *e.g.*, define or indicate the considerations or circumstances relevant to restrictions or limitations on the recognized rights, in-

130 M. Ali Mekouar, "Le droit à l'environnement dans ses rapports avec les autres droits de l'homme", *Environnement et droits de l'homme* (ed. P. Kromarek), Paris, UNESCO, 1987, P.96, and *cf.* pp. 94-95.

131 J. Crawford, "The Rights of Peoples: Some Conclusions", *The Rights of Peoples* (ed. J. Crawford), Oxford, Clarendon Press, 1988, p.167.

cluding in times of public emergency[132]. And restrictions, as already pointed out, are to be restrictively interpreted.

A key role is here reserved to the international supervisory organs themselves. This issue of the balancing between rights may arise not only with regard to such "new" rights as the right to a healthy environment, but also between any other rights (*e.g.*, reconciling the right to freedom of expression and the right to privacy, the freedoms of association and of movement, the right to property and certain social rights, etc.)[133]. Furthermore, the recognition of such "new" rights as the right to a healthy environment can only have the effect not of restricting, but rather of complementing, enriching and enhancing pre-existing rights (*e.g.*, the right to work, the freedom of movement, the right to education, the right to participation, the right to information, etc.)[134].

One last remark remains to be made on the matter at issue. It should not pass unnoticed that rights which are at the basis of the *ratio legis* of both environmental protection and human rights protection —such as the right to life and the right not to be subjected to inhumane or degrading treatment— are asserted by human rights treaties[135] as non-derogable. They admit no restrictions whatsoever, they are truly fundamental rights. As for the other recognized rights, in the "balancing" between them dictated by circumstances, "new" rights such as the right to a healthy environment have emerged ultimately to enhance rather than to restrict them, in the same way as they enhance the fundamental non-derogable rights.

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132 *Ibid.*, pp. 167-168.

133 *Cf. ibid.*, p.168.

134 M. Ali Mekouar, *op. cit. supra* n.(124), pp. 96-100 and 103-104.

135 E.g., U.N. Covenant on Civil and Political Rights, Article 4(2); European Convention on Human Rights, Article 15(2); American Convention on Human Rights, Article 27.